



# **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**

**by 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**

**The Global Health Justice Partnership (GHJP)** is an initiative of the Yale Law School and Yale School of Public Health established in 2012 to promote interdisciplinary, innovative, and effective responses to key problems in health justice. It is a transformative collaboration integrating different fields in order to make critical policy interventions, develop new kinds of cross-cutting research, and provide educational opportunities straddling a variety of academic disciplines. Leveraging Yale’s institutional assets, the GHJP trains students to undertake collaborative, real-world research and advocacy to promote health justice in the U.S. and globally. It also organizes conferences and events; builds partnerships with local NGOs and social movements in New Haven, the U.S., and around the world to move research and critical analyses into action; and nurtures a truly interdisciplinary brain trust dedicated to effecting social change. The cornerstone of GHJP is a practicum/clinic course fusing didactic and experiential learning on critical topics at the intersection of public health, rights, and justice in the twenty-first century.

**The Sex Workers Project of the Urban Justice Center (SWP)** is a national organization based in the U.S. that defends the human rights of sex workers by destigmatizing and decriminalizing people in the sex trades through free legal services, education, research, and policy advocacy. SWP aims to create a sexually liberated world where all workers have the autonomy and power to fully enjoy their human rights. In collaboration with and guided by impacted communities, SWP offers legal advocacy to survivors of human trafficking and people who engage in sex work, regardless of whether they do so by choice, circumstance, or coercion. SWP also engages in media advocacy, supports sex worker-led organizations, pursues local, state, and federal policy change, and conducts groundbreaking human rights research rooted in the real-life experiences of sex workers and survivors of trafficking.

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***This handbook is intended to be used and shared widely. If you use information or excerpts from the handbook, please include a citation, such as:***

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This handbook is not, and is not  
intended to be, legal counsel or  
advice. It includes only the  
restatement and summary of  
foundational legal concepts and  
research, as relevant.

Cover image: iStock.com/erhui1979

The cover image is an illustration of  
black dots representing rain, partially  
blocked by an extended forearm, and  
cupped red hand, with the palm  
facing down. The forearm is clothed  
with a white shirt cuff and black  
sleeve. The image represents  
discretion and how district attorneys  
may use it through non-prosecution  
policies to shield sex workers from  
some, but not all, the harms of the  
criminalization of sex work labor.

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# HOW TO USE THIS HANDBOOK

This handbook, by the Global Health Justice Partnership of the Yale Law School and Yale School of Public Health, with the Sex Workers Project of the Urban Justice Center, seeks to support sex worker rights advocates, prosecutors, policy makers and other stakeholders in understanding, influencing, tracking, and assessing the operation and impact of non-prosecution policies that include charges related to **sex work**, as adopted by District Attorneys in the United States.

In recent years, candidates for District Attorney (DA) 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, often identified with a broader “progressive prosecutor” movement, adopt such policies with varied levels of consultation and input from sex worker rights’ groups, despite years of community organizing by those groups in support of sex workers’ rights. More recent DA non-prosecution policies have been informed by growing support for the **full decriminalization** of sex work; for racial justice and the recognition of the harms of criminal law, particularly on Black people and communities of color, people with low or no income, Indigenous people, and transgender and queer people; and in recognition of the exacerbation of such harms due to the ongoing COVID-19 pandemic. Non-prosecution commitments by DAs have also taken on additional salience with the June 2022 Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization*, which eliminated the constitutional right to abortion after almost 50 years, as some prosecutors stated that they will refuse to prosecute those seeking, assisting, or providing abortions in states with abortion bans.

DA non-prosecution policies vary in scope, along with the broader context of their implementation. This handbook is intended to be used in advocacy and policymaking to develop or shift non-prosecution policies so that they protect and promote sex workers’ rights and health, including the right to health and broader human rights, and mitigate the harms of the criminal law, to the greatest extent possible in the context of sex work criminalization.

**The handbook is structured in five sections, as follows:**

## SECTION I: ACTION SHEET: MODEL POLICY AND LANDSCAPE ANALYSIS

Section I is an Action Sheet, providing a framework to navigate specific information across the thematic sections of the handbook as relevant, useful, or needed. It presents the scope of charges that DAs should decline to prosecute under a Model Policy, emphasizing the importance of non-prosecution policies that cover the range of offenses that may be used to surveil, control, and punish sex workers, clients and third parties. It then provides a series of Landscape Analysis Questions for advocates engaging with the development, implementation, and monitoring of non-prosecution policies, based on issues or factors that have arisen in the implementation of existing policies to date. The questions are accompanied by links to relevant sections of the handbook.

**Advocates can use this section to identify relevant issues, and avenues for advocacy with their local DA office.**

**Sex work**, broadly defined, 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. Work in the sex sector/sex trades occurs in many different forms and settings, including street-based or web-based settings, escort services, and video camera work (or “camming”), among others. Some forms of sex work, such as the exchange of sexual conduct, are criminalized through **prostitution laws** (see below); others, such as erotic dancing (i.e., ‘stripping’) or the portrayal of sexual activity through visual material (i.e., ‘pornography’ or ‘erotica’), are regulated but not prohibited by criminal law.<sup>1</sup>

**Prostitution laws** are 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, as well as those who assist, support or are supported by sex workers.<sup>2</sup> 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.” Using the term “sex work” reinforces the idea that sexual labor is work and supports the discussion of applying labor rights and concern for the conditions of work to sex work.<sup>3</sup>

**Full decriminalization** is the complete removal of criminal laws prohibiting sex work. It lifts penalties for sex work (i.e., soliciting / selling sex or “prostitution”), as well as for related activities, such as loitering and other ‘quality-of-life’ offenses often applied against street-based sex workers.<sup>4</sup> It also removes penalties for clients (e.g., patronizing a prostitute) and ‘third party’ activities including promotion, management, security, transportation, and organizing (criminalized under offenses such as “promoting prostitution.”) Under this framework, there are no criminal penalties for selling or buying sexual services absent other crimes. This means that trafficking (i.e., selling sex induced by force, fraud or coercion, or by an individual under 18 years old), violence and victimization, and intimate partner violence all remain illegal. Labor laws that promote sex workers’ rights remain applicable, with a shift to their protections governing sex work as labor, in the place of governance under criminal law.<sup>5</sup>

## SECTION II: POLICY DEVELOPMENT AND COMMUNICATIONS

Section II explores the development of non-prosecution policies to date, notably how policy development has been influenced by growing movements for sex workers' rights and the full decriminalization of sex work, growing mainstream support for racial justice and understanding of the harms of criminal law, and shifts in criminal law enforcement and prosecution due to the COVID-19 pandemic. It also discusses how choices made by DAs around how to communicate and implement their policies impacts transparency and backlash, and presents important principles for DA engagement with sex workers' rights groups and advocates.

**Advocates can use this section to identify relevant contextual drivers for the development of non-prosecution policies, and dynamics of DA communications and advocate engagement.**

## INFORMATION SHEETS

[Growing Support for Sex Workers' Rights](#)

[Growing Mainstream Recognition of the Harms of Criminal Law](#)

[COVID-19 and Prosecutorial Policies](#)

Section II includes information sheets summarizing background conditions that have informed non-prosecution policy development. Formatted as stand-alone documents, advocates may print or send these as part of advocacy or education efforts with DAs or other stakeholders.

Stand-alone PDFs are available alongside the handbook on [GHJP's website](#).

## SECTION III: KEY ELEMENTS OF A NON-PROSECUTION POLICY

Section III presents the key features of a model non-prosecution policy in detail, and discusses variations in policy models and their possible shortcomings. These key features include declining prosecution for all offenses related to the selling and buying of sex, including the non-prosecution of clients; declining prosecution of 'quality-of-life' offenses, such as vagrancy or loitering, and other offenses that engage sex workers in the criminal legal system, such as unlicensed massage; declining prosecution of 'third party' charges; and including action in the policy to support the dismissal of current and past charges and cases.

**Advocates can use this section for detailed recommendations for the scope of non-prosecution policies.**

## SECTION IV: POINTS OF INFLUENCE IN POLICY IMPLEMENTATION

Section IV explores points of influence on non-prosecutor policies, including public accountability mechanisms, such as elections, information sharing and research, and extending to the relationships between DA offices and police, other legal actors with prosecutorial power, legislatures, and judges. DAs have wide discretion and are central actors in shaping the concrete application of the law in their jurisdiction, but they also operate in an ecosystem of criminal legal actors. This section presents how each of these actors can inhibit or support non-prosecution policies and broader goals of mitigating the harms of criminalization on sex workers, relevant both as these actors may be addressed by advocates and in how DAs can and should seek collaboration.

**Advocates can use this section to identify other actors to target in advocacy, and their dynamics with DAs.**

## SECTION V: PRIMER ON DISTRICT ATTORNEYS, CRIMINAL LAW, AND SEX WORK

Section V provides important background information on the power of district attorneys; their role in the criminal legal system; the scope, rationales, and critiques of prosecutorial discretion; and the ways that DAs can enhance or mitigate the harms of criminal law, particularly regarding sex workers' health and rights.

*This section is intended to build foundational understanding of this area and should be the first section consulted for those new to engaging with DAs. Similar to the information sheets, it may also be used as a stand-alone resource to share with stakeholders or other audiences in advocacy or education.*

**Advocates can use this section to enhance their own or others' understanding of the role and powers of DAs, both generally and with regard to the harms of criminal law and its impact on sex workers' health and rights.**

This handbook is not intended to present an exhaustive in-depth analysis of every jurisdiction that has adopted a non-prosecution policy across the country.<sup>6</sup> However, we provide case studies throughout the toolkit, in order to examine how the context and policy model of non-prosecution policies may affect their implementation, outcomes, and impact on sex workers. These case studies are primarily drawn from five focus jurisdictions, chosen to represent varied approaches to implementing a non-prosecution policy for sex work-related charges:

- Baltimore, Maryland, due to the adoption of the policy in response to COVID-19;
- Manhattan, New York, due to the context of heavy sex worker rights organizing;
- New Haven, Connecticut, because of local advocacy to police, and the establishment of a non-arrest policy for prostitution offenses;
- Seattle, Washington, because policies in effect explicitly maintain the prosecution of clients; and
- Washtenaw County, Michigan, due to the DA's explicit positioning in favor of decriminalization and public health approaches.

Additionally, we include information from a broader range of jurisdictions that have implemented some form of non-prosecution policies, including but not limited to San Francisco, Philadelphia, Brooklyn, and Suffolk County.

The information in this handbook reflects the DA non-prosecution landscape from 2021 and 2022. As new policies are announced and others are reshaped, hopefully with the meaningful input of sex worker rights advocates, the landscape may shift. However, we believe that the handbook offers valuable information to support active and critically informed engagement by members of the sex worker rights movement and its allies to advocate for better policies on the ground, and work to highlight how these policies are successful (or not) in protecting and promoting sex workers' rights and health, while also providing necessary considerations for DAs looking to adopt non-prosecution policies.

**ACTION SHEET:  
MODEL POLICY AND  
LANDSCAPE ANALYSIS**

## MODEL POLICY

To protect and promote sex workers' rights and health, and mitigate the harms of the criminal law, to the greatest extent possible in the context of sex work criminalization, non-prosecution policies must cover the range of offenses used to harass, surveil, control, and punish sex workers, clients and third parties, while also supporting action to remove or mitigate current or past involvement in the criminal legal system. We consider how this may be done in exploring key elements of a model non-prosecution policy, considering examples of implementation on the ground.

