

TRANSFORMING THE SYSTEM



ERADICATE THE CRIMINALIZATION OF

Sex, Gender, and Sexuality

We all should have freedom to live without fear of being criminalized because of our expressed sex, gender, or sexuality. Nonetheless, women, women of color, LGBTQ people, and people suspected of engaging in sex work are often profiled for these reasons.

LGBTQ people have been targeted with increased police surveillance;⁴¹⁵ black women and other domestic violence survivors may be treated like suspects when they call police for assistance with domestic violence;⁴¹⁶ women, LGBTQ women of color, transgender men, and others have been the targets of lewd remarks by police; and women and LGBTQ people suspected of sex work have been profiled because they were carrying condoms.⁴¹⁷ These acts should not be tolerated, and law enforcement should have clear, gender-sensitive guidelines to respond to complaints from diverse communities.

Instituting gender-sensitive “use of force” guidelines

It is important that police officers receive clear mandates that prohibit excessive force that might violate an individual’s gender integrity. Force should not be used on pregnant women and children. Victims of police sexual harassment and abuse should be able to report incidents of officer misconduct to an independent body that will take serious action against officers who prey on vulnerable communities. Law enforcement officers should be trained to adopt practices that reduce gender bias and prohibit the use of force on women are pregnant.

415 See NCAVP, *supra* note 94.

416 Crenshaw & Ritchie, *supra* note 28.

417 Hanssens, et al., *supra* note 291.

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Local and state legislatures should pass legislation that:

- ▶ Creates heightened accountability for police officers who abuse their authority to engage in sexual harassment and sexual assault;⁴¹⁸
- ▶ Requires police officers to respect various genders, sexualities, and gender identities during all police interactions, including searches and placements in police custody;⁴¹⁹
- ▶ Modernizes legislation that currently criminalizes HIV status;⁴²⁰
- ▶ Creates an independent body that reviews police's compliance with the principles of the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement** and allows for community complaints concerning police officers who have engaged in gender-insensitive policing approaches; and
- ▶ Prohibits the use of force, including chokeholds, Tasers, and/or other form of physical force on pregnant women or children⁴²¹ in favor of de-escalation.

Local law enforcement agencies, chiefs of police, and police administrators should:

- ▶ Create heightened accountability for police officers who abuse their authority to engage in sexual harassment and sexual assault;⁴²²
- ▶ Ensure police officers and police management are thoroughly trained on the implementation of the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement.**⁴²³

418 Crenshaw & Ritchie, *supra* note 28.

419 Ibid.

420 Center for American Progress & Movement Advancement Project, *supra* note 342, at 122.

421 Ibid, at 37..

422 Crenshaw & Ritchie, *supra* note 28.

423 Department of Justice, *supra* note 126.

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Protecting human trafficking survivors

Survivors of human trafficking should be provided with additional services, not subject to harsh criminalization and continued marginalization. The law should ensure that these victims are provided with proper resources after surviving the trauma of human trafficking.

Local and state legislatures should pass legislation that:

- ▶ Grants a *vacatur*—which completely sets aside a criminal conviction and treats the conviction as if it never existed—to survivors of human trafficking as well as sex workers. The *vacatur* should adhere to the following model guidelines:
 - ▶ Ensures that there is a presumption of trafficking where trafficking survivors provide “official documentation” of trafficking, *without requiring* official documentation of trafficking;⁴²⁴
 - ▶ Ensures that the survivor is not required to undergo “rehabilitation” to receive the remedy;⁴²⁵
 - ▶ Requires confidentiality provisions that protect the survivor’s identity;⁴²⁶
 - ▶ Is the “most complete remedy possible under the law,” eliminating any possible negative legal consequences of the conviction;⁴²⁷
 - ▶ “State[s] that the Court must vacate the convictions and dismiss the accusatory instrument if an individual meets the elements”,⁴²⁸
 - ▶ Permits court to take appropriate action to institute the remedy;⁴²⁹

424 Melissa Broudo & Sienna Baskin, Sex Workers Project, *Vacating Criminal Convictions for Trafficked Persons: A Legal Memorandum for Advocates and Legislators* 2 (Apr. 22, 2012), <http://sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf>.

425 Ibid.

426 Ibid.

427 Ibid.

428 Ibid.

429 Ibid.

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- ▶ Is retroactive and allows for a remedy for older convictions;⁴³⁰
- ▶ Provide funding for legal services attorneys to bring these motions;⁴³¹
- ▶ Grants a similar remedy for prostitution offenses not involving trafficking.⁴³²

Decriminalizing the sex trade

Human rights advocates are in general agreement that sex workers and sex work should not be criminalized.⁴³³ Criminalizing sex work marginalizes sex workers and others involved in the trade and prevents them from seeking or providing help when they might need it.⁴³⁴ It also makes sex workers vulnerable to abuse by police and other criminal justice actors, who often exploit the illegality of their work for their personal benefit. The overpolicing of sex workers and their customers exposes sex workers to potential victimization, pushing them into further secrecy by encouraging them to mistrust the criminal justice system.⁴³⁵ Decriminalizing sex work should be a priority to ensure the safety and wellbeing of sex workers. Where many forms of sex work, especially prostitution, remain criminalized, it need not remain a police priority.

