



Community Guide

The Global Health
Justice Partnership of
the Yale Law School and
Yale School of Public
Health

in cooperation with

The Sex Workers Project
of the Urban Justice
Center

Possibilities and Impacts of Non-Prosecution Policies in the Context of Sex Work Criminalization

This resource is a Community Guide to *Exercising Discretion: A Handbook for Advocates and District Attorneys Navigating the Possibilities and Impacts of Non-Prosecution Policies in the Context of Sex Work Criminalization*. The Community Guide provides an overview of the main takeaways of the Handbook.

Introduction

In recent years, candidates for District Attorney and elected DAs across the country have announced their commitment to not prosecute some **sex work**-related charges, among others, according to formal non-prosecution policies. These DAs adopt such policies with varied levels of consultation and input from sex worker rights' groups. More recently, these DA policies have also been informed by growing mainstream support for the full decriminalization of sex work, for racial justice and the recognition of the harms of criminal law, especially on marginalized individuals, and in recognition of the exacerbation of harms arising from the ongoing COVID-19 pandemic.

Exercising Discretion provides an overview of key features of and variations in non-prosecution policies, their significance for implementation, and an exploration of some of the dynamics that can arise with criminal legal actors and other stakeholders, along with illustrative case studies drawn from a select number of relevant jurisdictions. It is intended to support active and critically informed engagement by affected communities with these varied DA policies on the ground.

Sex work is the exchange of sexual services for money or goods, including housing, food, drugs, or basic necessities. It may involve working independently, with others, or for a third party. Some forms of sex work, such as the exchange of sexual conduct, are criminalized through prostitution laws; others, such as erotic dancing ('stripping') or the portrayal of sexual activity through visual material ('pornography' or 'erotica'), are regulated but not prohibited by criminal law.

What is a District Attorney?

Prosecutors are attorneys working for the government, at the local, state, or federal level who are responsible for starting legal procedures and securing a conviction against someone accused of a **crime** – either by proving in court that they committed the crime or, more commonly, by negotiating for the person to plead guilty. The head prosecutor in a specific judicial district at the state level (county, parish, or borough), commonly called a district attorney (“DA”), is either elected or appointed by other state actors.

The two most common types of court cases are criminal and civil. A criminal case takes place when the government seeks to punish an individual for an act that has been classified as a **crime** under federal, state, or local law. In a criminal case a prosecutor initiates and controls the case (as opposed to the injured party in a civil case). Crimes are usually divided into three categories, based on severity of punishment: felony, misdemeanor, or infraction.

The DA leads a team of prosecutors who in practice take most cases forward, while the DA typically directly prosecutes only the most important cases. As chief prosecutor, however, the DA is responsible for the overall coordination of prosecution in a given jurisdiction and thus has influence over the work of other prosecutors. Many scholars consider prosecutors to be the most powerful officials in the **criminal legal system**.

We use the phrase “**criminal legal system**” rather than “criminal justice system” as an acknowledgement that the system does not deliver justice for many individuals and communities.

What is prosecutorial discretion?

Prosecutorial ‘discretion’ is a wide decision-making power given to prosecutors across every stage of the criminal process that allows them to choose whether and how to proceed with a criminal case.

Prosecutors have the power to decide which crimes a person will be charged with, including crimes more or less severe than what they were arrested for, and the power

to not charge them at all and/or to **divert** them from court to participate in a social services program. They have the power to negotiate with individuals to charge them with less serious crimes if they agree to plead guilty (**‘plea bargaining’**). They can request that a court grant bail, meaning that those who can afford it may pay to be released from custody before trial, or revoke bail. Courts rarely intervene to limit these decisions.

Diversion programs: A wide-ranging set of practices embedded in the criminal justice system claiming to offer persons facing arrest, conviction, or detention from certain eligible offenses an alternative to arrest or incarceration (and the resulting criminal record) through some form of conditional services. They may arise pre-arrest, pre-booking, pre- or post-adjudication or sentencing.

