

Criminalizing Sex Work: Exploring the full scope of the Law

Kate D'Adamo Kara Ingelhart Guillaume Bagal Daniel Bruner



People keep telling me they want a road map.
Here you go. With a picture.

- **Defining Sex Work and Criminalization**

- Kate D'Adamo, Reframe Health and Justice

- **Decriminalization, Legalization, and Beyond**

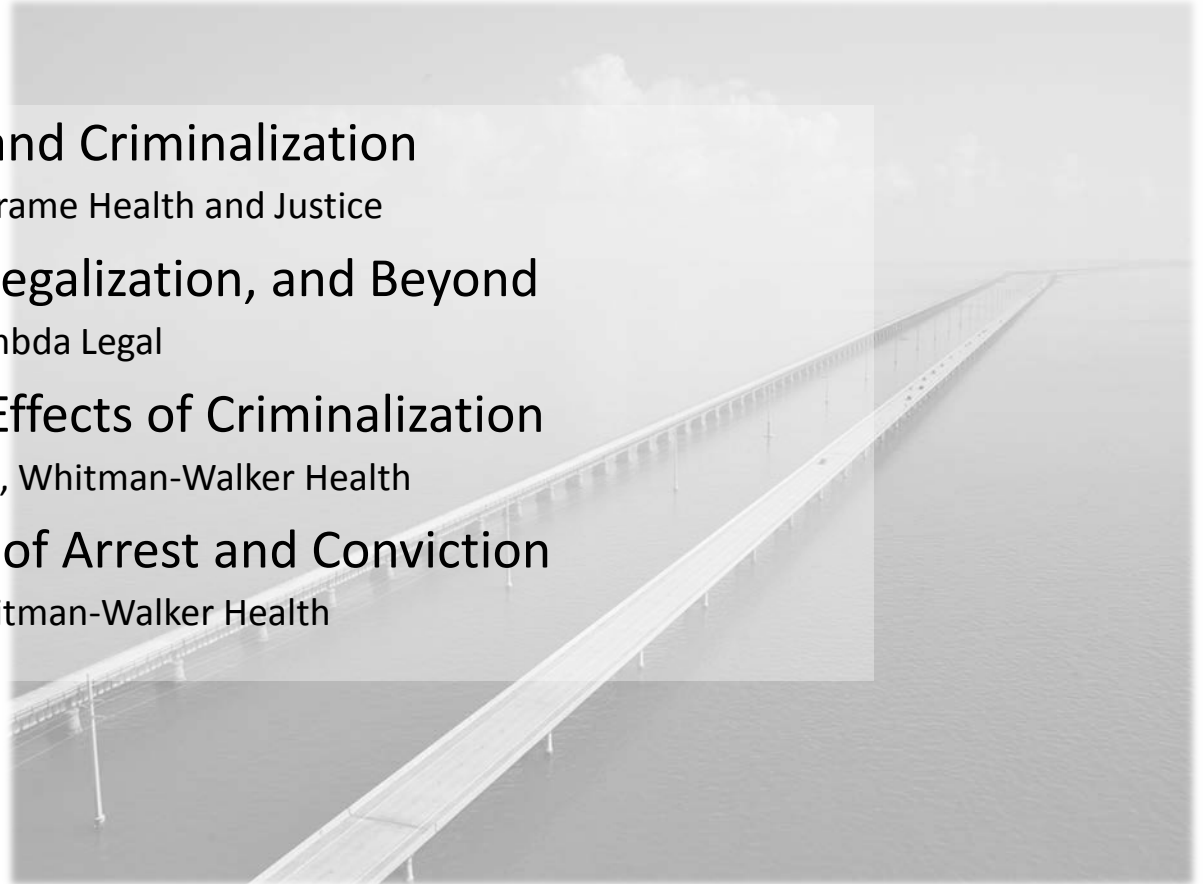
- Kara Ingelhart, Lambda Legal

- **Health & Wellness Effects of Criminalization**

- Guillaume Bagal III, Whitman-Walker Health

- **Legal Ramifications of Arrest and Conviction**

- Daniel Bruner, Whitman-Walker Health





Sex Work and Criminalization:

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What is Sex Work?

