

Blind Eyes to Trafficked Labor In Western New York

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TRAFFICKED FARM LABOR IN NEW YORK

Early in the summer of 2002, when farm owners across the United States were bracing for a difficult harvest under the hottest and driest conditions since the Dust Bowl, federal prosecutors delivered the industry another blow by way of a criminal complaint in the rural Western District of New York. One Maria Garcia Botello and her associates, a group of contractors among the thousands who each year deliver farm hands to labor-intensive crops across the country, had been indicted on a slew of crimes, including the unusual charge of “human trafficking.”

Though often used interchangeably with the term “smuggling,” a felony to which the northern border of New York is no stranger, the legal definition of human trafficking refers to the exploitation of a person through force, fraud, or coercion and does not require international transportation.¹ Rather than a violation of a nation’s borders, trafficking is the criminal abuse of a person for profit. Human smugglers offer willing custom-

ers a service; for human traffickers, people themselves are the commodity.

National media outlets soon picked up on this seemingly anachronistic story, reminiscent of the days of chattel slavery: Garcia Botello had lured a group of Mexican immigrants with false promises, packed them 30 to a van in Arizona, and driven them over 2000 miles across the United States to vegetable farms in Western New York, where they toiled for virtually no pay, sunrise to sunset, under armed threat.² “If we didn’t work harder,” said one of the men, “they would lock us in a small truck for a month without feeding us.”³

More than charge a violation of the 13th Amendment prohibition of slavery, famously won and ratified in 1865 after the Civil War, prosecutors of the Botello case were making the first use in the continental U.S. of labor trafficking provisions in the 2000 Victims of Trafficking and Violence Prevention Act (TVPA), a landmark bill hailed by Congress as its answer to modern forms of forced and coerced labor.

This article will consider how prosecutions of labor trafficking such as the Botello case have become a rarity, rather

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than an industry-shifting, criminal enterprise-threatening recurrence. Further, it will suggest that human trafficking conventions in the U.S. predominantly serve to intercept and disrupt criminal activity that exclusively relates to commercial sex and sexual exploitation and to address other types of human trafficking crimes mostly just in theory. To date, workers such as the 40 plaintiffs in *Botello* are all too often left alone to find their own justice when they fall prey to exploiters.

THE TVPA AS A SEX TRAFFICKING-DRIVEN UMBRELLA LAW

In many circles, the application of the TVPA in the agricultural expanses of Western New York in *Botello* came as a surprise. The political context in which President Clinton signed the bill into law was far removed from that which once greeted Lincoln's Emancipation Proclamation. At the beginning of the twenty-first century, public awareness around the issue of slavery had long shifted away from U.S. farms toward a more complex image of transnational criminal enterprises trading in persons for exploitation in a range of private industries, particularly commercial sex.

In line with the concurrently-drafted United Nations Palermo Protocol to Prevent, Suppress, and Punish Trafficking in Persons, the TVPA encompassed all forms of trafficking. But in a telling introductory clause, its authors memorialized their expectation that when it came to "this contemporary manifestation of slavery," the victims would be "predominantly women and children,"³ a demographic disproportionately affected by sex trafficking.

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Global estimates indeed place the percentage of overall trafficking victims who are female at 55, a true—if slight—majority. Children make up just over a quarter.⁴ The past 15 years of application of the TVPA by law enforcement and prosecutors, however, suggests its architects may not have only been pointing to this numerical fact in their introductory qualification, but also signaling a broader moral prioritization that deems sex trafficking of women, particularly young women and girls, a more urgent and prevalent problem than exploitation for labor.

In a country where 92 percent of constituents believe human trafficking victims "are almost always female,"⁵ the political coalitions necessary to sustain the now four-time reauthorization of this anti-trafficking law would have to respond first and foremost to that public perception, real or imagined. Accordingly, the last of these TVPA iterations⁶ passed Congress as an amendment to the 2013 Violence against Women Act. Likewise, New York's own version of the law, the most recent enhancement of which was enacted in January of this year, met Governor Cuomo's pen as part of a Women's Equality Agenda.⁷ Although this embedding of trafficking legislation within women's rights campaigns has proven politically strategic, such framing also inadvertently perpetuates the public image of trafficking as a one-gender issue.

