



**BROOKLYN
DEFENDER
SERVICES**

TESTIMONY OF:

**Jillian Modzeleski – Criminal Defense Practice
*BROOKLYN DEFENDER SERVICES***

Presented before

The New York City Council Committees on Courts & Legal Services and Women's Issues

Oversight Hearing on the Effectiveness of Human Trafficking Intervention Courts

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My name is Jillian Modzeleski and I am a trial attorney with Brooklyn Defender Services (BDS). Our organization provides innovative, multi-disciplinary, and client-centered criminal defense, family defense, immigration, civil legal services, social work support and advocacy to more than 40,000 indigent Brooklyn residents every year. I thank the New York City Council Committees on Courts & Legal Services and Women's Issues, and in particular Chairs Rory Lancman and Laurie Cumbo, for the opportunity to testify on the effectiveness of Human Trafficking Intervention Courts (HTICs).

BDS is fortunate to have the support of the City Council, as well as other elected officials and the Office of Court Administration, to supplement the services we provide as the public defense office in Brooklyn for people who have been arrested, those who are facing child welfare allegations and those who are facing deportation. We have developed a model of specialization to best represent certain types of clients, including people with mental illness, adolescents, and victims of human trafficking. Through specialized units of the office, we provide extensive wrap-around services that meet the needs of these traditionally under-served clients in a comprehensive way.

Since the inception of the HTIC in Kings County, I have served as BDS' dedicated defense attorney assigned to the part. In addition, we have had two specialized social workers assigned to the part who are in court weekly to assist with assessments, placements, crisis intervention, and other social service needs. BDS also has specialized immigration attorneys with

experience in the area of human trafficking, as well as family court attorneys available. We also attend the quarterly stakeholder meetings for the HTIC, which are facilitated by the judge and which have resulted in meaningful collaborations and effective resolution of numerous issues that have arisen since the part began.

HTICs can be a critical tool to protect trafficking victims from many of the devastating consequences of involvement with New York’s criminal justice system, but only when District Attorneys and Judges use them for that purpose. In BDS’ experience, HTICs predominately function as prostitution courts with connections to overstretched service providers. District Attorneys use the specter of punishment to persuade defendants who have been identified as potentially trafficked to inform on traffickers, but in my two and a half years of experience in HTICs, I have never—not once—seen this strategy work. Instead, some of my clients see case dispositions that mirror those of traditional criminal courts, though there has been an increase in ACDs since Brooklyn’s HTIC opened—from 49% of cases in which prostitution is the top charge to 66%. If the prosecution or the court deems one of my clients a victim of human trafficking, coerced into sex work as the mission of the court suggests, why do they not immediately dismiss the case or decline to prosecute?

When people arrested for prostitution-related charges are identified as having been trafficked, the criminal justice system should immediately cease treating that person as a “defendant.” Sexually exploited and/or trafficked individuals have complex needs and concerns, often including issues related to shelter, safety, children, immigration status, prior criminal justice involvement, addiction, and trauma. However, the court itself is not in the best position, nor is the prosecutor, to address those needs without running the risk of re-victimization and further trauma. BDS’ experience working with specialized populations, such as youth, veterans, people living with mental illness, has shown us that vulnerable individuals in contact with the criminal justice system bring a host of additional needs that often require substantial trust and rapport-building in order to adequately assess and address. Continued court involvement is not only onerous but can be detrimental, particularly for people who are identified as victims of sexual exploitation. BDS believes the potential for any trafficking victims to be penalized within the criminal court context, with court mandates, criminal consequences, far-reaching collateral consequences and further coercive control in their lives is counterproductive and wrong. Anyway, when services and support are delivered through the entities that are capable of punishing them, they are not likely to trust the system or see it as an ally in identifying their traffickers and holding them accountable.

BDS has a great working relationship with the other public defenders testifying today, and we share their belief that the fundamental problems with HTICs begin with the ludicrous idea that our City must arrest people to connect them with services.

Overcriminalization

While the intent of the HTICs may be an improvement over traditional criminal court, clients charged with the eligible offenses would be best served by not being arrested in the first place. This can be achieved in part by either repealing or, at the City government level, declining to prioritize enforcement of certain criminal statutes.