- "A broad definition of sex work would be: ***'the exchange of money or goods for sexual services***, either regularly or occasionally, involving female, male, and transgender adults, young people and children where the sex worker may or may not consciously define such activity as income-generating'.
- Sex work may be ***formal or informal***. In some instances, sex work is only a ***temporary*** informal activity. Women and men who have occasional commercial sexual transactions or where sex is exchanged for food, shelter or

protection (survival sex) would not consider themselves to be linked with formal sex work.

UNAIDS Inter-Agency Task Team on Gender and HIV/AIDS, in its fact sheet "HIV/AIDS, Gender and Sex Work," published in its 2005 Resource Pack on Gender and HIV/AIDS

What is Sex Work?

- Formal and Informal
- Independent, collective or for a third party
- Exchange for resources including currency, housing, food, drugs, services or other necessities
- Criminalized and Not criminalized
- Choice, circumstance and coercion
- *A constellation of experience*

What does it mean to criminalize?



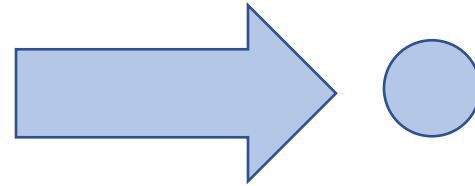
Types of Law

- Criminal
 - Prostitution & Proxy Laws
 - Trafficking Laws
 - Civil
 - Divorce and Custody Hearings
 - Administrative Law
 - Licensing requirements for massage parlor workers
 - Hint: FOR GOD'S SAKE ADVERTISE AS BODY WORK
 - Labor
 - Wage and hour
 - Health and safety conditions
- ▶ Federal
 - ▶ Trafficking Victims Protection Act
 - ▶ Mann Act
 - ▶ Travel Act
 - ▶ State (Every state)
 - ▶ Prostitution Laws, loitering laws, promoting laws
 - ▶ Municipal
 - ▶ Loitering Laws
 - ▶ Housing Laws

Criminalization of Sex Work

Loitering for the Purposes of Prostitution

Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute.



***Profiling-based charge predominantly targeting women of color, trans women, system-involved women

***Most public, most policed, most used

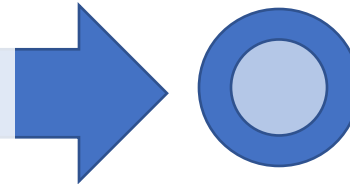
Criminalization of Sex Work

Prostitution

- A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee

Patronizing

- Patronizing a person for prostitution; definitions. 1. A person patronizes a person for prostitution when: (a) Pursuant to a prior understanding, he or she pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him or her; or (b) He or she pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person or a third person will engage in sexual conduct with him or her; or (c) He or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee.



Criminalization of Sex Work

Promoting prostitution; definitions of terms.

1. "Advance prostitution." A person "advances prostitution" when, acting other than as a person in prostitution or as a patron thereof, he or she knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution.

- Posting an ad for a peer
- Working collectively and sharing space
- Cleaning in a brothel
- Driving someone to an appointment
- Acting as a "bodyguard"
- Answering the phone and saying you're busy and someone else is available
- Giving condoms and harm reduction supplies
- Being a reference for a new client

Criminalization of Sex Work

Promoting prostitution; definitions of terms.

2. "Profit from prostitution." A person "profits from prostitution" when, acting other than as a person in prostitution receiving compensation for personally rendered prostitution services, he or she accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity.

