



Between victims and prostitutes: Is there any difference? The consequences of conflating sex work and sex trafficking

Citation

Goncalves, Alana. 2023. Between victims and prostitutes: Is there any difference? The consequences of conflating sex work and sex trafficking. Master's thesis, Harvard University Division of Continuing Education.

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Between victims and prostitutes: Is there any difference?

The consequences of conflating sex work and sex trafficking

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A Thesis in the Field of Government

for the Degree of Master of Liberal Arts in Extension Studies

Harvard University

May 2023

Abstract

This research aims to analyze what are the possible consequences of conflating sex work and sex trafficking, specifically in a criminalized setting. This research focuses on the United States and samples three states to make this assessment. The three states are New York, Idaho, and Massachusetts. The research focuses initially on establishing its design and context, establishing qualitative data as its main source of data. The second part follows to the analysis of whether sex trafficking and prostitution are conflated in practice while differentiated in theory. To this end, anti-prostitution statutes and anti-trafficking statutes are analyzed. As well as prostitution diversion programs and human trafficking task forces. Lastly, the research proceeds to the analysis of the consequences of the conflation of sex work as sex trafficking using a procedural timeline. Which starts on the moment before an arrest until a possible conviction. The research then, presents its crosscutting recommendation and conclusions.

Acknowledgments

Balancing a professional and academic life is far from an easy task. However, there are people who deserve recognition and acknowledgement for assisting you along the way. In this sense, I would firstly like to acknowledge my Thesis Director, Professor Dr. Rachel Meyer, for providing me guidance and assistance throughout the way. It would be impossible to proceed with this research without her expertise and patience. Secondly, my Research Advisor, Dr. Michael Miner, who has also provided me assistance along the way and linked me to Prof. Meyer. Besides acknowledgement, a thank you is also due to both.

To my family and friends besides acknowledgement, appreciation must be in writing. For being by my side and supporting my academic endeavors along the way. Especially my parents, who have always supported my professional and academic career and have made great efforts to make my dreams come to fruition. To my sister, brother-in-law and their little clan, the love and support you provide me never goes unnoticed. And to all my friends, noting the ones who were exceedingly patient with me during this time. To Fernanda, Eduardo, Luiz Henrique, Agatha, Luis Felipe, Mark, Kaue, Igor, Ana Carla, Giulia, Marina, and others. This is far from an exhaustive list but thank you all.

To my former team in the Prosecution of the International Criminal Court, with whom I have worked for the past year (2022-2023). Who patiently listened to my concerns and enabled me to take some time off to conduct this research, even when we had very tight deadlines coming up. I would especially like to acknowledge Olivia

Struyven and Kweku Vanderpuye, my supervisors at the ICC, for being extremely supportive along the way. To my current team, the Defense Counsel in the Kosovo Specialist Chambers, thank you for also being understanding as to what it takes to balance work with academia.

Lastly, I would like to acknowledge the Harvard Professors, lecturers, teaching assistants, and colleagues whose expertise and knowledge made me grow both academically and personally.

Without all of you this would not have been possible.

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Chapter I.

Introduction

The movie *Taken* was the first contact I had with the theme of sex trafficking. Back then, little did I know that the movie is not representative of the ground reality of the crime. However, the movie was shocking enough to spike my interest and motivate me to start doing research specifically on the sex trafficking of women.

What I have found throughout the years is that sex trafficking is far more mundane than the popular conception suggests. I have found that while women can be victimized i.e., by an attractive foreigner while traveling with a friend, most sex trafficking victims are victimized by close relatives or colleagues. I have also found that victims of sex trafficking are not necessarily held in shackles in a basement but are mostly, on the streets, in brothels, on webcams, on craigslist, and in every physical or remote space that is possible to sell sexual services.

It was by understanding the mundane reality of sex trafficking victims that I began to question the practical hardships that these victims may encounter in systems that criminalize prostitution. The logic follows: if sex trafficking victims are on the streets and essentially selling the same services as prostitutes, they will be subjected to the same treatment. At least initially. In criminalized systems, this means that their initial contact with law enforcement will most likely result in an arrest.

The United States is a source of many antitrafficking campaigns and organizations that strive to fight human trafficking. However, due to the total criminalization of prostitution, my perspective was that the protection of sex trafficking

victims becomes a difficult task as selling sex is a crime. In this sense, is that this research aims to analyze the consequences of conflating sex work and prostitution in a criminalized setting. It uses three U.S. states as samples to further assess those consequences. Focusing mostly on the practical implications of conflation. To this end, this research is structured as follows.

Chapter II establishes the research's design, limiting the scope and focus of the research. More specifically, it presents the type of data assessed and the options made to enable the proposed analysis. This Chapter also notes the general aspects of human trafficking and the focus on the sex trafficking of women. Lastly, it is acknowledged the contentious nature of the feminist debate on sex work and the disagreements within the movement.

Chapter III presents the general and state provisions on prostitution and sex trafficking. It does so, to first present what is intended *de jure*. Namely, to establish what the law sought to prosecute and protect in theory. To analyze what happens *de facto*. Through an assessment of whether sex trafficking and prostitution are conflated in practice and, if so, to what extent.

Chapter IV seeks to address the research question by analyzing the consequences of conflating sex work and sex trafficking. First, by briefly analyzing the general consequences that apply to both prostitutes and sex trafficking victims prior to and at the moment of arrest. To then present the verified consequences of the conflation of sex work and sex trafficking using a procedural timeline. From the moment of arrest to after conviction.

Lastly, the research moves to the general recommendation and its conclusions.

Chapter II.

Context and Research Design

Sex trafficking and prostitution are both intricate topics with a myriad of factors that add complexity to them. For instance, race, gender, migration, voluntary or forced prostitution, and consent, are some of the correlating themes. As this multiplicity of correlating themes makes both sex trafficking and prostitution multifaceted, a focused approach is needed to extract better results. In this regard, to assess what are the possible consequences of conflating sex trafficking and sex work, it is necessary to limit the scope of the research, which is the aim of this Chapter.

Research Design

As mentioned, the aim of this research is to analyze what are the possible consequences of conflating sex work and sex trafficking. The United States has been chosen because, as it fully criminalizes prostitution, it is difficult to grasp how authorities would differentiate sex trafficking and prostitution in practice. As both prostitutes and sex trafficking victims engage in the sale of sexual services.

The United States was also chosen because it promotes a robust antitrafficking campaign that advocates for the protection of victims, while fully criminalizing prostitution. Hence, hypothetically, the system exposes all sex workers to the detrimental effects of adopting a criminal justice-centered approach. This implies a discrepancy between what is intended and provisioned *de jure* to what is the *de facto* reality.

As a criminal lawyer, the consequences of adopting a criminal justice system-centered approach are familiar. But it is of relevance to investigate what are these consequences to the focus group. Namely, sex workers. Victims of sex trafficking or not.

To this end, this research's design is qualitative as it focuses on the experiences of sex workers and professionals who have experience with this focus group. In this regard, most findings are based on qualitative sources. As this research has found some significant limitations related to quantitative data. Such as i.e., the lack of quantitative data referent to the number of sex trafficking victims arrested for prostitution-related offenses. These limitations will be duly flagged throughout the research.

Lastly, despite providing a bird's-eye view of the national context and a recommendation aimed to be general, this research also focuses on a sample of three U.S. states. To analyze how consequences might be different depending on the state that the sex worker is located in. These three states are New York, Idaho, and Massachusetts.

The chosen sample was based on the differences and similarities between the states, to assess whether the consequences are mitigated – or not – by the presence of i.e., diversion programs or human trafficking intervention courts. Such decision was based on the classification of the crime by level of offense for prostitution; the fines imposed for the crime; the availability of prostitution diversion programs (PDPs); and other factors that will be elucidated. Such as, for instance, the availability of data for the state.

Research design presented, to start the analysis, it is first necessary to establish the context and limit the scope of the research.

Human trafficking, sex trafficking, and the sex trafficking of women

There are several misconceptions or stereotypes regarding human trafficking that oversimplify the reality of trafficking.¹ For instance, sex trafficking, is basically three times less recurrent than labor trafficking. According to the International Labour Organization (ILO), in 2021, a parcel of 6.3 million people of the total of 27.6 million forced into labor were forced into commercial sexual exploitation.² Hence, the first point to have in mind is that sex trafficking is not the most recurrent form of human trafficking. However, criminal statistics show an increase in sex trafficking numbers in the last few years.³ The COVID-19 pandemic also had an impact on numbers, being considered by the UN as an accelerator of human trafficking, including the trafficking of women for commercial sexual exploitation.⁴

It is important to bear in mind that, as criminal statistics depend on records, “[t]he magnitude of trafficking is hard to gauge and figures are hard to trust.”⁵ A considerable number of crimes are not reported, amounting to a ‘dark figure’ unknown to practitioners.⁶ Therefore, although important to estimate the dimension of the problem,

¹ See Michele Boggiani, When Is a Trafficking Victim a Trafficking Victim? Anti-Prostitution Statutes and Victim Protection, 64 Clev. St. L. Rev. 915 (2016) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol64/iss4/6>

² Forced labour, modern slavery and human trafficking (Forced labour, modern slavery and human trafficking)”, access 8 January 2023, <https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>.

³ Whilst the number of slave-like traffic incidents decreased from 2007 to 2017, from 2016 to 2017 there was a notable increase in sex trafficking. “Human Trafficking”, Migration data portal, access 8 January 2023, <https://www.migrationdataportal.org/themes/human-trafficking>; “Human trafficking - Statistics & Facts | Statista”, access 10 January 2023, <https://www.statista.com/topics/4238/human-trafficking/>.

⁴ “COVID-19 an Accelerator of Human Trafficking – UN”, Global Initiative, access 8 January 2023, <https://globalinitiative.net/analysis/covid-19-human-trafficking-un/>; “COVID-19 Seen Worsening Overall Trend in Human Trafficking”, United Nations : Office on Drugs and Crime, access 27 June 2022, <https://www.unodc.org/unodc/en/frontpage/2021/February/share-of-children-among-trafficking-victims-increases--boys-five-times-covid-19-seen-worsening-overall-trend-in-human-trafficking--says-unodc-report.html>.

⁵ Michele Boggiani, When Is a Trafficking Victim a Trafficking Victim? Anti-Prostitution Statutes and Victim Protection, 64 Clev. St. L. Rev. 915 (2016) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol64/iss4/6>, p. 918.

⁶ See Biderman, Albert D., and Albert J. Reiss. 1967. “On Exploring the “Dark Figure” of Crime.” The Annals of the American Academy of Political and Social Science 374 (1): 1–15. <https://doi.org/10.1177/000271626737400102>.

criminality is generally underestimated in the available data. Even in countries like the United States, which has extensive means to collect data and produce reports, "[h]uman trafficking is notoriously underreported. Shocking as these numbers are, they are likely one fraction of the actual problem."⁷

This research acknowledges the importance and complexity of the broader theme, but limits its scope to sex trafficking, more specifically, the sex trafficking of women. Women and girls account for 4.9 million of the total of 6.3 being forced into commercial sex.⁸ As noted by Smith and Mac, the sex industry is *gendered* as women mostly sell, while men mostly buy sex.⁹ Women are not the only ones to be victimized by commercial sexual exploitation, as men and children can also be victims, but for the purposes of this research sex trafficking is used interchangeably with the sex trafficking of women. Noting, women are all those who identify themselves as such, as pointed out by Talia Mae Bettcher "[...] a trans woman is not a strange type of woman, but a woman, period."¹⁰

It must be acknowledged though that i.e., a trans woman of color who is a sex worker will suffer different forms of oppression and different forms of violence than a white cis woman.¹¹ This is to say, intersectionality has undeniable weight when sex work

⁷ "Myths, Facts, and Statistics - Polaris", access 12 January 2023, <https://polarisproject.org/myths-facts-and-statistics/>.