Non-prosecution policies should:

- Decline prosecution for all offenses related to the selling and buying of sex, including the non-prosecution of clients, in light of the clear evidence of the harms of an End Demand model.....28
- Decline prosecution of broader 'quality-of-life' and other offenses, which may often substitute for charges specifically prohibiting transactions for sex in jurisdictions where only those offenses are declined, and more broadly engage sex workers in legal oppression and penalization .....34
- Decline prosecution of 'third party' charges, which have been used to criminalize people providing support to sex workers to conduct their work safely, critically this also includes other sex workers, as well as family members, friends, and those who live with or are supported by sex workers .....37
- Include specific action by DAs to support the dismissal of current and past charges and cases related to offenses under the non-prosecution policy, which in line with other recommendations should include a range of charges beyond those related specifically to the selling and buying of sex .....39

### NON-PROSECUTION POLICIES FALL SHORT OF FULL DECRIMINALIZATION AS A MEANS TO PROTECT SEX WORKERS' RIGHTS, SAFETY AND HEALTH

**As non-prosecution policies occur in the context of the continued criminalization of sex work, District Attorneys can use their power in the criminal legal system to mitigate some (and only some) of the harms in the day-to-day functioning of the criminal law.** Full decriminalization – the complete removal of criminal penalties related to the sex trade, including lifting penalties for both sex workers and clients, as well as for related activities – is essential to protecting the rights, safety and health of sex workers, reducing stigmatization, as well as ensuring that sex workers receive compensation for labor, have access to a stable livelihood, can access social services responsive to the needs of sex workers, and have the ability to organize and exercise collective powers.<sup>7</sup> This is critical to understand the importance of DA non-prosecution policies as a harm reduction tool within the context of sex work criminalization, but that the ultimate goal still remains full decriminalization.

**Absent decriminalization, sex workers face significant legal barriers to rights, safety, and health.** Police and prosecutors hostile to sex workers can lawfully continue to harass, arrest, and prosecute sex workers using the law. Sex workers may continue to be subject to police and state surveillance, arrests, court cases, criminal penalties, incarceration, and the collateral consequences of criminal records, as well as a context in which it is difficult, if not impossible, for sex workers to seek protection from violence and report it when it occurs. Indeed, DAs may continue to prosecute sex work-related charges even if they have released public, written policies of non-prosecution.<sup>8</sup>

**If DAs stay in office, and keep their word, they can open a preliminary space disengaging sex workers from some criminal legal involvement, lessening some of the barriers criminalization creates for sex worker rights organizing.**<sup>9</sup> Non-prosecution can present the possibility of quicker, but limited, change. But it also brings more attention to sex work and decriminalization equally quickly, which may heighten backlash, opposition organizing, and place the movement on the defensive.<sup>10</sup> For this reason, attempts to implement DA non-prosecution policies should include necessary organizing infrastructure and planning to mitigate potential backlash. With time and dedicated support to organizing, DA non-prosecution policies could facilitate more structural support, such as support from state government officials and law enforcement around sex worker labor rights and/or full decriminalization and, as included in the policy in Washtenaw County, Michigan, support for harm reduction approaches.<sup>11</sup>

## LANDSCAPE ANALYSIS QUESTIONS

To support advocates, prosecutors, policy makers and other stakeholders in seeking to shape the development or implementation of a non-prosecution policy, we provide here a non-exhaustive set of questions in line with issues and dynamics that have arisen to date in the operation of non-prosecution policies. Hyperlinks are provided to the sections of the handbook relevant to each question.

The first part of this section ('Policy Development') includes questions related to the development of a non-prosecution policy in jurisdictions where such a policy does not currently exist. The second part ('Policy Implementation') provides questions to guide engagement with and the evaluation of a non-prosecution policy in a jurisdiction where such a policy has been implemented.

### I. POLICY DEVELOPMENT

#### UNDERSTANDING AND ENGAGING WITH DISTRICT ATTORNEYS' OFFICES

1. What is your history of engagement with DAs generally and in your local jurisdiction in particular?
2. What is your understanding of your local DA's response to sex work?
3. What is your understanding of the role of DAs in the criminal law process and "prosecutorial discretion"?  
See [What is a Prosecutor? What is a District Attorney?; What is Prosecutorial Discretion?](#)
4. What is your understanding of the possibilities and limitations of "prosecutorial discretion" in mitigating or increasing the harms of the criminal legal system, and of the "progressive prosecutors" movement?  
See [How Can Discretion Increase or Mitigate the Harms of the Criminal Legal System?](#)
5. What is your understanding of the scope of sex work-related crimes and legal enforcement?
6. What is your understanding of the impact of criminal legal system engagement on sex workers' health and rights, including:
  - a) the dynamics of "mass misdemeanors"
  - b) police harassment and violence
  - c) the impact of criminal legal surveillance on sex workers' safety practices
  - d) the differential application of prostitution laws across both sex workers and clients according to race and gender expression?See [Discretion and the Impact of Criminal Law on Sex Workers' Health and Rights](#)
7. Do the actors you seek to engage with have a good understanding of these concepts, practices, and histories?

#### ELECTIONS

8. Are you advocating for a non-prosecution policy with a candidate or prospective DA, or a DA already in office?
9. Are DAs elected or appointed in your jurisdiction?
10. If DAs are appointed, what is the appointment process, and does it include mechanisms for public input?
11. If DAs are elected, does the race / did the race have:
  - a) high profile press coverage or low public engagement?
  - b) public engagement by the DA, the media or public around the inclusion of sex work-related charges?
  - c) high or low voter turnout?
12. Are there events, such as stings, high profile arrests or backlash to the policy, that provide opportunities for organizing outside of the election or appointment cycle?  
See [Public Accountability: Elections and Information Sharing](#)

## BACKGROUND CONDITIONS FOR POLICY DEVELOPMENT & DA ENGAGEMENT WITH STAKEHOLDERS

13. Has the DA engaged or is the DA open to engaging with sex workers and movements for the full decriminalization of sex work in the development, implementation, and/or evaluation of the policy?

See [Information Sheet: Growing Support for Sex Workers' Rights](#)

14. To what extent does the DA engage with advocates across all types of sex work, and sex workers across a range of identities and experiences?

See [DA Engagement with Sex Worker-Led Groups and Sex Worker Rights Advocates](#)

15. Has the DA engaged with movements for racial justice and recognition of the systemic harms of criminal law?

See [Information Sheet: Growing Mainstream Recognition of the Harms of Criminal Law](#)

16. Has the DA engaged with the impacts of the COVID-19 pandemic on criminalized people?

See [Information Sheet: COVID-19 and Prosecutorial Policies](#)

17. Are there other contextual factors that are influencing or could influence development of the proposed or potential policy?

18. To what extent are there organized groups that may oppose the proposed or potential policy?

19. How does public conversation and media coverage engage with:

- a) distinctions between non-prosecution and decriminalization?

See [Decline Prosecution for All Offenses Related to the Selling and Buying of Sex](#)

- b) distinctions between sex work and trafficking?

See [DA Engagement with Sex Worker-Led Groups and Sex Worker Rights Advocates](#); [Decline Prosecution for All Offenses Related to the Selling and Buying of Sex](#)

- c) claims related to the separation of powers?

See [What is Prosecutorial Discretion?](#)

- d) complaints about sex work from local residents and business owners, narratives of public safety, and sex workers as community members?

See [Decline Prosecution of 'Quality-Of-Life' And Other Offenses that Engage Sex Workers; Influence by Police](#)

## **II. POLICY IMPLEMENTATION**

### POLICY MODEL & COMMUNICATION

1. Is the non-prosecution policy public?
2. Does the policy provide information on all charges that will be declined?
3. Does the policy decline charges related to:
  - a) selling sex? See [Decline Prosecution for All Offenses Related to the Selling and Buying of Sex](#)
  - b) buying sex? See [Decline Prosecution for All Offenses Related to the Selling and Buying of Sex](#)
  - c) 'quality-of-life' offenses? See [Decline Prosecution of 'Quality-Of-Life' And Other Offenses that Engage Sex Workers](#)
  - d) unlicensed massage? See [Decline Prosecution of 'Quality-Of-Life' And Other Offenses that Engage Sex Workers](#)
  - e) 'third party' offenses? See [Decline Prosecution of 'Third Party' Charges](#)
4. What options are available in your jurisdiction for the dismissal of current and past charges and cases? Is it possible to have:
  - a) warrants, charges or convictions vacated?
  - b) arrest records and convictions sealed?
  - c) arrest records and convictions expunged?

5. Does the policy include action by DAs to support the dismissal of current and past charges and cases related to offenses under the non-prosecution policy?

See [Include Action to Support the Dismissal of Current and Past Charges and Cases](#)

6. If the policy **does** include action by DAs to support the dismissal of current and past charges and cases, which of the available options in your jurisdiction does the policy include?

7. Does the policy include the elimination of cash bail?

See [Include Action to Support the Dismissal of Current and Past Charges and Cases](#)

8. Does the policy mention police, and whether or not they are expected to adjust arrests in line with the policy?

9. Has the DA engaged in specific communication with police and other actors such as other prosecutors, legislators, and judges, who can influence the implementation of the policy? Who has been silent?

See [DA Practices in Communicating Their Policies](#); [Influence by Other Legal Actors with Prosecutorial Power](#); [Influence by Legislative Bodies](#); [Influence by Police](#); [Influence by Judges](#)

#### IMPACTS OF THE SCOPE OF THE NON-PROSECUTION POLICY

10. If the policy declines charges for selling sex, but maintains prosecutions for buying sex, how does it impact:

- a) police activity where sex workers conduct business, including surveillance, harassment, and arrest?
- b) enforcement dynamics against BIPOC and/or trans sex workers?
- c) enforcement dynamics against BIPOC clients?
- d) sex workers, clients, and third parties arrested under trafficking offenses?

See [Decline Prosecution for All Offenses Related to the Selling and Buying of Sex](#)

11. If the policy declines charges for selling sex, but maintains prosecutions for 'quality-of-life' offenses or unlicensed massage, how does it impact:

- a) police activity where sex workers conduct business, including surveillance, harassment, and arrest?
- b) where sex workers work to avoid police surveillance, harassment, and arrest?
- c) the offenses used by law enforcement to arrest or threaten arrest of sex workers?
- d) enforcement dynamics against BIPOC, poor and/or trans sex or gender non-conforming workers?
- e) enforcement dynamics against people perceived by law enforcement to be sex workers?

See [Decline Prosecution of 'Quality-Of-Life' And Other Offenses that Engage Sex Workers](#)

12. If the policy declines charges for selling sex, but maintains prosecutions for 'third party' offenses, how does it impact:

- a) the criminalization of people sex workers work with or for, hire, or who provide a good or service directly related to a sex worker's work?
- b) the criminalization of sex workers under third party charges?
- c) police activity where sex workers conduct business, including surveillance, harassment, and arrest?
- d) where sex workers work to avoid police surveillance, harassment, and arrest?

See [Decline Prosecution of 'Third Party' Charges](#)

#### INTERACTION WITH OTHER LEGAL ACTORS IN IMPLEMENTATION

##### **State Attorneys-General and other actors with prosecutorial power**

13. Does the State Attorney General have overlapping jurisdiction with the DA?
14. Has the legislature proposed or acted to create overlapping jurisdiction between the AG and the DA?
15. Has the AG spoken publicly about the non-prosecution policy?

16. Is the AG working collaboratively with the DA on charges related to sex work, or do their approaches conflict?
17. If the DA is a city official, are they working collaboratively with the DA at the county level and/or the AG, or do approaches across any level conflict?
18. Has the DA faced resistance from prosecutors in their office?

