https://www.opendemocracy.net/beyondslavery/alice-m-miller/gotcha-%E2%80%98bait-and-switch-and-bait-again%E2%80%99-of-us-antitrafficking-policy

Gotcha! the 'bait and switch and bait again' of US anti-trafficking policy

Alice M. Miller 16 April 2015

American understandings of trafficking concentrate on so-called 'sex trafficking,' however existing laws address many forms of labour exploitation. Too little is known about the effects of such laws on all workers.

The US's current anti-trafficking policy, which produces a tangle of finite good and possibly infinite harmful effects, is the product of a very modern twist on the classic '*bait and switch'* game of law-making. The 'bait' of sexual harm—stories of 'sex slaves' produced by some advocates and propagated with alacrity by the media and accepted by some US law makers—has permitted a constantly changing 'switch', an incoherent spectrum of immigration and criminal law enforcement operating without much critical oversight, let alone public understanding. Laws and practices ostensibly targeting trafficking can either benefit or negatively affect a wide range of domestic and border-crossing workers in vastly different labour sectors, ranging from door-to-door magazine sales, to domestic work, sex work, agricultural work, and construction.

It is my contention that we—including progressive critics of the (American) Trafficking Victim Protection Act or TVPA—know too little about the impacts of state and NGO practices carried out under the 'switch. ' All of us, critics and proponents alike, are still talking too much about the 'bait': the sex side of anti-trafficking work. Despite the now multi-pronged reach of the TVPA, the public understanding, the press and the vast majority of research and scholarship remains stubbornly focused on the sexual aspects of the practices covered by the crime of 'trafficking'. When the 'switch' occurs—the actual application of the TVPA to non-sexual labour in the U.S.—it goes relatively unnoticed, and relatively un-critiqued.

US press reports on a recent 'victory' under the TVPA makes this continued thrall to the sex-side of trafficking clear. In February 2015, five Indian welders and pipefitters employed by Signal International in the US though the H-2B visa program were awarded $14 million in compensatory and punitive damages as victims of 'labour trafficking'—i.e., through the application of the US anti-trafficking law. They had been promised but denied green cards, held in sub-standard living conditions and inhibited in their movement, among other harms. Over 200 more workers are part of a follow up action, claiming to be similarly situated. A national coalition of groups—including the Southern Poverty Law Center, the ACLU, the Asian American Legal Defense Fund, the Louisiana Justice Institute and two firms—carried out this campaign and litigation. These groups have made an assessment that the TVPA has some potential to benefit this set of exploited workers.

But the headlines, such as those of *The New York Times*, trumpeted not that they were 'trafficking victims' but that they were exploited *guest workers*—a characterization that readily plays into an equally vexed but different, racially charged immigration policy. This media mis-

characterization of the victims occurred even though spokespersons for the workers were careful to remind journalists that 'human trafficking' can take many forms, and press materials stressed this fact. Nonetheless, the media here followed the general advocacy template of treating exploited (male) workers as migrant labours while reserving the term 'trafficking' for (female) 'sex trafficking victims.'

Over the last decade, there have been dozens of press accounts of prosecutions using the TVPA that mis-characterize the affected victims, in both headline and text, as 'smuggled' or solely as victimized migrant worker cases. In general, the only cases using trafficking in the headlines are those of 'sex trafficking,' with a smattering of domestic worker cases attracting the term. Interestingly, the line of cases called into view after the 2014 high-profile arrest of an Indian diplomat were called 'trafficking' in their text but headlined as other forms of mis-treatment of domestic workers.

The public understanding of 'trafficking' as a contemporary crime remains over-determined to see it as a gendered/sexed crime in part because rhetorically and symbolically, it is the direct inheritor of the mantel of 'white slavery'. The persistent casting of all trafficking in line with the narratives of 'white slavery'—tales of girls and women tricked into prostitution in the late 19th/early 20th century—forecloses public engagement with anti-trafficking law as relevant to other kinds of workers. Many sex worker advocates warned in the late 1990s, as these laws were being adopted, that the crime of trafficking could never be extracted from tales of prostitution/horror, regardless of what the content of the law says. But what are scholars and advocates doing to counter this preoccupation with sex?

Therein lies the rub. Despite the serious concern among some labour advocates regarding the usefulness of the anti-trafficking framework overall, precious little of this garners the publicity it needs to affect the discourse. As Nandita Sharma, Sealing Cheng, and Judy Fudge have all argued on this site in different ways, anti-trafficking initiatives are always subject to countervailing state interests and ad hoc, politically driven enforcement because they are based in criminal law rather than labour rights. They are not organically organized to generate better working conditions as demanded by workers. An increasing number of advocates and scholars are now debating whether and how to mitigate the dangers of this, slices of which are reflected in the published work of Janie Chuang and Jennifer M Chacon. The Freedom Network is endeavoring to synthesize and publicize recent work on civil litigation, for example regarding the recovery of back wages for trafficked persons over and above the high profile stories of sexualized victims. But I would hazard a guess that few Americans know about this work, even as all my US students know about the 'trafficking of women for prostitution'.