⁸ Forced labour, modern slavery and human trafficking (Forced labour, modern slavery and human trafficking)", access 8 January 2023, <https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>.

⁹ Smith, Molly, and Juno Mac. 2018. *Revolting Prostitutes: the Fight for Sex Workers' Rights*. London; Brooklyn, NY: Verso. Kindle edition. Position 101.

¹⁰ Bettcher, Talia Mae (2013). "Trans Women and the Meaning of 'Woman'". In A. Soble, N. Power & R. Halwani (eds.), *Philosophy of Sex: Contemporary Readings*, Sixth Edition. Rowan & Littlefield. pp. 233-250, 2013. p. 233.

¹¹ In this regard, "Cisgender sex workers are safer from these risks than transgender sex workers; white sex workers are safer than sex workers of colour" Smith, Molly, and Juno Mac. 2018. *Revolting Prostitutes: the Fight for Sex Workers' Rights*. London; Brooklyn, NY: Verso. Kindle edition. Position 395.

is considered.¹² The persistence of structures that perpetuate violence and oppression on different levels is noted. For instance, “[t]rans sex workers experience harassment and violence, often at the hands of police, and these experiences are heightened for transgender people of color, especially women.”¹³ However, as noted by Romfeld, even though intersectionality should be weighted on, it must not translate to the impossibility of conceiving crosscutting policies, which incorporate different identity levels.¹⁴

For this reason, this research analyzes statutes and consequences that affect women in general and recommends policies that are crosscutting and applicable to a collective. Even though it is acknowledged that factors such as race, class, gender, sexuality, disability, ethnicity, nation, religion, and so on, have an impact on the hardships experienced by women involved in the sex trade.

Sex work and prostitution: the feminist debate

Taking into consideration this research’s focus, it is necessary to acknowledge the contentious nature of the prostitution debate in feminist theory. It is important to have in mind that there is no collective feminist view of prostitution. Feminists, despite agreeing on promoting women’s rights and agency, differ substantially on the ways to do so.¹⁵

¹² Intersectionality can be broadly defined as a way to assess different identity layers, and the pre-existing forms of violence and repression linked to this identity. See Hill Collins, Patricia, and Sirma Bilge. 2016. *Intersectionality*. Cambridge: Polity Press.

¹³ “Meaningful Work: Transgender Experiences in the Sex Trade”, National Center for Transgender Equality, 9 december 2015, <https://transequality.org/issues/resources/meaningful-work-transgender-experiences-in-the-sex-trade>.

¹⁴ Victor Sugamoto Romfeld, “Inimigas da moral sexual e dos bons costumes : um estudo dos discursos jurídico-criminológicos sobre as prostitutas”, 2018, <https://acervodigital.ufpr.br/handle/1884/56093>.

¹⁵ Claudia Fonseca, “Feminismos e estudos feministas: com as trabalhadoras sexuais na mira”, *Cadernos Pagu*, 22 july 2016, <https://doi.org/10.1590/18094449201600470003>.

Even employing the term *sex work* has implications. Hence, it is worth noting the contentious nature of the terminology and the discussion that underlines it.

Like sex work, the terminological debate is not peaceful amongst scholars, given the existence of conflicting feminist views. Historically, the feminist movement and its wings were based on different theoretical premises and historic waves.¹⁶ Contemporarily, the dominant discourse can be divided into two main *camp*s, the pro sex worker, and the abolitionist. In broad terms, to pro sex workers selling sex is a possible commercial act, which should be based in consent and agency.¹⁷ While to abolitionists, sex work and prostitution should be eradicated/abolished, as it is inherently exploitative.¹⁸

The terminology adopted by the interlocutor can usually suggest what strand one adheres to. The use of the term sex work, for instance, implies that the interlocutor conceives selling sex as a possible act of commerce, and that selling sex is “[...] as an income-generating activity or form of labor for women and men.”¹⁹ The term is usually adopted by pro sex workers. Abolitionists do not tend to use the term sex work, as selling sexual services is not conceived as a possibility. Julie Bindel, asserts that classifying prostitution as sex work would be “[...] a handy way to remove any notion that

¹⁶ Such as, for example, liberalism, libertarianism, radical feminism, Marxist feminism, intersectional feminism, among others. See O'Donohue, William T., and Paul A. Schewe. 2019. *Handbook of Sexual Assault and Sexual Assault Prevention*. 1st ed. 2019. Cham: Springer International Publishing: Imprint: Springer.

¹⁷ “Two main camps, mirroring the entrenched schism within activism, policy and academia, have emerged” “Not Just Semantics: Sex Work, Trafficking and Abolitionist Discourse in Malta”, access 8 January 2023, <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/06/not-just>.

¹⁸ “Not Just Semantics: Sex Work, Trafficking and Abolitionist Discourse in Malta”, access 8 January 2023, <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/06/not-just>

¹⁹ Kamala Kempadoo. Introduction Globalizing Sex Workers' Rights. In: Kamala Kempadoo e Jo Doezema, *Global Sex Workers: Rights, Resistance, and Redefinition* (Routledge, 2018). p. 3.

prostitution is based on the oppression of women.”²⁰ To Anna Szorenyi, both the abolitionist and the pro sex worker arguments, which consists of either helpless victims in need of a rescue, or willful sex workers asserting their agency, are overly simple stereotypes.²¹ It further “obscures the myriad contexts and experiences of sex work.”²²

Acknowledged the contentious nature of this debate, for the purposes of this research, both the term sex work and prostitution are used to refer to the commercialization of sexual acts between capable and consenting adults.²³ It follows the logic presented by sex workers Molly Smith and Juno Mac, when they stated that their focus is “[...] on the practical and material rather than the symbolic or metaphorical.”²⁴

Lastly, the term sex work encompasses various activities related to sexual practices, such as pornography, stripping, and prostitution, among others. However, in this research, the term sex work can be read as prostitution if not specified as other forms of sex work.

²⁰ Julie Bindel, *The Pimping of Prostitution: Abolishing the Sex Work Myth* (London, United Kingdom: Palgrave Macmillan, 2017), p. 47.

²¹ Szorenyi, Anna. 2014. “Rethinking the Boundaries: Towards a Butlerian Ethics of Vulnerability in Sex Trafficking Debates.” *Feminist Review* 107 (107): 20–36. <https://doi.org/10.1057/fr.2014.3>.

²² McClintock, Anne. 1993. “Sex Workers and Sex Work.” *Social Text*, no. 37: 1–10. p. 7.

²³ Noting *consent* is also a contentious topic.

²⁴ Smith, Molly, and Juno Mac. 2018. *Revolting Prostitutes: the Fight for Sex Workers' Rights*. London; Brooklyn, NY: Verso. Kindle edition. Position 77.

Chapter III.

Prostitution and Sex Trafficking

This Chapter aims to present and analyze the legal framework for both prostitution and sex trafficking to first present what is provisioned *de jure*. To then assess whether they are conflated in practice. Namely, this Chapter seeks to analyze whether there is a difference between theory and practice. To further address the question of what the consequences of this conflation are.

Prostitution: a criminal justice centered approach

In broad terms, prostitution can be understood as the purchase and sale of sexual services in exchange for some compensation, monetary or otherwise. The criminal justice system is at the center of prostitution policies in the United States. The United States criminalizes prostitution, instituting penalties for those who sell, buy, and profit from the prostitution of others, as well as for those who maintain an establishment that allows purchasing and selling sexual services.²⁵ The criminalization of prostitution implies “[...] intervention through arrest and incarceration via the judicial system for individuals selling sex; only some courts offer diversion programs.”²⁶ Hence, prostitution policies are intrinsically connected with the criminal justice system.

²⁵ Note: while prostitution is criminalized, it is important to note that other forms of sex work, such as i.e., careers in the porn industry, and the management of SOB's (sexually oriented business), are permitted across the country.

²⁶ Erica Koegler et al., “Examining Recidivism in a Prostitution Diversion Program”, *International Journal of Offender Therapy and Comparative Criminology* 64, n° 2–3 (1^o february 2020): 232–48, <https://doi.org/10.1177/0306624X19866115>. p. 233.

There are few exceptions to this rule in the United States, as some counties in Nevada allow for and regulate the sale of sexual services. However, besides those few counties, prostitution is fully prohibited across the country to a greater or lesser extent depending on local statutes. The classification of the crime with respect to level of offense varies across the United States. In a great number of U.S. states prostitution is considered a misdemeanor, however in states like Idaho, Florida, Texas, and a few others, recidivism can lead prostitution to be considered a felony.²⁷

Although the level of offense varies, most provisions of anti-prostitution statutes are similar if not identical. To Michele Boggiani, this is a logical consequence as most anti-prostitution provisions stem from the Standard Vice Repression Law of 1919.²⁸ This similarity applies to New York, Massachusetts, and Idaho anti-prostitution provisions. Which define as a crime to engage, offer, or agree to “engage in sexual conduct with another person in return for a fee.”²⁹ Hence, as noted, what differentiates those anti-prostitution statutes are the penalties, time of imprisonment, and fines applied. Another factor that differentiates prostitution penalties in those states, are the availability of diversion programs, which are to be considered.

With the advance of national and local movements in favor of the decriminalization of sex work, many states sought to conform to a less harsh application of anti-prostitution laws or to provide alternatives for women arrested for prostitution.³⁰

²⁷ Idaho Code § 18-5613, Florida Statutes & Constitution § 796.07, Texas Penal Code § 43.02.

²⁸ Michele Boggiani, When Is a Trafficking Victim a Trafficking Victim? Anti-Prostitution Statutes and Victim Protection, 64 Clev. St. L. Rev. 915 (2016) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol64/iss4/6>, p. 928

²⁹ New York Penal Code § 230.00; Idaho Code § 18-4602; Massachusetts General Laws, Chapter 272, Section 53A.

³⁰ “It’s Time to Decriminalize Sex Work”, *American Civil Liberties Union* (blog), accessed 26 January 2023, <https://www.aclu.org/news/topic/its-time-to-decriminalize-sex-work>; “From Margin to Center: Sex

Even though data shows that in 2019, the United States arrested 19,811 individuals for prostitution and commercialized vice, with women being the most arrested for these types of crimes.³¹ Which means, women are still incarcerated by prostitution to thousands.

In any case, New York is an example of a state seemingly pointing in the decriminalization direction, as it revoked its Loitering for Prostitution Laws (LPP) which unduly affected marginalized communities and street-based sex workers.³² In 2021, the Manhattan district attorney's office announced that prostitution cases were not going to be further prosecuted and dismissed around 900 cases open since the 1970s.³³ This significant reduction in prostitution arrests seem to be indicative of that trend towards decriminalization. Especially if considered that New York was among the top 10 states with total prostitution arrests in 2016.³⁴

However, despite moving to decriminalize prostitution or reduce prosecuting prostitution cases, women convicted of prostitution will still have a criminal record. Article 230 of the New York Penal Code classifies prostitution as a crime, and a Class B misdemeanor, with penalties including up to three months in jail and/or a fine of up to

Work Decriminalization Is a Racial Justice Issue”, Amnesty International USA, 12 december 2016, <https://www.amnestyusa.org/from-margin-to-center-sex-work-decriminalization-is-a-racial-justice-issue/>.

