



WASHTENAW COUNTY

OFFICE OF THE PROSECUTING ATTORNEY

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POLICY DIRECTIVE 2021-08: POLICY REGARDING SEX WORK

I. Introduction and Background

Sex work is frequently called “the world’s oldest profession.”¹ Yet with the exception of several counties in Nevada, sex work is generally criminalized in the United States.² America’s prohibitionist stance on sex work is increasingly out of step with international norms. Consensual sex work is legal—at least in some form—in nearly 100 countries across the globe.³ It is permitted (with or without limits) in Canada, Mexico, New Zealand, Israel, Japan, the United Kingdom, and most European countries.⁴ And Amnesty International,⁵ Human Rights Watch,⁶ and the American Civil Liberties Union⁷ have all called for the decriminalization of sex work.

The Washtenaw County Prosecutor’s Office is well aware that sex work carries an increased risk for violence, human trafficking, and coercion. Data and experience, however, have shown that criminalizing sex work does little to alleviate those harms. Indeed (as outlined in further detail below) the criminalization of sex work actually *increases* the risk of sex work-adjacent harm. Accordingly, the Washtenaw County Prosecutor’s Office will henceforth decline to bring charges related to consensual sex work *per se*. The Prosecutor’s Office, however, will continue to charge sex work-adjacent crime—including human trafficking, violence, and offenses involving children—that directly harm County residents.

In announcing this Policy, several points bear emphasis.

First, the criminalization of sex work in the United States is in tension with constitutionally protected liberties.⁸ Adults in the United States generally have the right to

¹ See, e.g., Jesse McKinley, *Could Prostitution Be Next to Be Decriminalized?*, The New York Times (May 31, 2019).

² See *id.*

³ World Population Review, *Countries Where Prostitution Is Legal 2020*, available at <https://worldpopulationreview.com/country-rankings/countries-where-prostitution-is-legal>.

⁴ *Id.*

⁵ Amnesty International Policy on State Obligations to Respect, Protect, and Fulfil the Human Rights of Sex Workers (May 26, 2016), available at <https://www.amnestyusa.org/reports/amnesty-international-policy-on-state-obligations-to-respect-protect-and-fulfil-the-human-rights-of-sex-workers/>

⁶ Human Rights Watch, *Why Sex Work Should Be Decriminalized, Questions and Answers* (Aug. 7, 2019), available at <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized>.

⁷ American Civil Liberties Union, *Sex Work is Real Work, and it’s Time to Treat it That Way* (June 10, 2020), available at <https://www.aclu.org/news/lgbt-rights/sex-work-is-real-work-and-its-time-to-treat-it-that-way/>.

⁸ This Policy is an exercise of discretion by the Washtenaw County Prosecuting Attorney, and does not purport to argue that that laws criminalizing sex work violate the United States Constitution. The purpose of this discussion is only to note the tension between the criminalization of sex work and fundamental constitutional values.

“engage in . . . private conduct in the exercise of their liberty.”⁹ “[A]bsent injury to a person or abuse of an institution,” the Supreme Court has emphasized, the right to engage in consensual private conduct “should counsel against attempts by the State . . . to set . . . boundaries” pertaining to a sexual relationship.¹⁰ Laws banning consensual sex between adults thus generally violate the United States Constitution.¹¹ It is only when sex is exchanged for money that such activity may be banned.

But even once money enters the equation, sex is not consistently criminalized. Pornography, for example, is generally legal in the United States. Sex can thus be exchanged for money so long as a camera or a video camera is recording the act. But as soon as the camera is removed or turned off, the consensual exchange of sex for money may be punished.¹²

The criminalization of sex work, in short, is in serious tension with established norms related to bodily autonomy and personal liberty. That factor, standing alone, “counsel[s] against” prosecution.¹³