See [Influence by Other Legal Actors with Prosecutorial Power](#)

#### **Legislative Bodies**

19. Has the legislative body in the DA's jurisdiction proposed or acted to restrict the DA's budget?

See [Influence by Legislative Bodies](#)

#### **Police**

20. Are police cooperating with the policy by stopping arrests, or have they proposed or acted to maintain arrests despite the policy?
21. If police maintain arrests despite the policy:
  - a) which offenses do they arrest under?
  - b) are there patterns in arrest, including differentially for BIPOC sex workers or clients, gender non-conforming sex workers, or people perceived to be sex workers?
  - c) what data is available around arrest practices?
22. Have police used non-arrest or non-cooperation with the non-prosecution policy through maintaining arrests as a tool to leverage pressure or critique of the non-prosecution policy?
23. Have police established an independent non-arrest policy?
24. Have police established a non-arrest policy in the absence of a non-prosecution policy?

See [Influence by Police](#)

#### **Judges**

25. Have judges granted any motion by the DA to dismiss warrants or charges or remove convictions?
26. Have judges denied recommendations for non-prosecution or otherwise resisted the non-prosecution policy?

See [Influence by Judges](#)

#### **General Collaboration and Opposition**

27. Has the DA engaged other legal actors in their jurisdiction to provide information or propose collaboration related to the impact of criminal law on the health and rights of sex workers?
28. If there is opposition to the policy, is it focused on the non-prosecution of sex work-related charges and/or does it focus on the non-prosecution of other charges?
29. If there is opposition to the policy, does it include public statements by police, prosecutors, the attorney general, or judges?

See [DA Practices in Communicating Their Policies](#); [Influence by Other Legal Actors with Prosecutorial Power](#); [Influence by Legislative Bodies](#); [Influence by Police](#); [Influence by Judges](#)

30. Have actors in your jurisdiction sought other forms of accountability or punishment for the DA due to their non-prosecution policy, such as ethics complaints, constitutional challenges or impeachment proceedings, or others processes through, e.g., victims' rights statutes?

See [Public Accountability: Elections and Information Sharing](#); [Influence by Legislative Bodies](#)

#### **RESEARCH AND TRANSPARENCY EFFORTS ON POLICY ELEMENTS AND IMPACTS**

31. Does the DA share information publicly about charging practices, plea bargaining or other data?

32. Does the DA share information about when and why they decline charges, and the reasons that contribute to those decisions, e.g., declining first or second offenses, or specific crimes, outside of or in addition to what is included in a non-prosecution policy?
33. Has the legislative body in the DA's jurisdiction proposed or acted to require the DA to report statistics or other information?
34. What relevant public information is otherwise available, e.g., arrest data, evaluations by universities or public interest organizations?
35. What are the strengths and weaknesses of available data? Is it complete?
36. Is data available because it has been mobilized towards a specific goal, such as the justification or critique of a non-prosecution policy? What does the source and presentation of the data indicate about data quality?
37. Does the DA collaborate with universities or organizations to evaluate their policies?
38. Does any research on DA policies adopt a public health or health justice approach?

See [Public Accountability: Elections and Information Sharing](#); [Influence by Legislative Bodies](#); [Discretion and the Impact of Criminal Law on Sex Workers' Health and Rights](#)

# POLICY DEVELOPMENT AND COMMUNICATIONS

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**This section explores the development of non-prosecution policies to date, discusses how choices made by DAs around how to communicate and implement their policies impacts transparency and backlash, and presents important principles for DA engagement with sex workers’ rights groups and advocates.**

## **Background Conditions for Policy Development**

Background conditions for the development of non-prosecution policies in recent years have included movements for sex workers’ rights and the full decriminalization of sex work, growing mainstream support for racial justice and understanding of the harms of criminal law, and shifts in criminal law enforcement and prosecution due to the COVID-19 pandemic. Each of these is summarized in information sheets formatted as stand-alone documents that advocates may print or send as part of advocacy or education efforts with DAs or other stakeholders. Stand-alone PDFs are available on **GHJP’s website**.

## **DA Practices in Communicating their Policies and Managing Backlash**

DAs vary in the level of public communication about the scope of non-prosecution policies, from releasing a full policy statement detailing the scope and rationale behind the policy to more limited announcements that list “prostitution” among other categories of covered offenses. 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, underscoring the need to engage with them as holistic documents. Specific, clearly stated and publicly available policies serve important ends of transparency and accountability, destigmatizing, and providing clarity on prosecutors’ future actions, which may also facilitate sex workers reporting violence and harassment without fear of prosecution. However, any reduction in police contact and arrest, and related harms of criminal law, requires police cooperation. Police, and other stakeholders, also have a platform to communicate their views on and intended action in response to non-prosecution policies.

## **DA Engagement with Sex Worker-Led Groups and Sex Worker Rights Advocates**

Non-prosecution policies have been developed with varied levels of input from sex workers and sex worker rights advocacy organizations, which have spent years organizing to have impact locally and nationally on sex workers’ rights, police arrest practices, prosecution, and the criminal law. This organizing has occurred within and outside of the DA election cycle. It has also occurred in the context of the criminalization of sex work, which creates barriers for public organizing due to stigma, fear of legal repercussions or police retaliation, and funding restrictions. Importantly, these barriers remain in places with non-prosecutions policies, limiting the organizing power of sex workers and advocacy groups to influence the policies and their outcomes. Even when these groups are involved, DAs often selectively incorporated policy recommendations, incorporating the most politically palatable recommendations, and sacrificing other key demands. Meaningful engagement by DAs can only occur 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.

## BACKGROUND CONDITIONS FOR POLICY DEVELOPMENT

In recent years, candidates for District Attorney in several jurisdictions across the country have run on platforms that included a commitment not to prosecute some sex work-related offenses, including in Multnomah County, Oregon;<sup>12</sup> Los Angeles, California;<sup>13</sup> New Orleans, Louisiana;<sup>14</sup> and Manhattan, New York.<sup>15</sup> Non-prosecution policies that include some sex work-related offenses have been established in Philadelphia, Pennsylvania;<sup>16</sup> Manhattan,<sup>17</sup> Brooklyn,<sup>18</sup> the Bronx,<sup>19</sup> and Queens,<sup>20</sup> New York; Seattle, Washington;<sup>21</sup> Los Angeles, California;<sup>22</sup> and Washtenaw County, Michigan.<sup>23</sup> Policies in Baltimore, Maryland,<sup>24</sup> and San Francisco, California<sup>25</sup> were implemented by DAs and then rolled back by their successors in office.

These proposals and established policies have been driven by years of community organizing by sex workers that paved the way for the consideration of sex workers' rights by DAs, and, in some cases, embedded them in political pressure and wider movements.<sup>26</sup> Among the policies we reviewed, DAs listed several reasons motivating their decisions to decline prosecuting low-level crimes such as prostitution, including wanting to more effectively allocate resources, given that prosecuting such crimes has no public safety value;<sup>27</sup> to prevent the further marginalization of sex workers,<sup>28</sup> including through racial disparities in the enforcement of prostitution laws;<sup>29</sup> and to shift from criminalization towards both supports and services (although in one jurisdiction this is explicitly through the frame of sex work abolition),<sup>30</sup> and a more public health-informed approach, including reducing COVID-19 transmission,<sup>31</sup> given research linking the decriminalization of sex work to better public health outcomes.<sup>32</sup>

As the creation of non-prosecution policies, in recent years,<sup>33</sup> has been spurred by the confluence of progress in movements for sex workers' rights and the full decriminalization of sex work, and for racial justice and the recognition of the systemic harms of criminal law, alongside the realities and fault lines exposed and exacerbated by the ongoing COVID-19 pandemic, we present these background conditions in the information sheets in this section.

Non-prosecution policies have also taken on additional salience with the Supreme Court's recent decision to eliminate the constitutional right to abortion after almost 50 years,<sup>34</sup> as some prosecutors have stated that they will refuse to prosecute those seeking, assisting or providing abortions in states with abortion bans.<sup>35</sup> Sex workers have also made clear the linkage between abortion access and sex worker rights as part of the broader struggle for reproductive justice and bodily autonomy, and with this the role DAs may play in reducing harms from laws that infringe on individuals' rights to health and bodily autonomy.<sup>36</sup>

DA engagement with sex worker rights groups in developing these policies has been varied: sometimes involved but lacking transparency and weighted toward specific activists and organizations savvy with media;<sup>37</sup> sometimes lacking,<sup>38</sup> or tempered by ideologies that minimize sex worker input.<sup>39</sup> DA engagement can also expand over time,<sup>40</sup> and often does not result in the full implementation of sex workers' recommendations. For this reason, important principles for engaging with sex worker-led group and sex worker rights advocates are included in the final part of this section.

## INFORMATION SHEET

### GROWING SUPPORT FOR SEX WORKERS' RIGHTS

The inclusion of the non-prosecution of sex work in DA campaign platforms and, once in office, concrete policies is part of, and alongside, the rapid uptake in the last few years of sex worker rights as an issue in state legislative reforms, as well as campaigns from the local level to the presidential race.

Bills to decriminalize sex work were introduced in DC in 2017 (then reintroduced in 2019);<sup>1</sup> in Maine<sup>2</sup> and New York in 2019 (then reintroduced in New York in 2021 and 2023);<sup>3</sup> in Connecticut,<sup>4</sup> Massachusetts,<sup>5</sup> Louisiana,<sup>6</sup> Oregon,<sup>7</sup> and Vermont<sup>8</sup> in 2021, and in Missouri<sup>9</sup> and Rhode Island<sup>10</sup> in 2022. While so far none of these bills have passed, their existence and proliferation mark a shift in support for sex worker rights by legislators and the general public. A poll released in 2020 by Data for Progress showed that 52% of all voters, regardless of party affiliation, “somewhat” or “strongly” support the decriminalization of sex work for both workers and clients.<sup>11</sup> Support for decriminalization is highest among Democrats and younger voters, with two-thirds of each group in support.<sup>12</sup> Sex workers and sex workers’ rights advocates have also been successful in securing the repeal of laws criminalizing “loitering with the intent to engage in prostitution” in California, New York and the City of Seattle.<sup>13</sup>

Decriminalization was a topic of discussion during the 2020 Democratic presidential primaries, with a few candidates including Bernie Sanders,<sup>14</sup> Elizabeth Warren,<sup>15</sup> and Kamala Harris<sup>16</sup> expressing support to consider some form of decriminalization, despite Harris’ previous opposition of a San Francisco decriminalization initiative.<sup>17</sup> After being questioned for their previous support of the Stop Enabling Sex Traffickers Act (SESTA) and the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) in 2018,<sup>18</sup> which sex worker advocates have long argued creates unsafe working conditions for sex workers by limiting their ability to screen clients and share information with each other online, Sanders and Warren co-sponsored the SAFE SEX Workers Study Act (originally introduced in 2019 and reintroduced in 2022), a bill that if passed would assess the impact of SESTA-FOSTA and evaluate whether the law has had negative consequences for the health and safety of sex workers.<sup>19</sup>

**Human Trafficking** is defined in United States federal and state law, as well as international law, as 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.<sup>20</sup> The U.S. Trafficking Victims Protection Act of 2000 (TVPA) defines sex trafficking to include inducement of a commercial sex act by a minor, regardless of whether there is evidence of force, fraud, or coercion, as one of the “severe forms of trafficking in persons.”<sup>21</sup>

These political developments show an increasing understanding of the arguments supporting the full decriminalization of sex work: police and state surveillance, arrests, court cases, criminal penalties, incarceration, and criminal records all contribute to making sex work less safe, limiting access to a stable livelihood for sex workers, and making it harder if not impossible for sex workers to seek protection from violence and report it when it occurs.<sup>22</sup> Evidence of the harms of criminalization has led to increasing support for the full decriminalization of sex work by several global and national human rights NGOs, including Amnesty International,<sup>23</sup> Human Rights Watch,<sup>24</sup> the American Civil Liberties Union;<sup>25</sup> anti-trafficking organizations including the Global Alliance Against Traffic in Women,<sup>26</sup> Freedom Network USA,<sup>27</sup> and Freedom United;<sup>28</sup> as well as intergovernmental organizations such as the World Health Organization.<sup>29</sup>