³¹ “Table 43”, FBI, access 20 February 2023, <https://ucr.fbi.gov/crime-in-the-u.s./2019/crime-in-the-u.s.-2019/tables/table-43>; FBI, “Table 42”, FBI, access 20 February 2023, <https://ucr.fbi.gov/crime-in-the-u.s./2017/crime-in-the-u.s.-2017/tables/table-42/table-42.xls>.

³² “Loitering for the Purpose of Prostitution (LPP) - DSW”, *Decriminalize Sex Work* (blog), access 26 january 2023, <https://decriminalizesex.work/why-decriminalization/briefing-papers/loitering-for-the-purpose-of-prostitution-lpp/>.

³³ Jonah E. Bromwich, “Manhattan to Stop Prosecuting Prostitution, Part of Nationwide Shift”, *The New York Times*, 21 april 2021, sec. New York, <https://www.nytimes.com/2021/04/21/nyregion/manhattan-to-stop-prosecuting-prostitution.html>; Rachel Treisman, “A ‘Relic’ And ‘Burden’: Manhattan District Attorney To Stop Prosecuting Prostitution”, *NPR*, 21 april 2021, sec. Law, <https://www.npr.org/2021/04/21/989588072/a-relic-and-burden-manhattan-district-attorney-to-stop-prosecuting-prostitution>.

³⁴ “US and State Prostitution Arrests - Prostitution - ProCon.Org”, Prostitution, access 27 january 2023, <https://prostitution.procon.org/us-and-state-prostitution-arrests/>.

\$500.³⁵ Repeated offenses might result in more severe penalties, including up to one year of imprisonment and up to \$1,000 in fines.³⁶ In sum, prostitution remains a crime in New York, and while the number of prostitution arrests significantly decreased, women are still arrested for it.³⁷

In Idaho, prostitution is a crime according to § 18-4602 of the Idaho Code, and is generally considered a misdemeanor, which can lead to up to 6 months in jail. However, after the third offense prostitution is considered a felony.³⁸ For being considered a felony, jail time can go up to 5 years and/or fines up to \$50,000.³⁹ Prostitutes might be also required to attend counseling or treatment programs, with the aim of avoiding recidivism. Despite having harsher laws, it is important to note that by 2016 Idaho was one of the states with less prostitution arrests, with a total of 11 that year.⁴⁰ In Idaho, from 2001 to 2016 there has not been a noticeable shift in the number of prostitution arrests.⁴¹

As for Massachusetts, prostitution is a crime under the Massachusetts General Laws, Chapter 272, §53A, and considered a misdemeanor, which can lead up to 1 year of imprisonment in the first offense, and up to 2 years by the second offense.⁴² Fines also

³⁵ New York Penal Code § 230.00

³⁶ “US Federal and State Prostitution Laws and Related Punishments - Prostitution - ProCon.Org”, Prostitution, access 27 January 2023, <https://prostitution.procon.org/us-federal-and-state-prostitution-laws-and-related-punishments/>.

³⁷ “There used to be tens of thousands of prostitution arrests annually in NYC. Now? About 100. - Gothamist”, accessed 28 January 2023, <https://gothamist.com/news/there-used-to-be-tens-of-thousands-of-prostitution-arrests-in-nyc-now-about-100/>; “Hardly Anyone Gets Arrested for Prostitution Anymore, so What’s the Future of Sex Work in NYC? | WNYC | New York Public Radio, Podcasts, Live Streaming Radio, News”, WNYC, 27 December 2022, <https://www.wnyc.org/story/hardly-anyone-gets-arrested-prostitution-anymore-so-whats-future-sex-work-nyc/>.

³⁸ Idaho State Legislature § 18-5613.

³⁹ “US Federal and State Prostitution Laws and Related Punishments - Prostitution - ProCon.Org”, Prostitution, access 27 January 2023, <https://prostitution.procon.org/us-federal-and-state-prostitution-laws-and-related-punishments/>.

⁴⁰ “US and State Prostitution Arrests - Prostitution - ProCon.Org”, Prostitution, access 27 January 2023, <https://prostitution.procon.org/us-and-state-prostitution-arrests/>.

⁴¹ “US and State Prostitution Arrests - Prostitution - ProCon.Org”, Prostitution, access 27 January 2023, <https://prostitution.procon.org/us-and-state-prostitution-arrests/>.

⁴² Massachusetts General Laws, Chapter 272 § 53A.

vary according to the number of offenses, being in the first offense up to \$500 and from the second on between \$1,000 to \$5,000.⁴³ The number of prostitution arrests in Massachusetts in 2016 was less than half of the number of 2001, which is also an indicative of a shift towards less harsh prostitution policies.⁴⁴

Prostitution can take up many forms, such as street and/or indoor prostitution (as in massage parlors and brothels), cyber prostitution, escorting, call and cam girls, among others.⁴⁵ While street prostitution is “[...] the most familiar and attention-getting form of prostitution [...] only ten to twenty percent of prostitutes solicit on the streets.”⁴⁶ However, street-based prostitution makes up to 85 to 90 percent of prostitution arrests.⁴⁷ For this reason, many of the consequences explored in this research will therein mostly affect street prostitutes.

In the three states, sex workers will be detained if caught offering or selling sexual services, taken into custody, and held in custody until a bail hearing is set. Hypothetically, if the judge grants bail, and the woman can pay for it, she will be released until a court date is set. In cases where the woman cannot afford to pay the bail, she will remain in detention until the case is tried. Alternatively, some states have diversion

⁴³ Massachusetts General Laws, Chapter 272 § 7.

⁴⁴ “US and State Prostitution Arrests - Prostitution - ProCon.Org”, Prostitution, accessed 27 february 2023, <https://prostitution.procon.org/us-and-state-prostitution-arrests/>.

⁴⁵ See Attwood, Feona. 2010. “CALL-GIRL DIARIES: NEW REPRESENTATIONS OF COSMOPOLITAN SEX WORK.” *Feminist Media Studies* 10 (1): 109.

<https://doi.org/10.1080/14680770903457469>; Caroline Moratti. 2018. “*Cam Girls: Meeting the Women Who Do Sex Work via Webcam.*”; Tawakal, Mohamad Iqbal, and Johanna Debora Imelda. 2022. “Transformation of Prostitution Services and Stigma Against Prostitutes (WTS).” *Soshum: Jurnal Sosial Dan Humaniora* 12 (2): 117–31. <https://doi.org/10.31940/soshum.v12i2.117-131>.

⁴⁶ Lucas, Ann M. 1995. “Race, Class, Gender, and Deviancy: The Criminalization of Prostitution.” *Berkeley Women's Law Journal* 10: 47. p. 48.

⁴⁷ Susan E. Thompson, "Prostitution - A Choice Ignored," *Women's Rights Law Reporter* 21, no. 3 (Summer 2000): 217-248. p. 226.

programs, which can be applied in lieu of criminal prosecution and punishment.⁴⁸ These programs tend to rely on authorities' discretion and will depend on the prosecutor or court to weigh in on the offender's eligibility for that program. Prostitution diversion programs (PDPs) are not available in Idaho and Massachusetts but are available in New York.

Diversion programs “[...] go by many different names (e.g., specialty courts, first-offender programs, deferred prosecution), but all have the primary goal of funneling low-level offenders away from jail and into “rehabilitative” or alternative programming.”⁴⁹ In the case of an arrest for prostitution, most PDPs have an educational and capacitating component, as the primary aim of these kind of programs is to avoid recidivism and “[...] to help women leave or exit prostitution.”⁵⁰

As noted, in Idaho and Massachusetts PDPs are not available.⁵¹ While there might be other diversion programs that offer support and resources to individuals who have been arrested, the absence of PDPs translates to prosecution, and eventually a criminal conviction of the woman arrested for prostitution. In New York, there are a few diversion programs available to individuals who have been arrested for prostitution.⁵² More specifically, by adopting the stance that every prostitute could be a sex trafficking victim,

⁴⁸ “Diversion Program Law and Legal Definition | USLegal, Inc.”, access 27 january 2023, <https://definitions.uslegal.com/d/diversion-program/>.

⁴⁹ “Diversion from Justice: A Rights-Based Analysis of Local “Prostitution Diversion Programs” and their Impacts on People in the Sex Sector in the United States”, September 2018, access 27 january 2023, https://law.yale.edu/sites/default/files/area/center/ghjp/documents/diversion_from_justice_pdp_report_ghjp_2018rev.pdf, p. 14.

⁵⁰ Erica Koegler et al., “Examining Recidivism in a Prostitution Diversion Program”, *International Journal of Offender Therapy and Comparative Criminology* 64, n° 2–3 (1^o february 2020): 232–48, <https://doi.org/10.1177/0306624X19866115>. p. 233.

⁵¹ See “Survey of United States Diversion Programs”. Accessed, November 10, 2022, <https://www.amaralegal.org/wp-content/uploads/2018/11/survey-of-united-states-diversion-programs.pdf>, p. 41.

⁵² i.e., “Prostitution Diversion Programs”, Center for Justice Innovation, 9 july 2012, <https://www.innovatingjustice.org/publications/prostitution-diversion-programs>.

in 2013 New York has established the NYC Human Trafficking Intervention Courts (HTICs).⁵³ Which aim is “[...] to “divert” individuals out of traditional criminal justice processes and into rehabilitative programming delivered through a service mandate.”⁵⁴ Women arrested for prostitution offenses are the main focus of the HTICs.

Ideally diversion programs would provide resources and support to women who have been arrested for prostitution, including counseling, job capacitation/training, education, and other social services. All towards the aim of helping women to leave the sex trade and/or to help them with underlying issues that may have contributed to their involvement in the sex trade. However, “[...] most of the available research reveals that success is mixed.”⁵⁵ Some studies found that diversion programs, when duly completed, prevented recidivism on some levels.⁵⁶ Others, found that despite assisting some to exit the sex trade, diversion programs fail to encompass all sex workers, especially the minority groups who are most incarcerated.⁵⁷ Similarly, the Yale Global Health Justice Partnership (GHJP) analyzed prostitution diversion programs, and found that “[m]ost do not offer sustained interventions capable of addressing the structural needs of sex

⁵³ Unmeetable Promises: Rhetoric and Reality in New York City’s Human Trafficking Intervention Courts”, September 2018, access 27 January 2023, https://law.yale.edu/sites/default/files/area/center/ghjp/documents/unmeetable_promises_htic_report_ghjp_2018rev.pdf, p. 12.

⁵⁴ Unmeetable Promises: Rhetoric and Reality in New York City’s Human Trafficking Intervention Courts”, September 2018, access 27 January 2023, https://law.yale.edu/sites/default/files/area/center/ghjp/documents/unmeetable_promises_htic_report_ghjp_2018rev.pdf, p. 12.

⁵⁵ Erica Koegler et al., “Examining Recidivism in a Prostitution Diversion Program”, *International Journal of Offender Therapy and Comparative Criminology* 64, n° 2–3 (1^o february 2020): 232–48, <https://doi.org/10.1177/0306624X19866115>. P. 233.

⁵⁶ Roe-Sepowitz, Dominique E., Kristine E. Hickie, Martha Pérez Loubert, and Tom Egan. 2011. “Adult Prostitution Recidivism: Risk Factors and Impact of a Diversion Program.” *Journal of Offender Rehabilitation* 50 (5): 272–85. <https://doi.org/10.1080/10509674.2011.574205>.

