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 who are pregnant.

\(^{415}\) See NCAVP, supra note 94.

\(^{416}\) Crenshaw & Ritchie, supra note 28.

\(^{417}\) Hanssens, et al., supra note 291.
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 children 421 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.
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.\(^\text{424}\)
  - Ensures that the survivor is not required to undergo “rehabilitation” to receive the remedy.\(^\text{425}\)
  - Requires confidentiality provisions that protect the survivor’s identity.\(^\text{426}\)
  - Is the “most complete remedy possible under the law,” eliminating any possible negative legal consequences of the conviction.\(^\text{427}\)
  - “State[s] that the Court must vacate the convictions and dismiss the accusatory instrument if an individual meets the elements”.\(^\text{428}\)
  - Permits court to take appropriate action to institute the remedy.\(^\text{429}\)


\(^\text{425}\) Ibid.

\(^\text{426}\) Ibid.

\(^\text{427}\) Ibid.

\(^\text{428}\) Ibid.

\(^\text{429}\) Ibid.
Decriminalizing the sex trade

Human rights advocates are in general agreement that sex workers and sex work should not be criminalized.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{436}

\textsuperscript{430} Ibid.
\textsuperscript{431} Ibid.
\textsuperscript{432} Ibid.
\textsuperscript{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.

\textsuperscript{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”).

\textsuperscript{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).

\textsuperscript{436} Hanssens, et al., supra note 291.
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;\(^{444}\)

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\(^{437}\) See Amnesty, supra note 434.


\(^{439}\) 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.


\(^{444}\) Ibid.
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

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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.
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;\textsuperscript{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

\textsuperscript{455} Department of Justice, \textit{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.
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.\textsuperscript{456}

\begin{itemize}
  \item Minimize the impact of trafficking on young people by enacting “safe harbor” laws, which provide immunity and services to children who have been trafficked.\textsuperscript{457}
\end{itemize}

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

- The \textbf{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.

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

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

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