Among the most common charges that are handled by HTICs is Loitering for the Purpose of Prostitution, which should not be a crime. The statute refers to “wander[ing] about in a public place” and “repeatedly...attempt[ing] to engage passers-by in conversation” for the purposes of prostitution.¹ Engaging or offering to engage in a sex act for a fee is criminalized in another statute; this loitering law only serves to give law enforcement the discretion to profile, arrest, and charge those whom officers deem likely to commit prostitution in the future—or those whom they want to harass—with a lower standard of proof. Enforcement of the law, if not the law itself, is patently sexist and racist. Of the BDS clients charged with this offense in the last three years, 76% were black and 87% were identified on their rap sheets as women. (The latter figure is complicated by police officers’ inconsistent approach to recording gender identities and expressions, as many of our clients are transgender.) They are commonly identified by their clothing choices. The law is also likely unconstitutional; in 2012, New York City settled a \$15 million lawsuit for enforcing laws prohibiting loitering to panhandle or search for a sex partner after they were struck down by state and federal courts.² **Loitering charges clog the system, stretch the resources of service-providers whose focus would be better served on sexually exploited people who truly need them, and distract from the real work of identifying human traffickers and assisting victims.** Since Brooklyn’s HTIC opened, the percentage of BDS’ loitering for prostitution cases that result in ACDs has doubled—from 26% to 53%—but another 40% continue to result in convictions. While the City Council cannot rewrite state law, it can certainly push the New York Police Department and local District Attorneys to stop enforcing unconstitutional, counterproductive statutes.

Certainly, many trafficking victims and sex workers would be ensnared in our criminal justice system regardless of prostitution-related statutes. HTICs could help connect these individuals with needed services while offering favorable case dispositions but, again, this would only be true when judges and District Attorneys use them for this purpose. To that end, one critical improvement to HTICs would be to open them up to handling additional charges. Furthermore, cases which may not involve sexual exploitation but involve another form of trafficking, such as labor trafficking, could be identified and better addressed through HTICs. Lastly, HTICs should be provided with dedicated Mandarin translators, as many cases are held up while the court waits for translators it shares with other parts.

The Systemic Injustice of Bail

Another critical flaw in HTICs is symptomatic of a broader injustice: the misuse of bail and pre-trial detention. I deeply appreciate that the Council, and Chair Lancman in particular, has sought to address this issue, and BDS is hopeful that one or more of the proposals currently in development will help our clients who are charged with HTIC-eligible offenses. Factors that could indicate a greater degree of victimhood, such as a long history of prostitution arrests, are also factors that make judges more likely to set bail. According to New York State law, bail is only to be used to secure a defendant’s return to court. However, it is an open secret that District Attorneys and Courts use it to ensure pre-trial detention, ostensibly in the interest of public safety. Cash bail is not uniquely good at achieving either of these objectives. Studies show that unsecured sureties and appearance bonds (e.g. promissory notes or credit card holds) are just as

¹ § NYS CPL 240.37

² <http://www.nytimes.com/2012/02/08/nyregion/new-york-settles-suit-on-illegal-arrests-for-loitering.html>

effective as securing defendants' return to court. Outsourcing enforcement to bail bonds companies, whose only objective is profit, has never been shown to improve public safety. Moreover, nearly every BDS client in HTIC has been charged with only non-violent offenses, and thus public safety is not an issue.

Every year, tens of thousands of New Yorkers suffer the brutality of Rikers Island and other City jails simply because they are poor and cannot afford bail. They include people with serious mental illness, people who are medically fragile, adolescents, and victims of human trafficking. The vast majority are people of color, including 89% of those held on \$1,000 or less.³ Each day inside increases the likelihood of job loss, loss of shelter or apartment placement, mental and physical health deterioration, and even death. Many suffer the torture of solitary confinement while still “presumed innocent.” As with other courts, cash bail deprives poor people of the right to a fair trial in HTICs. Pre-trial detention has been proven to distort case outcomes, as detained defendants who are inhibited from participating in their own defense and desperate to return to their families, jobs, and homes will accept far worse plea deals saddling them with a criminal record whether or not they are innocent, just to be released from Rikers with a sentence of “time served.”⁴ Almost none of my HTIC clients have ever made bail, and they almost always end up taking pleas with a more onerous mandate just to get out of jail. Moreover, I cannot interface with my incarcerated clients and therefore cannot connect them with critical support services to keep them healthy and safe. Significantly, I cannot start to form a meaningful relationship with them that would make them feel comfortable opening up about their histories and potential trafficking. The longer that sex workers are in custody, the longer they wait for help, should they want or need it.

