

NON-CRIMINALIZATION OF JUVENILE SEX TRAFFICKING VICTIMS

JUST RESPONSE POLICY PAPER

A PROJECT OF



“Nobody uses the term, ‘ex-porn star’ for someone who was abused by [child] pornography. Why do we use the term, ‘ex-prostitute?’”

-A survivor of child sex trafficking referencing use of the word “prostitute” when referring to children¹

Introduction

Fifteen years after the Trafficking Victims Protection Act² set the benchmark for identifying commercially sexually exploited minors as victims of sex trafficking, the vast majority of state prostitution laws continue to criminalize, penalize and stigmatize juvenile sex trafficking victims as offenders under prostitution laws.³ Consequently, punishing commercially sexually exploited⁴ minors creates social and legal contradictions that undermine the fight against juvenile sex trafficking— further harming victims and hindering a needed shift in cultural attitudes.

Resolving the conflicts created by criminalizing juvenile sex trafficking victims is not merely a matter of legal theory but an imminent concern for juvenile sex trafficking victims who daily endure trauma caused by their exploitation. In developing protective responses and avenues to connect youth to services rather than punishment, determining how to eliminate the criminalization⁵ of juveniles for conduct that is inherently non-criminal remains a fundamental, indispensable element of this effort.

I. Practical Implications of Criminalizing Juvenile Sex Trafficking Victims

A. Direct, Experiential Impact of Criminalization on Victims

The broad scope of harms caused by the direct and collateral consequences of a criminal justice response is a driving concern behind efforts to eliminate criminal liability under prostitution laws for juvenile sex trafficking victims. Across the U.S., juvenile sex trafficking victims are being treated as criminals and suffering unjust, traumatizing consequences. Criminalization subjects victims to arrest, detention and adjudication in an adversarial process. Arrest involves the trauma of physical restraint, which can be stigmatizing, especially when administered in public. Victims may also be subjected to interrogation conducted by individuals who have not been trained in the trauma dynamics associated with juvenile sex trafficking. Detention, itself,

¹ SHARED HOPE INTERNATIONAL, DEMANDING JUSTICE ARIZONA: A FIELD ASSESSMENT OF DEMAND DETERRENCE AND ENFORCEMENT AND JUSTICE FOR VICTIMS 51 (2015), available at http://sharedhope.org/wp-content/uploads/2015/06/DJP_Arizona-Field-Assessment_optimized.pdf (last accessed Jan. 6, 2016).

² Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

³ See Shared Hope International, State Law Survey: Prohibiting Criminalization of Juvenile Sex Trafficking Victims Under State Prostitution Laws (2015), http://sharedhope.org/wp-content/uploads/2015/09/SharedHopeStateLawSurvey_Non-criminalizationofminors.pdf (last accessed Jan. 4, 2016).

⁴ For purposes of this paper, the term “prostitution” is used only to refer to the criminal offense of engaging, offering to engage or agreeing to engage in commercial sex in exchange for something of value. This paper focuses on the criminalization of juvenile sex trafficking victims and does not address criminalization of youth who purchase sex acts with either adults or minors.

⁵ The term “criminalization” is used broadly to include any state laws that direct juveniles into the criminal justice or the juvenile justice system for prostitution-related conduct. “Non-criminalization” is used in this paper to describe laws that prohibit or otherwise eliminate criminal liability for minors who engage in conduct prohibited under the prostitution law.

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involves additional restraint, deprivation of liberty and may involve strip searches and solitary confinement,⁶ which often further intensifies trauma already endured by trafficking victims. Moreover, detention facilities generally lack the resources to provide minor sex trafficking victims with trauma-informed specialized services, and when training and awareness are lacking among detention facility staff, detention facilities could even pose safety risks for detained victims.⁷

Although established to protect the rights of the accused and even promote rehabilitation in the context of juvenile justice, criminal justice processes are nevertheless adversarial and risk re-traumatizing juvenile sex trafficking victims. Juvenile justice diversion programs and affirmative defense laws developed to mitigate the punitive nature of a criminal response do not avoid all of the harms of the criminal process since the burden remains on the juvenile victim to prove his or her victimization, sending the message that juvenile victims are responsible for the crimes and violence committed against them. Additionally, victims' traumatization may be compounded by having to testify about their exploitation in order to meet this evidentiary burden. Thus, even when a juvenile victim is able to avoid penalties from a conviction or delinquency adjudication by successfully asserting a defense or completing a diversion process, shifting this burden to victims can be traumatic and inherently unfair.