⁵⁷ Koegler, Erica, Kathleen M. Preble, Andrea N. Cimino, Jordan E. Stevens, and Sue Diehl. 2020. “Examining Recidivism in a Prostitution Diversion Program.” *International Journal of Offender Therapy and Comparative Criminology* 64 (2-3): 232–48. <https://doi.org/10.1177/0306624X19866115>. p. 244.

workers, and all expand the coercive reach of penal institutions by enabling them to act as gatekeepers and managers of social services.”⁵⁸ Nonetheless, regardless of the dispute involving the efficacy of diversion programs, researchers tend to agree on the necessity of further and more in depth research about the effects of these programs.

In conclusion, considering the anti-prostitution statutes in the selected states and across the United States, it is possible to argue that “[...] the intent behind the legislation was, and still is, the suppression to the highest degree possible of commercial sex.”⁵⁹ Hence, despite the progressive efforts to decriminalize or minimize the effects of criminalized prostitution in some U.S. states, prostitution is still a crime. In some states, such as New York, this quest for suppression of commercial sex has been considerably mitigated. However, in states like Idaho, despite fewer prostitution arrests, the legislation translates how badly commercial sex is sought to be suppressed. By considering recidivism in prostitution as a felony, the Code of Idaho demonstrates the gravity that is attached to prostitution-related offenses.

Lastly, prostitution diversion programs are not widely available. To date, Massachusetts and Idaho do not have PDPs. Meaning that, besides paying the fine, women arrested for prostitution will face trial and eventually jail. Even in states like New York, which has diversion programs as an alternative to traditional criminal justice processes, prostitutes are still seen and treated as criminals.⁶⁰ Which is a potential

⁵⁸ “GHJP Releases Reports on Prostitution ‘Diversion’ Programs”, accessed 31 January 2023, <https://law.yale.edu/yls-today/news/ghjp-releases-reports-prostitution-diversion-programs>.

⁵⁹ Michele Boggiani, When Is a Trafficking Victim a Trafficking Victim? Anti-Prostitution Statutes and Victim Protection, 64 Clev. St. L. Rev. 915 (2016) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol64/iss4/6>, p. 930.

⁶⁰ Unmeetable Promises: Rhetoric and Reality in New York City’s Human Trafficking Intervention Courts”, September 2018, access 27 January 2023, https://law.yale.edu/sites/default/files/area/center/ghjp/documents/unmeetable_promises_htic_report_ghjp_2018rev.pdf, p. 12.

problem not only for the women involved in the sex trade, but also for the trafficking victims subjected to prostitution. In any case, to assess the possible consequences of conflating prostitution and sex trafficking, it is first necessary to lay out the legal provisions on sex trafficking, as follows.

Sex Trafficking in the United States

Human trafficking became a hot topic internationally “[...] at the start of the twenty-first century.”⁶¹ However, human, and more specifically sex trafficking has been in the international political agenda since the Victorian era. Understanding the international framework is important, as international documents not only are the result of a debate between national entities, but also influence the creation of national policies, statutes, guidelines, and others. It should be noted that the in-depth analysis of all documents concerning human trafficking would be beyond the scope of this work. Therefore, this research will limit its scope to include only the most relevant documents.

At the international level, the UN is one of the most prominent international organizations, and source of the predominant definition of human trafficking. For instance, the most widely accepted definition of human trafficking comes from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and Children (UN Protocol).⁶² There is still an active debate surrounding the trafficking

⁶¹ Kempadoo, Kamala. *Trafficking and Prostitution Reconsidered* (Transnational Feminist Studies) (p. vii). Taylor and Francis. Edição do Kindle.

⁶² Important to note, that “[...] there are competing definitions of trafficking; little consensus or agreement among researchers, policy makers, and activists about the scope of the problem; and scant evidence or substantiation about actual trafficking practices.” Kempadoo, Kamala., Jyoti. Sanghera, and Bandana Pattanaik. 2012. *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*. 2nd ed. Boulder, Colo.: Paradigm Publishers. Kindle edition. p. vii; “Protocol to

definition provided by the UN Protocol, as its drafting was influenced by the antagonist strands of feminism alluded before. It is worth noting that historically the UN did not differentiate forced and voluntary prostitution.⁶³ Which means that sex work and sex trafficking have been historically conflated.

According to the UN Protocol, human trafficking involves: (i) an action, which can be recruiting, transporting, transferring, harboring or receiving people; (ii) the means employed to carry the action, which can include threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation; (iii) an end, to exploit, and shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.⁶⁴

In the United States, the Department of State began monitoring trafficking in persons as part of the Department's Annual Reports on Human Rights Practices in 1994.⁶⁵ However, the first federal provision on human trafficking is from the 2000s. The

Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime | OHCHR”, access 11 January 2023, <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons>.

⁶³ Doezema, Jo. 2018. “Forced to Choose.” In *Global Sex Workers*, 34–50. Routledge. <https://doi.org/10.4324/9781315865768-3>. Kindle edition, p. 39.

⁶⁴ Art. 3(a) “Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime”, OHCHR, access 11 January 2023, <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons>; “Human-Trafficking”, United Nations : Office on Drugs and Crime, access 11 January 2023, [//www.unodc.org/unodc/en/human-Trafficking/Human-Trafficking.html](https://www.unodc.org/unodc/en/human-Trafficking/Human-Trafficking.html).

⁶⁵ Department's Annual Country Reports on Human Rights Practices. “2020 Trafficking in Persons Report - United States Department of State”, accessed 1^o March 2022, <https://www.state.gov/reports/2020-trafficking-in-persons-report/>.

Trafficking Victims Protection Act (TVPA) is the first federal law on trafficking in persons. The TVPA mirrors the United Nations Protocol. The TVPA and the UN Protocol define human and sex trafficking in a similar fashion. Both include provisions on prevention, protection of victims, and prosecution of traffickers.⁶⁶

As a federal legal provision, all U.S. states are subjected to the TVPA. However, as it is the case with prostitution, states have their own legal dispositions on human and sex trafficking. Again, differentiating themselves on the penalties, fines, and other measures adopted to tackle the crime. The New York Penal Code provides that compelling and promoting prostitution are felonies and can be punishable by up to 25 years in prison.⁶⁷ In Idaho and in Massachusetts, penalties for sex trafficking can lead up to life imprisonment.⁶⁸

The punchline of sex trafficking laws is the criminalization of the trafficker, who exploits, and who forces or coerces other(s) to engage in commercial sexual acts. Hence, sex trafficking statutes are, logically, directed towards the criminalization of the trafficker. If sex trafficking laws are meant to criminalize traffickers, important questions arise such as: what provisions stand for victims in the United States? And more importantly, how it is assessed whether a woman was coerced into selling sex?

New York, Idaho, and Massachusetts have human trafficking coalitions, programs, task forces, and guidelines for law enforcement agencies that aim to identify and provide resources to victims of sex trafficking.⁶⁹ Noting that victims need to be

⁶⁶ “National | National Human Trafficking Hotline”, access 28 January 2023, <https://humantraffickinghotline.org/en/statistics>.

⁶⁷ New York Penal Code §230.34-a to §230.34-c.

⁶⁸ Idaho Code § 18-4673; Massachusetts General Laws § 22A to 22D.

⁶⁹ For New York, there are statewide task forces, and local task forces such as the New York State Human Trafficking Task Force; the Western District of NY Task Force, Brooklyn Task Force, Bronx Task Force, and others. *See* “Human Trafficking Overview - NY DCJS”, NYS Division of Criminal Justice Services,

identified or seek assistance to be redirected to these programs. In the three states, most of the programs for sex trafficking victims are offered by nonprofit organizations. The core of these programs is to aid victims to *rebuild their lives* after being exploited by traffickers. Services include education, legal counseling, trainings, assistance with finding and applying for housing, and others.

In New York, there are several programs for victims of sex trafficking. The New York City's Mayor Office of Criminal Justice provides a resource directory with contact details of human trafficking services.⁷⁰ In this directory, it is listed the contacts of non-governmental organizations, governmental entities, law enforcement agencies, and support groups. With a specification of the special populations they attend to and the services they provide. Among these nonprofit organizations are the Girls Educational and Mentoring Services (GEMS), Safe Horizon, Restore, and the Sanctuary for Families, to cite a few.⁷¹

In Idaho, there are also programs for sex trafficking victims. The Idaho Anti-Trafficking Coalition aims to provide support for victims of human and sex trafficking.⁷²

access 30 January 2023, <https://www.criminaljustice.ny.gov/pio/humantrafficking/humantrafficking.htm>; Human Trafficking Initiatives | Division of Youth Development and Partnerships for Success | OCFS", access 30 January 2023, <https://ocfs.ny.gov/programs/human-trafficking/initiatives.php>; as for Idaho: Idaho human trafficking task force; Idaho State Police Human Trafficking Unit; Idaho Anti-Trafficking Coalition, "Idaho Anti-Trafficking Coalition", Idaho Anti-Trafficking Coalition, access 30 January 2023, <https://idahoatc.org/>; "Idaho | National Human Trafficking Hotline", accessed 1º February 2023, <https://humantraffickinghotline.org/en/statistics/idaho>; And Massachusetts, Massachusetts Attorney General's Human Trafficking Division; Massachusetts Human Trafficking Task Force; "Commonwealth Anti-Trafficking Task Force | Mass.Gov", access 30 January 2023, <https://www.mass.gov/info-details/commonwealth-anti-trafficking-task-force>.

⁷⁰ Elizabeth Glazer, "MESSAGE FROM THE NEW YORK CITY MAYOR'S OFFICE OF CRIMINAL JUSTICE", https://www.nyc.gov/assets/acs/pdf/child_welfare/ct/2016/humtrfresourcedirs.pdf,

⁷¹ Anti-Trafficking Program", Safe Horizon, access 20 February 2023, <https://www.safehorizon.org/anti-trafficking-program/>; "Girls Educational & Mentoring Services (GEMS)", access 20 February 2023, <https://www.gems-girls.org/>; "Home - Restore NYC", access 20 February 2023, <https://restorenyc.org/>; "Sanctuary for Families | In love there is no violence", access 20 February 2023, <https://sanctuaryforfamilies.org/>.

⁷² Idaho Anti-Trafficking Coalition, "Idaho Anti-Trafficking Coalition", Idaho Anti-Trafficking Coalition, access 20 February 2023, <https://idahoatc.org/>.

And a few other nonprofit organizations such as Faces of Hope Victim Center, the Idaho Coalition Against Sexual and Domestic Violence, the Idaho Department of Health and Welfare, are examples of programs available for victims of sex trafficking.⁷³

As for Massachusetts, the Attorney General’s Human Trafficking Division lists a few organizations the division works in partnership with.⁷⁴ Among those is the My Life My Choice nonprofit, for girls and women who have been sexually exploited. Besides the ones cited by the Attorney General’s Human Trafficking Division, there is also the Massachusetts Office of Victim Assistance, an independent state agency that seeks to aid victims of crime, RIA, and other programs.⁷⁵

Therefore, it is possible to acknowledge the existence of a range of programs available for victims of sex trafficking. However, victims need to be identified to be provided with or directed to these kinds of programs. Therefore, the next essential question is how are victims of sex trafficking identified? Or more importantly, how are they identified when arrested for prostitution related offenses? It is precisely in this point that problems start to arise, and it is possible to verify the difference between what is provisioned *de jure* to what happens *de facto*.

If the victim of sex trafficking is first approached as a prostitute, they will be perceived as criminals. Given the criminalization of prostitution in all three states, the

⁷³ “Help Healing Domestic Violence Sexual Abuse - Boise ID”, access 20 february 2023, <https://www.facesofhopevictimcenter.org/>; “Engaging Voices | Idaho Coalition Against Sexual and Domestic Violence”, access 20 february 2023, <https://idvsa.org/>; “Welcome to Idaho Department of Health and Welfare | Idaho Department of Health and Welfare”, access 20 february 2023, <https://healthandwelfare.idaho.gov/>.