- Splitting rent
- Sharing resources
- Taking money when in need from someone you know is a sex workers (including children of sex workers)
- Collecting a "finders fee" when hooking up peers with safe/new clients
- Managers of any kind
- Assistants of any kind

Criminalization *Beyond the Worker*

- Promotion of Prostitution
 - Someone who posts an online ad for a friend whose phone is broken
- Operating a Business of Prostitution
 - A manager of a brothel or dungeon
- Compelling Prostitution
 - One sex worker offers a friend who has recently lost their job if they would like to see a regular client together for some extra cash
- Deriving Support from the Proceeds of prostitution
 - An adult child of a sex worker who is in financial need
- Renting Space to be Used for Prostitution
 - Two people are seeing a client and one puts the hotel room under their name

Administrative Criminalization of Sex Work

- Massage Without a License (Bodywork)
- Stripping Without a License (Jurisdictions which require licensing)

Example: Atlanta

Fees

Fingerprint - \$20

Processing fee - \$50

Adult entertainment permit - \$200

Requirements

Application card

Background check

Fingerprint

Stipulations

Non-transferable

Requires Annual Renewal

**Not confidential to inquiries*

Policing's Collateral Damage

- ▶ Physical Isolation into precarious spaces to avoid police
- ▶ Physical Isolation away from peers, service providers
- ▶ Shorter and more coded negotiations
 - ▶ Can't talk about boundaries, cost, activities, condom use
- ▶ Fewer client options
 - ▶ Less negotiating power
 - ▶ Less power to refuse clients who are intoxicated, have a bad vibe
- ▶ ***Increases in Interpersonal violence***
- ▶ ***Increases in Exploitation***

Non-Criminalized Sex Work

- Professional Domination/Submission
 - Criminalized in New Jersey, Massachusetts
- Body Work
 - “Massage” is a term which requires a license in New York
- Exotic Dancing
 - In jurisdictions which do not require a license
- Sugar Baby, other less formal exchanges
- Cam Work
- Pornography

Criminalization of the Sex Trade

▶ Social Institutions

- ▶ Stigma from community, family, social circles
- ▶ Not allowing people to define their experience, especially in access social services (code switching)
- ▶ Discrimination in housing, including temp housing/hotels based on past experience or profiling
- ▶ Not being allowed to report crimes, not being taken seriously when reporting
- ▶ Refusing funding to programs which are not anti-prostitution
- ▶ Closing of bank accounts, crowd-funding accounts, Paypal/other financial mechanisms
- ▶ Discrimination in family court, other civil proceedings

What Workers Want: Decriminalization

- *Decriminalization is the removal of criminal penalties specific to engaging in the sex trade*
 - Prostitution and Loitering
 - Patronizing a Prostitute (Buying)
 - Pandering, Promoting
 - Brothel-Keeping
- *What stays illegal under decriminalization?*
 - Trafficking
 - Violence and victimization
 - Domestic violence/Intimate partner violence
 - Including when there is financial coercion

Private and Social Institutions

What are our institutions?

- Hospitals
- Banks and Financial Institutions
- Churches
- Schools

- *"I used to be very open about it until going to see a male OB/GYN. Asia Carrera claimed PayPal had shut down her account, when she tried to solicit funds from her fans after her husband died in a car accident. Andre Shakti, a Bay Area sex worker, was also turned away from the payment processor WePay after raising \$500 for a trip to the Feminist Porn Awards on the crowd-funding site Fundly. Their argument was that Shakti's campaign had violated their terms of service."*

Exploitation of Sex Workers

“the action or fact of treating someone unfairly in order to benefit from their work”

As in every industry, there are elements of exploitation which can be more or less severe.

- ❖ Because of the informal nature of much of sex work, people can move in and out of situations which are exploitative
- ❖ Because of criminalization, resolution is often challenging

Exploitation of Sex Workers

- A manager at a strip club refuses to call the police for an incident the dancer considers sexual assault or refuses to intervene if the client will not pay a dancer
- A dominatrix is charged arbitrary fees and fines during her shift and is not allowed to leave the premises until she has paid off this “debt”
- Someone working in a brothel who is required to have STI testing, paid out of pocket to work, and is not allowed to leave the brothel “unaccompanied”
- A body worker is required to have several sessions of “training” where the manager offers a two-for-one special and only the trainer is paid/tipped
- A submissive performer in fetish shoot knows that the longer they keep the scene going, despite their limits, the more likely they will be called back for another shoot
- A client promises \$200 for a session and hands over \$140
- Taxi drivers charge significantly higher for dancers leaving the club at the end of a shift, knowing they will have cash on them and are less comfortable taking public transit alone at that hour

What is Trafficking in Persons?