A **plea bargain** is an agreement between the defense and the prosecutor in which the defendant agrees to declare themselves guilty or to not dispute the charges in exchange for an agreement by the prosecution to drop some charges, reduce a charge to a less serious one, or recommend to the judge a specific sentence. Plea bargains are very common: more than 90% of convictions come from plea bargains.

As chief prosecutors, DAs can instruct all prosecutors in their offices to make specific decisions according to given guidelines.

How does prosecutorial discretion impact sex workers’ health and rights?

With the exception of certain counties in Nevada, all US states explicitly ban the selling and buying of sexual conduct for material or financial compensation, which is referred to by criminal law as **‘prostitution’**.

DAs operate at the state and county level, and so their policies particularly impact sex workers because much of the law criminalizing sex work, including prostitution

Prostitution laws: Laws that prohibit the exchange of sexual conduct for money or goods and certain related activities by placing criminal penalties on individuals who sell or buy sexual services. We note that we use the term “prostitution” solely in reference to the legal wording of prostitution offenses. In all other contexts, we use the preferred term “sex worker” or sex trade worker.

offenses and laws like loitering for the purpose of prostitution, is found in state law and municipal codes.

These laws lead to arrest and involvement in criminal legal processes, particularly in poorer communities and communities of color, where the most visible and policed forms of sex work are concentrated, and also impact people profiled as sex workers, such as transgender women of color. Criminal records carry a range of consequences, from difficulty in

seeking employment and housing, impacts on custody, adoption and other family court matters, to denial of immigration relief and possible deportation.

DAs' choices can facilitate or mitigate the harms of criminalization, including poorer sexual and mental health outcomes; exposure to harassment and violence by police and clients; and deterring sex workers from seeking out social services, health care, and legal recourse for harm.

Key elements of a model non-prosecution policy

Variations in non-prosecution policies result in different shortcomings. A model non-prosecution policy would include the key features below.

Decline prosecution for all offenses related to the selling and buying of sex

The scope of non-prosecution policies has been influenced by DAs and movements aligned with different model legal frameworks for sex work, most notably **full decriminalization** or the **'End Demand'** model. Non-prosecution policies mimic these different models by declining to prosecute both sex workers and clients, or declining to prosecute sex workers but continuing to prosecute clients, in the context of the continued criminalization of sex work.

Full decriminalization is the complete removal of criminal penalties related to the sex trade. It lifts penalties for both sex workers and clients, as well as for related activities. The Global Justice Health Partnership, the Sex Workers Project, most sex worker-led organizations, as well as many other human rights organizations – such as Human Rights Watch, the ACLU, and Amnesty International – favor this approach.

The **"End Demand"** a.k.a. Nordic model criminalizes buying sexual services but not selling sexual services. Clients and anyone who facilitates selling and buying sex are subject to criminal penalties. This model nevertheless directs police action to areas where sex workers conduct business, exposing sex workers to arrest and prosecution under non-sex work related charges, as well as all of the elements of state violence from police exposure.

Policies that continue to prosecute clients encourage police surveillance, reduce sex worker safety, facilitate the arrest of sex workers on other charges, and enable the targeting of low-income men and men of color. End Demand-aligned policies are risky as a potential harm reductionist or incremental step to a broader policy, as they may become established and contribute to growing an ideology inconsistent with full decriminalization.

Decline prosecution of 'quality-of-life' and other offenses that engage sex workers

Non-prosecution policies also vary in the offenses covered, with some including only sex work-specific offenses related to buying and selling sex, and others including laws against vagrancy, obscenity, drug use, and other **quality of life** offenses.

Declining to prosecute sex work-specific offenses is important; but non-prosecution policies are limited if they do not include the other crimes commonly used to harass, arrest, charge, and prosecute sex workers.

Quality-of-life offenses are an umbrella category, grouping some infractions and misdemeanors that are thought to make a community feel less safe or desirable. They are not a formal category of criminal offenses, but rather one based on moral or value judgment. Examples of quality-of-life offenses include excessive noise, loitering, vandalism, panhandling, drug use, prostitution, and others.