⁷⁴ “Human Trafficking Division Resources | Mass.Gov”, access 20 february 2023, <https://www.mass.gov/service-details/human-trafficking-division-resources>.

⁷⁵ “General 2”, My Life My Choice, access 20 february 2023, <https://www.mylifemychoice.org/the-big-picture>; “Massachusetts Office for Victim Assistance | Mass.gov”, access 20 february 2023, <https://www.mass.gov/orgs/massachusetts-office-for-victim-assistance>; “RIA, Inc.”, RIA, Inc., access 20 february 2023, <https://riahouse.org/>.

initial contact with authorities tends to be based on an adversarial relationship between prostitutes and law enforcement. Especially if there is an encounter between both on the streets. There are exceptions, such as when there are police raids dismantling sex trafficking rings or when there are calls to the human trafficking hotline. Namely, when the sex trafficking victim is in a clear victim position. However, usually, victims are presumed to be and are treated as criminals.

Hence, sex work and sex trafficking are indeed conflated in practice while not in theory. To the point that the criminal justice system, at least initially, similarly tackles them. This practical conflation enables the existence of victim-defendants. A victim-defendant in relation to sex trafficking can be defined as a victim of trafficking, who has been arrested and charged with a crime associated with sex trafficking.⁷⁶ This means that instead of a victim-centered approach, due to anti-prostitution statutes, victims are also subjected to a criminal justice system-centered approach.

For instance, the antitrafficking statutes of New York, Idaho, and Massachusetts, all mention prostitution on their sex trafficking dispositions. Which means that the three states recognize sex trafficked women are usually subjected to prostitution. Nevertheless, federal and state laws that seek to protect sex trafficking victims “[...] are threatened by the concurrent existence of anti-prostitution statutes, which criminalize exactly the

⁷⁶ It is important to bear in mind that sex trafficking victims can also be the perpetrators of other types of crime by coercion of their traffickers, or not. *See* United Nations Office on Drugs and Crime. “Female victims of trafficking for sexual exploitation as defendants: a case law analysis”. Available at: https://www.unodc.org/documents/human-trafficking/2020/final_Female_victims_of_trafficking_for_sexual_exploitation_as_defendants.pdf

conduct in which traffickers force these victims to engage. These individuals are treated as criminals by the same government that solemnly pledged to protect them.”⁷⁷

Thus, as conflated, the question that follows is what are the implications of this conflation. Since despite being differentiated in theory, sex trafficking victims and prostitutes face roughly the same practical consequences.

⁷⁷ Michele Boggiani, When Is a Trafficking Victim a Trafficking Victim? Anti-Prostitution Statutes and Victim Protection, 64 Clev. St. L. Rev. 915 (2016) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol64/iss4/6.p.953>.

Chapter IV.

The consequences of conflating sex work and sex trafficking

The first finding is that despite being differentiated in theory, prostitution, and sex trafficking are conflated in practice. Researchers herein mentioned such as Kate Mogulescu, Michele Boggiani, and Melissa Dittmore, have already come to this finding. However, this research aims to further investigate what are the consequences of this conflation on the focus group. In this regard, this chapter will analyze these possible consequences.

First, by briefly analyzing the general consequences that apply to both prostitutes and sex trafficking victims prior to and at the moment of arrest. To then present the verified consequences of the conflation of sex work and sex trafficking using a procedural timeline. The timeline follows from the initial contact with authorities to possible consequences after conviction. As follows.

General consequences

This section will analyze the general consequences of the conflation of sex trafficking and sex work, focusing on the moment prior to and during an arrest. Those moments were chosen to set out the basis for the specific analysis that will follow. It is important to acknowledge, however, that the consequences herein mentioned are not exhaustive, and many layers could be explored further.

The first general point to be considered is that the criminalization of prostitution affects sex workers even before the initial contact with authorities. Due to

criminalization, both prostitutes and sex-trafficked victims alike seek to avoid contact with law enforcement agents. To avoid being arrested, workers will often “[...] compromise on some or all of their safety strategies in the hope of avoiding the police.”⁷⁸ Prostitutes are aware of the increased risk of being arrested on the streets. Hence, over the last few years, some sex workers in Idaho, for instance, will use ads on websites such as craigslist to meet potential clients.⁷⁹ The problem with that strategy to avoid contact with authorities is that sex workers will often prioritize “[...] avoiding arrest over avoiding risk of assault.”⁸⁰

Besides, according to data, globally sex workers have around “[...] a 45% to 75% chance of experiencing sexual violence on the job.”⁸¹ In the United States it is reported that “[...] over 80% of street-based sex workers experienced violence.”⁸² When the criminalization of prostitution is in effect, the likeability of sex workers to denounce a crime committed against them is extremely low.⁸³ The situation can be even direr for

⁷⁸ Smith, Molly, and Juno Mac. 2018. *Revolting Prostitutes: the Fight for Sex Workers' Rights*. London; Brooklyn, NY: Verso. Position 2243-2250.

⁷⁹ Nate Sunderland, EastIdahoNews.com, “A look at the sex trade in east Idaho from women who work it”, East Idaho News, 22 march 2018, <https://www.eastidahonews.com/2018/03/look-sex-trade-east-idaho-women-work/>.

⁸⁰ Krüsi, A, K Pacey, L Bird, C Taylor, J Chettiar, S Allan, D Bennett, J S Montaner, T Kerr, and K Shannon. 2014. “Criminalisation of Clients: Reproducing Vulnerabilities for Violence and Poor Health Among Street-Based Sex Workers in Canada—a Qualitative Study.” *BMJ Open* 4 (6): e005191–e005191. <https://doi.org/10.1136/bmjopen-2014-005191>, p. 87.

⁸¹ “Sex Workers Project Fact Sheet Sexual Violence against SWers.” n.d. <https://swp.urbanjustice.org/wp-content/uploads/sites/14/2020/08/Fact-Sheet-Sexual-Violence-Against-Sex-Workers-1-1-1.pdf>, p. 1.

⁸² Koster, Katherine “17 Facts About Sexual Violence and Sex Work”, HuffPost, 4 de dezembro de 2015, https://www.huffpost.com/entry/16-facts-about-sexual-ass_b_8711720.

⁸³ See Zahra Stardust, Carla Treloar, Elena Cama, and Jules Kim. 2021. “I Wouldn't Call the Cops If I Was Being Bashed to Death': Sex Work, Whore Stigma and the Criminal Legal System.” *International Journal for Crime, Justice and Social Democracy* 10 (3): 142–57; “Global Network of Sex Work Projects 1 Sex Workers' Lack of Access to Justice.” n.d. https://www.nswp.org/sites/default/files/bp_sws_lack_of_access_to_justice.pdf; Lauren Crosby Medlicott, “Sex Workers Are Human Too. They Deserve Protections for Reporting Violence.”, Business Insider, acessado 12 february 2023, <https://www.businessinsider.com/sex-workers-deserve-protections-for-reporting-violence-2021-2>.

victims of sex trafficking, as they are under the control of their traffickers. Who also strive to avoid contact with authorities.

If the attempt to avoid policing fails, prostitutes and sex trafficking victims alike will be subjected to the discretion of the authorities that they encounter while selling sex.⁸⁴ In other words, the authorities they encounter while engaging in criminal activity. A well-documented consequence that flows from the initial contact and moment of arrest is the abuse of power by those authorities.⁸⁵ Research based on the experience of around 100 street-based sex workers found that some police officers abused their power in varied ways, including by violating constitutional rights, and exceeding the use of force. Especially in known prostitution areas.⁸⁶

For prostitution-related offenses, there is no oversight of the arrest process. Meaning that arrests can be made arbitrarily. In fact, “[u]nlike other types of crimes, where an officer either speaks to or meets with a prosecutor as part of the arrest process, these arrests proceed entirely by affidavit, meaning an officer merely has to check off boxes on a pre-printed form to complete the processing of a prostitution arrest.”⁸⁷ For example, after an investigation into abuses of power in prostitution arrests in New York, it was found that some NYPD officers went on a quest to arrest as many people as possible. Even with insufficient evidence. The problem is, even when there is no

⁸⁴ For the purposes of this research, discretion can be understood as the subjective decisions of authoritative figures whose incumbency is to enforce and apply the law. To illustrate discretion, one can consider i.e., the decision of a police officer to enforce a specific law by making an arrest.

⁸⁵ See Jayne Swift, “The Harm of Anti-Prostitution Loitering Laws”, *Gender Policy Report* (blog), 5 October 2022, <https://genderpolicyreport.umn.edu/the-harm-of-anti-prostitution-loitering-laws/>.

⁸⁶ Dewey, Susan, and Tonia St. Germain. 2014. ““It Depends on the Cop:” Street-Based Sex Workers’ Perspectives on Police Patrol Officers.” *Sexuality Research & Social Policy* 11 (3): 256–70. <https://doi.org/10.1007/s13178-014-0163-8>, p. 264.

⁸⁷ Mogulescu, Kate. 2012. “The Public Defender as Anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking.” *CUNY Law Review* 15 (2): 471. <https://doi.org/10.31641/clr150219>, p.

evidence to support the arrest, the sex worker will most likely be in jail until there is a decision on whether she will be charged.⁸⁸

Sexual assault and rape committed by police officers conducting prostitution arrests are also a consequence of criminalized prostitution.⁸⁹ The same applies to sex trafficking victims, as it is unlikely that at the moment of initial contact, police officers will conceive an adult prostitute as a victim of sex trafficking.⁹⁰ In this logic, a 2008 survey found that one in five sex workers were approached by police officers who, under some circumstances, asked for sexual favors or services in exchange for non-arrest and eventual prosecution for prostitution.⁹¹ A former sex worker interviewed for the same survey recounted how she interacted with a police officer who asked for a ‘sexual favor’ in exchange for not arresting her.⁹² In addition, it appears to be common ground amongst sex workers that there is a lack of accountability for authorities who harass prostitutes. And if there is accountability, it is unclear how.⁹³ Hence, prostitutes are at least on the verge of violence by clients and law enforcement agents.

⁸⁸ Dewey, Susan, and Tonia St. Germain. 2014. “‘It Depends on the Cop:’ Street-Based Sex Workers’ Perspectives on Police Patrol Officers.” *Sexuality Research & Social Policy* 11 (3): 256–70. <https://doi.org/10.1007/s13178-014-0163-8>, p. 264.

⁸⁹ See Sirin Kale, “Police Are Allegedly Sleeping with Sex Workers Before Arresting Them”, *Vice* (blog), 3 May 2017, <https://www.vice.com/en/article/59mbkx/police-are-allegedly-sleeping-with-sex-workers-before-arresting-them>.

⁹⁰ Michele Boggiani, When Is a Trafficking Victim a Trafficking Victim? Anti-Prostitution Statutes and Victim Protection, 64 *Clev. St. L. Rev.* 915 (2016) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol64/iss4/6>, p. 948-949.

⁹¹ Arrington, Monsello, Skytrinia Berkeley Luz, Clara Gonzalez, Darby Hickey, J Kirby, Barrett Langston, Penelope Saunders, and Erika Smith. 2008. “Community Research Team.” <https://dctranscoalition.files.wordpress.com/2010/05/movealongreport.pdf>, p. 53.

⁹² Arrington, Monsello, Skytrinia Berkeley Luz, Clara Gonzalez, Darby Hickey, J Kirby, Barrett Langston, Penelope Saunders, and Erika Smith. 2008. “Community Research Team.” <https://dctranscoalition.files.wordpress.com/2010/05/movealongreport.pdf>, p. 54.

