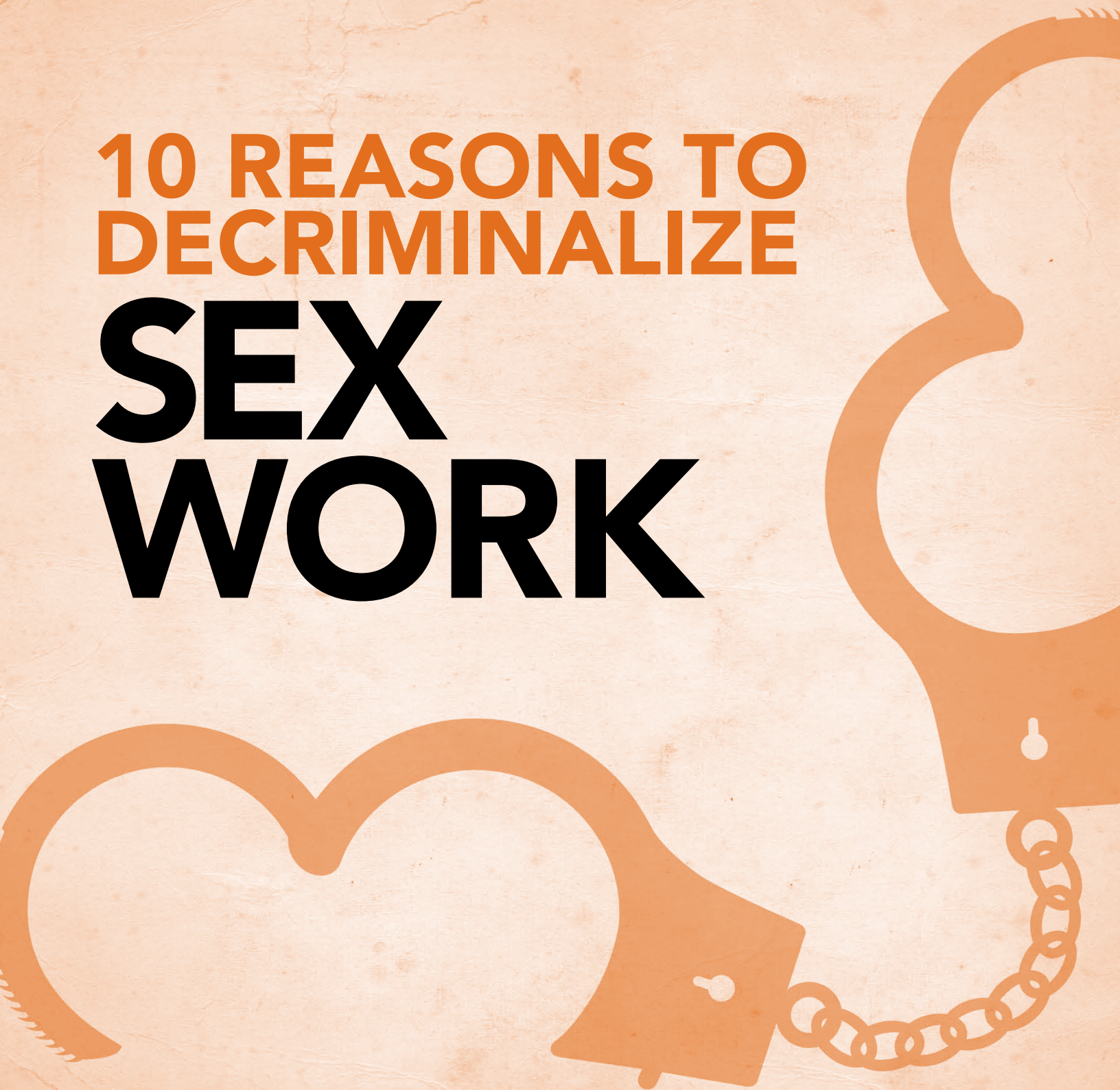


10 REASONS TO DECRIMINALIZE SEX WORK



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Open Society Foundations

The Open Society Foundations work to build vibrant and tolerant democracies whose governments are accountable to their citizens. Working with local communities in more than 70 countries, the Open Society Foundations support justice and human rights, freedom of expression, and access to public health and education.