These other offenses target public space and those working in street economies, including street-based sex workers, and facilitate class-based discrimination against poor people, racism, and gender-based discrimination, including against trans and gender non-conforming people.

Policies are also limited if they do not explicitly include non-prosecution for unlicensed massage, which have long caused police raids disproportionately impacting Asian communities, and often resulting in immigration-related charges. Since **trafficking** charges are excluded from non-prosecution policies, sex workers are not protected from the indiscriminate use of trafficking arrests to target sex workers who work together.

Trafficking is defined in United States federal and state law, as well as international law, and refers to the recruitment, receipt, or harboring of an individual through force, fraud, or coercion for the purposes of exploitation in any labor sector, including but not primarily the sex sector. The U.S. Trafficking Victims Protection Act of 2000 defines trafficking to include inducement of a commercial sex act by a minor, regardless of whether there is evidence of force, fraud, or coercion.

Decline prosecution of 'third party' charges

Non-prosecution policies are limited if they do not include offenses, such as promoting prostitution, that criminalize third parties, i.e. people working as personal assistants, drivers, security, web designers and even other sex workers and/or friends and family, who work with, are paid by, support or are supported by sex workers. Notably, paying security or working together are safety strategies used by sex workers to overcome the lack of labor and police protection caused by criminalization.

Excluding third party offenses deters people from providing those supports, discourages sex workers from working together for safety, and functions similarly to End Demand-style policies in maintaining police surveillance and harassment.

Drop current charges, advocate to courts to dismiss current and past warrants, charges and cases, and advocate to courts and legislatures to expunge related convictions

Non-prosecution policies should include action to mitigate the impact of past charges, such as seeking to have arrest warrants, charges, cases, or convictions withdrawn in court or by the legislature. Depending on the action legally available in a specific state, this can modify the criminal record to note that a charge or conviction have been withdrawn (**vacated**), hide the record from public view (**sealing**), or remove it entirely (**expungement**). In each case, this removes related actions (e.g. arrest on an active warrant) or penalties (e.g. having to cite a conviction on an employment application). However, none of these options remove references in court documents, police blotters, the press, Google or social media.

Non-prosecution policies are limited and unfair if they do not seek to remove prior charges and convictions. Such penalties cause ongoing consequences in relation to education, housing, immigration, and family law, among others. Removing penalties is also aligned with movements for cash bail reform, in keeping people with sex work-related charges out of dangerous conditions in jail, and not punishing individuals for poverty.

Vacating a warrant, charge, or conviction withdraws the warrant, charge, or guilty verdict (and any penalties), and modifies the criminal record to note that the charge or conviction has been vacated. A formal record of the charge or conviction remains.

Sealing removes the conviction from an individual's public record, but it is still accessible to law enforcement and courts. A formal record of the charge or conviction remains.

Expungement, in some states, takes the extra step of destroying the arrest and/or conviction and related records.

Points of influence in policy implementation

Because prosecutors have broad discretion in their jurisdictions, they are central actors in shaping the concrete application of the law, but they are not alone. Indeed, District Attorneys function in a broad ecosystem of court actors (judges and defense attorneys, among others), law enforcement, and other state officials – including **attorneys general** (AGs), the top legal officers of a particular state (and DC) – who may or may not cooperate with the DA's specific priorities.

State Attorneys General (AGs) are in each state the chief law enforcement officers of the state government. Their specific functions vary state to state, but generally include representing the state in litigation, advising government, leading law reform and policy across a range of areas, and some criminal law enforcement, mostly appellate or statewide prosecutions, but also in some states including the overlapping power with DAs to prosecute local cases, and even to oversee or intervene in DA cases.

Influence by other legal actors with prosecutorial power

DAs function alongside other legal officials with the power to prosecute sex work-related charges, complicating the ability of an individual DA to ensure that sex workers are not prosecuted.

State Attorneys General are elected or appointed separately to DAs, and so DAs do not 'work for' them. AGs in many states have some power to prosecute state-law criminal violations as part of their role, and may even in some states take over responsibility for the case. This can lead to conflict where DAs decline to prosecute, and State AGs may prosecute in their place; indeed, some state legislatures have granted State AGs that power in response to DA policies.