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## INFORMATION SHEET

### GROWING MAINSTREAM RECOGNITION OF THE HARMS OF CRIMINAL LAW

Growing awareness of the harms of criminalizing sex work has developed with, and benefited from, a broader national conversation about policing, incarceration, and the criminal legal system as a whole, that was thrust into the mainstream by recent waves of struggle for racial justice and challenging anti-Blackness, and spurred in 2020 by the killings of George Floyd, Ahmaud Arbery, and Breonna Taylor by current or former police officers.<sup>1</sup>

**Criminal legal system** is the phrase we use, rather than “criminal justice system,” as an acknowledgement that the system does not deliver justice for many individuals and communities. The phrase “criminal punishment system” is also used by advocates to highlight how it functions as an apparatus of racist violence, serving aims of surveillance, control, punishment, and retribution.<sup>2</sup>

This renewed understanding of the harms of policing and carceral systems on racialized and poor individuals is reflected in the policy statement “Addressing Law Enforcement Violence as a Public Health Issue” adopted in 2018 by the American Public Health Association (APHA), the largest professional association for public health in the U.S.<sup>3</sup> The statement acknowledges that the system of law enforcement is one of the factors causing the disproportionate levels of physical and psychological violence targeted at marginalized communities, including Black people and other people of color, Indigenous people, immigrants, LGBTQ+ people, people with disabilities or mental illnesses, people engaging in criminalized activities such as sex work and drug use, and people suffering from poverty-related issues including homelessness. In 2021, over 250 researchers and scientists signed an open letter to President Joe Biden and Vice President Kamala Harris underscoring the “wealth of empirical data” on the harms of criminalizing sex work, and called for decriminalization, among other measures.<sup>4</sup>

**Sex workers are differentially exposed to the harms of criminalization and violence based on the level of physical contact with both clients and police involved in the type(s) of sex work performed:**<sup>5</sup> For example, individuals who cam or are phone sex operators have less contact with clients and police than in-person and street-based sex workers. This also highlights the different level and kind of police interaction and surveillance dealt with by people in legalized sectors of the sex trades, although they still may face restrictions and censorship due to SESTA-FOSTA. Sex workers who exclusively produce and publish adult content online may work with agencies and platforms operating legally, and are not necessarily engaging in criminalized sectors of sex work. Moving between types of sex work as a risk management strategy is not possible for everyone, as seen when some in-person sex workers moved to online settings at the beginning of the pandemic, as sex workers and clients sought to avoid COVID-19 transmission. This harm reduction strategy is contingently accessible, based on access to technology, digital skills, differential opportunities for non-white sex workers in online spaces, restrictions due to SESTA-FOSTA,<sup>6</sup> and limited payment options due in part to Mastercard’s restrictions on processing payments for adult content.<sup>7</sup> **Exposure to the harms of criminalization is also a function of stereotypes about sex work, which are often racialized and gendered in specific ways.**

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## INFORMATION SHEET

### COVID-19 AND PROSECUTORIAL POLICIES

The onset of the COVID-19 pandemic in early 2020 brought heightened attention to the double systemic harms of racism and COVID-19. This, combined with the continued organizing efforts of the sex worker rights movement for policy change in tandem with work developing and expanding mutual aid networks for life-saving support in the absence of government action, led several district attorneys to reevaluate their prosecution policies, and, in some instances, police departments to shift arrest practices.<sup>1</sup>

Prosecutor's offices, including in Brooklyn, New York;<sup>4</sup> Philadelphia, Pennsylvania;<sup>5</sup> Maricopa County, Arizona,<sup>6</sup> Baltimore, Maryland,<sup>7</sup> Multnomah County, Oregon;<sup>8</sup> Cook County, Illinois and King County, Washington,<sup>9</sup> stopped or reduced charging minor offenses and/or advocated for early release, in a context where some police departments also delayed arrests by issuing warrants or citations for a variety of offenses as a response to COVID-19. In Seattle, police had formally announced the ramping up of arrests of both sex workers and clients beginning in 2019.<sup>10</sup> In 2020, police reversed course, likely due to the pandemic, among a number of factors including public criticism of the arrests, a change in police department leadership, and staffing challenges.<sup>11</sup> Nonetheless, the enforcement of COVID-19 regulations also increased police surveillance, harassment and violence against sex workers, and reduced access to essential health services, with trans, undocumented and/or BIPOC sex workers particularly vulnerable to over-policing and punitive measures.<sup>12</sup>

**Transgender** (or "trans") is a term used to describe someone whose gender identity is different than the sex they were assigned at birth.<sup>2</sup>

**Cisgender** (or "cis") is a term used to describe someone who identifies with the sex they were assigned at birth.<sup>3</sup>

The pandemic has highlighted the harms of mass incarceration and the lack of sanitary and safe conditions in carceral facilities, prompting calls to state governors and other public officials to adopt decarceration measures to reduce prison and jail populations and mitigate the spread of COVID-19 among incarcerated individuals.<sup>13</sup> While policymakers largely failed to heed these calls to significantly reduce prison and jail populations, some individual jurisdictions took action to increase releases and reduce admissions.<sup>14</sup> The COVID-19 crisis also prompted the public health field to turn its attention to the harms of incarceration, resulting in the American Public Health Association adopting the policy statement "Advancing Public Health Interventions to Address the Harms of the Carceral System" in October 2021.<sup>15</sup> The statement acknowledges the chronic health harms of incarceration and recommends moving towards the abolition of carceral systems.<sup>16</sup>

In this context, these non-prosecution policies sought to lessen the burden of criminalization for so-called 'quality-of-life' or 'petty' offenses, which include offenses related to street-based sex work and low-level drug possession as well as associated 'disorder' offenses such as loitering, trespassing, or disorderly conduct. The criminalization of these activities has been criticized for widening the net of individuals who get caught in the criminal legal system and targeting poor or low-income individuals, often also BIPOC individuals, resulting in a system of policing and courts that is fundamentally tasked with the criminalization of poverty.<sup>17</sup>

In March 2020 Baltimore City's then-State's Attorney Marilyn Mosby announced the Covid Criminal Justice Policies, an approach to crime developed with public health authorities under which Baltimore City would stop prosecuting the crime of prostitution, among a slate of offenses including low-level drug and drug paraphernalia possession, minor traffic violations, and disorder-related offenses, in an effort to reduce admission to jails and prisons and curb the spread of COVID-19.<sup>18</sup> A year later, an evaluation conducted by Johns Hopkins University found that the policy resulted in a reduction of arrests without causing any increase in threats to public safety or public complaints,<sup>19</sup> and the State's Attorney's office announced the intention to adopt the policy permanently during Mosby's (now completed) term.<sup>20</sup> The pandemic offered a window to make this policy shift.

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- <sup>8</sup> Bernstein, Maxine. 2020. "Multnomah County's adult jail population has dropped about 30% due to fewer arrests, early releases." *Oregon Live*, April 14, 2020. <https://www.oregonlive.com/coronavirus/2020/04/multnomah-countys-adult-jail-population-has-dropped-about-30-percent-due-to-fewer-arrests-early-releases.html>
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- <sup>11</sup> Kiefer, Paul. 2021. "Court Approves City Attorney's Motion to Clear Outstanding Prostitution Warrants." *Publicola*, September 16, 2021. <https://publicola.com/2021/09/16/court-approves-city-attorneys-motion-to-clear-outstanding-prostitution-warrants/>
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## DA PRACTICES IN COMMUNICATING THEIR POLICIES

A key aspect of the implementation of a non-prosecution policy is the decision by a DA about how, to whom, and to what extent to communicate the scope and details of the policy.

**DAs may choose to release a full policy statement detailing the scope and rationale behind the policy, and who it applies to (e.g., sex workers and/or clients; all sex workers or only those at their first arrest, etc.).<sup>41</sup>**

A clearly communicated and publicly available policy stating a commitment to not arrest persons selling or buying sex absent evidence of other crimes:

- increases transparency and accountability;
- destigmatizes sex work to the general public;
- provides clarity to sex workers regarding the extent to which sex workers can expect to not be prosecuted for sex work-related charges; and
- may create a more favorable environment for sex workers to seek help and report experiences of violence without fear of being charged and prosecuted, which is a significant barrier where sex work is criminalized.

**DAs may alternatively simply announce that they will stop prosecuting “prostitution” offenses without further details regarding the scope of the policy and the circumstances in which it applies.<sup>42</sup>**

This is more common, and especially the case when the non-prosecution of sex work-related charges forms part of a broader policy to decline to prosecute low-level offenses. A more general frame for the policy:

- may in some cases be advantageous to avoid political backlash and give prosecutors more leeway to pursue non-prosecution without stoking opposition. Publicly announcing a policy of non-prosecution of clients, for example, may trigger concerted action by End Demand advocates who oppose this policy model.<sup>43</sup> For example, one critic of DA Eli Savit’s policy in Washtenaw County stated that it “will normalize an inherently harmful sex trade and further disenfranchise those he promised to protect by exempting most sex buyers from prosecution.”<sup>44</sup> Another urges action “before Ann Arbor becomes the next Amsterdam.”<sup>45</sup>
- may not prevent backlash. Opposition may also arise even with a DA who does not explicitly include clients in the policy, as with Baltimore City’s previous State’s Attorney Marilyn Mosby’s announcement to not prosecute prostitution charges, so the extent of the political advantages of a general policy may be limited.<sup>46</sup>

**End Demand / Nordic / Swedish / Equality / Entrapment / “partial decriminalization” model:** This model, which has been presented under a multitude of names, criminalizes buying sexual services but not selling sexual services. In other words, clients and anyone who facilitates selling and buys sex are subject to criminal penalties, while persons selling sex technically are not.<sup>47</sup> The label “partial decriminalization” for this model (on the assumption that it does not criminalize sex workers) is overinclusive, as a focus on buyers nevertheless directs police action to areas where sex workers conduct business, exposing sex workers to police harassment, and arrest and prosecution under other charges. It also ignores that sex workers may at times buy sex and therefore be criminalized.

**Communication and collaboration with the police beyond general, public communications is important, given that any reduction in police contact and arrest depends on the level of police cooperation with the policy.**

Specific communications are important for a range of actors who can influence the implementation of non-prosecution policies. DAs should engage with the range of legal actors in their jurisdictions – police, other legal actors with prosecutorial power, legislatures, judges – to provide information about how the non-prosecution policy can positively impact the health and rights of sex workers, and ensure their support – or at minimum, non-obstruction – in implementation. These relationships are explored in the section [Points of Influence in Policy Implementation](#).

Further, police, along with a number of other stakeholders, have a platform to communicate their views on non-prosecution policies and announce how they will act in response:

#### **SAN FRANCISCO, CALIFORNIA**

A DA's decision not to prosecute certain charges may lead to a deprioritization of arrests on such charges. In San Francisco, for instance, after now-recalled DA Chesa Boudin announced that his office would decline to prosecute sex work-related charges, along with other quality-of-life offenses, a spokesman for the San Francisco Police Department (SFPD) confirmed that "the department and the DA are on the same page when it comes to not prosecuting sex work."<sup>48</sup>

#### **BALTIMORE, MARYLAND**

The response to Baltimore City's previous State's Attorney Marilyn Mosby's non-prosecution policy shifted. At first, the Baltimore police appeared to have opposed the policy. Police Commissioner Michael Harrison reported that the "policy had been difficult for officers to accept when it was implemented last year, and that he expected crime to rise," although it did not.<sup>49</sup> There was more support, however, for the March 2021 permanent policy, with support coming from both Baltimore Mayor Brandon Scott and Baltimore City Police Commissioner Michael Harrison.<sup>50</sup> Rank-and-file police, however, seemed to have continued opposition to the policy, though they announced that they would comply: the Baltimore Fraternal Order of Police (FOP) sent a tweet that accused Mosby of giving drug users and sex workers free reign, but affirmed that the department will align with the policy.<sup>51</sup>

**Response to a non-prosecution policy, including organized attacks and backlash, may include and/or extend beyond the sex work-specific charges included in the policy.**

Non-prosecution policies must be analyzed and engaged with as a whole, in order to understand their positioning as political documents and as platforms that impact charging practices across a wide range of conduct on the ground. Depending on the place and context of implementation, the inclusion of sex work-related charges may be politically charged, or not the focus of public discourse and pressure.

