

Criminalization of Trafficking Victims

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The **Trafficking Victims Advocacy Project** addresses the comprehensive needs of victims of human trafficking who are arrested and prosecuted for prostitution, and other criminal offenses, across New York City. TVAP provides specialized legal advocacy and representation for victims of trafficking. It also works to create greater access to post-conviction relief for trafficking survivors to mitigate the devastating collateral consequences of prior criminalization.

Widely recognized for its expertise and contributions to gender jurisprudence and human rights practice, the **International Women's Human Rights Clinic** advocates before international and regional human rights bodies and national and local courts and legal institutions. The Clinic works to combat gender discrimination and sexual violence, advance reproductive and sexual rights and economic and social rights, and promote women's participation and empowerment.

I. SUMMARY

1. This Stakeholder Report is submitted by the Trafficking Victims Advocacy Project (TVAP) of the Legal Aid Society of New York and the International Women's Human Rights Clinic at the City University of New York. It is based on TVAP's direct legal representation of trafficking victims in criminal proceedings and the IWHR's report [Clearing the Slate: Seeking Effective Remedies for Criminalized Victims of Trafficking](#),¹ which is based on interviews, testimony and statements of trafficking survivors, attorneys and experts.

2. The U.S. recognizes that human trafficking is a grave human rights violation and has accepted recommendations to prevent trafficking and child prostitution, assist trafficking victims and address the stigmatization of all people engaged in sex work in order to prevent discrimination and violence. However, in most states in the U.S., laws and policies are designed to maximize prostitution arrests and prosecutions, rather than to identify and assist people who have been trafficked. As a result many trafficking victims, including children under 18, frequently first come into contact with authorities when they are arrested and prosecuted for prostitution and other related crimes. Criminal arrests are traumatic experiences that reinforce fear and distrust of police and authorities instilled by traffickers. Further, criminal convictions make it more difficult for trafficking victims to obtain safe housing, education and legal employment and continue to haunt them even after they have escaped their traffickers.

3. Because policies and practices that humiliate, punish and criminalize trafficking victims violate basic human rights, U.N. Human Rights bodies have criticized the U.S. for allowing criminal prosecution of children engaged in prostitution and for arresting and prosecuting adult trafficking victims. *See Documents for Further Reference ¶ 18.*

4. The U.S. should take steps to end law enforcement practices and amend laws that criminalize children engaged in prostitution and adult sex trafficking victims and provide training and funding to better identify and assist trafficking victims. It should also encourage state legislation allowing trafficking victims to vacate criminal convictions that occur as a result of human trafficking.

II. LEGAL FRAMEWORK

5. Anti-Trafficking and Prostitution Laws. In the United States human trafficking is a crime under the federal Trafficking Victims Protection Act and almost every state has criminalized sex trafficking.² The TVPA also authorizes grants to state and local law enforcement to investigate and prosecute trafficking.³ While the U.S. has made strides in defining and recognizing human trafficking as a crime, its laws and law enforcement policies around prostitution also have a substantial impact on trafficking victims.

¹ SUZANNAH PHILLIPS ET. AL., CLEARING THE SLATE City Univ. of N.Y. Sch. of Law. Int'l Women's Human Rights Clinic (2014).

² POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS 5-6 (2013).

³ PHILLIPS, *supra* at 11.

Prostitution is a crime in all states in the U.S. with the exception of some counties in the state of Nevada. Although individuals who are trafficked into sex work are forced to commit criminal offenses, many state criminal laws do not recognize exceptions or create defenses or immunity from prosecution for them.

6. In addition, in the vast majority of states, the law treats children engaged in prostitution as criminals rather than victims. Only three states provide immunity from prosecution for children under 18 who have engaged in prostitution-related offenses.⁴ Two other states set an age limitation for prostitution offenses but the limit does not include all children below 18. In Texas and Michigan children charged with prostitution must be at least 14 and 16 years old, respectively.⁵

7. Law Enforcement Practices. The lack of explicit immunity from prosecution for children and victims of trafficking is compounded by local law enforcement practices around prostitution and, ironically, by anti-trafficking policies that prioritize arrest and prosecution of traffickers over the welfare of their victims. In the U.S. common policing strategies, driven by the “broken windows” theory that unchecked minor crimes will increase overall criminal activity, emphasize arrests for low-level misdemeanors, including prostitution. In addition, policing strategies that purport to prevent sex trafficking, often focus on the arrest of trafficking victims and others engaged in sex work through brothel raids and vigorous enforcement. The result of these strategies are high rates of arrest for low level prostitution offenses, and very few prosecutions of traffickers. For example, in 2012, New York State arrested 2,962 individuals for prostitution or loitering for prostitution. In contrast, only 34 individuals were prosecuted statewide for human trafficking offenses.⁶