- “Trafficking in persons” shall mean the: recruitment, transportation, transfer, harbouring or receipt of persons, by means of the 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.

United Nations’ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. 2004

Decriminalization of the Sex Trade

Kara Ingelhart

Lambda Legal

Our Mission:

Lambda Legal is a national organization committed to achieving full recognition of the civil rights of **lesbian women, gay men, bisexual people, transgender people and people living with HIV** through **impact litigation, education and public policy work.**

Reform Models

Full Criminalization

✧ Status quo.

End Demand

✧ Criminalizing the purchasers of sexual services. The assumption is either deprioritizing arrest of those selling sex, but that has been inconsistent in implementation.

Full Decriminalization

✧ Repeal of criminal laws that deal with sex work.

Legislation and Regulation

✧ No criminal prosecution, but differs from decriminalization in that it actively regulates sex work through zoning restrictions, licensing requirements, and public health measures.

Why Decriminalization?

- ✧ **Defend human rights & reduce risk of abuse.**
- ✧ Without risk of prosecution:
 - ✧ Freer to report abuse.
 - ✧ Less disincentive to go to police.
- ✧ Reallocation of resources.

Why Not End Demand?

Supply & Demand Principles

- ✧ Loss of bargaining power.
- ✧ Increase risk behavior.



Criminalization Key Terms:

▶ Prostitution

- ❑ Defined at a state and city level in criminal code.

▶ Human Trafficking

- ❑ Recruitment, harboring, transportation, provision, or obtaining of a person for exploitation.

ADVOCACY TOOL

“[T]he decriminalization of consensual sex work . . . is based on evidence that [criminalization] often [makes] sex workers less safe and provide impunity for abusers with sex workers often too scared of being penalized to report crime to the police.”

– *Amnesty International*

Criminalizing LGBT People

- In 2012, approximately one fourth of reported anti-LGBT homicides were against sex workers.
- A new study about HIV rates in the transgender community found that among sex workers, trans women are nine times likelier to be living with HIV than their cisgender counterparts.

ADVOCACY TOOL

REMEMBER: Arguments for criminalization are quick to dismiss the fact that any laws against sex work punish the most vulnerable further, instead of tackling the basic issues such as poverty and discrimination that disproportionately affect LGBT people and PLWH.

Source: World Health Organization, Transgender People & HIV (2015); National Coalition of Anti-Violence Programs, 2012 report on anti-LGBTQ hate violence.

Legal Help Desk:

information and assistance regarding discrimination related to sexual orientation, gender identity and expression, and HIV status.