Second, research demonstrates that the criminalization of sex work “enhances sex workers’ vulnerabilities to violence and exploitation.”¹⁴ Because sex work “is regarded as criminal activity . . . sex workers are easy targets for abuse and exploitation.”¹⁵ Criminalization forces sex workers to operate in “isolated conditions and locations,” thereby increasing their “physical vulnerability.”¹⁶ And because sex workers can be criminally charged for engaging in sex work, they are “less likely to report instances of violence or exploitation.”¹⁷ The criminalization of sex work, in short, creates a “climate of impunity,” in which people feel free “to abuse sex workers’ rights.”¹⁸

In this regard, the criminalization of sex work reflects the effects observed from other prohibitionist policies. Time and again, the United States has attempted to criminalize activity that runs counter to purported social mores. From 1920-1933, the federal government criminalized the production and sale of alcoholic beverages. And for decades, the United States

⁹ *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

¹⁰ *Id.* at 567.

¹¹ *Id.*

¹² The doctrinal reason for the distinction between pornography and prostitution is that the criminalization of pornography arguably “impinge[s] unconstitutionally upon First Amendment values.” *People v. Freeman*, 758 P.2d 1128, 1131 (1988). The inconsistency between the American criminal system’s differential treatment of pornography and sex work has been highlighted by Justice Sandra Day O’Connor, who noted the oddity of “otherwise illegal conduct . . . made legal by being filmed.” *California v. Freeman*, 488 U.S. 1311, 1313, 109 S. Ct. 854, 856, 102 L. Ed. 2d 957 (1989) (O’Connor, J., in chambers).

¹³ *Lawrence*, 539 U.S. at 567.

¹⁴ Erin Albright & Kat D’Amado, *Decreasing Human Trafficking Through Sex Work Decriminalization*, *AMA J. Ethics* 122, 122 (2017).

¹⁵ *Id.* at 123.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Michelle Decker, Anna-Louise Crago, Sandra K.H. Chu, Susan G. Sherman, Meena Seshu, Kholi Buthelzi, Mandeep Dhaliwal, & Chris Breyer, *Human Rights Violations Against Sex Workers: Burden and Effect on HIV*, *The Lancet* 186, 192 (2015).

has been engaged in the so-called “War on Drugs,” which imposes severe criminal penalties on personal drug use and possession.

These policies, however, failed to have their desired effects. Prohibitionist policies did not prevent Americans from consuming drugs and alcohol. And the data demonstrates that prohibition significantly *increased* the violence associated with the drug and alcohol trade. “[P]rohibitions create black markets, and in black markets participants use violence to resolve commercial disputes.”¹⁹ As a result, researchers have concluded that “drug and alcohol prohibition have substantially raised the homicide rate in the United States over much of the past 100 years.”²⁰

The same is true with sex work. Criminalizing sex work forces participants to operate in a black market. That, in turn, leads participants to resort to “violence to resolve commercial disputes.”²¹ And the victims of such violence are typically sex workers themselves.

Third, and relatedly, the criminalization of sex work threatens public health. Because sex work is illegal, sex workers have “little control over their working conditions,” including their ability to “enforce condom use with clients.”²² Indeed, physical and sexual abuse perpetuated by clients often “occurs during condom negotiation.”²³

The criminalization of sex work thus prevents sex workers from insisting on condom use. The results are predictable. Unprotected sex work facilitates the spread of HIV and other sexually transmitted infections. For that reason, a series of research papers published in *The Lancet*—the world’s leading independent general medical journal²⁴—concluded that decriminalization of sex work would have “*the greatest effect*,” worldwide, on reducing new HIV infections in the next decade.²⁵

Fourth, like many crimes, the criminalization of sex work disproportionately affects minority populations. According to Amnesty International, nearly 40 percent of adults and 60 percent of youth arrested for prostitution in the United States are Black.²⁶ Transgender women “are also especially likely to be arrested on sex work charges, even if they’re not doing sex work.”²⁷ Declining to charge consensual sex work is thus consistent with the Washtenaw County Prosecutor’s Office’s mission to ensure that justice is dispensed evenhandedly, irrespective of sex, race, gender, sexual orientation, gender identity, religion, national origin, or immigration status.