Public Health Program

The Open Society Public Health Program aims to build societies committed to inclusion, human rights, and justice, in which health-related laws, policies, and practices are evidence-based and reflect these values. The program works to advance the health and human rights of marginalized people by building the capacity of civil society leaders and organizations, and by advocating for greater accountability and transparency in health policy and practice. The Public Health Program engages in five core strategies to advance its mission and goals: grantmaking, capacity building, advocacy, strategic convening, and mobilizing and leveraging funding. The Public Health Program works in Central and Eastern Europe, Southern and Eastern Africa, Southeast Asia, and China.

Sex workers are adults who receive money or goods in exchange for sexual services, either regularly or occasionally.¹ A sex worker can be male, female, or transgender. In most countries, sex work and activities associated with it are criminal acts.²

Sex work is criminalized either through direct prohibitions on selling sexual services for money or through laws that prohibit solicitation of sex, living off of the earnings of sex work, brothel-keeping, or procuring sexual services. In addition, sex workers are frequently prosecuted for non-criminal offenses—often municipal-level administrative offenses—such as loitering, vagrancy, and impeding the flow of traffic. By reducing the freedom of sex workers to negotiate condom use with clients, organize for fair treatment, and publicly advocate for their rights, criminalization and aggressive policing have been shown to increase sex workers' vulnerability to violence, extortion, and health risks.³

This document provides ten reasons why decriminalizing sex work is the best policy for promoting health and human rights for sex workers, their families, and communities.

Decriminalization refers to the removal of all criminal and administrative prohibitions and penalties on sex work, including laws targeting clients and brothel owners. Removing criminal prosecution of sex work goes hand-in-hand with recognizing sex work as work and protecting the rights of sex workers through workplace health and safety standards. Decriminalizing sex work allows workers to access financial services like bank accounts and insurance and other financial services. Moreover, decriminalization means sex workers are more likely to live without stigma, social exclusion, and fear of violence.

To effectively protect the health and rights of sex workers, governments must remove all criminal laws regulating sex work, including laws that criminalize the purchase of sex. Systems that maintain criminal penalties for clients who purchase sexual services continue to put sex workers at risk. Rather than ending demand for sex work, penalties on clients force sex workers to provide services in clandestine locations, which increases the risk of violence and limits the power of the sex workers in the transaction.⁴ When sex work is decriminalized, sex workers are empowered to realize their right to work safely, and to use the justice system to seek redress for abuses and discrimination.⁵ Even if sex work is decriminalized, the prostitution of minors and human trafficking can and should remain criminal acts.

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- 2 UNAIDS, Global Network of People Living with HIV, et al. (2010). Making the law work for the HIV response. Available at http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20100728_HR_Poster_en-1.pdf.
- 3 Shannon K and Csete J. Violence, condom negotiation and HIV/STI risk among sex workers. *Journal of the American Medical Association* 304(5):573-74.
- 4 Norway Ministry of Justice and the Police Working Group on the Legal Regulation of the Purchase of Sexual Services. (2004). *Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences, An Abbreviated English Version*, available at, <http://www.regjeringen.no/en/dep/jd/Documents-and-publications/Reports/Reports/2004/Purchasing-Sexual-Services.html?id=106214>. See also UNAIDS Advisory Group on HIV and Sex Work. *Report of the UNAIDS Advisory Group on HIV and Sex Work*. Geneva, 2011, available at http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/20111215_Report-UNAIDS-Advisory-group-HIV-Sex-Work_en.pdf, and Ostegren, P. (1999). *Sex Workers' Critique of Swedish Prostitution Policy*. Available at http://www.petraostergren.com/pages.aspx?r_id=40716.
- 5 Abel G, Fitzgerald L, Brunton C (2009). The impact of decriminalisation on the number of sex workers in New Zealand, *Journal of Social Policy* 38(3):515-531.

- 6 See e.g. Devine et al. (2010) Pathways to sex-work in Nagaland, India: Implications for HIV prevention and community Mobilisation, *AIDS Care* 22: 228 -237.
- 7 International Committee on the Rights of Sex Workers in Europe, *Declaration of the Rights of Sex Workers in Europe* (2005), available at <http://www.sexworkeurope.org/en/resources-mainmenu-189/declaration-mainmenu-199>.
- 8 Sex Workers' Rights Advocacy Network (SWAN) (2009). *Arrest the Violence: Human Rights Violations Against Sex Workers in Central and Eastern Europe and Central Asia*, available at http://www.soros.org/initiatives/health/focus/sharp/articles_publications/publications/human-rights-violations-20091217/arrest-violence-20091217.pdf.
- 9 Jenkins, C. (2006). *Violence and Exposure to HIV Among Sex Workers in Phnom Penh, Cambodia*, USAID. <http://www.sexworkeurope.org/en/resources-mainmenu-189/declaration-mainmenu-199>.
- 10 New Zealand Ministry of Justice (2003). *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act*. Available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>.