www.lambdalegal.org/help

Toll-free 1-866-542-8336

Health and Wellness Effects of Criminalizing Sex Work

Creating Change Conference

January 26, 2018

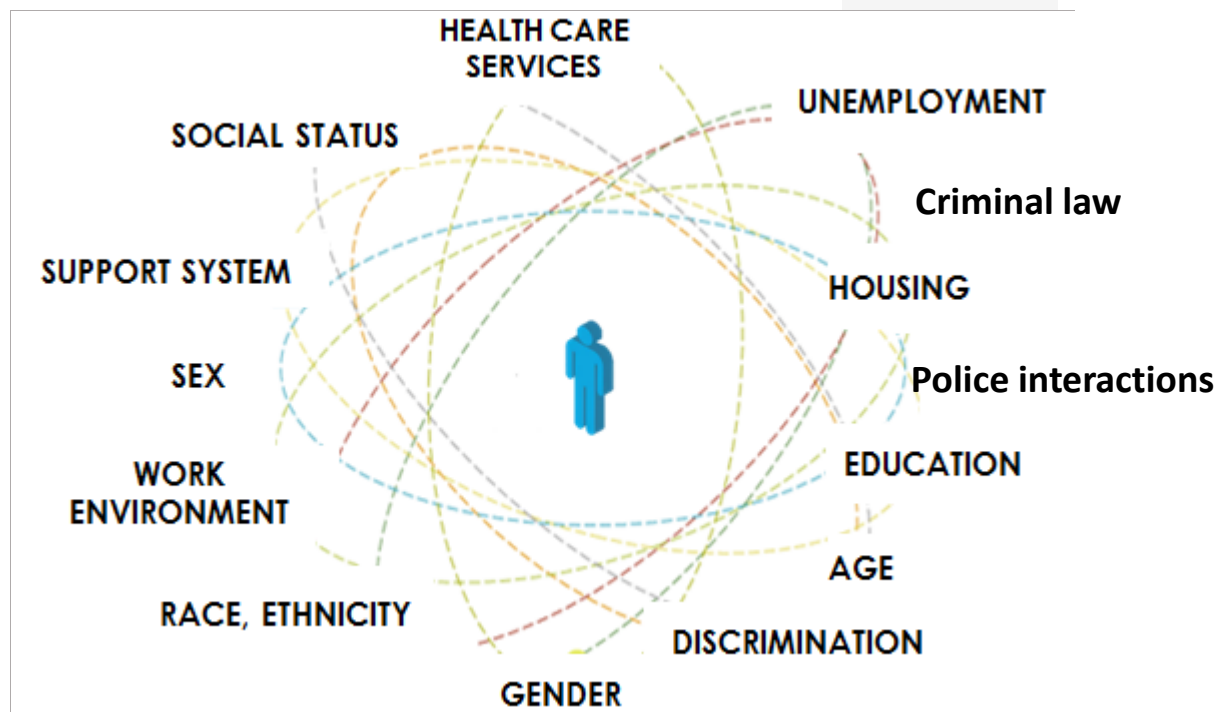
Guillaume Bagal, III



WHITMAN-WALKER HEALTH

we see you.

Social Determinants of Health Disparities among Sex Workers



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Health Implications of Criminalizing Sex Work

Criminalization of sex work...

- Fuels stigma and discrimination toward sex workers
- Exacerbates HIV risks
- Increases violence against sex workers
- Undermines prevention and treatment efforts targeting sex workers
 - Including primary care, mental health, and behavioral health
- Subjects sex workers to arrests and confinement, leading to medical adherence barriers



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Sex Workers' Vulnerability to HIV

- Multiple partners and inconsistent condom use
 - However, what increases their likelihood of contracting HIV is if they do not use condoms consistently and correctly
- Police harassment and arrest of sex workers for carrying condoms are primary barriers to consistent condom use
- Difficulties negotiating safer sex as clients may...
 - Refuse to pay
 - Use intimidation or violence to force unprotected sex
 - Offer to pay more money for sex without a condom
- Operating in the shadows is dangerous
 - Exposure to violence and increased alienation from society
 - Lack of availability of condoms and water-based lubricants are barriers to safer sex
 - HIV prevention and treatment related services have difficulty reaching sex workers



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Three Australian Cities with Different Sex Work Laws

- Comparison of health promotion programs in three Australian cities with different prostitution laws:
 - **Melbourne** - sex work is only **legalized** in licensed brothels
 - **Perth** - all sex work is **criminalized**
 - **Sydney** - sex work is **decriminalized** and does not require licensing

After interviewing and surveying over 600 sex workers living in these cities, the researchers reported the following findings:

- There was a thriving and diverse sex industry in each city
- Sex workers in Perth had the least access to free condoms
- Stigma persisted despite legalization, which led brothels to being geographically isolated
- Brothels in Perth had the lowest health and safety levels, while brothels in Sydney and Melbourne rated high for occupational health and safety

The decriminalization of prostitution is associated with better coverage of health promotion programs for sex workers. Harcourt et al. Aust N Z J Public Health. October 2010.