Charging victims with prostitution can also have a negative impact collectively on the overall fight against sex trafficking. The emotional toll of re-traumatizing victims through criminal justice or juvenile justice processes risks undermining relationships with those who seek to help and protect survivors, such as law enforcement, prosecutors, child welfare, and even service providers. Many traffickers align themselves alongside their victims against law enforcement as a control tactic; thus, criminalizing victims can strengthen the trauma bond and render victims less trustful of justice systems.⁸ A victim who faces prosecution for prostitution may also be reticent to disclose his or her commercial exploitation in other contexts. Hindering key relationships with first responders or other professionals seeking to help victims of sex trafficking may thwart the rapport necessary to support a victim's adherence to a service plan designed to keep vulnerable minors from being re-exploited and may inhibit victims' ready cooperation in investigations and prosecutions of perpetrators.⁹

B. Implementation Concerns Regarding Non-criminalization

Safety concerns are commonly presented as an argument to continue criminalizing juveniles under prostitution laws, reasoning that without the ability to detain youth, which often requires criminal charges, and require victims' participation in services, victims will be left on the street or in dangerous, abusive situations and continue to be exploited. Although eliminating criminalization does not independently create an avenue for juvenile victims to access services, the risks of re-traumatization through arrest, detention and

⁶ MALIKA SAADA SAAR, REBECCA EPSTEIN, LINDSAY ROSENTHAL, AND YASMIN VAFA, *SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY* 14 (2015).

⁷ *Id.* at 12, 15. ("In addition, some girls experience new incidents of sexual victimization while in the system.")

⁸ See e.g., Nikki Trautman Baszynski, *Perception, Compulsion, and the "Victim-Criminal" Avoiding the Imposition of Criminality on Human Sex Trafficking Victims in Ohio*, OHIO ST. J. OF CRIM. L., Amici Blog (2014) <http://moritzlaw.osu.edu/students/groups/osjcl/amici-blog/perception-compulsion-and-the-victim-criminal-avoiding-the-imposition-of-criminality-on-human-sex-trafficking-victims-in-ohio/> ("... it legitimizes the stories and warnings traffickers feed their victims to persuade them not to seek help from authorities. Traffickers tell their victims that police will simply arrest them and throw them in jail and that they are not interested in helping them."). <http://moritzlaw.osu.edu/students/groups/osjcl/amici-blog/perception-compulsion-and-the-victim-criminal-avoiding-the-imposition-of-criminality-on-human-sex-trafficking-victims-in-ohio/>

⁹ See *supra* note 1, DEMANDING JUSTICE ARIZONA at 49.

adjudication reflect the potential harms of funneling already traumatized youth into a criminal justice response. The incongruity of these harms with the goal of connecting youth to services makes non-criminalization a necessary component when designing comprehensive protective system responses for juvenile sex trafficking victims, whether as a starting point for prompting change or as the ultimate goal of long term system response development.

C. Enabling Flawed Cultural Perceptions and Unfair, Harmful Stigmas

In addition to the negative emotional and psychological impact of criminalization on individual victims, codifying a non-criminal response to juvenile sex trafficking victims also helps to reshape cultural attitudes that have grown up around anachronistic perceptions of commercial sexual exploitation. A society's laws and mindset exist in a symbiotic relationship, each prodding the other forward. A law that coherently respects victim status and withholds criminal stigma from juvenile sex trafficking victims helps correct unjust, but prevalent, negative perceptions of commercially sexually exploited youth. As minors are classified as offenders under prostitution laws, society projects unfair stigmas onto juvenile victims as "child prostitutes."

These cultural and legal inconsistencies also tend to align with perceptions of victims based on their age. Although 16 and 17 year olds may appear less vulnerable than 10 year olds, older minors are also susceptible to victimization through sex trafficking. At first glance, older commercially sexually exploited teenagers may seem independent and even defiant, but these are often coping mechanisms developed from suffering various types of abuse. When society judges exploited youth for their own abuse, this judgment exacerbates their victimization, attaching an ostracizing stigma to these minor victims.

