



CSE INSTITUTE POLICY PAPER

Why Recidivism Provisions in the Crime of Prostitution Equate to Gender-Based Inequality and Should be Removed

I. Introduction

With the passing of Act 105 in September of 2014, Pennsylvania is beginning to recognize people criminally charged with the crime of prostitution as who they truly are—victims of sex trafficking.¹ However, the crime of prostitution under Pennsylvania law still carries draconian recidivist provisions.² This paper will address why these provisions conflict with current Pennsylvania law, and result in both gender-based inequality and an economic waste of resources.

II. History of Recidivist Provisions in Prostitution Crimes

A. Purpose of Recidivist Provisions

Recidivist provisions increase punishment with new convictions so that the more times one is convicted of a crime, the higher the penalty. The crime of prostitution in Pennsylvania recidivizes from a third degree misdemeanor up to a first degree misdemeanor for a fourth or subsequent offense – carrying a statutory maximum of up to five years incarceration.³

¹ 18 PA. CONS. STAT. ANN. §§ 3001 et. seq. (2014).

² *Id.* § 5902(a.1).

³ 30 PA. CODE § 303.15 (2015).

B. Archaic Ideologies

At one time, policymakers may have believed that a woman freely chooses to enter into “the life” of prostitution, and consequently, she might be deterred from re-entering “the life” if she fears harsher punishment from getting caught again.⁴ However, this view is archaic and unfounded. The reality is that most women do not sell sex by choice, but rather as a means of survival. Many of these women are in “the life” because they ran away from abusive homes as children, lived on the streets, and remain uneducated, jobless, and homeless.

III. Problems with Recidivist Provisions in Modern Society

A. Conflict with Current Pennsylvania Law

When passing Act 105 in September 2014, the legislature recognized that the many prostitution-related crimes are not the fault of the victim, but rather, a trafficker who has exploited them.⁵ Act 105 explicitly lists the means traffickers use to force, defraud, or coerce victims into compliance with a life of sexual servitude including “recruiting, enticing, soliciting, harboring, transporting, providing, obtaining or maintaining an individual” for exploitive purposes.⁶ Therefore, Pennsylvania’s draconian recidivist provisions are useless in preventing these victims from returning to “the life.” Instead, these provisions conflict with Pennsylvania law by punishing victims further.

B. Gender-Based Inequality

In practice, recidivist provisions for prostitution offenses result in gender-based inequalities because the crime of prostitution is policed in such a way that those who sell sex – “prostitutes” – primarily women – are routinely arrested and convicted, while the buyers –

⁴ The life refers to “The experience of being used in prostitution. Virtually always involves heavy drug and alcohol use, violence and other crime.” Joe Parker, *Prostitution Terminology & Slang*, Gandberg.com (June 7, 2015, 11:49 AM), <http://genderberg.com/boards/viewtopic.php?f=10&t=1244>.

⁵ *Id.* § 3011(a).

⁶ *Id.* § 3012(b).

primarily men – are given nothing more than a “slap on the wrist” or walk free from arrest altogether. For example, between January 1, 2014 and December 31, 2015, 6,050 arrests for prostitution were made in the state of Pennsylvania. However, during that same time frame, police made only 1,487 arrests for patronizing a prostitute.⁷ This blatant disparity in arrest numbers reflects gender-based inequality in policing methods.

C. Economic Waste of Resources

By way of numerical illustration, consider the following. On June 26, 2015, 70 women in the Philadelphia County Prison population were incarcerated for prostitution charges, and yet no men were incarcerated for patronizing a prostitute. This inequality results not only from patterns of policing prostitution – but from the opportunities male buyers have to avoid conviction through diversion programs. For example, in Philadelphia County, many of the men arrested for the crime of patronizing a prostitute enter into the Accelerated Misdemeanor Program (AMP).⁸ There are two tiers of AMP.⁹ The first tier, (AMP1) is for those who do not have prior records.¹⁰ The second tier, (AMP2) is for those with prior records.¹¹ AMP1 requires the men to attend a diversionary program known as the Sexual Education and Responsibility (SER) program.¹² SER is a “John School” that educates on the topics of sexual exploitation and abuse in an effort to divert men from buying sex in the future.¹³ At the completion of the