When Congress initially passed the TVPA in 2000, it was as part of an awkward right-left compromise between broader human rights and narrower anti-prostitution policies. Both groups of policies operated in an over-heated atmosphere redolent of stories of Eastern European and South East Asian 'sex slaves' being bought and sold in the US. Despite the limited data on the actual needs of exploited workers in all the sectors covered by the TVPA—such as agricultural, factory, or domestic work—Congress re-authorised and revised the act in 2003, 2005, 2008 and 2013. Each time they tweaked the content of the crime of trafficking, and the remedies so that it both concretized the range of crimes beyond forced movement into sexual commerce AND

remained tethered to sex. It also remained a criminal prosecution statute but added civil remedies. As the work of anthropologist Alicia Peters and law professor Dina Haynes has shown, the dominant narrative and the ideal trafficked victims remains the 'innocent/duped sex slave.' At the same time, the dominant understanding of the law in the media and in the public remains prosecution and not wage redress.

In the shadow of this sex/crime narrative, revisions of the TVPA have altered the priorities for prosecution as well as the programmes for its prevention and amelioration. Notably, on the side of 'tethered to sex', the most recent revisions redoubled the TVPA's powers to reach under 18s. The new category of innocent victim is the under 18-year-old harmed through sexual commerce in the US. Globally, the TVPA is expanding its focus on kids and sexual harm has also expanded (possibly unconstitutionally, as research and analysis by one of my students is suggesting) its reach to child sexual exploitation through the 'Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT)' Act of 2003.

While many revisions continued the focus on sexual harm, there have been some interesting shifts in the actual law of the TVPA vis-a-vis other forms of labour: in 2008 the TVPA reconciled its definition for the crime, removing the higher threshold for the use of force in the crime of labour trafficking vs. sex trafficking for example. If the TVPA has found use for other non-sexy forms of labour trafficking now, scholars are in a good position to understand the effects of that change—if we wanted to pay attention to the actual scope of the 'switch'. But scholarship and research haven't fully kept up with the changing scope of the TVPA.

Under these circumstances, I think it is fair to say that the progressive critiques by academics on the sexuality side of the problem have *become* part of the problem—scholarship on 'trafficking' remains remarkably lop-sided. The academy approached the issues of the anti-trafficking framework—rightly I think—with a strong critique of the 'bait' side. A strong cadre of critical race/feminist and post colonial scholar/advocates—myself included—sought to take apart the way that racialized and sexualized melodramatic tales of sexual violation were presented as facts of migration and labor (as *melomentaries,* to use Carole Vance's term). Our entry points were often concerns about the conflation of all sex work with 'trafficking'; the use of rescue and raids to disrupt the sex sector regardless of evidence of actual harm, the colonialist assumptions about 'brown women' being unable to show agentic movement etc.

But we have not moved substantially from the 'bait' side. This has happened in part, I suspect, because the academic institutional apparatus of sexuality, queer studies and feminism with which we approached our initial critique has now trapped us: critiques of the anti-trafficking framework resonate in gender studies classes, not in migration and labor studies programs. Many of us are now stuck to the bait of criticizing sex trafficking. Sadly, it is a knotty problem that continues to produce bad effects in practice as well as in the academy. The press seems to cover fights within feminism over sex work and prostitution law as much as it covers what they are fighting about: their attention to these struggles seems a bit like the superior attitudes of watching 'girl fights'.

Our own theories about the power dynamics in and around sexuality tell us that 'sex is sticky'. We need a way out that will respect both the continuing bad effects of the 'sex panic' but also fully engage with how sex diverts attention away from exploited workers outside the sex sector

and fails to help folks in the sex sector. To do this we need grounded, longitudinal and snap shot research on many different labor sectors that asks whether or not the TVPA is a useful tool for workers of all types. The numbers of people engaged in this side of study are smaller than the numbers buzzing around sexual hysteria (both generating it and critiquing it).

Moreover, more than increasing numbers, we need to think hard about the range of different scholars and advocates who need to be in the room. In 1998, Barbara Limanowska, a feminist activist from Poland, told me that most of what needed to be known about the migration patterns of women from eastern Europe could be gleaned from currency fluctuations, yet she had never been to an anti-trafficking conference that included micro and macro-economists, or fiscal policy analysts.

This is changing. It now appears that researchers of migration and scholars of informal labour and labour rights are increasing in the room in international conferences on trafficking. We need more support for their presence in our debates on anti-trafficking policies here in the U.S. It would be important to organize more of those conferences alongside the critical race feminist scholars and advocates. It won't be easy, in part because the funding for this kind of cross-disciplinary, theoretically rich and empirical research at the intersection of borders, labor and sex is not obvious in the US, nor is the route to shifting public understandings. But without the theory and research, we have no chance against the mis-use of anti-trafficking law. Sadly though, we must keep reckoning with the fact that we cannot keep contributing to the frisson of fights over 'white savours', raid and rescue, and 'girl fights within feminism' that has made the sex-framed anti-trafficking work so attractive as the bait.