8. While the effectiveness of these strategies to combat trafficking is questionable, their impact on trafficking victims can be devastating. Victims are charged with crimes they were forced to commit and subjected to the humiliating experience of arrest and detention. In New York City they can be held up to 24 hours in the “squalid” and “chronically overcrowded” central booking facility. They may be forced to remain unclothed for long periods of time and are often subjected to inappropriate conduct and harassment while in custody.⁷

9. Once a trafficking victim is charged with prostitution, the circumstances around the arrest and the overtaxed criminal court system create tremendous pressure on the victim to plead guilty, rather than contesting the charge or revealing the trafficking situation.⁸ For non-citizens, arrest for prostitution can result in immigration detention and deportation.⁹ For those who remain in the U.S., criminal convictions create significant barriers to individuals who seek to escape a trafficking situation in finding lawful

⁴ Polaris Project, p. 34.

⁵ *Id.*

⁶ PHILLIPS, *supra* at 13-14.

⁷ *Id.* at 18.

⁸ *Id.*

⁹ *Id.* at 19.

employment, safe housing and education and continue to haunt trafficking survivors long after they escape their trafficking situation.¹⁰

10. Even where trafficking victims are identified, federal and state initiatives to combat human trafficking often prioritize prosecution of perpetrators at the expense of victims. Victims are often seen primarily as “instruments of criminal investigation, rather than as holders of rights.”¹¹ Rather than respecting the autonomy, safety and emotional needs of victims, prosecutors can use the threat of criminal charges in order to get victims to assist in an investigation. The TVPA also conditions cooperation with law enforcement as a condition of eligibility for relief under the law, including lawful immigration status and other services and benefits.¹² Other state laws have similar requirements.

11. U.S. First Periodic Review. The U.S.’s global efforts to address trafficking were recognized during the its First Periodic Review. ¶¶ 75, 81. However, it was encouraged to take steps to address trafficking and child prostitution including to “[d]efine, prohibit and punish” the crimes and to “insist more on measures aiming to combat the demand and provide information and services to victims of trafficking.” ¶¶ 192.167-69. It was also recommended that the U.S. “[u]ndertake awareness-raising campaigns for combatting stereotypes and violence . . . and ensure access to public services paying attention to the special vulnerability of sexual workers to violence and human rights abuses.” ¶ 192.86

12. The U.S. accepted these recommendations. In response to recommendation 86, it stated that “no one should face violence or discrimination in access to public services based on . . . their status as a person in prostitution.”

III. U.S. COMPLIANCE WITH ITS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

13. In 2013, the U.S. passed the Trafficking Victims Protection Reauthorization Act of 2013 (TVPRA), which reauthorized federal funding grants to state and local law enforcement. The TVPRA also created a model State statute to protect children by “prohibiting the charging or prosecution of an individual” under 18 who has been arrested for engaging or attempting to engage in a sexual act in exchange for monetary compensation.¹³ The model statute also provides that such individuals should be treated as victims of a severe form of trafficking and referred to the appropriate service providers. To date, we are not aware of any state that has amended its criminal law based on the TVPRA model.

15. Since the U.S.’s first review, prostitution arrests by state and local law enforcement

¹⁰ *Id.* at 21-24.

¹¹ Joy Ngozi Ezelio, Special Rapporteur on trafficking in persons, especially women and children, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, ¶ 61, U.N. Doc. A/HRC/17/35 (Apr. 13, 2011); PHILLIPS, *supra* at 13-14.

¹² PHILLIPS, *supra* at 14.