Consistent with the resolution of the Presidential Advisory Council on HIV/AIDS, the **Department of Justice (DOJ)** and the **Centers for Disease Control and Prevention (CDC)** should “develop, disseminate, publicize, and promote guidance to state lawmakers and prosecutors to adopt legislation and policies that would eliminate the practice of using possession or presence of condoms as the basis of criminal prosecutions or sentence enhancement.”⁴³⁶

430 Ibid.

431 Ibid.

432 Ibid.

433 Amnesty International released a drafted policy of supporting sex work in order to comply with human rights obligations toward sex workers. See Amnesty International, 32nd International Council Meeting Circular No. 18 2015 ICM circular: *Draft policy on Sex Work* (July 7, 2015), (“In response to the human rights violations caused by the criminalisation of sex work, states must: repeal existing and/or refrain from introducing laws that criminalise (directly or in practice) the consensual exchange of sexual services for remuneration”). In recognition of this human rights approach to the treatment of sex work, police department should de-prioritize the policing of sex workers.

434 See *Amnesty International Policy on State Obligation to Respect, Protect and Fulfil the Human Rights of Sex Workers*, POL 30/4062/2016 (May, 26 2016); *Freedom Network Statement in Support of Amnesty International Vote* (August 2015) (“The vote to support decriminalization for both sex workers and third parties is an important step towards valuing the rights and safety of everyone in the sex trade, including trafficking victims, without detracting from the importance of anti-trafficking efforts and the ability to punish traffickers”).

435 See also Melissa Ditmore, Sex Workers Project, *The Use of Raids to Fight Trafficking in Persons* (2009) 47-48 (discussing the public health harms from using condoms as evidence of prostitution).

436 Hanssens, et al., *supra* note 291.

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Local and state legislatures should pass legislation that:

- ▶ Decriminalizes all aspects of sex work.⁴³⁷
- ▶ Provides a “comprehensive ban on confiscation, use, or mere possession or presence of condoms as evidence of any prostitution-related offense.”⁴³⁸
- ▶ Prohibits the profiling of people suspected of engaging in sex work including LGBTQ persons.⁴³⁹
- ▶ Creates heightened accountability for police officers who abuse their authority to engage in sexual harassment and sexual assault.⁴⁴⁰
- ▶ Prohibits the arrest of individuals who are survivors of trafficking.⁴⁴¹
- ▶ Eliminates the use of condoms as proof of intent to solicit or engage in prostitution.⁴⁴²
- ▶ Grants a vacatur remedy for sex workers, which adheres to the following model guidelines:
 - ▶ Ensures that the sex worker is not required to undergo “rehabilitation” to receive the remedy;⁴⁴³
 - ▶ Requires confidentiality provisions that protect the sex worker’s identity;⁴⁴⁴

437 See Amnesty, *supra* note 434.

438 Crenshaw & Ritchie, *supra* note 28. See Juhu Thukral & Melissa Ditmore, Sex Workers Project, Urban Justice Center, *Revolving Door: An Analysis of Street-Based Prostitution in New York City* 76 (2003).

439 See Thukral & Ditmore, *supra* note 438, at 76.

440 Crenshaw & Ritchie, *African*, *supra* note 28. See also Thukral & Dimore, *supra* note 438, at 76.

441 See Thukral & Ditmore, *supra* note 438.

442 Ibid. See also Ditmore, *supra* note 435.

443 Melissa Broudo & Sienna Baskin, Sex Workers Project, *Vacating Criminal Convictions for Trafficked Persons: A Legal Memorandum for Advocates and Legislators 2* (Apr. 22, 2012), <http://sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf>. See also Freedom Network Statement, *supra* note 445.