#### **MANHATTAN, NEW YORK**

The non-prosecution policy under Manhattan DA Alvin Bragg has been met with backlash from police organizations and representatives, mostly against the policy as a whole. The *New York Post* – a source that often holds biases against sex workers – quoted an NYPD "insider," who stated that the policy would "hurt [...] the girls," and another officer that saw non-prosecution as part of "decriminalizing everything."<sup>52</sup> The Sergeants Benevolent Association,<sup>53</sup> the President of the Police Benevolent Association,<sup>54</sup> and then-acting NYPD Police commissioner<sup>55</sup> all expressed opposition to the memo. In response to the backlash, Bragg revised some contentious elements of the policy, which did not include sections related to sex work.<sup>56</sup>

## DA ENGAGEMENT WITH SEX WORKER-LED GROUPS AND SEX WORKER RIGHTS ADVOCATES

A key aspect affecting the design and implementation of a non-prosecution policy is the involvement of sex workers and sex worker-led organizations, particularly in shaping the policy and driving its adoption.

**DAs should ensure their full engagement with sex workers and sex workers' rights organizations in the development of non-prosecution policies and provide meaningful avenues for continued accountability during and after implementation, such as the inclusion of sex workers in monitoring and evaluation efforts.**

- DAs' decisions not to prosecute sex work-related charges occur in the context of years of community organizing by sex workers, locally and nationally, on sex workers' rights. Yet, DA engagement with sex worker rights groups has been varied. Groups seeking to secure this engagement, particularly as policies shift, can and have sought to influence DAs through specific **points of influence in policy implementation**.
- Full engagement includes the range of sex workers and sex workers' rights organizations working in their jurisdiction, nationally, and even the materials and insights of those working for and studying the health and rights of sex workers internationally. It also includes recognition and engagement with sex workers as members of the public and constituents who vote in elections, and live in and contribute to communities.

**DA engagement should extend across:**

- **Policy conception and implementation:** In Washtenaw County, the policy was driven by internal research, but later expanded to engagement with community groups.<sup>57</sup>

### BALTIMORE, MARYLAND

Then-SA Mosby's non-prosecution policy in Baltimore appears to have been developed in consultation with sex worker groups. In announcing the extension of the policy beyond its one-year "experiment" phase aimed at decreasing the spread of COVID-19, the SA office, along with Baltimore police and the Baltimore Crisis Response Inc. announced that it would work to support sex workers by partnering with SPARC, a center for women in southwest Baltimore, Baltimore Safe Haven, and the Baltimore branch of the Sex Workers Outreach Project, in an effort to encourage members of the public to connect with these organizations.<sup>58</sup>

- **Sex workers and sex worker rights advocates on all types of sex work and work sectors:** In Manhattan, a range of groups were consulted by DA Bragg and helped shift the driving ideology of the policy, with the notable exception of grassroots organizations working with massage workers.<sup>59</sup> Engagement should not be limited to indoor sex workers.<sup>60</sup>
- **Engagement with sex workers across the full range of identities and experiences,** including sex workers of all races, genders and sexualities, sex workers with disabilities, sex workers who are migrants, and sex workers with different levels of income. Engagement should not be limited to white, cis sex workers.<sup>61</sup>
- **Engagement with sex worker rights advocates:** In Seattle, King County prosecutors refused to meet with sex workers' rights advocates "because it flies in the face of their end-demand agenda," in the context of continued work with an anti-sex work group conflating sex work and trafficking.<sup>62</sup> Full engagement with a sex workers' rights frame has also been limited by the issue focus, at least on the county level, on declining drug charges.<sup>63</sup>

## SEX WORKERS' RIGHTS AND ANTI-TRAFFICKING WORK

There are deep tensions in the anti-trafficking space regarding sex work, intensified by changes to the definition of trafficking in U.S. federal law in the early 2000s.<sup>64</sup> Anti-trafficking organizations frequently fall into two separate groups: on one hand, sex worker rights advocacy groups, who view trafficking as distinct from sex work<sup>65</sup> and increasingly have built programs to offer support and resources to trafficking survivors.<sup>66</sup> On the other hand, there are self-described anti-trafficking groups – often comprised both of advocates for the “End Demand” model (i.e., ostensibly criminalizing the buyer of sex only) and advocates for prohibiting sex work altogether – claiming that decriminalizing sex work will increase trafficking.<sup>67</sup> Sex workers and sex worker rights advocacy groups have underscored that experience reveals that End Demand policies are at best ineffectual and at worst harmful and potentially deadly. Data shows that this model worsens the health and safety of sex workers by increasing police surveillance powers, and its efficacy as an approach to addressing trafficking has been criticized.<sup>68</sup>

Freedom Network USA, “the nation’s largest coalition working to ensure that trafficked persons have access to justice, safety, and opportunity,”<sup>69</sup> is notable for its current support of the decriminalization of sex work.<sup>70</sup> Other major anti-trafficking NGOs tend to conflate trafficking in the sex trades with all sex work, believing that any and all sex work is inherently exploitative. This leads to policy stances increasing sex workers’ vulnerability to surveillance, prosecution, and criminalization, rather than supporting their labor rights. Over two decades of campaigns equating “anti-trafficking” and “anti-slavery” have made the movement popular for celebrities, advocates, and politicians alike to champion, despite sex workers repeatedly asserting that interactions with law enforcement are harmful to their health, safety, and autonomy.<sup>71</sup> Anti-trafficking work of this nature also has historical links to Christian evangelism and traditional religious values of Protestant Christianity of sexual morality and gender.<sup>72</sup> This shapes a ‘savior’ narrative viewing sex workers as “victims” in need of rescuing.

- **Full implementation of sex workers’ demands:** While sex workers’ ability to shape policy is itself a victory given an historical lack of political capital and exclusion from policymaking; meaningful participation involves moving beyond consultations with sex workers only as a formality. Selectiveness by DAs in incorporating the policy recommendations of sex workers and sex worker-led organizations highlights a key limitation: in advocacy and collaboration with DAs, one possible result is that only the most politically palatable parts of the policy platforms advanced by sex workers are adopted, and other key demands are sacrificed.

## PHILADELPHIA, PENNSYLVANIA

Before he was elected as Philadelphia DA in 2017, then-candidate Larry Krasner met with sex worker advocates and listened to their policy platforms.<sup>73</sup> Krasner’s office then issued a memo in 2018 with guidance to not charge prostitution cases against individuals with two or fewer prior prostitution convictions on record,<sup>74</sup> while individuals with three or more arrests are recommended to be diverted to Project Dawn Court, a prostitution diversion program.<sup>75</sup> Aisha Mohammed, a member of the Kensington Sex Workers’ Collective, notes that most of the organization’s members have experienced far more than three arrests; as such, this non-prosecution policy falls short of protecting workers who have been arrested multiple times from involvement in the criminal legal system.<sup>76</sup> Additionally, while sex worker advocates in Philadelphia have highlighted the dangers of an End Demand model,<sup>77</sup> Krasner has declared that his office continues to prosecute clients.<sup>78</sup> Nonetheless, in her Op Ed, Mohammed notes the importance of sex workers having “a space at [Krasner’s] table” to be able to continue pushing for more policies promoting sex workers’ safety and rights.<sup>79</sup>

**In seeking the input of sex workers and sex worker rights organizations, DAs and other policymakers must recognize that while sex work continues to be criminalized, there are significant barriers to sex worker organizing efforts.**

- Sex worker-led groups often struggle to secure sizable funding due to bureaucratic barriers, strict grant requirements, and a general unwillingness from many funders to support the sex worker rights movement.<sup>80</sup>

- Sex workers may be discouraged from publicly organizing due to stigma and fear of legal repercussions or police retaliation.<sup>81</sup> While the adoption of non-prosecution policies as a result of sex workers' demands shows the importance of sex worker organizing, it also raises concerns that sex workers in jurisdictions where barriers to successful organizing are the highest (including due to heavy enforcement of sex work criminalization) may be those least likely to see a shift in prosecution policies.

**While discussions around DA accountability mechanisms and policy shift often focus on electoral accountability through DA elections, organizing and activism outside the electoral process can shift prosecution policies and their impact on sex workers' contact with the criminal legal system.**

- Activism and organizing have impacted both arrest and charging decisions by legal actors. In both jurisdictions where DAs are directly elected and those where DAs are appointed, sex worker mobilization vis-a-vis both prosecutors and the police has been a factor in fewer arrests and charges.

#### **SEATTLE, WASHINGTON**

In the City of Seattle and King County, Washington – both of which have directly elected prosecutors – activism and public backlash to police operations targeting both sex workers and clients was credited as one factor in reducing arrests and charges.<sup>82</sup> In 2019, Seattle Police ramped up arrests of sex workers on Aurora Avenue in North Seattle, a reversal of what it claimed to be its Nordic model of not arresting workers.<sup>83</sup> That same year, police raided 11 massage businesses in supposed “sex trafficking operations” that led to the owners being charged with promoting prostitution, not trafficking, and the displacement of the women who had been “rescued.”<sup>84</sup> According to Lisa Daugaard, the executive director of the Public Defender Association and co-founder of Let Everyone Advance with Dignity (LEAD), public criticism of the Aurora Avenue arrests “likely prompted the department to reverse course,” along with a change in police department leadership, the COVID-19 pandemic, and Seattle Police Department’s ongoing staffing challenges.<sup>85</sup> Public criticism coincided with a decline of arrests of both workers and clients: prostitution arrests declined from 175 in 2019 to 55 in 2021, while only seven clients were arrested in 2021 and nine in 2020, down from 76 in 2019.<sup>86</sup> Moreover, then-Seattle City Attorney Pete Holmes moved to quash all outstanding warrants for misdemeanor prostitution in 2021, which a judge granted.<sup>87</sup> Members of the Massage Parlor Outreach Project, a member organization of the Coalition for Rights and Safety for People in the Sex Trade in Seattle/King County, Washington, “have worked with community organizations for years to get Seattle City Council to pass bills repealing prostitution loitering and drug traffic loitering laws, and also have all outstanding prostitution cases in Seattle Municipal Court closed/dismissed/vacated.”<sup>88</sup> This example underscores the importance of applying pressure to multiple actors—both prosecutors and police—through several mechanisms, not solely limited to elected officials.

#### **NEW HAVEN, CONNECTICUT**

In New Haven, the Sex Workers and Allies Network works to increase the safety and well-being of sex workers by “doing life-saving harm reduction outreach and advocacy.”<sup>89</sup> After a 2016 sting, SWAN advocated to end arrests for prostitution with the New Haven Police Department (NHPD) Interim Chief Anthony Campbell, winning policy changes to end sting operations and “naming and shaming” through the publication of the names and photos of arrested sex workers in local newspapers.<sup>90</sup> The DA office has not publicly opposed the NHPD’s non-arrest policy.