1 DECRIMINALIZATION REFLECTS RESPECT FOR HUMAN RIGHTS AND PERSONAL DIGNITY

There are many reasons why adults enter into sex work, including as their main livelihood or temporarily for survival or short-term revenue.⁶

Regardless of their reasons for engaging in sex work and the nature of their work, all people should be treated with respect and dignity. Sex work should be acknowledged as work and sex workers must be entitled to the fundamental right to work to support themselves and their families. Sex workers in many parts of the world have organized to fight for their human rights.⁷ These rights cannot be fully realized while criminal laws threaten sex workers' access to justice and to health and social services, undermine their right to workplace and labor protections, and expose them to arbitrary arrest.

2 DECRIMINALIZATION REDUCES POLICE ABUSE AND VIOLENCE

Police are often the perpetrators of abuses against sex workers. Where sex work is criminalized, police wield power over sex workers in the form of threats of arrest and public humiliation. They use this power to coerce, extort from, and physically abuse sex workers. In Central and Eastern Europe and Central Asia, a high proportion of sex workers have reported suffering sexual assault by police at some time, ranging from 20 percent of sex workers in Bulgaria to as high as 90 percent in Kyrgyzstan.⁸ In Cambodia, reports indicate that 42 percent of freelance sex workers have been beaten by police and 44 percent have been raped by police officers. Similarly, 72 percent of brothel-based sex workers have been beaten by police and 57 percent have been raped by police.⁹ Police in these contexts enjoy impunity for their offenses, in part because sex workers fear they will be arrested or subjected to further abuse if they report these crimes. Although decriminalization may not solve all of the problems of police abuse and misconduct, it can empower sex workers to come forward to register complaints against police who act unlawfully, and to bring offenders to justice without fear of negative consequences for their own livelihoods. This is exactly the experience that was documented following the 2003 law reform in New Zealand, as sex workers reported they could turn to the police and courts for help without fear of prosecution for the first time in their lives.¹⁰ Decriminalization should be paired with access to legal services to promote the health and rights of sex workers.

3 DECRIMINALIZATION INCREASES SEX WORKERS' ACCESS TO JUSTICE

The incidence of rape is high among sex workers in many settings. A survey of sex workers in Kenya, for example, revealed that 58 percent had experienced forced sexual encounters.¹¹ But sex workers who are criminalized are unlikely to feel safe going to the police to report violence perpetrated against them. The criminal law is also a barrier to access to civil protections, such as restraining orders, or to obtaining treatment and support after rape and abuse. In a 2011 ruling, the Ontario Superior Court decided that certain criminal prohibitions on sex work violated the Canadian Charter of Rights and Freedoms, citing evidence that most sex workers don't report violence because they fear they may be arrested or punished in other ways, such as losing custody of their children, losing their lawful employment, or being stigmatized for their association with sex work.¹² Decriminalization removes a major barrier to sex workers' reporting of rape and other crimes and makes it harder for violence against sex workers to be committed with impunity.

4 DECRIMINALIZATION PROMOTES SAFE WORKING CONDITIONS.

Decriminalization of sex work in New South Wales in Australia has been associated with sex workers' decreased risk of occupational injury or insecurity as compared to other Australian jurisdictions.¹³ One important way in which decriminalization promotes safer working conditions for sex workers is by enabling workers to organize. Collectively, sex workers can address risk factors in their workplaces and insist upon improved conditions. The power of collectivization to promote health by increasing access to condoms and other HIV prevention materials, as well as to establish health services and access to financial services, is evident from the successes of collectives in India, including the Durbar Mahila Samanwaya Committee in Sonagachi (Kolkata) and VAMP/SANGRAM in Sangli.¹⁴ The mobilizing efforts of the New Zealand Prostitutes Collective have had similar results for improving workplace safety. Decriminalization in New Zealand brought sex workers under the Health and Safety in Employment Act, resulting in the creation of occupational health guidelines, which sex workers have used to assert their rights with employers and clients.¹⁵