Rikers is especially dangerous for individuals within the demographic groups whose cases are most likely to be handled by HTICs—namely women and transgender people. A survey conducted by the U.S. Department of Justice found the percentage of people at Rose M. Singer Center, the jail for women on Rikers Island, who reported staff sexual misconduct to be more than three times higher than the national average for all jails, and approximately two and a half times the national average for women's jails.⁵ Incarcerated transgender women are particularly vulnerable, as numerous studies have shown that rates of violence and sexual assault against them are far higher than those against cisgender individuals.⁶

Adriana, a BDS client in HTIC, was prominently featured in a recent New York Times Magazine article, entitled “The Bail Trap.” She had left her daughter with a friend when she went to pick up diapers, and returned to find police officers waiting to arrest her for endangering the welfare of a child. The Assistant District Attorney on her case sought \$5,000 bail, and the judge ultimately set it at \$1,500, which made no difference, as Adriana could never afford either amount. (She had no conviction record, and no history of missed court appearances.) She spent the next two weeks on Rikers Island, with her daughter in foster care and the life that she was working hard to build crumbling more and more each day, while BDS attorneys sought without

³ Jamie Fellner, *The Price of Freedom* (Human Rights Watch 2010).

⁴ Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America* (VERA 2015)

⁵ <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>

⁶ E.g., Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (Irvine: Center for Evidence-Based Corrections, University of California, 2007), 3.

success to get bail lifted. Because Adriana had a history of sex work, her attorneys were able to get her case transferred to the HTIC, where the judge released her with conditions. She had to participate in a program. Meanwhile, a family court judge found that she had been a victim of human trafficking—something law enforcement should have considered much earlier given her history of prostitution-related court appearances in different states. Nonetheless, the Assistant District Attorney and judge continued to treat her case as a matter of child endangerment, and not as one of a single mother overcoming immense hardships and doing everything she could to provide for her daughter.

In most cases, HTIC judges can and should release our clients pending trial. Otherwise, judges should impose the least onerous form of bail—beginning with an unsecured appearance bond—that is required to secure a defendant’s return to court, and show cause on the record for the use of any form other than unsecured sureties. In addition, Assistant District Attorneys should be required to submit unique written motions requesting bail conditions and explaining the reasons for the request. Lastly, courts should have to reconsider bail at the end of every week of a defendant’s incarceration and consider her inability to pay as a “change of circumstance” that warrants a bail reduction or a conversion to a less onerous form. HTIC hearings are held every week, so the court has the ability to adjourn cases for short return, reducing the already small chances that a defendant will miss a court appearance. **Ultimately, New York should live up to the American ideal of presumed innocence and end pre-trial detention for all but the most serious cases. Bail reform is one critical step to making that a reality.**

Vacating Convictions

In 2010, New York State passed legislation enabling victims of sex trafficking to vacate their convictions for prostitution and loitering for the purposes of prostitution through a procedure established in Section 440.10 of the Criminal Procedure Law. This law was drafted and passed with critical support from a coalition of advocates and service providers that included sex workers, under the leadership of the Sex Workers Project, and represented a major victory against the criminalization of trafficking victims. However, the onus should not be on victims to vacate convictions. Instead, the onus should be on law enforcement to not arrest and prosecute them. Moreover, policymakers who are concerned about the collateral consequences of criminal convictions should look beyond the most politically sympathetic groups and address the permanent impacts of criminal convictions on those involved in sex work by choice or circumstances, as well. A robust sealing law is long-overdue in New York State.

Judicial Selection

The judge who currently sits on the bench in Brooklyn’s HTIC regularly demonstrates a deep understanding of the issue of human trafficking, and clearly cares about the well-being of our clients. That has not always been true in specialized courts, including in HTICs. BDS strongly believes that the position must be held by judges who volunteer for it, and who have committed to being educated and trained on issues related to human trafficking and the needs of its victims. Given the reality of HTIC, judges must also understand sex work. They also must be open to learning about the communities we serve, including trans clients, people struggling with addiction, and victims of domestic violence, and commit to evidence-based responses to the issues they face. This is also true, though perhaps to a lesser extent, for court staff. The current

staff in Brooklyn's HTIC is well-informed and treat our clients with the respect, and it is important for this practice to continue as staff turnover.

Condoms as Evidence

In accordance with a variety of new policies and informal agreements, we have not seen possession of condoms used as evidence of prostitution in Brooklyn in many months. This is a welcome change that is particularly visible in HTICs. The fact that these instruments of safe sex were ever criminalized is shameful, and the end of this practice represents important progress that should be emulated everywhere.

Conclusion

HTICs have served many of our clients well in terms of providing services and diversion from criminal convictions through offers that include ACD with program participation. However, for all practical purposes the part operates as a successful prostitution diversion court. For the mission of the HTIC to be actualized, all of the actors in the criminal justice process would have to alter their treatment of a case as soon as an individual is identified as potentially trafficked. In addition, policymakers and law enforcement officials must devise a new strategy around sex work that does not involve arrests. Even in the best outcomes in HTICs, that arrest remains a part of a person's record in both government-run and private, for-profit databases for the rest of their life. It is long past time that we as a society confront the scourge of human trafficking without subjecting its victims to additional challenges, trauma and abuse.