At all jurisdictional levels, application of trafficking statutes strongly reflects this single-track outlook. Federal authorities reported that out of 257 trafficking cases pursued for prosecution under the TVPA in the last recorded 12-month period, more than 95 percent (249) exclusively concerned the sex trade.⁸ Records in Albany reveal an even heavier bias toward such cases within New York: of the 42 convictions obtained in the 9-year history of the state's trafficking law, all but one involved commercial sex.⁹ (Although researchers have shown that boys and LGBTQ youth make up an under-identified portion of sex trafficking cases,¹⁰ the aforementioned prosecutions have almost invariably involved women and girls.)

These numbers from law enforcement and prosecutors stand in sharp contrast to the caseloads of another pillar of

the U.S. response to trafficking in persons: the broad network of federally-funded service providers for whom the identification by law enforcement of a trafficking victim is just the start of the work. Grant monitors for one of the two major funding streams for these services report that the majority of cases their grantees encounter are of labor trafficking—which affects all genders more evenly—in addition to a significant percentage with elements of both sexual and non-sexual exploitation.¹¹ Individual victim-serving agencies corroborate that national tendency in their own numbers: one of the largest New York legal services providers reported that as of February 2016, labor trafficking cases made up 60 percent of their overall trafficking caseload.¹²

A side-by-side comparison of such reports from the law enforcement and services sectors reveals a tiered response to human trafficking across the United States. Whereas trafficking crimes involving mostly younger women and girls for sexual exploitation trigger both service provision and prosecutions, the type of trafficking that exploits mostly foreign nationals of all ages and genders for manual labor is often identified and addressed by service providers, but elicits little to no response from federal investigators and prosecutors.

HARVEST OF SHAME

A nationwide survey service provider's records reveal that labor trafficking is most common in specific high-risk workplaces. Not surprisingly, the low-wage industries of domestic service and care giving, restaurants, hospitality, and agriculture topped the list. Of these, agriculture served as the venue for exploitation in nearly a fifth of the cases.¹³

These are uneasy statistics for New York, where agriculture brought in more than US\$7 billion in gross receipts in 2014, making it the state's number one industry. Unwilling to use these proceeds to provide wages and conditions attractive to locally-born workers, the 10 345 New York farms that hire outside help have turned to more pliant, economically desperate workers from as far as Mexico, Central America, and the Caribbean. Within this increasingly consolidated industry, only 1 429 agricultural operations require more than 10 workers. It is that highest-earning tier of New York farms that most relies on the state's 60 944 farmworkers.¹⁴

These employers only formally sponsor about 9 percent of the statewide agricultural workforce through the H2-A Guest Worker Program,¹⁵ the only legal means to procure for-

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eign labor for work on U.S. farms. The vast majority of the overall industry instead relies on registered or informal labor contractors such as Botello to seek their hired help. The largest farms in particular, whose infrastructure often includes on-site barrack-style farm labor camps, pay top dollar to this sprawling army of brokers, who secure a constant flow of workers to harvest crops during narrow, unpredictable time windows or to staff 24-hour, 365-days-a-year milking rotations. Indeed, the latter industry, dairy, New York State's top agricultural sector, must rely on informal labor markets to procure foreign workers, since seasonal visas, by definition, cannot meet their year-round demands.

The work of these contractors does not end with a successful job placement. It is often these same facilitators who help finance the journeys of immigrants from impoverished, violence-ridden communities to the work camps and who manage them afterwards as crew bosses. As the United States continues to pour billions of dollars into militarizing its southern border, the cost of all northward journeys has steadily increased, forcing more immigrants to go into debt with smuggling networks.