# KEY ELEMENTS OF A NON-PROSECUTION POLICY

Decline Prosecution for All Offenses Related to the Selling and Buying of Sex .....	28
Decline Prosecution of ‘Quality-of-Life’ and Other Offenses that Engage Sex Workers .....	34
Decline Prosecution of ‘Third Party’ Charges .....	37
Include Action to Support the Dismissal of Current and Past Charges and Cases .....	39

**This section presents the key features of a model non-prosecution policy in detail, and discusses variations in policy models and their possible shortcomings. These key features include declining prosecution for all offenses related to the selling and buying of sex, including the non-prosecution of clients; declining prosecution of ‘quality-of-life’ offenses, such as vagrancy or loitering, and other offenses that engage sex workers in the criminal legal system, such as unlicensed massage; declining prosecution of ‘third party’ charges; and including action in the policy to support the dismissal of current and past charges and cases.**

## **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 the full decriminalization of sex work (both selling and buying sex, and other criminal penalties) or a model focused on imposing formal criminal penalties for clients only (called, among other names, the ‘End Demand’ model, on the assumption that enforcement against clients will deter them and end market demand for sex work, ending the practice, often conflated by End Demand advocates with trafficking). 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. As such, many of the harms of criminalization remain, including arrests and police harassment, and even non-prosecution policies declining to prosecute both sex workers and clients are not the same as or functionally equivalent to full decriminalization. Moreover, 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 and/or BIPOC men. 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 also including laws against vagrancy, obscenity, drug use, and other “quality-of-life” offenses. Declining to prosecute sex work-specific offenses is important, due to the impact of these crimes on housing, employment, education, and immigration. But non-prosecution policies are limited if they do not include the other crimes commonly used to harass, arrest, charge, and prosecute sex workers. These other offenses target public space and those 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. Law enforcement have frequently used unlicensed massage as the rationale for their interventions, including raids which rarely identify trafficking victims, while disproportionately impacting migrant Asian communities, and often resulting in immigration-related charges. Policies are also limited if they ignore how trafficking arrests and charges have been, and continue to be, indiscriminately used to target sex workers’ friends and colleagues, sex workers working together, and workers in massage businesses.

### **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 such 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 that seek to overcome the lack of labor and police protection caused by criminalization. Excluding third party offenses from these policies deters people from providing those supports, discourages work with others, including indoor sex work, and functions similarly to End Demand-style policies in maintaining police surveillance and harassment.

### **Include Action to Support the Dismissal of Current and Past Charges and Cases**

As statements about future prosecutor action, non-prosecution policies vary in whether they also include action to remove or mitigate the impact of current and past charges. This can include the DA seeking to have arrest warrants, charges, cases, and/or convictions withdrawn in court. Depending on the action available or taken, this can variably modify the criminal record to note that a charge or conviction and its penalties have been withdrawn (vacated), hide the record from public view (sealing), or remove the record entirely (expungement). 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 penalties and ongoing consequences across education, housing, immigration, and family law, among others, for individuals with current and past charges and convictions for conduct now treated as not deserving of legal penalties going forward. Removing charges 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.

## DECLINE PROSECUTION FOR ALL OFFENSES RELATED TO THE SELLING AND BUYING OF SEX

**Non-prosecution policies should decline prosecution for all offenses related to the selling and buying of sex, including the non-prosecution of clients, considering the clear evidence of the harms of an End Demand model.**

- **Non-prosecution policies vary in the extent to which they do not prosecute charges related to both selling and buying sex.** The policy directive in Washtenaw County, Michigan, for example, includes **both sex workers and clients** in declining to bring charges related to sex work, generally.<sup>91</sup> Manhattan’s policy and procedure memorandum, likewise, states that the Office will not prosecute the crime of Prostitution (selling sex).<sup>92</sup> However, instead of declining to prosecute the crime of Patronizing a Person for Prostitution (buying sex) outright, it instead imposes the requirement that prosecutors seek supervisory approval during case screening.<sup>93</sup> On the other hand, the Seattle City Attorney’s Office and the King County Prosecutor’s Office have cooperated on **not prosecuting selling sex, but have explicitly targeted clients** in Seattle.<sup>94</sup>

**Supervisory approval:** A procedure under which the prosecutors in a DA’s office must seek approval of specific types of decisions from a supervisor before proceeding with them, which may include their unit’s supervisor and/or the DA. This can include decisions, for example, to charge a person with certain crimes, such as patronizing a person for prostitution, not to charge specific crimes, or to seek incarceration beyond a set number of days or years for certain offenses.<sup>95</sup>

- **These differences in scope align with, and are derived from, DAs’ commitments to different model legal frameworks for sex work, which are in place around the world but not in most of the United States, where the legal framework is the criminalization of sex work.** Ultimately, it is up to the legislature to shift the actual legal framework in place by changing or repealing the relevant criminal law provisions. But while the selling and buying of sex remains criminalized on the books in these places, DAs can shift the operation of criminal law closer to these specific different models, even if only to a limited extent, in declining to prosecute specific charges. Notably, to shift or mitigate the full operation of criminal law on the ground, DAs must influence the behavior of other criminal legal actors, such as police.<sup>96</sup>

To better understand the scope and ideologies of these models, and the implications for sex workers’ rights and health when DAs seek to craft non-prosecution policies that align with them, we consider two models – Full Decriminalization and the ‘End Demand’ model, along with examples of aligned DA policies in turn:

### Decriminalization

- **The Model:** Full decriminalization is the complete removal of criminal laws prohibiting sex work. It lifts penalties for sex work (i.e., soliciting / selling sex or “prostitution”), as well as for related activities, such as loitering, and other ‘quality-of-life’ offenses often applied against street-based sex workers.<sup>97</sup> It also removes penalties for clients (e.g., patronizing a prostitute) and ‘third party’ activities including promotion, management, security, transportation, and organizing (criminalized under offenses such as “promoting prostitution.”) Under this framework, there are no criminal penalties for selling or buying sexual services absent other crimes. This means that trafficking (i.e., selling sex induced by force, fraud or coercion, or by an individual under 18 years old), violence and victimization, and intimate partner violence all remain illegal. Labor laws that promote sex workers’ rights remain applicable, with a shift to their protections governing sex work as labor, in the place of governance under criminal law.<sup>98</sup> The Global Justice Health Partnership, the Sex Workers Project of the Urban Justice Center, most sex worker-led organizations, and many other human rights organizations – such as Human Rights Watch, the ACLU, and Amnesty International – favor this approach.<sup>99</sup>

**Quality-of-life offense:** 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, including social prohibitions, as underscored by the categorization of certain quality-of-life offenses in some contexts as “crimes against society.” Examples of quality-of-life offenses include excessive noise, loitering, vandalism, panhandling, drug use, prostitution, and others.<sup>100</sup> “Quality-of-life” policing appeared as a term in New York City in the 1980s, to refer to “a practice of heavily policing a number of normally non-criminal activities such as standing, congregating, sleeping, eating and/or drinking in public spaces” in addition to such minor offenses under ideas linked to “broken windows” theory suggesting that allowing signs of “disorder” to exist in a neighborhood will lead to more serious crime.<sup>101</sup> Quality-of-life offenses serve many of the functions of vagrancy laws, which targeted “objectionable out of place people” rather than any particular conduct, and were found unconstitutional in the early 1970s following the social upheaval of the 1960s and concerted efforts against the “vagrancy regime.”<sup>102</sup>

- **Non-prosecution policies more closely aligned with decriminalization decline to prosecute offenses related to the buying and selling of sex, which would both be decriminalized under that model.** Current Manhattan DA Alvin Bragg appears to have kept his word in not prosecuting specific sex work-related charges, in a context where he has increased prosecutions generally.<sup>103</sup> But, as explored in the sections below, sex work and related activities may still be prosecuted under other charges, particularly ‘quality-of-life’ and third party offenses. A number of policies aligned with a model of *full* decriminalization and the mitigation of the full range of crimes that can impact sex workers also decline to prosecute other crimes that can be used against sex workers as they work, including these ‘quality-of-life’ offenses like loitering; as well as third party offenses, such as “promoting prostitution,” which can impact people who are supporting or supported by sex workers, like other sex workers, managers, and family members.<sup>104</sup>

#### WASHTENAW COUNTY, MICHIGAN

The Washtenaw County Prosecutor’s Office non-prosecution policy does not change the fact that sex work remains criminalized in Michigan. However, its policy directive to not prosecute charges related to sex work generally (both sex workers and clients) is explicitly grounded in “the demonstrated public-safety and public-health benefits of decriminalizing sex work.”<sup>105</sup> Among other considerations, the directive points to general support for decriminalization across a number of national and international advocacy, anti-trafficking and health organizations, as well as research on public health outcomes supporting decriminalization.<sup>106</sup> DA Savit has also expressed support for decriminalization with commitment to the non-prosecution of sex work on social media.<sup>107</sup>

- **The technical distinction between sex work-related charges not being prosecuted and the full decriminalization of sex work can be confused in public discourse and the media.**<sup>108</sup> This is enhanced where support for decriminalization is included rhetorically in the text of a policy, such as in Washtenaw County;<sup>109</sup> in critiques<sup>110</sup> or praise<sup>111</sup> by those who view non-prosecution as *effectively* the repeal of the law by preventing conviction;<sup>112</sup> or in headlines that claim a non-prosecution policy is decriminalization (“Assessing Cy Vance’s decriminalization of prostitution”)<sup>113</sup> or lead with a DA’s general support for decriminalization (“Brooklyn DA Eric Gonzalez wants to decriminalize prostitution”)<sup>114</sup> while making clarifications about non-prosecution only in the body of the article. While this conflation could arguably move the conversation on decriminalization forward, opening space to chip at the stigma of criminalization,<sup>115</sup> it does not reflect a deeper shift in thinking about sex work or the reality of criminalization and prosecution on the ground.

#### End Demand

- **The Model:** The “End Demand” model involves **removing criminal penalties for the specific crime of selling sex, but maintaining criminal penalties for buying sexual services**,<sup>116</sup> and for a range of other offenses essential to selling sex safely.<sup>117</sup> This model is also called the “Nordic” model, “Swedish” model, “Equality” model, “Entrapment” model, or included under a competing, overinclusive, and co-opted definition of “decriminalization” as “partial decriminalization”.<sup>118</sup> Proponents of this model seek to criminalize clients and third parties (both of whom may also be sex workers),<sup>119</sup> on the theory that this will end demand for sex work

and therefore eradicate the sex work industry. Many supporters, who identify as feminist (asserting that they are using the power of prosecution to “equalize” what they assume is male dominance performed through buying sex), disregard the significant harms to sex workers as many aspects of the policing of sex work continue in service of this goal.<sup>120</sup> Instead, they prioritize seeking to end the sexual exploitation of women supposedly part and parcel to sex work,<sup>121</sup> which is viewed as inherently harmful, immoral, or coercive in all its forms.<sup>122</sup> Notably, this view often conflates all sex work with trafficking.<sup>123</sup> End Demand frames often ignore the existence of cis men, trans men and nonbinary people in conceptions of both sex workers and survivors of human trafficking, and in speaking for “women” have historically invisibilized trans women sex workers, in some cases even leading to the arrest of trans women sex workers as “johns.”<sup>124</sup> End Demand advocacy has also historically centered the image of white women as victims, with a more recent shift to highlight Black women as victims of white male aggression. In each case, the undercurrent of the narrative is a fear of cross-racial mixing, with many End Demand groups also not interrogating the racial dynamics of increased criminalization and space-focused policing and its disparate impact on BIPOC men, including migrant men.<sup>125</sup>

- **Non-prosecution policies aligned with the End Demand model decline to prosecute crimes associated with selling sex, but maintain prosecutions for buying sex**, along with ‘quality-of-life’ offenses. The prosecution of offenses such as “promoting prostitution” often occurs under the assumption that those criminalized – often other sex workers, managers, and family members – are involved in trafficking.