II. Legal Context for Non-Criminalization

The federal sex trafficking law and most state sex trafficking laws identify a commercially sexually exploited minor as a victim of sex trafficking, whether that child is 7 years old or seventeen years old, but that same child still faces criminal charges under the prostitution law in most states. Additionally, the laws of many states fail to recognize juvenile sex trafficking victims as child abuse victims under statutory rape laws simply because their form of sexual abuse is commercialized. The primary reason the criminalization of minors under state prostitution laws cannot be coherently reconciled with the federal sex trafficking law or the majority of state sex trafficking laws is because the conduct that makes the minor a victim of sex trafficking—engaging in commercial sex—is the same conduct that subjects that minor to prosecution under the prostitution law. From a legal perspective, non-criminalization is not only the fairest response to juvenile sex trafficking victims but also the most consistent with the purpose and intent of state and federal sex trafficking laws. Amongst legal scholars there is overwhelming agreement that criminalizing minors for prostitution is inconsistent with sex trafficking laws and inherently unfair.¹⁰

¹⁰ E.g., Tessa L. Dysart, *Child, Victim, or Prostitute? Justice through Immunity for Prostituted Children*, 21 Duke J. Gender L. & Pol'y 255, 270-72 (2014) (discussing legal scholarship on non-criminalization).

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A. Development of Non-criminalization Responses

In 2000, when the TVPA was enacted, it was a crime in almost all states¹¹ and the District of Columbia to exchange sex acts for something of value regardless of whether the person exchanging sex acts for a fee was a minor or an adult. Almost a decade passed after enactment of the TVPA before states began to eliminate criminal liability for minors for prostitution.¹² Recent years however demonstrate a growing trend toward eliminating the criminalization of minors. Since 2000, 14 states and the District of Columbia have enacted legislation eliminating criminal liability for some or all minors for prostitution offenses,¹³ while two other states have pending legislation that would eliminate criminalization of minors for prostitution.¹⁴ In addition, the Uniform Act on the Prevention of and Remedies for Human Trafficking (Uniform Act), which was approved for adoption by the states by the Uniform Law Commission in 2013, also provides for non-criminalization of juvenile sex trafficking victims, and four of the seven states that have adopted the Uniform Act adopted the non-criminalization provision.¹⁵

B. Conflict of Laws

At the heart of acknowledging the victim status of juvenile sex trafficking victims is recognizing that juveniles are unable to consent to sell sexual services. Under the laws of many states, minors who are legally unable to consent to sex based on their age could simultaneously be criminalized for engaging in *commercial sex*. Another layer of incongruence is added by the fact that most of these states that criminalize minors engaged in commercial sex also define a commercially sexually exploited minor as a victim under the sex trafficking law.¹⁶ Thus, in moving toward a consistent national response to juvenile sex trafficking victims, the age of majority¹⁷ as defined under the federal and most state sex trafficking laws, rather than the age of consent,¹⁸ provides a more legally consistent bright line for eliminating criminal liability for juvenile sex trafficking victims under state prostitution laws. Specifically, the federal sex trafficking law as well as 46 states and the District of Columbia do not require proof of force, fraud or coercion when the victim of sex trafficking is under the age

¹¹ Rhode Island did not specifically criminalize prostitution until 2009. (2009 R.I. Pub. Ch. 185, 2009 R.I. HB 5044). Michigan criminalized prostitution but excluded minors under 17 from application of the law until 2002 when the maximum age of culpability under the prostitution law was lowered to 16. *See* Mich. Comp. Laws Ann. § 750.448 as amended by House Bill 5449. (2002 Mi. P.A. 45; 2001 Mi. HB 5449).

¹² In 2010, Connecticut enacted Senate Bill 153 which eliminated criminal liability for prostitution for minors under the age of 16. S.B. 153, 2010 Gen. Assemb., Reg. Sess. (Conn. 2010). In 2010, Illinois also amended its prostitution laws to eliminate criminal liability for all minors under the age of 18. 2010 Ill. Laws 6931, Public Act 096-1464. In 2011, Tennessee also amended its prostitution laws to exclude minors from criminal liability. 2011 Tenn. Public Acts 377.