When DAs are city officials, their power to prosecute overlaps with the power not only of state AGs, but also of county DAs working over the same area.

Influence by police

DAs have an interdependent relationship with police as their role, generally, relies on their arrests and evidence collection to bring charges and prosecute cases. While non-prosecution policies mean that DAs are not charging people for certain offenses, this does not remove these offenses from the law, and police still have the power to arrest under them.

While some DAs and police departments have worked together to reduce arrests in alignment with non-prosecution policies, others have not, and continued police contact, arrests and harassment maintain many of the harms of the criminalization of sex work. A lack of data around criminal enforcement, especially for low-level misdemeanors, means there is virtually no way to systematically assess whether police are reinforcing or undermining a non-prosecution policy. Continued police action may be in response to complaints from local businesses or community groups. Police have also selectively not enforced other crimes as leverage against a DA policy they disagreed with, limiting prosecutors' ability to prosecute those crimes and claiming that they were included in the policy. However, police may also create policies of non-arrest independently of non-prosecution policies, preventing prosecution and reducing contact between sex workers and the criminal legal system.

Influence by judges

DAs may face resistance from judges; for example, judges may deny DA recommendations of non-prosecution or refuse to accept motions to strike past convictions. However, a number of judges have supported DAs' in granting their requests to have current and past arrests, charges, and convictions withdrawn as part of non-prosecution policies.

Policy development and communication

Practices in communicating policies

DAs' public communication about the scope of non-prosecution policies varies. Some DAs release a full policy statement detailing the scope of the policy while others do not emphasize non-prosecution of sex work-related charges but only list them among other charges no longer prosecuted. A more general frame may help to avoid backlash: for example, an explicit statement that clients will not be prosecuted may trigger action by End Demand advocates, although this type of action has also occurred with a vague policy. Backlash may also occur based on parts of policies unrelated to sex work.

Specific, clearly stated, and publicly available policies better ensure transparency and accountability, while also destigmatizing sex work, and providing clarity on prosecutors' future actions.

Engagement with advocates

Non-prosecution policies are developed with varied levels of input from sex workers and sex worker rights advocacy

organizations. These individuals and groups have spent years organizing to impact sex workers' rights locally and nationally in relation to police practices, prosecution, and the criminal law. This organizing and activism has occurred within and outside of the election cycle. Notably, the criminalization of sex work creates barriers for public organizing due to stigma, fear of legal repercussions or police retaliation, and funding restrictions. Importantly, these barriers remain unmitigated in places with non-prosecutions policies, where targeted organizing is needed.

Even where these groups are involved, DAs have often selectively incorporated the most politically palatable demands, while other key recommendations are sacrificed. Meaningful engagement by DAs only occurs where sex workers are fully engaged in the development of policies, demands are fully implemented, and continued accountability mechanisms are created, such as sex worker inclusion in monitoring and evaluation efforts.

Recommendations

A core theme of *Exercising Discretion* is that full decriminalization of sex work is essential to protecting the human rights, safety and health of sex workers, reducing stigma, as well as ensuring that sex workers receive compensation for their labor, have access to a stable livelihood and social services responsive to their needs, while also being able to organize and exercise collective powers.

With the goal of full decriminalization in mind, DAs can use their power to mitigate some of the current harms of criminalization, highlighting the following recommendations:

- Seek out the expertise and input of sex workers and sex workers' rights organizations.
- Engage with the range of legal actors in their jurisdictions.
- Decline prosecution for all offenses related to the selling and buying of sex, including prosecution of 'third party' charges absent evidence of force, theft or coercion.
- Decline prosecution of broader 'quality of life' offenses.
- Include specific action to seek the dismissal of current and past charges.
- Track data on prosecution and arrest to ensure that all sex workers, including sex workers of color, trans and gender nonconforming sex workers, and low-income sex workers, are included in the protection of a non-prosecution policy.