#### SEATTLE, WASHINGTON

The implementation of the (limited) non-prosecution policy in Seattle occurs within a context of widespread conflation of sex work and trafficking; a number of anti-trafficking raids leading only to sex work-related (and no trafficking) charges, including raids funded by an anti-sex work organization; anti-trafficking awareness raising, including a campaign with government and business partners; and a large presence of end-demand-oriented anti-trafficking groups and funding.<sup>126</sup> Seattle has adopted a model of targeted prosecution against clients at the city level since 2012,<sup>127</sup> and a similar model for Kings County was announced in 2014.<sup>128</sup> As noted above, in 2021, then-City Attorney Pete Holmes moved to quash misdemeanor prostitution bench warrants, and dismiss cases.<sup>129</sup> It appears that his more-conservative successor, Ann Davison, has continued to decline charges for sex workers (while prosecuting clients).<sup>130</sup>

Explaining their policies, former City Attorney Pete Holmes and King County Prosecuting Attorney Dan Sattenberg wrote an op-ed in 2015 with Debra Boyer, the then-Executive Director of end-demand group Organization for Prostitution Survivors. In the article – which sex worker rights advocate Mistress Matisse has noted as “striking in its presentation of opinions as fact and its use of utterly bogus ‘statistics’”<sup>131</sup> – they state:

*“The Seattle City Attorney’s Office and King County Prosecutor’s Office support working toward the “Nordic model.” We have been putting that model into practice by refocusing prosecution emphasis on those causing the harm — the buyers — while connecting prostituted people with services to transition out of the sex trade. We must increase those services, while increasing penalties for buyers. This is the socially just path, and is the only way to end commercial sexual exploitation and the crimes associated with it...Decriminalization supports the very root of sex trafficking, which exists for one reason only: to supply the demand for commercial sex. By chilling the demand for sex buying, we chill the economic incentives for sex trafficking.”<sup>132</sup>*

Holmes also wrote a letter in 2017 to seven municipal court judges explaining that a policy shift to cracking down on clients (“johns”) was meant to end demand by punishing them with “public disclosure of their activities.”<sup>133</sup> Further, the State Attorney-General’s office, in 2014, helped organize a march called “Men’s March to End Demand,”<sup>134</sup> and has worked with the Seattle City Attorney’s Office and the King County Prosecuting Attorney’s Office to create the “Ending Exploitation Collaborative,” an initiative to “reduce the criminalization of survivors and redirecting the focus of law enforcement and prosecution toward sex buyers.”<sup>135</sup>

Seattle has had some movement in favor of sex workers' rights, however. In 2020, following weeks of protests for racial justice, the City Council repealed its prostitution loitering law due to concerns about their disproportionate impacts on Black and Indigenous people and other people of color.<sup>136</sup> This followed the release, in 2018, of a report by the Reentry Workgroup of Seattle's Office for Civil Rights recommending repeal, which sex worker rights advocates had long been pushing to be implemented. The report underscored the dangers of bringing sex workers into the criminal legal system, which can "only exacerbate any underlying unmet needs and expose them to further physical and sexual harm caused by incarceration".<sup>137</sup>

- **An anti-trafficking frame that excludes sex workers' rights not only misapplies the label of trafficking to a range of activities related to sex work, including safety practices, but creates dynamics of prosecution and service delivery that incentivize sex workers navigating them to identify as trafficking victims, thereby creating data and narratives that superficially affirm anti-trafficking rhetoric about their lives.**

#### **HOW SLIPPAGE IN LANGUAGE AND CONCEPTIONS OF TRAFFICKING AND SEX WORK MATTERS FOR NON-PROSECUTION**

End Demand advocates and others, including the public, often conflate sex trafficking with sex work. For example, in Washtenaw County, Michigan, attacks on DA Savit's non-prosecution policy deploying anti-trafficking narratives influenced members of the public to think the policy allowed trafficking.<sup>138</sup> This is in part due to a history of advocacy and legal developments that locked the concept of anti-trafficking work into anti-sex work frames.<sup>139</sup> But, as the Irina Project – an organization that monitors and analyzes media representations of sex trafficking – explains, while it is possible for an individual to experience both sex work and trafficking in their life, they are distinct.<sup>140</sup>

This conceptual blurring has specific consequences and can be perpetuated, also, as sex workers and other advocates, and clients, navigate spaces, services, and laws that seek to define their experiences, and access to resources and safety, in line with specific narratives around sex trafficking. This is a space of limited navigation and claiming, as it is ultimately up to the DA in each case to decide the charges, and they may overlay their conception of the person, their circumstances, and the context of arrest, in doing so.<sup>141</sup>

- Non-prosecution policies that decline charges for selling sex, and claim to not target sex workers in continuing to pursue charges against clients and third parties in line with a trafficking frame, actually enable the prosecution of sex workers for not acting in ways that align with that trafficking frame. For example, sex workers may be framed as a trafficker and charged with promoting prostitution for sharing indoors spaces, which is a proactive safety measure particularly important for new sex workers or those who cannot afford hourly rent for a hotel room.<sup>142</sup>
- Adopting a trafficking narrative is required to access relief under targeted statutes allowing criminal convictions to be vacated. Given the range of collateral consequences faced by those with convictions, whether for sex work-related charges or others, this creates incentive to have such convictions vacated, regardless of whether trafficking actually occurred.<sup>143</sup>
- There are specific services provided only for people identified as victims of trafficking, requiring sex workers arrested as part of anti-trafficking raids to accept the trafficking label to access services offered on that condition, or for migrant sex workers to access a T visa (available only to victims of trafficking) to remain in the country.<sup>144</sup>
- The trafficking frame can also create impacts for clients, some of whom may also do sex work. For example, in 2015, the Seattle City Council renamed the crime of "patronizing a prostitute" – already stigmatizing to sex workers – to "sexual exploitation,"<sup>145</sup> and the then-City Attorney directed prosecutors to rule out pre-trial diversion for those accused of soliciting sex workers under the idea, not supported by evidence, that casting clients as sexual predators and more harshly criminalizing them would stop them from buying sex. Public defenders have noted that this approach could have a disproportionate impact on noncitizens, including through deportation.<sup>146</sup>

'Sex work' as a category may also be similarly contingently claimed, imposed, or denied when someone is faced with the weight of the criminal legal system and potential punishment, with differential outcomes.

- In New York, many massage workers who are unlicensed and provide oral sex or non-penetrative sexual services, including as a new practice adopted as a COVID precaution, do not self-identify to police or other criminal legal actors as sex workers, based on their particular conception of sex work as full service and/or street-based as well as their own potential negative associations with the term 'sex worker'.<sup>147</sup> Yet, lighter criminal penalties are assigned (alongside harsher immigration consequences), under a prostitution charge (a class B misdemeanor explicitly covered by DA Bragg's policy) than for a charge of unlicensed massage (a class E felony only potentially unofficially covered in the policy).<sup>148</sup> Compounding the likelihood that charges are not declined, and harsher penalties imposed, under unlicensed massage are racialized targeting and narratives related to trafficking: "[l]aw enforcement officers weaponize unlicensed massage statutes to raid massage businesses and arrest almost exclusively Asian women, many of whom are noncitizens or undocumented," often "claim[ing] that they intend to save victims of sex trafficking."<sup>149</sup>

**The 'End Demand' model has notable limitations and harms that may translate into and impact the implementation of non-prosecution policies aligned with that model in important ways.**

- **The 'End Demand' model – through the criminalization of clients – 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 the elements of state violence that flow from ongoing police exposure.**<sup>150</sup>

Ongoing policing of the sector means continued state violence against workers, which is also likely to be deployed unevenly against people and communities based on their class, race, gender expression and sexual identity, and citizenship. Furthermore, evidence has shown that this legal framework stigmatizes and isolates sex workers, for example by driving street-based sex workers to work in less visible and more isolated places where it may be more difficult to safely negotiate with clients.<sup>151</sup> As a result, sex workers may have less access to supports and health services,<sup>152</sup> fewer choices regarding their clients, less control over their working conditions, and less negotiating power over safe sex practices and other safety screens, such as recording vehicle plate numbers, assessing safety before entering a client's car, and negotiating where the services will be provided for street-based workers.<sup>153</sup> After the 'End Demand' model was implemented in France, 42% of people in the sex work industry reported increased workplace violence, and 38% reported greater difficulty negotiating condom usage with clients.<sup>154</sup>

- **This model enhances already problematic enforcement dynamics against BIPOC clients, while ignoring wealthy, white clients; and this may be exacerbated by the operation of prosecutorial discretion.**<sup>155</sup>

Relying on local prosecutorial non-prosecution policies to mitigate the impact of criminal law, rather than full legislative decriminalization of sex work, keeps the enforcement decision-making power in the hands of the prosecutor, who may selectively enforce the policy or revise it (although this opens them up to criticism), or see it changed by a successor in office. Depending on the scope of the policy, a DA may also strategically seek alternative charges that are not covered by the policy, such as promoting prostitution or human trafficking.

Depending on the structure of the policy, the DA may formally retain discretion without having to circumvent the policy. For example, in Manhattan, the non-prosecution policy includes clients, but does not direct non-prosecution in all cases. Instead, it requires supervisory approval for the prosecution of clients, with the clarification that the policy "does not include any felonies, or coercive practices regularly performed by those who traffic in the sex trade or related crimes..."<sup>156</sup> While narrowing the scope of discretion, this still allows decision-making on a case-by-case basis, notably on the basis of whether a trafficking frame can be applied.

Any policy that relies on prosecutors' willingness to enforce it on an ongoing basis is vulnerable to these electoral realities as DAs must pivot and negotiate their position within the community. In other words, a DA may have a non-prosecution policy on paper, but depending on a variety of factors, including concerns over a future election, they may not always abide by that policy.

This creates the potential for media manipulation and enforcement patterns designed to enhance a DA's perception by key constituencies. For example, local law enforcement in an urban jurisdiction where the prosecutor professes to follow an 'End Demand' model may engage in tokenistic, high-profile arrests of white suburban men who have traveled to purchase sex, and the media coverage of these arrests may disguise the fact that most people prosecuted under the policy are local, low-income BIPOC men. This allows elected prosecutors to shore up their reputation among both local neighborhood groups operating under a "clean up the neighborhood" narrative and some feminist groups operating under a "save the women" narrative who wish to see wealthy white men punished for their participation in the sex trade.

Wherever jurisdictions adopt 'End Demand'-aligned policies, the racial make-up and socioeconomic status of those who are policed, charged and/or prosecuted as clients under purchasing charges need to be tracked and analyzed to identify cases where the war on "demand" for sex work ends up reproducing and re-entrenching the criminalization of poor BIPOC men under the guise of "protecting women." This would help in demonstrating how 'End Demand' models fit into the category of other archaic policing tactics – such as stop and frisk, and broken windows policing – that harm BIPOC and/or low-income people and communities, and that should be abandoned. As additional work by SWP looking at New York arrest data shows, those arrested for patronizing charges are overwhelmingly Black and Hispanic men (see SWP's [Resources](#) page).

