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VAWA @ 20: HIV, Violence Against Women, and Criminal Law Interventions

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VAWA @ 20: HIV, VIOLENCE AGAINST WOMEN, AND CRIMINAL LAW INTERVENTIONS

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The growing calls for the “securitization of body and property,”¹ documented by Jonathan Simon in his book *Governing Through Crime*, illustrates a deep tension in our understanding of the role of criminal law as a tool for societal transformation.² For some, including communities of color, the criminal legal system is a place where inequality flourishes;³ for others, including those feminists who have support criminal law interventions, it has become a tool to realize equality.⁴ The Trafficking Victims Protection Act, reauthorized in 2013 as an amendment to the Violence Against Women Act (VAWA),⁵ relies heavily on the criminal law to obtain its goals. Countering the conventional reliance on criminal law, critical feminist legal scholars concerned about the detrimental impact on

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¹ Jonathan Simon, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 13 (2007).

² *Id.* at 11.

³ See generally Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the ‘Race Question’ in the US*, 13 NEW LEFT REVIEW (2002); Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

⁴ See Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 31 FLORIDA STATE UNIVERSITY LAW REVIEW (2009) (Discussing, in part, the rise of the mandatory arrest and prosecution approach to domestic violence and its negative consequences for women); see also Simon, *supra* note ii, at 182 (Explaining how the feminist reform project lined up with arguments for the decline of the welfare state).

⁵ 47 U.S.C. §1-1264.

poor communities and communities of color. They critique the criminal law orientation of TVPA and VAWA for contributing to the destabilization of communities, particularly, communities of color.⁶ The carceral aspects of VAWA/TVPA also raise difficult questions for anti-violence advocates concerned about the war on crime, including, mass-incarceration. How has this “feminist war on crime,”⁷ backfired?

In the realm of HIV/AIDS, an area in which I research and write, the feminist war on crime produces troubling effects. As feminist attention to HIV increased, so did the importation of feminist ideas about why women may be at risk for HIV.⁸ One of the primary reasons, feminists argue, is violence against women.⁹ But what constitutes violence against women? A key point of contention was the issue of transactional sex – sex in exchange for goods, money, or services. The way the issue of increased HIV risk in the context of transactional sex splintered feminists. Should violence against women be defined broadly, including all forms of transactional sex as a form of violence against women? Should we see all transactional sex as sex-trafficking? Is it possible that some people choose to engage in transactional sex or sex work? Abolitionist feminists answer this question clearly: no woman *chooses* to sell sex, all women who do so are trafficked. In turn, these feminists engaged the criminal justice system to end the sex-industry.

Although the abolitionist project is well-meaning, this criminal law approach to trafficking has many negative consequences. Women, particularly women of color,¹⁰ are frequently arrested in the course of raids and rescues.¹¹ Some feminists focus on “ending demand”:¹² ramping up

⁶ See Goodmark, *supra* note 5; see also Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS LAW REVIEW 1009 (2009); Aya Grueber, *The Feminist War on Crime*, 97 IOWA LAW REVIEW 741 (2007).

⁷ This phrase was coined by Aya Grueber. See Grueber, *supra* note 7, at 741.

⁸ Aziza Ahmed, *Rugged Vaginas and Vulnerable Rectums: The Sexual Identity, Epidemiology, and Law of the Global HIV Epidemic*, 26 COLUMBIA JOURNAL OF GENDER AND LAW 1 (2013).

⁹ National Coalition Against Domestic Violence, *Intimate Partner Violence and HIV/AIDS*, available at <http://www.ncadv.org/learn/DV%20and%20HIV%20AIDS.php> (last visited October 12, 2014). This claim is based on epidemiological work, see, e.g., Kristin Dunkle et al., *Gender Based Violence, Relationship Power, and Risk of HIV Infection in Women Attending Ante-Natal Clinics in South Africa*, 363 THE LANCET 1415 (2004).

¹⁰ Red Umbrella Project, *Criminal, Victim, or Worker: The Effect of New York’s Human Trafficking Courts on Adults Charged with Prostitution Related Offenses*, available at <http://www.redumbrellaproject.org/wp-content/uploads/2014/09/RedUP-NYHTIC-FINALweb.pdf> (last visited October 12, 2014).

¹¹ Melissa Ditmore, *The Use of Raids to Fight Trafficking in Persons (2009)*, available at <http://sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf> (last

efforts to criminalize purchasing sex (abolitionist feminists do not support the arrest of women in the sex industry). The connection between HIV, anti-trafficking raids, prostitution arrests, complicates this picture even further. Law enforcement frequently use condoms, promoted by public health agencies as a means to stop the spread of HIV, as evidence against those being charged with prostitution related crimes. In 2012, Human Rights Watch documented the extensive use of condoms as evidence in New York, Washington DC, Los Angeles, and San Francisco.¹³ Sex work activists challenging the use of condoms as evidence have had some success in changing these programs. The Access to Condoms Coalition reported that while advocacy resulted in a policy shift in New York away from using condoms in prostitution cases, trafficking cases may still utilize condoms as evidence.¹⁴

Given the potential for criminal law related interventions driving vulnerable groups away from necessary services instead of to them, and due to negative consequences like the use of condoms as evidence, public health experts see criminal law as a barrier to effectively addressing the HIV epidemic amongst marginalized individuals who are otherwise persecuted by or prosecuted by the state. In 2014, for example, a leading public health journal the *Lancet*, dedicated a special issue to sex work. An article by Kate Shannon and her co-authors modeled various interventions to measure how change in structural determinants of health would impact HIV transmission. Researchers found that the decriminalization of sex work would avert “33-46% of HIV infections in the next decade.”¹⁵ This evidence places the pro-carceral, anti-sex trafficking feminist position in opposition to public health evidence on reducing the spread of HIV.

The blunt tools of the criminal law system offer little to remedy the complex realities that accompany the precarious existence of many in the sex industry. Ending violence requires us to take a critical lens to the current reliance on criminal law as a tool to realize women’s equality.

* * *

visited October 10, 2014).

¹² Coalition Against Trafficking in Women, *Ending the Demand*, available at <http://www.catwinternational.org/BestPractices/EndingDemand> (last visited November 15, 2014).

¹³ Human Rights Watch, *Sex Workers at Risk*, available at <http://www.hrw.org/reports/2012/07/19/sex-workers-risk> (last visited October 10, 2014).

¹⁴ Access to Condoms Coalition, *Access to Condom Coalition’s Response to NYPD Announcement*, available at <http://www.nocondomsasevidence.org/2014/05/12/access-to-condoms-coalition-response-to-nypd-announcement/> (last visited November 15, 2014).

¹⁵ Kate Shannon et al., *Global Epidemiology of HIV Among Female Sex Workers: Influence of Structural Determinants*, THE LANCET (2014).