¹³ *See* State Law Survey: Prohibiting Criminalization of Juvenile Sex Trafficking Victims Under State Prostitution Laws, *supra* note 3.

¹⁴ S.B. 851, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015); S.B. 200/A.B. 267, 2015 Leg., Reg. Sess. (Wis. 2015).

¹⁵ According to the Uniform Act Enactment Status Map, the following seven states have adopted some aspect of the Uniform Act: Delaware, Louisiana, Pennsylvania, Montana, North Dakota, New Hampshire and South Carolina. Montana, North Dakota, New Hampshire and South Carolina adopted the partial non-criminalization provided in the Uniform Act. Uniform Law Commission, Prevention of and Remedies for Human Trafficking Enactment Status Map, <http://www.uniformlaws.org/Act.aspx?title=Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking> (last accessed Jan. 6, 2016).

¹⁶ Shared Hope International, Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims, (August 2015), http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf (last accessed Jan. 6, 2016).

¹⁷ The age of majority ranges from 18 to 21. While the age of majority is higher in Mississippi (age 21) and Alabama (age 19), the remaining states set the age of majority at 18.

¹⁸ *See* SHARED HOPE INTERNATIONAL, DEMANDING JUSTICE REPORT, Appendix: State Law Survey of Base Penalties for Buyers of Sex Acts with a Minor, pgs 114-19 (2014), available at http://sharedhope.org/wp-content/uploads/2014/08/Demanding_Justice_Report_2014.pdf (last accessed Jan. 6, 2016).

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of 18.¹⁹ Thus, non-criminalization of *all* minors under 18 would align with the intended protection of minors under these laws and allow for the development of a consistent protective service response. Drawing this bright line consistent with trafficking laws also aligns with the recognition that children are particularly susceptible to certain types of exploitation due to their minority and accordingly require special protection. This concern is the basis for a range of laws that distinguish minors and adults,²⁰ a need that continues to be re-affirmed by scientific studies on the adolescent brain.²¹

Conclusion

Criminalization of juvenile sex trafficking victims is fundamentally unfair and implies that victims of sex trafficking are responsible for the severe crime committed against them. No other child sexual abuse victim faces criminalization for their own sexual abuse, yet 36 states still allow minors to be charged with prostitution simply because the abusive conduct suffered is commercialized.

As long as juvenile victims under sex trafficking laws continue to be treated as perpetrators under prostitution laws, there cannot be a true shift in cultural attitudes to stop stigmatizing juvenile victims as “child prostitutes” and start acknowledging child sex trafficking—the buying and selling of children for sex—as a serious crime against children. Treating commercially sexually exploited youth as culpable for the same transactions that victimized them goes to the heart of why this type of child abuse has been able to persist in the shadows for so long—exploitation of children through prostitution conjures a stigma that distorts the perception of the victim.

While non-criminalization is fundamental to a complete response to juvenile sex trafficking victims, it is not the only component. Without access to services, victims remain at risk of re-exploitation, and the nation is still struggling to identify the best avenues to services for this victim population. For this reason, non-criminalization may be a starting point for some states; for other states it may be a long-term goal, but regardless, policy makers, law enforcement, prosecutors, service providers and society at large will continue to confront the need to eliminate criminal liability under prostitution laws for any minor in order to consistently recognize the victimization of commercially sexually exploited youth.

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¹⁹ See Shared Hope International, State Law Survey: Requiring Proof of Force, Fraud, or Coercion When the Victim of Sex Trafficking is a Minor (2015), http://sharedhope.org/wp-content/uploads/2015/09/Shared-Hope-State-law-survey_FFC-under-HT-Law_as-of-12.4.15.pdf (last accessed Jan. 6, 2016). (Oregon and Ohio’s sex trafficking laws do not require proof of force, fraud or coercion when the minor victim is under 15 or 16, respectively.)

²⁰ *E.g.*, prohibitions on purchasing cigarettes or alcohol, registering to vote, obtaining a driver’s license, executing a valid contract, obtaining employment, enlisting in the military, obtaining a marriage license, consenting to medical care, and commencing a lawsuit.

²¹ See generally Jay N. Giedd, *The Amazing Teen Brain*, THE SCIENTIFIC AMERICAN, June 2015 (discussing adolescent brain development).