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More Human Rights Violations When Sex Work is Criminalized

- Widespread human rights abuses by both state and non-state actors including:
 - Homicide; violence from law enforcement, clients, and intimate partners; unlawful arrest and detention; discrimination in accessing health services; and forced HIV testing
- These abuses directly and indirectly increase HIV susceptibility, and undermine effective HIV-prevention and intervention efforts

“After the arrest, I was always scared... There were times when I didn’t have a condom when I needed one, and I used a plastic bag.”

- Female sex worker, USA

- Sex workers’ health and human rights improvement:
 - Policy reform and tactful implementations
 - Sex worker mobilization
 - Grass-roots organization

M. Decker et al. HIV and Sex Workers. Human Rights Violations against Sex Workers: Burden and Effect on HIV. Lancet. 2014



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Decriminalization could Significantly Reduce HIV Epidemics

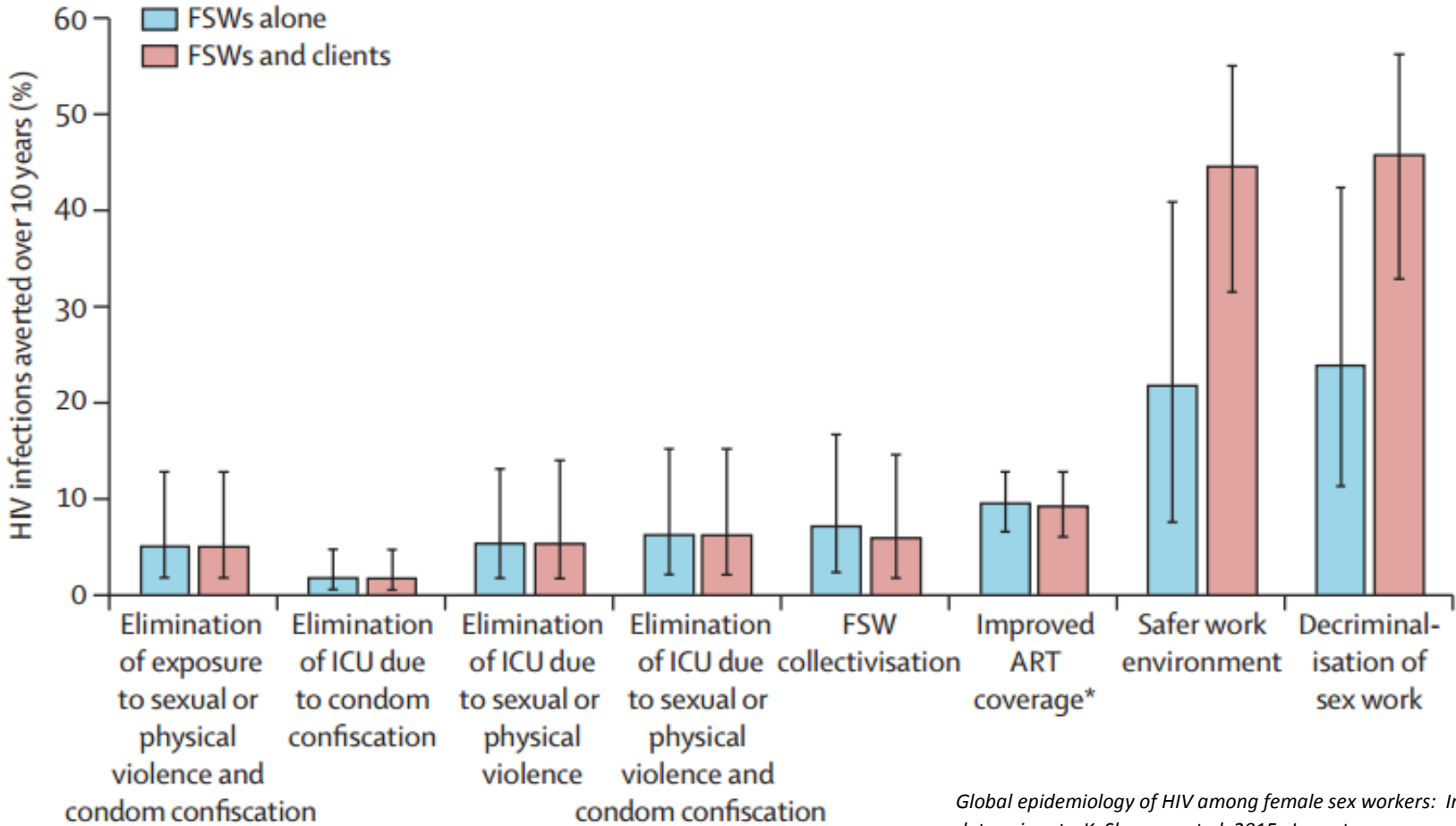
- Models suggest that sex work decriminalization could have the largest effect on the course of the HIV epidemics:
 - Avert **33–46%** of new HIV infections in female sex workers and clients over a decade
- This would be achieved through combined effects in reducing:
 - Physical and sexual violence
 - Police harassment
 - Non-condom use
- Need for more sex work law and health research inclusive of transgender people
- Need to improve the sensitivity of health providers, police, and social service agencies to sex-worker needs and rights
- Continue to fight the criminalization of HIV