¹⁹ Jeffrey A. Miron, *Violence and the U.S. Prohibition on Drugs and Alcohol*, National Bureau of Economic Research Working Paper No. 6950 (1999), available at <https://www.nber.org/papers/w6950.pdf>

²⁰ *Id.*

²¹ *See id.*

²² Decker *et al.*, *supra* n. 19.

²³ *Id.*

²⁴ Elsevier, *The Lancet*, available at <https://www.journals.elsevier.com/the-lancet>.

²⁵ The Lancet, *Keeping Sex Workers Safe* (Aug. 8, 2015) (emphasis added), available at [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)61460-X/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)61460-X/fulltext).

²⁶ Anna Nort, *The Movement to Decriminalize Sex Work, Explained*, Vox (Aug. 2, 2019), available at <https://www.vox.com/2019/8/2/20692327/sex-work-decriminalization-prostitution-new-york-dc>.

²⁷ *Id.*

Fifth, and finally, criminalizing sex work can have the perverse effect of forcing people to *remain* in the sex work industry. The Washtenaw County Prosecutor’s Office is well-aware that choice to engage in sex work is sometimes made out of desperation.²⁸ Some people who engage in sex work would prefer to do so for only a limited time. But criminalization—and the cascading employment-related consequences of a criminal record—can trap people in the sex work industry. That is because “[b]eing convicted of sex work-related offenses . . . gives sex workers a criminal record, which can make it hard to find . . . non-sex work employment.”²⁹

At the end of the day, laws which seek to avoid exposing people to the trauma, stigma, and violence associated with sex work may be well intentioned. When those laws carry criminal consequences, however, they can have the effect of *increasing* stigma, and foreclosing other employment options for sex workers. In that respect, criminalization of sex work is reminiscent of long-discarded “paternalistic” laws which sought to shield female workers from purportedly harmful consequences associated with a chosen profession—but, “in practical effect,” placed them “not on a pedestal, but in a cage.”³⁰

In any event, criminalization does not appear to prevent people from engaging in sex work. In the years following decriminalization of sex work in New Zealand, for example, “[t]he number of sex workers . . . does not appear to have meaningfully changed”—though “the vast majority” of sex workers enjoyed better, safer working conditions as a result of decriminalization.³¹

* * *

Accordingly—given the demonstrated public-safety and public-health benefits of decriminalizing sex work—the Prosecutor’s Office will decline to bring criminal charges that are based solely on the consensual exchange, between adults, of sex for money. The Prosecutor’s Office, however, will continue to vigorously pursue sex work-adjacent criminal charges, including charges involving violence, trafficking, or the victimization of children.

II. Policy Directive

1. Consensual Sex Work and Solicitation: The Washtenaw County Prosecutor’s Office will not file criminal charges based *solely* on:

- (a) the consensual exchange, between adults, of sex for (i) money or (ii) another thing of value, or

²⁸ See *id.* (quoting a sex worker: “If I could get a normal job as a black transgender woman that paid me sufficiently, that would make a bit of difference[.] [But] our government has chosen to continue to criminalize people instead of increasing resources, expanding opportunities, and giving people the ability to thrive.”)

²⁹ Nort, *supra* n. 26.

³⁰ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); see *Goesaert v. Cleary*, 335 U.S. 464, 466(1948) (upholding law generally prohibiting women from being bartenders because such a profession may “give rise to moral and social problems”), *overruled by Craig v. Boren*, 429 U.S. 190 (1976).

³¹ New Zealand Parliament, *Prostitution Law Reform in New Zealand* (July 2012), available at <https://www.parliament.nz/mi/pb/research-papers/document/00PLSocRP12051/prostitution-law-reform-in-new-zealand/>

(b) the solicitation of such an exchange.

For purposes of this Policy, an “adult” is someone 18 years of age or older. A “minor” is someone under the age of 18.

2. Violence and Sexual Assault: The Washtenaw County Prosecutor’s Office will continue to file—and to vigorously pursue—criminal charges in cases where violence or sexual assault arises out of a planned exchange of sex for money.