As a result, a growing norm for new arrivals to U.S. agriculture is to spend their first months or years working off a debt to *coyotes* (smugglers), transporters, and labor brokers who walk a fine line between smuggling and trafficking. To secure the repayment of these often-exorbitant fees, smugglers may confiscate documents, threaten violence, firing or deportation, or simply apply unreasonable interest rates on the loan principals, turning smuggling into a form of trafficking defined in U.S. law as "debt bondage."¹⁶ Unlike the era when indentured servants tended Britain's colonial farms throughout North America for a fixed period of time, victims of this type of crime face indeterminate years of exploitation under coercive creditors as a rite of passage into the United States labor force.

Debt brokers and labor contractors are in constant and direct contact with New York's farmworkers by design. They provide a layer of deniability between the workforce and the end recipients of trafficked labor: the land-owning employers. Although cutting-edge litigation strategies have at times

succeeded in naming such parties liable as “joint employers” alongside their contractors, criminal justice responses to non-sexual labor trafficking have largely ignored the complicity of deeper-pocket farm employers, fixating on their hired henchmen instead.

As in Botello, these crew bosses are often second-generation immigrants or even former low-wage workers, who provide farms easy access to a known work force, often from their own hometowns in Latin America. The agricultural industry’s version of low-level management, they stand a rung above hand-harvesters and milkers, earning themselves higher pay that depends on their ability to extract efficient, compliant labor from the workers. Insofar as they employ coercive tactics to achieve production goals, the middlemen often assume complete and sole liability for the criminal activity. These *mayordomos*, as workers know them, are easily dispensable, allowing farmers to avoid legal ramifications in case of an outside inquiry.

The liability buffer created by this labor contracting system leaves farmworkers at constant and ubiquitous risk of extreme forms of exploitation under unafraid, unscrupulous employers who act with impunity. A survey of the undocumented Spanish-speaking farmworker population in San Diego County, California, revealed a 31-percent prevalence rate of violations that met the legal definition for human trafficking.¹⁷ Another study carried out just a few states down the East Coast migrant stream from New York, in North Carolina, found that 1 in 5 farmworkers in that area had experienced some form of trafficking, with significant numbers reporting deception and lies (21 percent), restriction and deprivation (15 percent), and even threats to physical integrity (12 percent).¹⁸

While the prevalence of the first two categories warn of increasing sophistication within farm labor trafficking schemes, involving bait-and-switch job offers, debt repayments, and psychological manipulation, the mere existence of the third serves as a sobering reminder that current farm labor standards for auditing and enforcement are weak enough to allow recurring cases where employers simply force their workers through actual or threatened physical harm.

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GOVERNMENTAL ABDICATION

From the view of the federal government buildings around Niagara Square in downtown Buffalo, New York, the past 15 years have made the Botello case seem more a historical anomaly than a watershed moment. Federal officials have since inquired into only a handful of labor trafficking cases. Yet even when these rare probes into low-wage industries have led to the certification of victims of forced labor and referrals to social services, charges often fall short of the TVPA, instead focusing on the employers’ “harboring” or “transporting of illegal aliens.”

By taking this approach, officials send a problematic message to the undocumented community: that their irregular immigration status may be of more interest to the government than their victimization. Hesitant to apply a trafficking lens to the worst abuses taking place in farms, restaurants, and other businesses, officials in rural New York have joined a national trend of reserving use of the all-encompassing TVPA to only address sexual exploitation.¹⁹

For the Western District of New York (WDNY) specifically, anti-trafficking work has predominantly involved disrupting the activities of sex traffickers in Buffalo and Rochester. Those efforts alone generated so many trafficking cases in 2015 as to make theirs the district with the most prosecutions of that type in the entire country—a distinction made more dramatic considering the relatively low population density of their area compared to other jurisdictions.