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Decriminalization could Significantly Reduce HIV Epidemics



Global epidemiology of HIV among female sex workers: Influence of structural determinants. K. Shannon et al. 2015. Lancet



Legal Ramifications of Arrests and Convictions for Sex Work-Related Crimes

Creating Change Conference

January 26, 2018

Daniel Bruner, Senior Director of Policy

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Connor J. Cory, Skadden Fellow



WHITMAN-WALKER HEALTH

we see you.

Whitman-Walker Health Legal Services Provides Legal Assistance on a Wide Range of Issues to LGBTQ Individuals and Persons Affected by HIV

Sex work-related arrests or convictions can have damaging effects on other legal cases, including:

- Discrimination in health care, employment, public accommodations
- Prosecutions of offenders when the sex worker is a victim of crime
- Name and gender marker changes for transgender and gender-expansive individuals
- Immigration cases



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Types of Criminal Records That May Burden Sex Workers

- Sex workers may be arrested, prosecuted, and convicted of a wide range of offenses, including: prostitution, solicitation, loitering, trespassing, resisting arrest, disobeying a police order (e.g., to “move along”), having a “fake” ID, or a third-party offense (aiding another to commit prostitution, operating or residing in a “bawdy house,” etc.).
- Many offenses are misdemeanors, but some are felonies (e.g., many third-party offenses), and many are treated as “crimes of moral turpitude” under immigration laws and policies.



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Plaintiffs or Witnesses in Discrimination Cases, Witnesses in Criminal Prosecutions for Crimes Against Sex Workers

- In a discrimination case, a plaintiff's past (including arrests and convictions) can usually be uncovered in discovery. This is also true of witnesses.
- Plaintiff-side lawyers – including the public-interest as well as the private bar – favor “model” plaintiffs.
- Prosecutors may be disinclined to pursue criminal cases where the victim is a sex worker because of perceived “credibility” problems.

Name and Gender Change Cases

- In many jurisdictions, a petition to change a name must disclose:
 - Any open criminal matter
 - Any felony conviction
 - Any matter for which the petitioner is on probation or parole

A Petitioner may also be required to serve a copy of the name change petition on the relevant law enforcement agency, creating a risk particularly for those who are undocumented.

Immigration Cases - Generally

- Arrest and conviction records can have serious, damaging effects on immigration cases – including asylum and other forms of immigration relief; lawful permanent residency; and citizenship.
- Many criminal defense lawyers are not well-informed about immigration law and advise their (non-citizen) clients to enter into plea agreements with harmful consequences. Failing to advise clients of immigration consequences arising from a guilty plea may constitute ineffective assistance of counsel pursuant to *Padilla v. Kentucky*.
- Trans individuals, who have good reason to fear incarceration, may have an incentive to plead to offenses if they avoid jail time.
- Many if not most jail and prison systems cooperate with ICE, even if the police do not (e.g., DC), so individuals out of status have additional incentive to plead to avoid incarceration.