⁷ According to the Administrative Office of Pennsylvania Courts (AOPC), between January 1, 2014 and December 31, 2015, there were 5,606 prostitution arrests in violation of 18 Pa. C.S. 5902 (a)(1) and 444 arrests in violation of 18 Pa. C.S. § 5902 (a)(2). The AOPC reports 1,487 arrests for patronizing a prostitute in violation of 18 Pa. C.S. § 5902 (e). The total number of arrests for prostitution, § 5902 (a) may actually be higher than the number listed here. According to the AOPC, counties are not required to disclose the number of arrests they made for these crimes. In a survey conducted by the CSE Institute, Bedford and Mercer counties both reported 1 arrest for a violation of § 5902 (a). However, the information from the AOPC reflects there were 0 arrests for these crimes in those counties during the same time period.

⁸ Sarah Allen, Assistant Defender, Philadelphia Defender Association (July, 13, 2015).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

program, the men’s criminal records are expunged.¹⁴ In contrast, most of the women arrested on prostitution charges are not eligible for the AMP1 due to their *prior* criminal records—which are tainted from the unequal policing of the crime of prostitution in the first place.¹⁵ The result is that the men walk free, without conviction, while the women accrue yet more convictions that expose them to draconian punishments under Pennsylvania’s prostitution recidivism penalties.¹⁶ This situation demonstrates the overwhelming inequality in the policing and prosecution of prostitution.

For those who remain unmoved by the fact that our Commonwealth punishes victims at a far higher rate and severity than it does their exploiters, consider the financial cost of incarcerating these victims. The astronomical financial cost to imprison women with prostitution convictions presents a compelling reason to abolish recidivist provisions for prostitution. The City of Philadelphia, for example, spends \$115.00 daily per inmate.¹⁷ Based on this statistic, if even 70 women are imprisoned for prostitution, the city spends \$8,050.00 daily - or \$2,938,250.00 a year incarcerating non-violent women who most often engage in the sex trade out of desperation or abuse.¹⁸ If even a portion of these resources were spent on programs to assist these women in exiting prostitution, the financial gains would be tremendous.

IV. Solution

The solution to this gender-based inequality and the economic waste of resources is to eliminate the recidivism provisions for both crimes of prostitution and patronizing a prostitute.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ CITY OF PHILA. PRISON SYS., PHILADELPHIA PRISON SYSTEM PERFORMANCE REPORT, (June 26, 2015), *available at* www.phila.gov/prisons.

¹⁸ *Id.*

This makes sense because prostituted persons are not freely entering into this life in the first place, and as such, recidivist provisions fail as a deterrence mechanism.

Pennsylvania had the opportunity to amend these recidivist provisions in February 2012, when it last amended the Pennsylvania statute prohibiting prostitution. Instead, however, the legislature chose to leave these discriminating provisions in the statute. As a result, Pennsylvania remains behind 37 states with lesser penalties for prostitution convictions, ranks among the top ten states for harshest penalties for a first or non-graded offense of prostitution, and is one of three states with the harshest prostitution maximum penalties.

V. Conclusion

According to the Pennsylvania Department of Corrections, since the statute was recidivized, 133 women have been incarcerated in state prison for the crime of prostitution—33 of those women from Philadelphia.¹⁹ Our system is failing these women in getting them the help they need and deserve. It is time for our Commonwealth to catch up with the many states that have already recognized prostitution for what it truly is—sexual exploitation and not a freely-chosen profession. The first step towards this recognition is to abolishing unfair and unequal recidivist provisions.

¹⁹ Pennsylvania Department of Corrections (June 30, 2015).