By way of example, criminal charges are appropriate where the evidence indicates:

- (a) A buyer, or a prospective buyer, physically assaulted a sex worker;
- (b) A buyer, or a prospective buyer, sexually assaulted a sex worker;
- (c) A buyer refused to use a condom despite a sex worker’s expressed wishes;
- (d) A buyer engaged in a sexual act to which a sex worker did not consent; or
- (e) A buyer engaged in sexual activity with a sex worker, but refused to pay. In such a case, the sex worker’s consent to engage in sexual activity was given contingent on the buyer’s promise to pay. The evidence may therefore indicate that consent for the sexual act was obtained via “coercion,” including the buyer’s “concealment” of the fact that the buyer had no intention to pay.³²

Note that in all of the foregoing examples, *the sex worker is the victim of a crime*. In such instances, pursuant to this Policy, charges should be filed only against the buyer/assailant—not against the sex worker who was the victim of physical or sexual assault.

3. Human Trafficking: This Policy does not prohibit or discourage the filing of charges related to human trafficking. The Prosecutor’s Office will continue to charge human traffickers—and those who knowingly seek to purchase sex with a trafficked person—wherever the evidence dictates. The Prosecutor’s Office will also continue to pursue charges against those colloquially known as “pimps.”³³ This Policy, however, prohibits prostitution and solicitation charges against individuals who were the *victims* of human trafficking, and who were forced to engage in sex work.

4. Purchase and Solicitation of Sex From Minors: This Policy does not prohibit or discourage the filing of charges against individuals who purchase sex, or seek to purchase sex, from minors. In such circumstances, however, charges related to the exchange of sex for money should be brought only against the buyer or the prospective buyer, not the minor.

5. Other Charges Not Covered By This Policy: Nothing in this Policy shall be interpreted to prohibit or discourage the filing of charges that are not covered by this Policy.

For example, if a police officer observes two people engaged in the consensual exchange of sex for money in an automobile, and further discovers that the automobile was stolen, the

³² See MCL 750.520e.

³³ See MCL 750.455 (criminalizing “procuring or inducing person to engage in prostitution”; MCL 750.457 (criminalizing the knowing acceptance or appropriation, without consideration, “from the proceeds of the earnings of any person engaged in prostitution.”).

Prosecutor's Office may, consistent with this Policy, file charges related to the automobile theft if the evidence dictates. Similarly, if in the process of engaging in the exchange of sex for money, a person engages in indecent exposure (e.g., has sex in a public place), the Prosecutor's Office may, consistent with this Policy, file charges of indecent exposure, if the evidence dictates and it is in the interest of justice.

6. Charges Should Be Supported by Evidence and in the Interests of Justice: Nothing in this Policy shall be interpreted to mandate or encourage the filing of charges that are not covered by this Policy. If an Assistant Prosecuting Attorney (APA) believes that filing charges other than those covered by this Policy are not supported by the evidence, or are not in the interest of justice, the APA should not file those charges.

7. Expungement: The Prosecutor's Office will not contest any application for expungement where the underlying charge arose solely from the consensual exchange of sex for something of value, or the solicitation of such an exchange.

8. No Substantive Rights Created: This Policy is an exercise of discretion by the Washtenaw County Prosecuting Attorney's Office. Nothing in this Policy purports to affect the legality or propriety of any law enforcement officer's actions. Nothing in this Policy shall be interpreted to create substantive or enforceable rights.

9. Solicitation of Prostitution in Commercial or Residential Areas: Nothing in this Policy should be construed to encourage the solicitation of, or engagement in, prostitution in commercial or residential areas. The Prosecutor's Office expects that law enforcement will continue to respond to calls for service related to solicitation or engagement in prostitution from such areas, and will respond as appropriate. This Policy covers only the upstream charging decision by the Prosecutor's Office.

10. Exceptions: Requests for deviations from this Policy shall be made in writing, and require the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney. A deviation from this Policy will be granted only in exceptional circumstances, and where public safety requires that deviation.



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