⁹³ Arrington, Monsello, Skytrinia Berkeley Luz, Clara Gonzalez, Darby Hickey, J Kirby, Barrett Langston, Penelope Saunders, and Erika Smith. 2008. “Community Research Team.” <https://dctranscoalition.files.wordpress.com/2010/05/movealongreport.pdf>, p. 49.

It is important to note, however, that while sexual harassment by officers policing commercial sex is a shared view among community members, there is also a parcel of sex workers who have neutral or even favorable perception of police officers. Viewing them as prospective helpers or as people solely performing their jobs.⁹⁴

It is key to understand how this setting and those general consequences impact the way sex workers and sex trafficking victims perceive law enforcement agents. Since the sex worker or victim will need to further cooperate with authorities to be put under a program or offered an alternative to traditional punishment. However, the adversarial relationship set by anti-prostitution statutes, the fear of law enforcement agents, and the mistrust of the legal system by lack of clear accountability of officers who commit crimes against sex workers mitigate the chances of cooperation.

The consequences of conflating sex work and sex trafficking

This section aims to analyze what was found to be the consequences of the conflation of prostitution and sex trafficking in a system that fully criminalizes prostitution. To this end, a procedural timeline from the moment of arrest to after conviction is employed to assess those consequences. Throughout the analysis of this procedural timeline, it was found that due to criminalization, there is an undue burden

⁹⁴ Melissa Ditmore e Catherine Poulcallec-Gordon, “Human Rights Violations: The Acceptance of Violence against Sex Workers in New York”, <https://sexworkersproject.org/downloads/DitmorePoulcallec200312.pdf>; Dewey, Susan, and Tonia St. Germain. 2014. ““It Depends on the Cop:” Street-Based Sex Workers’ Perspectives on Police Patrol Officers.” *Sexuality Research & Social Policy* 11 (3): 256–70. <https://doi.org/10.1007/s13178-014-0163-8>. p. 260.

deposited on sex trafficking victims. Since they are victimized both by their traffickers and by a system that sworn to protect them.

This research has also found that consequences are noted in all stages of interaction with the criminal justice system. Whether diversion programs are available or not. In this regard, while a robust framework establishes the protection of victims, anti-prostitution statutes are an obstacle to the fruition of the protective goals provisioned in national and local documents. It is a flaw in essence, as it is sought to demonstrate.

Arrest and identification

Going back to the inquiry made at the end of Chapter III, the first essential question is, when arrested for prostitution-related offenses, how are victims of sex trafficking identified? Following that question, other necessary inquiries would be: How many sex trafficking victims were identified among the women arrested for prostitution-related offenses? And what happens to them after identification?

To answer the first question, the assessment of whether a prostitute is a victim requires a multi-disciplinary approach. Which involves law enforcement agencies, social services, and other organizations, working together to determine what is the appropriate course of action.⁹⁵ Hypothetically, if the authorities perceive sex trafficking indicators after an arrest, there are a couple steps that might enable them to identify victims, such as i.e., a screening interview. However, despite these generalized procedures, for authorities to recognize sex trafficking indicators, they must be properly trained to do so.

⁹⁵ See UNODC “Needs Assessment Toolkit on the Criminal Justice Response to Human Trafficking”, https://www.unodc.org/documents/human-trafficking/Needs_Assessment_Toolkit_ebook_09-87518_June_2010.pdf.

For training to be effective, it is necessary to debunk common misconceptions on sex trafficking. New York, Idaho, and Massachusetts have human trafficking coalitions, programs, task forces, and guidelines for law enforcement agencies that aim to identify and provide resources to victims of sex trafficking.⁹⁶ However, compared to theories and laws linked to prostitution, sex trafficking is relatively a new topic that has only been officially a part of the law enforcement agenda since the advent of the TVPA. Hence, training must go beyond the stereotypes of sex trafficking that are widely diffused. For instance, the presumption that sex trafficked victims are subjected to ongoing physical violence by their traffickers.⁹⁷

Sex trafficking can occur in ways that go beyond physical violence. From the cases reported to the Human Trafficking hotline, data shows that physical abuse amounts to 14% of the cases of sex trafficking, while emotional abuse amounts to 29%.⁹⁸ In fact, fraud, coercion, deception, and threats can be more subtle than the public conscience might suggest. It is necessary to change “the paradigm of trafficking to improve law

⁹⁶ For New York, there are statewide task forces, and local task forces such as the New York State Human Trafficking Task Force; the Western District of NY Task Force, Brooklyn Task Force, Bronx Task Force, and others. See “Human Trafficking Overview - NY DCJS”, NYS Division of Criminal Justice Services, access 30 January 2023, <https://www.criminaljustice.ny.gov/pio/humantrafficking/humantrafficking.htm>; Human Trafficking Initiatives | Division of Youth Development and Partnerships for Success | OCFS”, access 30 January 2023, <https://ocfs.ny.gov/programs/human-trafficking/initiatives.php>; as for Idaho: Idaho human trafficking task force; Idaho State Police Human Trafficking Unit; Idaho Anti-Trafficking Coalition, “Idaho Anti-Trafficking Coalition”, Idaho Anti-Trafficking Coalition, access 30 January 2023, <https://idahoatc.org/>; “Idaho | National Human Trafficking Hotline”, accessed 1^o February 2023, <https://humantraffickinghotline.org/en/statistics/idaho>; And Massachusetts, Massachusetts Attorney General’s Human Trafficking Division; Massachusetts Human Trafficking Task Force; “Commonwealth Anti-Trafficking Task Force | Mass.Gov”, access 30 January 2023, <https://www.mass.gov/info-details/commonwealth-anti-trafficking-task-force>.

⁹⁷ “Victims of sex trafficking, in particular, are often physically and sexually abused by their traffickers and ‘buyers.’” “CRITICAL ISSUES in POLICING SERIES How Local Police Can Combat the Global Problem of Human Trafficking: Collaboration, Training, Support for Victims, and Technology Are Keys to Success.” n.d. <https://www.policeforum.org/assets/CombatHumanTrafficking.pdf>, p. 6.

⁹⁸ *Polaris Analysis of 2021 Data from the National Human Trafficking Hotline*. n.d. <https://polarisproject.org/wp-content/uploads/2020/07/Polaris-Analysis-of-2021-Data-from-the-National-Human-Trafficking-Hotline.pdf>; Polaris Project. Accessed February 10, 2023, p. 25.

enforcement training.”⁹⁹ In cases of sex trafficking by ‘lover boys’, for instance, the victim can be emotionally coerced.¹⁰⁰ Matter of fact, data also shows that among the top types of exploiters are “[...] those with a familial relationship to the victim (26%), and intimate partners (22%).”¹⁰¹ Therefore, training must be offered in a way that goes beyond stereotypes of sex trafficking to enable better identification.

Proceeding to the question concerning the number of sex trafficking victims that are identified among the women arrested for prostitution-related offenses. This research found that this question remains unanswered. Statistics show that 16,600 people were arrested for prostitution and commercialized vice in 2020.¹⁰² As provided by the FBI, more than 60 percent of the number of people arrested for prostitution and commercialized vice are women.¹⁰³ It is unclear, however, how many victims of sex trafficking are included in this number.

This applies to all three states analyzed in this research, as their human trafficking numbers usually refer to what has been reported, not to the number of victims identified post-arrest.¹⁰⁴ In fact, as noted by Donna M. Hughes “[...] laws and reporting of

⁹⁹ Michele Boggiani, When Is a Trafficking Victim a Trafficking Victim? Anti-Prostitution Statutes and Victim Protection, 64 Clev. St. L. Rev. 915 (2016) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol64/iss4/6>, p. 953.

¹⁰⁰ Ministerie van Justitie en Veiligheid, “‘Loverboys’ - Human Trafficking and People Smuggling - Government.NL”, onderwerp (Ministerie van Algemene Zaken, 6 de maio de 2019), <https://www.government.nl/topics/human-trafficking/romeo-pimps-loverboys>.

¹⁰¹ *Polaris Analysis of 2021 Data from the National Human Trafficking Hotline*. n.d. <https://polarisproject.org/wp-content/uploads/2020/07/Polaris-Analysis-of-2021-Data-from-the-National-Human-Trafficking-Hotline.pdf>: Polaris Project. Accessed February 10, 2023, p. 2.

¹⁰² U.S. Department of Justice, “Arrests by offense, age, and race”, access 8 february 2023, https://www.ojdp.gov/ojstatbb/crime/ucr.asp?table_in=2&selYrs=2020&rdoGroups=3&rdoData=c.

¹⁰³ FBI, Table 42”, FBI, access 8 february 2023, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-42/table-42.xls>

¹⁰⁴ Review of Human Trafficking in New York. n.d. *Human Trafficking Courts* (blog). Accessed January 30, 2023. <https://htcourts.org/new-york/>; Human Trafficking in Idaho. n.d. *Human Trafficking Courts* (blog). Accessed January 30, 2023. <https://htcourts.org/idaho/>; Human Trafficking in Massachusetts. n.d. *Human Trafficking Courts* (blog). Accessed January 30, 2023. <https://htcourts.org/massachusetts/>.

prostitution-related statistics give little or no indication of victimization.”¹⁰⁵ Since antitrafficking statutes are focused on the arrest, prosecution, conviction, and sentence imposed to traffickers, most of the sex trafficking statistics provided by law enforcement agencies are focused on offenders instead of victims.¹⁰⁶ And other statistics available usually focus on the number of cases reported to authorities, and not the number of identified victims after prostitution-related arrests.¹⁰⁷

This research has found a lack of data in this regard. Since the percentage of sex-trafficking victims identified among sex workers arrested for prostitution-related offenses is unclear. In this sense, despite statistics providing the number of arrests for prostitution, sex trafficking, and reported sex trafficking victims, there is no quantitative indication of the number of sex trafficking victims arrested for prostitution. In this regard, research is essential to determine the number of identified victims after arrest to have at least an idea of the dimension of the problem.

Nevertheless, despite this verified insufficiency of data and uncertainty on how many of the women arrested for prostitution are identified as victims of sex trafficking, it is still worth questioning what happens to them after an arrest. As follows.

¹⁰⁵ Donna M. Hughes, “Race and Prostitution in the United States.” n.d. https://s3.eu-west-3.amazonaws.com/observatoirebdd/2005_Race_and_prost_US_HUGHES.pdf, p.1.

¹⁰⁶ See U.S. Department of Justice. “DATA COLLECTION PROFILE Human Trafficking Data Collection Activities, 2022.” 2022. <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/htdca22.pdf>; FBI, Table 42”, FBI, access 8 february 2023, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-42/table-42.xls>.

¹⁰⁷ *Polaris Analysis of 2021 Data from the National Human Trafficking Hotline*. n.d. <https://polarisproject.org/wp-content/uploads/2020/07/Polaris-Analysis-of-2021-Data-from-the-National-Human-Trafficking-Hotline.pdf>; Polaris Project. Accessed February 10, 2023.

What follows from an arrest for prostitution-related offenses and identification as a sex trafficking victim

Prostitution is a crime, and to a lesser or greater degree, it is still treated as such. Victims are still arrested and can be subjected to prosecution. In theory, when identified, sex trafficking victims should have their charges dropped, but this is not always the case. Since in many cases the victim will need to comply with authorities to be duly treated as a victim.