¹³ Trafficking Victims Protection Reauthorization Act of 2013, § 1243 (codified as 22 U.S.C. § 7101. (2000)).

continue unabated. Perhaps more troubling is that increased prostitution arrests are sometimes justified and funded as initiatives to combat sex trafficking. For instance, it has become common for local law enforcement authorities to divert significant resources to prostitution arrests prior to large cultural events like the “Super Bowl.”¹⁴ However, these initiatives fail to yield meaningful investigation or arrests of traffickers. Instead, the increased arrests for and criminalization of prostitution have a devastating impact on trafficked and non-trafficked persons engaged in prostitution.¹⁵

16. Although it is difficult to know the number of youth under 18 who continue to be arrested and convicted for prostitution in the United States, the Legal Aid Society of New York routinely represents individuals who were convicted for prostitution offenses based on acts that were committed when they were minors. Further, trafficked minors and adults are also convicted of non-prostitution crimes that they are compelled to commit as a result of being trafficked. The Legal Aid Society has represented countless girls and women prosecuted for promoting prostitution, trafficking or even violent felony offenses as accomplices of their traffickers. This is the case despite the fact that these girls and women were victims of trafficking themselves.

17. One promising trend in the U.S. is the passage of legislation in several states designed to allow victims of trafficking to clear their criminal records. Since 2010, 23 states have adopted legislation to allow trafficking victims to vacate criminal convictions that arise from their trafficking situation.¹⁶

Suggested Recommendations

- The U.S. should legally and effectively decriminalize children engaged in prostitution and adult victims of trafficking into the sex trade and ensure that no state prostitution law allows for the arrest and detention of individuals who have been trafficked into the sex trade.
- The U.S. should provide training and funding for identification and services for trafficking victims, including counseling, job training, housing, and immigration assistance.
- The U.S. should encourage additional state legislation allowing individuals to vacate criminal convictions that occur as a result of human trafficking.
- The U.S. should develop policies and practices to address discrimination against sex workers to ensure that they have equal access to public services and benefits and to protect them from violence and other human rights abuses.

IV. CONCLUSION

18. As a result of the criminal nature of trafficking, the United States, like many other countries, concentrates the bulk of its anti-trafficking resources and efforts on

¹⁴ Mary Pilon, *Jump in Prostitution Arrests in Super Bowl Week*, N.Y. TIMES, Jan. 30, 2014, at B16.

¹⁵ Kate Mogulescu, *The Super Bowl and Sex Trafficking*, N.Y. TIMES, Jan. 31, 2014 at A23.

¹⁶ PHILLIPS, *supra* at 30.; POLARIS PROJECT, , *supra* at 1-3.

apprehending and prosecuting traffickers. However, an unfortunate consequence of focusing on maximizing arrests and prosecutions, without adequate allocation of resources to identify victims and safeguard their rights, is that victims of human trafficking frequently first come into contact with the criminal justice system because they are arrested. Current U.S. laws and practices that treat trafficking victims, including children under 18, as criminals and instruments of criminal investigations rather than holders of rights compounds the harm inflicted by their traffickers and violates their basic rights.

The U.S. should be encouraged to end law enforcement practices and amend laws that criminalize children engaged in prostitution and adult sex trafficking victims and provide training and funding to better identify and assist trafficking victims. It should also encourage additional states to adopt legislation allowing trafficking victims to vacate criminal convictions that occur as a result of human trafficking.

Documents for Further Reference:

- HRC Concluding Observations to the U.S. (2014): The Human Rights Committee expressed concern about the “criminalization of [trafficking] victims on prostitution-related charges” and insufficient identification of trafficking victims. The Committee urged the U.S. to “to prevent the criminalization of victims of sex trafficking, including child victims, to the extent that they have been compelled to engage in unlawful activities.” U.N. Doc. CCPR/C/USA/CO/4, ¶ 14.
- CRC Concluding Observations to the U.S. (2013): The Committee on the Rights of the Child expressed concern that “[c]hildren are still being legally arrested, detained and prosecuted for prostitution in the majority of states.” The CRC called on the U.S. to “[l]egally and effectively decriminalize the involvement of children in prostitution ensuring that no state law on prostitution allows for the arrest and detention of ... minors” and recommended legislative measures to ensure that children are “protected and not arrested or detained.” U.N. Doc. CRC/C/OPSC/USA/CO/2, ¶¶ 33(b) – 34.
- Report of the Special Rapporteur on trafficking in persons (2012) The Special Rapporteur has emphasized that trafficking victims “not be prosecuted for offenses relating to their status as trafficking victims [because criminalization] compounds the harm already experienced by trafficked persons and denies them the rights to which they are entitled.” Criminalization can undermine efforts to combat trafficking “because it destroys trust, retraumatizes victims and reinforces what traffickers may have told victims about law enforcement authorities.” U.N. Doc. A/HRC/20/18 (June 6, 2012), ¶¶ 25-26.