WDNY’s record combatting these types of abuse is notable in its own right and speaks to the effectiveness of their interdisciplinary Human Trafficking Task Force (HTTF). But it also begs the question of why, in a district that is home to some of the country’s largest employers of vulnerable farmworkers, and given the known prevalence of forced labor in comparable agricultural areas, so few have had their rights vindicated in WDNY courts since Botello.

Asked point-blank about this dearth of non-sexual labor cases on live television, the then-United States Attorney for this district, William J. Hochul, Jr., offered a candid, telling theory:

From what I’ve seen, from my vantage point, it is very difficult to conduct an investigation when agriculture workers, *who may be here for two to five days during a harvest time*, are involved. By the time law enforcement would even get a lead that there is [sic] potential undocumented workers who are being held

against their will and then mobilize the resources to conduct the investigations, those workers may in fact have already moved on to the next community. [Author's emphasis.]²⁰

By conjuring the image of immigrant farmworkers spending days, not the usual months, harvesting New York's crops, WDNy's chief prosecutor minimizes both the contribution of that workforce to his district's economy, and its need for attention from his office. More broadly, the comment ignores the fact that, due in part to the presence of federal immigration officials as far as 100 miles inland from the northern U.S. border, 84 percent of New York State farmworkers no longer migrate,²¹ but rather choose to settle year-round in the relative safety of farm labor camps for fear of apprehension and deportation.

Whatever the factors are that keep WDNy officials from reaching workers at the farm labor camps or vice versa, the outcomes speak for themselves: of the 12 cases that earned WDNy its number-one place in trafficking prosecutions for 2015, none involved farm labor abuses or labor trafficking in any industry, an unlikely state of affairs for the district that once pioneered the application of labor trafficking law to agriculture at the dawn of the TVPA.

BOTELLO, EMBLEM OF A SYSTEM

Even if WDNy were to reprioritize forced labor alongside other types of trafficking prosecutions, it would only address one element of a broader, systemic issue. As much as the farming industry has preferred to believe since the sentencing of Botello that she was a rogue actor among an otherwise above-board *statu quo*, a comparison of her behavior to the current standards for agricultural labor brokering suggests the main difference between her and many other contractors still staffing New York's farms may be that she was caught.

Indeed, a criminal-justice-only approach to labor trafficking might serve more to validate than to transform the industries that benefit from forced labor. By casting the precious few middlemen who are each year named in federal complaints charging forced and coerced labor as "bad apple" perpetrators, the U.S. justice system suggests that such instances are manageable ruptures in otherwise accountable industries, rather than predictable expressions of no-questions-asked supply chains, where consumers and middlemen simply demand the best quality product and services for the lowest possible price. By that standard, the pushing of work-

ers into maximum productivity through human trafficking is not a failing of the current system, but its purest achievement.

For their part, U.S. Attorney Hochul and his WDNy Human Trafficking Task Force recently convened a sub-group solely dedicated to the identification and prosecution of non-sexual labor trafficking. This new committee, one of the first of its kind in the country, is led by the Worker Justice Center of New York (WJCNy), which, under its previous name of Farmworker Legal Services, and in tandem with Hochul's predecessors, once helped Botello's victims escape indentured servitude.

One of the WJCNy staff involved in that extraction, Renán Salgado, coordinates the group, which includes prosecutors, law enforcement agencies, and service providers. His hope is to remind officials that although labor trafficking cases follow a different pattern than sex trafficking cases and their "low-hanging" evidentiary trails on web-based escort sites, they follow a pattern nonetheless, one more obvious and common than is widely accepted. "There is a mentality that these are difficult cases, which leads to a reluctance to dedicate resources," he says. "We are out to change that."²² ■■■

NOTES

¹ *Victims of Trafficking and Violence Protection Act of 2000*, Public Law 106-386, U.S. Statutes at Large 114 (2000), 1486, codified at U.S. Code 18 (2000), § 1589.

² From here on, the author refers to the accused in this case as "Botello" instead of using both her last names "Garcia Botello" as in the Spanish-language usage. We have left this as is since the case is probably known this way due to the U.S. practice of only citing the second last name. [Editor's Note.]