- 11 Federation of Women Lawyers Kenya (2008). *Documenting Human Rights Violations of Sex Workers in Kenya: A Report Based on Findings of a Study Conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi Towns In Kenya*.
- 12 *Bedford v. Canada*, 2010 ONSC 4264
- 13 Harcourt C et al. (2010). The decriminalization of sex work is associated with better coverage of health promotion programs for sex workers. *Australian and New Zealand Journal of Public Health* 34(5): 482-486.
- 14 Jana S, Basu I, Rotheram-Borus MJ, Newman PA (2004). The Sonagachi Project: A sustainable community intervention program. *AIDS Education and Prevention* 16:405-414; Shetty P (2010). Meena Saraswathi Seshu: Tackling HIV for India's sex workers. *Lancet* 376(9734):17. See also SANGRAM's collectives: Engaging communities in India to demand their rights, AIDSTAR-One Case Study Series.
- 15 New Zealand Ministry of Justice (2003) *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act*, available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>

- 16 Harcourt C et al. (2010). The decriminalization of sex work is associated with better coverage of health promotion programs for sex workers. *Australian and New Zealand Journal of Public Health* 34(5):482-486.
- 17 Jana et al., op.cit.
- 18 Blankenship K and Koester S. Criminal law, policing policy and HIV risk in female sex workers and injection drug users (2002). *Journal of Law, Medicine and Ethics*, 30: 548-559.
- 19 New Zealand Ministry of Justice, op.cit.

5 DECRIMINALIZATION INCREASES ACCESS TO HEALTH SERVICES

In Australia, laws regulating sex work vary from state to state—from decriminalization to legalization of only licensed brothels to criminalization of all prostitution, including brothel, street-based, and private sex work. Researchers have assessed whether different legal contexts affect the delivery of health services and occupational health and safety outcomes among sex workers.¹⁶ One study found that decriminalization is associated with the greatest financial support for sex worker health programs and the best access to brothels for outreach workers. Better financial support means greater capacity to conduct health outreach in the evening, an important feature because the evenings are often the busiest times for sex workers. Condom access and rates of use among sex workers are also higher in New South Wales, where sex work is decriminalized, than in other jurisdictions. In addition, when sex workers are able to work in collectives, they can organize health services for themselves, which are likely to be more respectful and more frequently used than other non sex worker-led services.¹⁷ Removing criminal penalties against sex work also facilitates partnerships between government and sex workers in addressing health and safety issues in sex work. Collectives are generally more difficult to organize where sex work is criminalized and criminal laws are harshly enforced.

6 DECRIMINALIZATION REDUCES SEX WORKERS' RISK OF HIV

Criminalization diminishes sex workers' bargaining capacity and the time and space available to negotiate condom use with clients.¹⁸ Fear that visible condoms, or the process of negotiation, will make sex workers more vulnerable to arrest is a likely deterrent for condom use, particularly among street-based sex workers who are often at highest risk for HIV. When sex work is decriminalized, sex workers are more empowered to insist on condom use by clients. Sex workers in New Zealand have reported that Ministry of Health guidelines about the requirement that clients and sex workers use condoms have helped inform them of their rights and have proven useful in safer-sex negotiations with clients.¹⁹

7 DECRIMINALIZATION CHALLENGES STIGMA AND DISCRIMINATION AND THE CONSEQUENCES OF HAVING A CRIMINAL RECORD

In many countries, harsh application of criminal law ensures that a large proportion of sex workers will have criminal records and will be put in jail or police lock-ups at some time in their lives. Sex workers are particularly susceptible to physical and sexual abuse in prisons, pretrial detention facilities, and police lock-ups, with dire health and human rights consequences.²⁰ In addition, being a former prisoner with a criminal record is a deeply stigmatized condition; the intersection of this stigma and the stigma already associated with sex work is a heavy burden. In some parts of the United States, for example, people convicted of sex work-related crimes are registered as “sex offenders” and must carry documents identifying them as such. They are then ineligible for public housing and other social services and are greatly impeded from finding non-sex work employment.²¹

8 DECRIMINALIZATION DOES NOT RESULT IN AN INCREASE IN THE POPULATION OF SEX WORKERS

There is no evidence to support the claim made by some that removing criminal prohibitions on sex work will result in an expansion of the sex industry.²² In New Zealand, a study estimating the number of sex workers in five locations throughout the country before and after decriminalization demonstrated that the Prostitution Reform Act of 2003 had little impact on the number of people working in the sex industry.²³

20 Shannon K and Csete J. Violence, condom negotiation and HIV/STI risk among sex workers. *Journal of the American Medical Association* 304(5):573-74.