The need to comply with authorities to be duly treated as a victim instead of a perpetrator is also a consequence of the conflation of sex work and sex trafficking in a criminalized setting. As if prostitution was not criminalized, victims would only be seen as victims and not as possible victim-defendants. Besides, as seen on the general consequences, sex workers have an adversarial relationship with authorities due to anti-prostitution statutes. And despite the ‘progressive gloss’, the full criminalization model is still based on coercive practices and on the imposition of penalties.¹⁰⁸

With anti-prostitution statutes in place, prosecutors might use the threat of punishment as leverage to get information from victims. However, demanding victim cooperation at a procedural pace might be unrealistic due to trauma or even physical risk if they disclose information about their traffickers to authorities. As noted by Mogulescu:

[...] in the few cases where police or prosecutors have identified someone arrested for prostitution as a potential victim of trafficking, the victim must cooperate in the time frame deemed appropriate by the prosecutor in order to escape criminalization. Should the victims be unwilling or unready, at the

¹⁰⁸ Smith, Molly, and Juno Mac. 2018. *Revolting Prostitutes: the Fight for Sex Workers' Rights*. London; Brooklyn, NY: Verso. Position 2258.

precise moment of arrest, or immediately thereafter, they are made to go through the criminal court process marked as defendants.¹⁰⁹

In addition, and as seen on the previous section, considering that a great number of sex trafficking cases involve coercion of the victim by someone they knew and possibly loved, complying with the authorities becomes particularly difficult.¹¹⁰ Accordingly, unless victims cooperate or comply with authorities, their victim status does not offer them further protection. As stressed by Kamala Kempadoo unless victims “[...] become police informants and hand over their 'traffickers', who may well be their friends, lovers, brothers, sisters, or their employers, they are treated as illegal immigrants, criminals, or threats to national security.”¹¹¹

Besides, given the strong stance of anti-trafficking statutes and the desire to *combat* sex trafficking, the need to comply with authorities will probably take precedence over victims’ protection.¹¹² After arrest and identification, prosecutors have the power to dismiss charges. This dismissal relies on their sole discretion. Charges may be dropped at any moment during the legal process, even before a trial or following the entry of a guilty plea. However, if the goal is to pursue traffickers, victims can be often relegated. As

¹⁰⁹ Mogulescu, Kate. 2012. “The Public Defender as Anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking.” *CUNY Law Review* 15 (2): 471. <https://doi.org/10.31641/clr150219>. p. 481.

¹¹⁰ “Love and Trafficking: How Traffickers Groom & Control Their Victims - Polaris”, access 30 January 2023, <https://polarisproject.org/blog/2021/02/love-and-trafficking-how-traffickers-groom-control-their-victims/>.

¹¹¹ Free translation of “Um dos efeitos mais impressionantes é que, embora as pessoas objeto de tráfico sejam designadas como 'vítimas' em várias políticas e leis, a menos que se tornem informantes da polícia e entreguem seus 'traficantes', que bem podem ser seus amigos, amantes, irmãos, irmãs, ou seus empregadores, elas são tratadas como imigrantes ilegais, criminosas ou ameaças à segurança nacional” Kempadoo, Kamala. 2005. “Mudando o debate sobre o tráfico de mulheres.” *Cadernos Pagu*, no. 25: 55–78. <https://doi.org/10.1590/S0104-83332005000200003>. p.789.

¹¹² The wording *combat* is used in most international and national documents and stress the combative tone that might bear consequences for victims standing in the middle of the clash between authorities and traffickers.

noted by Franciso Zornosa, “[a]lmost every week, a news article covers a different story that underscores our government’s preference—and the preference of society, more generally—for successful human trafficking prosecutions over the recovery and rehabilitation of trafficking victims.”¹¹³ Similarly, Kate Mogulescu affirmed that “[c]urrent efforts center on a criminal justice approach, [...] governed by a singular focus on apprehending perpetrators rather than supporting survivors.”¹¹⁴

Taking the three states into account, in New York, it was noted a progression in this sense as the Manhattan district attorney stated it would no longer prosecute prostitution cases.¹¹⁵ Nevertheless, despite a drastic drop, in 2022, there were still around a hundred arrests for prostitution.¹¹⁶ As to Massachusetts and Idaho, there are no statements following this logic of dismissing prostitution cases.

Hence, due to the conflation of sex trafficking and prostitution the victim will first rely on the capacity of law enforcement agents to identify them as victims. Then, it will further depend on the prosecutor’s willingness to drop the charges. If charges are not dropped, alternatives to traditional criminal justice processes might be considered. Such as PDPs. However, PDPs depend on availability of those programs in the victim’s state.

¹¹³ Zornosa, Francisco. 2016. “Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense.” *Washington and Lee Journal of Civil Rights and Social Justice* 22 (1): 177, p. 178.

¹¹⁴ Mogulescu, Kate. 2012. “The Public Defender as Anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking.” *CUNY Law Review* 15 (2): 471. <https://doi.org/10.31641/clr150219>. p. 481.

¹¹⁵ Jonah E. Bromwich, “Manhattan to Stop Prosecuting Prostitution, Part of Nationwide Shift”, *The New York Times*, 21 de abril de 2021, seç. New York, <https://www.nytimes.com/2021/04/21/nyregion/manhattan-to-stop-prosecuting-prostitution.html>.

¹¹⁶ Matt Katz, “There used to be tens of thousands of prostitution arrests annually in NYC. Now? About 100. - Gothamist”, access 12 march 2023, <https://gothamist.com/news/there-used-to-be-tens-of-thousands-of-prostitution-arrests-in-nyc-now-about-100>.

In this regard, as previously mentioned, Massachusetts and Idaho do not offer specific PDPs. Despite having an interagency task force to address sex trafficking, Massachusetts does not have a specific diversion program for sex workers and sex trafficking victims alike.¹¹⁷ Noting, however, that under the Massachusetts General Laws there is a window for victims to be accepted in pre-trial diversion for selected offenders.¹¹⁸ Granted that they fill the eligibility criteria.

As to Idaho, the Chief Criminal Deputy in the Ada County Prosecutor's Office was contacted between 2017 and 2018, and informed researchers that she was not aware of special courts or diversion programs for sex trafficking victims.¹¹⁹ The Deputy also informed that circumstances in which the crime occurred can be weighted in and influence the charging decision and sentence imposed, which might lead to a referral to the Drug Court or Mental Health Court in Ada County.¹²⁰ Both Courts are diversion courts used as alternatives to incarceration, and other counties in Idaho might have similar courts.

In New York due to the HTCIs, there are alternatives for sex trafficking victims, but researchers argue that those courts fall short on their proposition. As previously mentioned, the HTCIs are a type of post-arrest diversion court for human trafficking that develops tailored, trauma-informed programs for participants.¹²¹ However, it is argued

¹¹⁷ "Commonwealth Anti-Trafficking Task Force | Mass.Gov", access 31 january 2023, <https://www.mass.gov/info-details/commonwealth-anti-trafficking-task-force>.

¹¹⁸ Massachusetts General Laws, Chapter 276A.

¹¹⁹ "Survey of United States Diversion Programs". Accessed, November 10, 2022, <https://www.amaralegal.org/wp-content/uploads/2018/11/survey-of-united-states-diversion-programs.pdf>, p. 41.

¹²⁰ "Survey of United States Diversion Programs". Accessed, November 10, 2022, <https://www.amaralegal.org/wp-content/uploads/2018/11/survey-of-united-states-diversion-programs.pdf>, p. 41.

¹²¹ "Human Trafficking Intervention Courts - Overview | NYCOURTS.GOV", accessed 1^o february 2023, https://ww2.nycourts.gov/courts/problem_solving/htc/index.shtml.

that diversion programs tend to “[...] present numerous challenges, both for sex workers stuck in the web of the criminal justice system and for researchers seeking to understand their implications in a systematic way.”¹²²

Fall short firstly for conflating sex work and sex trafficking. While being named HTICs, it was found that these intervention Courts are mostly focused on addressing prostitution offenses rather than human trafficking cases in general. And “while being trafficked is a defense to a prostitution charge in NYS law, individuals must forgo this defense if they decide to enter the HTICs and must accept an adjudication of their prostitution offense as if a criminal defendant.”¹²³ Secondly, HTICs fall short because they are centered on criminal justice measures – i.e., existence of a criminal record or not, diminished penalties, etc. –, instead of focusing on “[...] structures and practices needed for effective uptake of counseling and social services by marginalized and at-risk populations.”¹²⁴ Hence, they do not serve the purpose of providing women with the means to exit the sex trade.

As observed by Kate Mogulescu, despite being a step towards the right direction, these programs “[...] cannot undo the damage caused by the unjust arrests

¹²² “Diversion from Justice: A Rights-Based Analysis of Local “Prostitution Diversion Programs” and their Impacts on People in the Sex Sector in the United States”, September 2018, access 27 January 2023, https://law.yale.edu/sites/default/files/area/center/ghjp/documents/diversion_from_justice_pdp_report_ghjp_2018rev.pdf, p. 7.

¹²³ “Unmeetable Promises: Rhetoric and Reality in New York City’s Human Trafficking Intervention Courts”, September 2018, access 27 January 2023, https://law.yale.edu/sites/default/files/area/center/ghjp/documents/unmeetable_promises_htic_report_ghjp_2018rev.pdf, p. 12.

¹²⁴ “Unmeetable Promises: Rhetoric and Reality in New York City’s Human Trafficking Intervention Courts”, September 2018, access 27 January 2023, https://law.yale.edu/sites/default/files/area/center/ghjp/documents/unmeetable_promises_htic_report_ghjp_2018rev.pdf, p. 8.

themselves.”¹²⁵ In fact, it is argued that HTICs “[...] are another example of penal warfare. Their adherents argue that they are a progressive shift towards services, premised on the idea that people arrested for prostitution should be treated as trafficking victims. Yet they nonetheless involve arresting a woman.”¹²⁶

Therefore, even in progressive states such as New York, where prostitution cases are being dropped, not further prosecuted, or even alternatives are available, there are still many problems. Which are mostly derived from the conflation of sex trafficking and prostitution in a criminalized scenario. In sum, the alternative falls short, because it seeks to bridge a gap created by the criminal justice system approach to prostitution.¹²⁷

In addition, beyond relying on identification, prosecutorial discretion, and viable alternatives, the victim will further depend on their defense counsel to vouch for them in case the charges are not dropped. Or eventually face conviction and its consequences, as follows.

A system that allows for the existence of victim-defendants and eventually convicts the
people it sworn to protect

If the case continues, the victim will fall under the spectrum of victim-defendant and will further rely on the capacity of their legal counsel to use their victim status as

¹²⁵ Kate Mogulescu, "The Public Defender as anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking," CUNY Law Review 15, no. 2 (Summer 2012): 471-490, p. 487.

¹²⁶ Smith, Molly; Mac, Juno. Revolting Prostitutes. Verso. Edição do Kindle. Position 2283-2291.

¹²⁷ "Diversion from Justice: A Rights-Based Analysis of Local "Prostitution Diversion Programs" and their Impacts on People in the Sex Sector in the United States", September 2018, access 27 January 2023, https://law.yale.edu/sites/default/files/area/center/ghjp/documents/diversion_from_justice_pdp_report_ghjp_2018rev.pdf, p. 54; "Unmeetable Promises: Rhetoric and Reality in New York City's Human Trafficking Intervention Courts", September 2018, access 27 January 2023, https://law.yale.edu/sites/default/files/area/center/ghjp/documents/unmeetable_promises_htic_report_ghjp_2018rev.pdf, p. 70.

affirmative defense. New York, Idaho, and Massachusetts laws enable the sex trafficking victim to assert their victim status as an affirmative defense thesis in case they are charged with prostitution.¹²⁸ Depending, then, on their defense counsel's ability to present the affirmative defense thesis in a convincing way. However, the possibility to use sex trafficking as affirmative defense does not mean it will hold up in Court.