³ *The New York Times*, June 21, 2002, <http://www.nytimes.com/2002/06/21/nyregion/migrant-camp-operators-face-forced-labor-charges.html>.

⁴ *Victims of Trafficking and Violence Protection Act of 2000*, Public Law 106-386, U.S. Statutes at Large 114 (2000), 1466.

⁵ International Labour Organization, "21 Million People Are Now Victims of Forced Labour, ILO Says," June 1, 2012, http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_181961/lang-en/index.htm.

⁶ Vanessa Bouche, Amy Farrell, and Dana Wittmer, "Identifying Effective Counter-Trafficking Programs and Practices in the U.S.: Legislative, Legal, and Public Opinion Strategies that Work," 2015, <https://www.ncjrs.gov/pdffiles1/nij/grants/249670.pdf>.

⁷ *Violence against Women Reauthorization Act of 2013*, Public Law 113-4, U.S. Statutes at Large 127 (2000), 53.

⁸ New York State Governor's Office, "Governor Cuomo Signs Legislation to Protect and Further Women's Equality in New York State," October 21, 2015. <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-protect-and-further-women-s-equality-new-york-state>.

⁹ U.S. State Department, *Trafficking in Persons Report*, June 2016. <https://www.state.gov/documents/organization/258876.pdf>.

¹⁰ Interview by the author with New York State Division of Criminal Justice Services officers, November 3, 2015.

¹¹ Ric Curtis, Karen Terry, Meredith Dank, Kirk Dombrowski, and Bilal Khan, *The Commercial Sexual Exploitation of Children in New York City: Executive Summary*, September 2008, John Jay College of Criminal Justice, http://www.courtinnovation.org/sites/default/files/CSEC_NYC_Executive_Summary.pdf.

- ¹¹ Duren Banks and Tracey Kyckelhahn, "Characteristics of Suspected Human Trafficking Incidents, 2008-2010" (Washington, D.C.: US Department of Justice, Bureau of Justice Statistics, 2011).
- ¹² City Bar Justice Center, 2016 <http://www2.nycbar.org/citybarjusticecenter/images/stories/pdfs/the-impact-of-legal-services-on-human-trafficking-survivors.pdf>.
- ¹³ Urban Institute 2014, <http://www.urban.org/research/publication/understanding-organization-operation-and-victimization-process-labor-trafficking-united-states>.
- ¹⁴ U.S. Department of Agriculture, *Census of Agriculture*, 2012, http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_County_Level/New_York/.
- ¹⁵ U.S. Department of Labor, "Office of Foreign Labor Certification: H-2A Temporary Agricultural Labor Certification Program-Selected Statistics, FY 2015," https://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY_2015_Q4.pdf, accessed March 3, 2017.
- ¹⁶ *Victims of Trafficking and Violence Protection Act of 2000*, Public Law 106-386, U.S. Statutes at Large 114 (2000), 1469.
- ¹⁷ Kelle Barrick, Pamela Lattimore, Wayne Pitts, and Sheldon Zhang, *Indicators of Labor Trafficking Among North Carolina Migrant Farmworkers*, 2013, National Institute of Justice, <https://www.ncjrs.gov/pdffiles1/nij/grants/240223.pdf>.
- ¹⁸ Ibid.
- ¹⁹ Annick Febrey, "Reevaluating the Trafficking Victims Protection Act," *The Hill*, March 31, 2016, <http://thehill.com/blogs/congress-blog/civil-rights/274800-reevaluating-the-trafficking-victims-protection-act>.
- ²⁰ Helene Biandudi Hofer, "Human Trafficking in Monroe County," *WXXI News*, September 25, 2014, <http://wxxi.com/post/watch-human-trafficking-monroe-county-need-know-special>.
- ²¹ USDA, *Census of Agriculture*, 2012.
- ²² Telephone interview by the author with Renán Salgado, November 3, 2015.