Immigration Cases - Generally

- Having engaged in prostitution in the past 10 years is a bar to lawful status
 - NOT limited to arrest or conviction
 - Bar applies even if occurred in a state or country where sex work is not criminalized (such as Nevada, Netherlands, El Salvador, Colombia, etc.)
- Lawyers must counsel clients to be truthful, but waivers can be obtained in many circumstances, although not for aggravated felonies, including convictions under third-party laws. Waivers are generally discretionary – there is very little if any opportunity to challenge a denial.
- Must demonstrate that the individual has been “rehabilitated” – sex work was in their past, not current.

Immigration Cases - Generally

- Being in a diversion program – if pre-sentencing, then there is a conviction record that can be problematic.
 - Immigration has a much broader definition of a “conviction” that includes diversion programs, even if charges are later dismissed.
- If sealing or expunging an arrest or conviction record is an available remedy, the record must still be disclosed to the immigration authorities. The records must be disclosed in order to obtain a waiver, which can make sealing or expungement problematic.
 - Arrest histories are never sealed or expunged in federal biometric records for immigration purposes, so will always exist in the immigration file.

Asylum/Withholding of Removal

- Conviction of a “particularly serious crime” is a bar.
 - Aggravated felonies, which is a term of art that can include misdemeanors, are statutorily considered a “particularly serious crime” and a bar to almost any type of immigration status.
 - Convictions under third-party laws (such as keeping a place of prostitution or presence in a “bawdy house” or “promoting prostitution”) can be especially risky because any conviction that “relates to the owning, controlling, managing, or supervising of a prostitution business” is an aggravated felony no matter the sentence.
- Mere involvement (even without conviction) can be a negative discretionary factor, depending on the Asylum Officer or Immigration Judge.
- Being HIV+ can be an aggravating factor resulting in conviction of a greater offense.

Adjustment of Status to Lawful Permanent Resident

- Conviction of a “crime of moral turpitude” can make someone inadmissible to the United States.
 - There is a limited “petty offense” exception (ex: where the maximum penalty less than 1 year, and not sentenced to more than 6 months; can only be applied to one offense). There is also a limited exception if the offense was committed under age 18.
- The application for adjustment contains several specific questions about prostitution because prostitution in last 10 years is a bar to adjustment.
- Even after a green card is received, the holder can be subject to deportation for two convictions of “crimes of moral turpitude,” or one conviction within the past 5 years, or the conviction of an aggravated felony.

Adjustment of Status to Lawful Permanent Resident

Questions in the Adjustment Application specific to sex work:

- “Have you ever engaged in prostitution or are you coming to the United States to engage in prostitution?”
- “Have you ever directly or indirectly procured (or attempted to procure) or imported prostitutes or persons for the purpose of prostitution?”
- “Have you ever received any proceeds or money from prostitution?”
- “Do you intend to engage in...prostitution...while in the United States?”

Application for Citizenship

- Must demonstrate “good moral character” for last 5 years, which generally requires 5 years without any criminal convictions.
 - Engaging in prostitution during 5 year period, even if no conviction, is a bar to GMC.
 - Crime Involving Moral Turpitude during 5 year period is automatic bar to GMC.
- All criminal history – even a *nolo contendere* plea (accepting a guilty verdict without admitting guilt) – must be disclosed, even if outside the 5 year GMC period.
- An aggravated felony (such as promoting prostitution or theft with a 1 year sentence) is a permanent bar to citizenship.
- N-400 Application contains this specific question:
 - “Have you ever been a prostitute, or procured anyone for prostitution?”

Conclusions

- Sealing/expunging records, or pre-sentencing diversion programs, still subject sex workers to many legal risks, particularly in immigration proceedings.
- Decriminalization, or reclassifying offenses as lower-grade so that police and prosecutors won't bother with them, is preferable.
- But without community education and changes in social norms, police will still be under pressure to harass and arrest sex workers.
- And without changes to federal immigration laws and policies, non-citizens engaging in sex work will continue to face challenges.