444 Ibid.

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- ▶ Is the “most complete remedy possible under the law,” eliminating any possible negative legal consequences of the conviction;⁴⁴⁵
- ▶ “State[s] that the Court must vacate the convictions and dismiss the accusatory instrument if an individual meets the elements;”⁴⁴⁶
- ▶ Permits courts to take appropriate action to institute the remedy;⁴⁴⁷
- ▶ Is retroactive and allows for a remedy for older convictions;⁴⁴⁸
- ▶ Provides funding for “legal services attorneys to bring these motions;”⁴⁴⁹
- ▶ Ensures that all sex work–related offenses include an element that requires coercion in order to find a party guilty of trafficking.⁴⁵⁰
- ▶ Grant a similar vacatur remedy for prostitution offenses not involving trafficking.⁴⁵¹

Local police departments should:

- ▶ De-prioritize the policing of sex work;⁴⁵²
- ▶ Avoid arresting individuals who may be survivors of trafficking;⁴⁵³
- ▶ Implement reporting structures that allow sex workers to comfortably report police officer sexual harassment.⁴⁵⁴

445 Ibid.

446 Ibid.

447 Ibid.

448 Ibid.

449 Ibid.

450 Janie A. Chuang, “Exploitation Creep and the Unmaking of Human Trafficking Law,” *Am.J. Int’l L.* 609, 612 (2014) (“[T]rafficking is defined as: (1) an act of recruitment, movement, harbouring, or receipt of a person, (2) by means of force, fraud, or coercion, (3) for the purpose of ‘exploitation.’”). CORRECT HERE RATHER THAN IN TRAFFICKING SECTION?

451 *Supra*, note 438.

452 Ibid at 76.

453 Ibid.

454 Ibid.

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Training and sensitizing on gender, sex, and sexuality issues

Criminal justice actors should receive adequate training and guidance to ensure that they are able to respond to persons of all genders, sexes, and sexualities properly. To this end, the following solutions and actions should be adopted.

Criminal justice actors, including **law enforcement agents, prosecutors, defense attorneys, judges, and parole and probation officers** should:

- ▶ Receive training on the implementation of the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement** to sensitize them to the issues of gender, sex, and sexuality and enable them to respond to persons of varying expressed sexes, genders, gender identities, and sexualities;⁴⁵⁵
- ▶ Have in place explicit bans on the profiling of persons for sex, gender, and/or sexuality;
- ▶ Have in place policies that ensure that community members' is not compromised due to their expressed gender and/or sexuality, while detained or otherwise interacting with law enforcement officials; and
- ▶ Have in place policies that ensure the safety and wellbeing of pregnant and postpartum women, including a ban on the use of shackles during labor and recovery and adequate care to postpartum women, including a minimum recovery period and screenings for postpartum depression.

State, and local governments should also:

- ▶ Have in place explicit bans on the profiling of persons for sex, gender, and/or sexuality;
- ▶ Decriminalize domestic abuse survivors by prohibiting policies such as nuisance

455 Department of Justice, *supra* note 126. This document provides guidance to police officers on curtailing unconscious bias; acknowledges that preventing gender discrimination in policing is a human rights matter; recognizes intersectionality (mentions challenges of LGBTQ, sex workers, people of color, and people with multiple of these identities); and commits to law enforcement accountability.

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ordinances that force survivors out of their homes or prevent them from calling police by levying steep fines against the landlord or homeowner if a home is a site of a certain number of calls for police or alleged nuisance conduct.⁴⁵⁶

- ▶ Minimize the impact of trafficking on young people by enacting “safe harbor” laws, which provide immunity and services to children who have been trafficked.⁴⁵⁷



For more information on the criminalization of sex, gender, and sexuality and policies to address it, check out:

The **Sex Workers Project** at the Urban Justice Center, which provides advocacy, legal and social services to individuals who engage in sex work. Our former Communications Institute Fellows Crystal DeBoise and Jessica Peñaranda work with the sex worker community through the Sex Workers Project.

Amnesty International's 2016 policy report on state obligations to “respect, protect, and fulfill the human rights” of sex workers.

The New York Anti-Trafficking Network, which sheds lights on the problem of trafficking of persons and provides survivors with support. The **#TalkTraffic Video Series** provides important insights about how to approach and solve trafficking.

Kimberle Williams Crenshaw and Andrea J. Ritchie's report, **Say Her Name: Resisting Police Brutality Against Black Women**, which highlights the importance of intersectionality in criminal justice reform and a racial justice movement.

The 2012 book by Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, **Queer (In)Justice: The Criminalization of LGBT People in the United States**, which illustrates the punishment of queer expression in the criminal justice system.

456 The ACLU has recently brought suit against two municipalities that have such policies. See *Nancy Markham v. City of Surprise*, ACLU (Aug. 27, 2015), <https://www.aclu.org/cases/nancy-markham-v-city-surprise>; and *Briggs v. Borough of Norristown et al*, ACLU (Sept. 18, 2014) <https://www.aclu.org/cases/briggs-v-borough-norristown-et-al?redirect=womens-rights/briggs-v-borough-norristown-et-al>.

457 Polaris Project, *Human Trafficking Issue Brief: Safe Harbor* (Fall 2015), <https://polarisproject.org/sites/default/files/2015%20Safe%20Harbor>