21 Best Practices Policy Project. Report on the United States of America submitted to the UN Human Rights Council for the 9th Universal Periodic Review, 2010, available at <http://www.bestpracticespolicy.org/UPRreport20101.html>.

22 Harcourt C, Egger S and Donovan B (2005). Sex work and the law. *Sexual Health* 2:121-128.

23 Abel et al, op.cit.

- 24** United States Department of State, *Trafficking in Persons Report* (2010), available at <http://www.state.gov/g/tip/rls/tiprpt/2010/index.htm>.
- 25** UNAIDS Guidance Note on HIV and Sex Work (2009), at p 12, available at http://data.unaids.org/pub/BaseDocument/2009/jc1696_guidance_note_hiv_and_sexwork_en.pdf.
- 26** Transgender people are rarely protected by law from discrimination based on gender identity, and discrimination in employment may be one factor that leads them to engage in sex work. See, e.g., K Slamah, S Winter and K Ordek. Stigma and violence against transgender sex workers. *RH Reality Check*, 16 Dec. 2010. Available at <http://www.rhrealitycheck.org/blog/2010/12/16/stigma-exclusion-violence-against-trans-workers>.

9 DECRIMINALIZATION FACILITATES EFFECTIVE RESPONSES TO TRAFFICKING

Concerns that decriminalization will promote sex trafficking are founded on a mistaken conflation of sex work and trafficking. In fact, jurisdictions that decriminalize sex work can retain and even strengthen criminal prohibitions on trafficking, sexual coercion, and the prostitution of minors. Decriminalizing sex work does not cause an increase in trafficking. For example, New Zealand, which decriminalized sex work in 2003, continues to be ranked in Tier 1 by the United States State Department's Trafficking in Persons report—that is, the country is judged to be among those doing the most effective work on human trafficking.²⁴ Laws and policies that encourage or enable collectivization of sex workers may also facilitate enforcement of anti-trafficking laws. When not themselves under the threat of criminal penalties, sex workers and their organizations can work with law enforcement to combat trafficking. The UNAIDS Guidance Note on HIV and Sex Work highlights sex worker organizations as best positioned to refer women and children who are victims of trafficking to appropriate services.²⁵ Criminalization of sex work can impede the anti-trafficking efforts of sex worker organizations and make it easier for sex workers to be wrongly categorized as trafficked persons.

10 DECRIMINALIZATION CHALLENGES STATE CONTROL OVER BODIES AND SEXUALITY

The different treatment of sex work from other types of work is an example of governments' long history of exerting control over bodies and sexuality. Decriminalization is an issue of gender equality and sexual rights. Laws against sex work intrude into private sexual behaviors and constitute a form of state control over the bodies of women and transgender women, who make up a large majority of sex workers worldwide.²⁶ Like state controls over reproductive rights and limits on abortion, criminal laws prohibiting sex work attempt to legislate morality without regard for bodily autonomy. Decriminalizing sex work is a step in the direction of recognizing the right of all people to privacy and freedom from undue state control over sex and sexual expression.

Criminal laws contribute to social marginalization not only through the imposition of legal penalties on sex workers prosecuted for specific acts, but also through the assignment of criminal status to all sex workers, regardless of any particular arrest, charge, or prosecution.²⁷ This sweeping condemnation leads to widespread discrimination, stigma, and ill treatment in social institutions and services, by health providers, police, and the general public. Decriminalization removes one source of stigma, the criminal label that serves to validate mistreatment or social exclusion.

- 27** Csete J and Cohen J (2010). Health benefits of legal services for criminalized populations: The case of people who use drugs, sex workers and sexual and gender minorities. *Journal of Law, Medicine and Ethics*, 38: 816-828.

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Sexual Health and Rights Project

The Sexual Health and Rights Project, part of the Open Society Public Health Program, promotes human rights-based approaches to advancing the health of sex workers and transgender individuals. The project often aims to develop, pilot, and disseminate information on innovative approaches to improving the health of sex workers and transgender individuals in order to integrate these approaches into wide-scale health programs and plans.

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