It is also not clear what is the incidence that affirmative defense is used.

According to a Human Trafficking Courts blog, prostitutes in Massachusetts “[...] play the victim” to stay out of jail.¹²⁹ But there is no indication of the number of possible perpetrators that use victimization to escape from jail. Besides, it is noted that “[t]o prosecute cases of human trafficking, the government has acquired the authority to look into massage parlors, online sexual advertising and solicitations, chat groups, and other places thanks to federal and state law enforcement task force funds. – the focus continues to be *prosecution* of traffickers.”¹³⁰ Which again, shows that the focus is less on the protection of victims then it is on the prosecution of traffickers.

Further on, in case the thesis does not hold up in Court and the victim is found guilty, they will have a criminal record and suffer the traditional consequences of having a criminal record. Limiting their capacity to exit the sex trade. This is why it is often mentioned that criminalization is a *revolving door* for prostitution arrests.¹³¹ Being unlikely that after conviction, women will exit the sex trade.

¹²⁸ New York Penal Code § 230.01; Massachusetts General Laws, Part IV, title I, Chapter 265, Section 59; Idaho Code § 18-8606.

¹²⁹ Human Trafficking in Massachusetts. n.d. *Human Trafficking Courts* (blog). Accessed January 30, 2023. <https://htcourts.org/massachusetts/>.

¹³⁰ Human Trafficking in Massachusetts. n.d. *Human Trafficking Courts* (blog). Accessed January 30, 2023. <https://htcourts.org/massachusetts/>.

¹³¹ See “REVOLVING DOOR an Analysis of Street-Based Prostitution in New York City.” n.d. <https://sexworkersproject.org/downloads/RevolvingDoor.pdf>.

Even when assigned to a diversion program, “[...] four statistically significant risk factors for prostitution rearrest were detected in the sample of diversion participants including: prior prostitution arrest [...] Participants with prior arrests for prostitution were significantly more likely to be rearrested within the year of opportunity.”¹³²

A criminal record comes with further economic and social hardships for the sex worker. Including, but not limited to difficulties applying for housing, jobs, loans, and education.¹³³ To victims of sex trafficking, “[t]hese records plague them, even after they have escaped a trafficker, and act as a bar for many forms of housing, employment, and other opportunities. Furthermore, the experience of arrest and prosecution is itself sufficiently traumatic.”¹³⁴ On top of that, if the sex worker is a mother providing for her child before being arrested, this could also mean losing custody of their children.¹³⁵

In addition, the fines imposed to prostitution, in some states like Idaho, can reach \$50.000,00 for repeated offenses.¹³⁶ The costs with legal bills and the penalties added to the job choice limitations make it even more unlikely that sex workers will stop selling sex to work in a job that pays less. This is to say, that if the woman has had financial issues before her conviction, the situation will probably be more dire afterwards.

¹³² Dominique E. Roe-Sepowitz; Kristine E. Hickle; Martha Perez Loubert; Tom Egan, "Adult Prostitution Recidivism: Risk Factors and Impact of a Diversion Program," *Journal of Offender Rehabilitation* 50, no. 5 (2011): 272-285, p. 281.

¹³³ Drasin, Whitney J. 2012. "New York's Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or Just Covering It Up?" *Touro Law Review* 28 (2): 489. p. 490.

¹³⁴ Mogulescu, Kate. 2012. "The Public Defender as Anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking." *CUNY Law Review* 15 (2): 471. <https://doi.org/10.31641/clr150219>. p. 479.

¹³⁵ Molly Smith, *Revolted Prostitutes: The Fight for Sex Workers' Rights* (London ; Brooklyn, NY: Verso, 2018). Position 2175.

¹³⁶ US Federal and State Prostitution Laws and Related Punishments - Prostitution - ProCon.Org", Prostitution, access 27 january 2023, <https://prostitution.procon.org/us-federal-and-state-prostitution-laws-and-related-punishments/>

As a last resort, after being convicted, sex trafficking victims have the option to file a motion to vacate their conviction. This applies to all three states considered in this research. However, it is important to bear in mind that the victim will need to file a motion for their case to be reopened.¹³⁷ Hence, further legal counseling and costs will be involved in the process.

In conclusion, the conflation of sex work and sex trafficking in a criminalized setting is extremely prejudicial to victims of sex trafficking. It exposes them to double victimization and to a series of consequences throughout their interaction with the criminal justice system. As victims endure the same as prostitutes and still need to: rely on the authorities' capacity to identify them as victims; comply with law enforcement agents; rely on the capacity of the defense to vouch for them in case the prosecution does not drop the charges; rely on the state's availability of diversion programs and still abide by court orders. Then, in case of a conviction, endure all consequences of having a criminal record and eventually seek for legal assistance to file a motion to request for vacation of conviction.

¹³⁷ Barnard, Alyssa M. 2014. "'THE SECOND CHANCE THEY DESERVE': VACATING CONVICTIONS OF SEX TRAFFICKING VICTIMS." *Columbia Law Review* 114 (6): 1463–1501. p. 1480.

Chapter V.

General Recommendation

In the United States sex trafficking and prostitution are conflated due to the criminalization of prostitution. This means that both sex trafficking victims and prostitutes alike will face arrest, prosecution, and eventual conviction. This conflation is extremely burdensome for victims, as it exposes them to a series of consequences. Including but not limited to the need to: rely on the authorities' capacity to identify them as victims; comply with law enforcement agents; rely on the capacity of the defense to vouch for them in case the prosecution does not drop the charges; rely on the state's availability of diversion programs and still abide by court orders. Then, in case of a conviction, endure all consequences of having a criminal record and eventually seek for legal assistance to file a motion to request for vacation of conviction.

All the consequences herein mentioned are derived from the criminalization of prostitution. The legal alternatives, such as diversion programs, vacation laws, etc. explored in this research were also created to mitigate the system own flaws. Flaws derived from criminalization. Hence, to erase these consequences, the simplistic but best \ alternative is decriminalization.

Decriminalization removes prostitution of the criminal justice sphere and moves it to different legal spheres such as contractual or connected to labor laws. Removing prostitution from the criminal justice sphere is a reasonable stance, given all the consequences here presented. It is a system that enables for protection from sexual assault, "[...] adequate breaks on shifts and between shifts, a requirement for management to supply safer sex materials [...], provisions barring workplace

discrimination, and the right for sex workers to refuse clients and to receive support from their managers in doing so.”¹³⁸

In addition, the stigma of prostitution affects all women who work as prostitutes, including sex trafficking victims, who are coerced into selling sex.

“Similar to the way the United States treats and criminalizes drug use, the policing of sex work exacerbates stigma, compromises access to resources, justifies violence, and is steeped in racial disparities. [...] Because sex work and sex trafficking are conflated, interventions are focused on abolishing the sex industry instead of eliminating structural issues that drive exploitation.”¹³⁹

It fuels the stigma, by portraying selling sex as condemnable to the extent of removing the prostitute from living in society. According to a sex worker, the stigma is one of the worse parts of prostitution, as “[...] facing the world’s hate is what breaks me down.”¹⁴⁰ Much of the consequences related to criminal procedures and discretion of authorities would be removed from the equation, as decriminalization “[...] displaces the police as the *de facto* regulators of sex work.”¹⁴¹

Noting the costs for the state, the legal system, and all taxpayers that are involved with criminalization,¹⁴² with this reduction resources could be effectively transferred to

¹³⁸ Molly Smith, *Revolted Prostitutes: The Fight for Sex Workers’ Rights* (London ; Brooklyn, NY: Verso, 2018). Position 3529.

¹³⁹ “From Margin to Center: Sex Work Decriminalization Is a Racial Justice Issue”, Amnesty International USA, 12 de dezembro de 2016, <https://www.amnestyusa.org/from-margin-to-center-sex-work-decriminalization-is-a-racial-justice-issue/>.

¹⁴⁰ McClintock, Anne. 1993. “Sex Workers and Sex Work: Introduction.” *Social Text*, no. 37: 1–10.

¹⁴¹ Molly Smith, *Revolted Prostitutes: The Fight for Sex Workers’ Rights* (London ; Brooklyn, NY: Verso, 2018). Position 3576.

¹⁴² Mogulescu, Kate. 2012. “The Public Defender as Anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking.” *CUNY Law Review* 15 (2): 471. <https://doi.org/10.31641/clr150219>. p. 487.

sex trafficking, focusing on high-level offenders (trafficking), and programs for victims that do not involve incarceration, and do not demand the creation of special programs to supplement a flawed system.

Public policies with a social connotation should also accompany decriminalization, promoting educational campaigns to reduce stigma, programs to debunk common myths about prostitution such as the image of the vulnerable woman, enabling the creation of safety nets, among others. Fact is, regardless of the intention of the scholar, legislator, activist, or whomever, it is necessary to consider the practical implications that existing policies have on the lives of those who sell sex. Harm reduction should be the goal. In fact, if the intention is to protect victims and combat sex trafficking, minimizing the use of the criminal justice system through decriminalization serves this purpose. As well as promotes better working conditions for sex workers.

For this reason, decriminalization seems to be the best crosscutting alternative available and as recommendation should be generally considered. If not, states should at least consider specific diversion programs. As, despite their flaws, those programs are still better than the full imposition of traditional criminal justice processes.

Chapter VI.

Conclusion

This research aimed to answer what are the possible consequences of conflating sex work and sex trafficking. To this end, this research sought at first to set out the research design and to limit its scope. It also sought to lay out the context and the feminist debate regarding sex work.

Then, the research sought to investigate if sex work and sex trafficking were conflated in practice, while differentiated in theory. To this end, the legal framework for both prostitution and sex trafficking in the United States and in the selected states were considered. Similarly, to other scholars herein mentioned such as Boggiani, Mogulescu and Dittmore, it found sex work and sex trafficking are indeed conflated. To the extent that sex trafficking victims and prostitutes face roughly the same practical consequences.

On the third part, it sought to analyze the consequences of this conflation and how it affects sex workers and victims of sex trafficking. First, by briefly analyzing the general consequences that applies to both prostitutes and sex trafficking victims prior to and at the moment of arrest. To then present the implications of the conflation of sex work and sex trafficking through a procedural timeline.

It was shown, that conflating sex work and sex trafficking is extremely burdensome for victims. Since, as consequence of this conflation, victims need to: rely on the authorities' capacity to identify them as victims; comply with law enforcement agents, which they tend not to trust as shown; rely on the capacity of the defense to vouch for them in case the prosecution does not drop the charges; rely on the state's availability of diversion programs and still abide by court orders. Lastly, in case of a conviction,

endure all consequences of having a criminal record and eventually seek for legal assistance to file a motion to request for vacation of conviction.

Conclusively, the research recommends the decriminalization of prostitution as a crosscutting solution. As all the consequences mentioned in this research are derived from the same source. That is, the full criminalization of prostitution. It is of opinion that sex work is a form of work, which should be considered as such and given appropriate considerations in a sphere other than criminal. Sex trafficking, by its turn, involves coercion and violence *per se*, and victims should not be subjected to imprisonment because of what they were coerced to engage in.

Decriminalization, then, removes prostitution of the criminal justice sphere and moves it to different legal spheres such as contractual or connected to labor laws. Which seems to be a reasonable solution to the problem. If the intention is to *combat* sex trafficking and to protect victims, minimizing the use of the criminal justice system serves this purpose, as well as promotes better working conditions for sex workers.

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