- **The 'End Demand' model ignores the reality that sex workers may also be clients of other sex workers.** This undermines the binary of sex worker/client assumed under such a model, and the argument by 'End Demand' proponents that this approach amounts to the partial decriminalization of sex work by way of targeting clients and third parties only. This approach is reductive in its understanding of the sex trades and the at times fluid roles individuals play within it, crossing between sex worker, client, and third party.
- **Even sought instrumentally as a potential harm reductionist or incremental step to broader change, 'End Demand' measures hold risk in becoming established for a long time and helping to spread an ideology aligned with it among actors in each place, and beyond.**<sup>157</sup> Seattle's Law Enforcement Assisted Diversion program, for example, has become a model implemented nationwide.<sup>158</sup>

## DECLINE PROSECUTION OF ‘QUALITY-OF-LIFE’ AND OTHER OFFENSES THAT ENGAGE SEX WORKERS

**Non-prosecution policies should decline prosecution of broader ‘quality-of-life’ and other offenses, which may often substitute for charges specifically prohibiting transactions for sex in jurisdictions where only those offenses are declined, and more broadly engage sex workers in legal oppression and penalization.**

- **Non-prosecution policies vary in the extent to which they cover charges beyond selling and buying sex.** Concretely, this impacts the extent to which non-prosecution policies engage different types of sex work, including sex work other than in-person full-service sex work. Non-prosecution policies are particularly limited if they do not protect all sex workers from prosecution equally, regardless of the type(s) of sex work performed, and across differential exposure to police and police harassment, particularly for low-income sex workers, trans sex workers, and BIPOC sex workers.<sup>159</sup>

**While removing prosecution under specific sex work-related charges is important, because of their impact on housing, employment, education, and immigration, non-prosecution policies are limited if they do not include broader ‘quality-of-life’ offenses.**

- The concept of ‘quality-of-life’ offenses emerged during the era of “broken windows” policing in the 1990s and early 2000s, when predominant criminological theory taught that prosecuting low-level crimes would make communities safer and thereby prevent larger, violent crimes. The category of ‘quality-of-life’ crimes thus describes those offenses thought to make a community’s streets feel less safe and instigate community breakdown.<sup>160</sup> Sex worker-led groups include these offenses within decriminalization work, as the broader effort to end all legal oppression and penalization of sex workers goes beyond criminal laws specific to sex work to include laws against vagrancy, obscenity, drug use, and other ‘quality-of-life’ offenses,<sup>161</sup> such as loitering, public camping, public urination, illegally congregating, and panhandling.<sup>162</sup> Similarly, given the broad net of criminalization cast by these crimes, coalitions like Decrim Poverty DC try to address all forms of criminalization targeting poor people, including people doing sex work.<sup>163</sup> Non-prosecution policies seeking to engage and mitigate the same harms should likewise include these offenses within their scope.

### SAN FRANCISCO, CALIFORNIA

According to data released by now-recalled San Francisco DA Chesa Boudin’s office, the charging rate for ‘quality-of-life’ offenses was half of what it was before he took office and implemented a non-prosecution policy, down to 10% from more than 20%; the charging rate for prostitution offenses went from around 12% to 0%.<sup>164</sup>

### WASHTENAW COUNTY, MICHIGAN

Washtenaw County’s non-prosecution policy encompasses only the selling and buying of sex. The policy directive explicitly states, “While the intent of this policy is to decline to prosecute consensual sex work in order to prevent victimization and harm, it is not intended to prevent enforcement of public nuisance or other ordinance violations that are a secondary result of sex work.”<sup>165</sup> This exception to the policy has apparently had minimal impact, as police are ostensibly not arresting sex workers on these other grounds.<sup>166</sup>

**Not including broader ‘quality-of-life’ crimes in non-prosecution policies, as in decriminalization efforts, means that sex workers continue to be at increased risk of policing, police harassment, charges, and prosecution.<sup>167</sup>**

- **The enforcement of these laws habitually includes activities such as sitting, standing, or congregating in public in certain circumstances.** As a result, policing and prosecution of ‘quality-of-life’ offenses often target

street economies and the people who work in them, including street-based sex workers. For example, law enforcement can arrest people they believe to be unhoused or selling drugs or sex under ‘quality-of-life’ offenses, when there would not otherwise be probable cause to arrest them.<sup>168</sup> Sex workers can be moved if too visible and even charged with “pandering” or “promoting prostitution” (in some states, a felony), in place of prostitution charges.<sup>169</sup>

- **Sex workers in public spaces suffer particularly from class-based discrimination against poor people, racism, and gender-based discrimination, including discrimination against trans and gender non-conforming people.** In a 2020 California legislative debate about whether to eliminate the state’s law criminalizing “loitering with the intent to engage in prostitution,” one state Assemblyman admitted the law allows police officers to preemptively arrest women “dressed like that” and carrying “a purse full of condoms.”<sup>170</sup> In Washington D.C., for instance, enhanced loitering statutes have empowered “move along” policies that attempt to “cleanse” certain neighborhoods of sex workers, including to appease complaints from some residents.<sup>171</sup> These efforts ignore that sex workers are often residents and community members, with a stake and voice in communities where sex workers can often both work and live. It is no coincidence, then, that these efforts are also tied to changes in cities and communities, including gentrification to make particular areas more appealing to wealthier residents, families, and commercial businesses.<sup>172</sup> This may compound with actions from multiple players, from local government to developers, that also push sex workers into more precarity.<sup>173</sup>
- **These laws impact sex worker’s safety and health.** In research by the Alliance for a Safe & Diverse D.C. on anti-sex work policies in D.C., most people reported that after being told to “move along,” they relocated to areas where they felt more vulnerable to violence. Additionally, these policies make it more difficult for sex workers to access health and social services.<sup>174</sup> Notably, some organizations, deploying an anti-sex work anti-trafficking frame, have argued for the enforcement of ‘quality-of-life’ offenses, despite the harms caused to sex workers, on the view that increased engagement by law enforcement facilitates the initiation of trafficking investigations. Others underscore that this simply leads to arrest and barriers to resources for survivors.<sup>175</sup>

#### BALTIMORE, MARYLAND

Baltimore City is an example of a jurisdiction that has been conscious of the overlap between prosecution of sex work-specific offenses and other ‘quality-of-life’ offenses.<sup>176</sup> As part of its announcement that it would not prosecute sex work, Baltimore City’s previous SA Mosby announced that the State’s Attorney’s Office would not prosecute other ‘quality-of-life’ offenses, including trespassing.<sup>177</sup> The State’s Attorney’s Office had adopted the explicit frame that sex work *is* a ‘quality-of-life’ issue, rather than a public safety issue, not wanting to see sex workers getting arrested for other ‘quality-of-life’ offenses. Implementation involved monitoring police charges for other quality-of-life offense issues to make sure that police were not switching out one offense for prostitution to continue to arrest sex workers.<sup>178</sup> Other jurisdictions, such as Manhattan, have gestured towards this approach through DA Bragg’s Day One memo, which indicated his office would not prosecute sex work, as well as ‘quality-of-life’ offenses such as cannabis misdemeanors and trespassing.<sup>179</sup>

**Non-prosecution policies do not protect all sex workers from prosecution equally if they do not include crimes related to unlicensed massage.**

- Notably, this differentially impacts sex workers on the basis of race and immigration status, and leaves a highly targeted population of sex workers unprotected.<sup>180</sup>

#### MANHATTAN, NEW YORK

The Manhattan non-prosecution policy, shared in an internal memo from District Attorney Alvin Bragg to staff dated January 3, 2022,<sup>181</sup> states that the crime of prostitution will no longer be prosecuted unless associated with

a felony count, and that prosecuting the crime of patronizing would require supervisory approval.<sup>182</sup> But the memo is limited in that it does not cover all legal provisions that sex workers could be criminalized under; for example, the memo does not directly address massage workers who may also provide sexual services to clients. And it appears that some elements of the Office's non-prosecution policy are not included in the memo. Notably Bragg does not appear to be prosecuting unlicensed massage but has not made an official announcement; his predecessor stopped prosecuting this offense right before he left office.

This exclusion can have very serious consequences, because massage workers, in particular, are subject to increased police surveillance.<sup>183</sup> In New York, the practice of unlicensed massage is disproportionately being conducted by Asian migrant workers due to a variety of factors, including immigration status and language-based barriers to licensing and other employment.<sup>184</sup> Despite the general reduction in prostitution-related arrests following the non-prosecution policy—including a reduction in arrests related to unlicensed massage<sup>185</sup>—targeting continues for massage workers located within Asian communities, who are subject to raids by law enforcement.<sup>186</sup> Asian massage businesses have long been the target of law enforcement interventions, including raids as part of immigration or anti-trafficking stings.<sup>187</sup> Due to a longstanding reliance on harmful carceral approaches within the anti-trafficking movement, and certain NGOs and government agencies identifying massage businesses as sites of human trafficking,<sup>188</sup> “[m]assage work is one of the only licensed professions in New York where the criminal law – including felony charges – is routinely used to police unlicensed practitioners.”<sup>189</sup> Yet, anti-trafficking operations identify few trafficking victims, primarily target sex work, and treat workers, particularly also Black workers, as criminal: “[c]ritics posit that these law enforcement operations are merely anti-sex work efforts rebranded as anti-sex trafficking interventions.”<sup>190</sup> Anti-trafficking police work often also results in immigration-related charges.<sup>191</sup> Between 2012 and 2016, arrests for Asian-identified massage workers have increased 2,700%.<sup>192</sup> Efforts to decriminalize unlicensed massage work continues. A bill was introduced in the New York State Assembly to decriminalize unlicensed massage work in 2021, and there are plans to reintroduce it in 2023.<sup>193</sup>

## DECLINE PROSECUTION OF ‘THIRD PARTY’ CHARGES

**Non-prosecution policies should decline prosecution of ‘third party’ charges, which have been used to criminalize people providing support to sex workers to conduct their work safely, critically this includes other sex workers, as well as family members, friends, and those who live with or are supported by sex workers.**

- **Non-prosecution policies vary in their treatment of third parties; that is, those who may be drawn into the criminal law around sex work, but who are not directly involved in the transaction of selling or buying sex.**<sup>194</sup> Many prostitution statutes cover not only the sex worker and client but also these third parties.
- Third parties may be people sex workers work with or for, hire, or who provide a good or service directly related to a sex worker’s labor.<sup>195</sup> Third parties can fill any number of functions related to sex work: they may serve as “personal assistants, drivers, security, web designers, agents, and worksite providers as well as owners, managers and receptionists of outcall agencies (e.g., escort agencies) or in-call establishments (e.g., brothels and massage businesses).”<sup>196</sup> As sex worker rights activist Maya Morena stressed, regarding the non-prosecution policy in Manhattan under former DA Cyrus Vance, Jr.: “They will still be criminalizing our...third-party, which often means anyone we pay, including our landlords, friends, drivers, and customers, are criminalized.”<sup>197</sup> Third parties are also not included in the non-prosecution policy under current DA Alvin Bragg.<sup>198</sup> In Seattle, Washington, the Seattle City Attorney’s Office and the King County Prosecutor’s Office have aggressively prosecuted clients, sex workers and third parties with the crime of promoting prostitution in the second degree, which is a felony and requires sex offender registration if a second relevant conviction.<sup>199</sup>

### BALTIMORE, MARYLAND

The former Baltimore City State’s Attorney chose not to prosecute any of the crimes under Maryland’s statute criminalizing activities related to sex work, which is broader in scope than the selling and buying of sex, extending to activities involving third parties, includes using or allowing use of a building or vehicle for selling and buying sex, as part of efforts to be as broad as possible within the prosecutor’s powers.<sup>200</sup>

**The inclusion of third parties in non-prosecution policies can help mitigate several harms associated with sex work criminalization and criminalization simply for supporting sex workers:**

- **The criminalization of third parties subjects sex work to police surveillance and intervention and has the effect of making sex work less safe.** In this way, maintaining a policy of prosecuting third parties functions similarly to – and can blur with – prosecution of clients in line with the ‘End Demand’ model. While people acting as third parties, like clients, can in some cases harm sex workers, it is important to “reject...the notion that third parties, by their very nature, are always and inevitably abusive or exploitative.”<sup>201</sup> As one report from the Canadian Alliance for Sex Work Law Reform notes, the criminalization of third parties prevents sex workers from hiring third parties that might improve their safety (such as acting as security or receiving payment to write down license plate numbers), decreases the attractiveness of some indoor sex work as an alternative to street-based work, limits access to the criminal legal system, and pushes sex work into the shadows.<sup>202</sup>
- **Several ‘third party’ activities captured by the law are a function of needs created by the criminal legal system itself.** The need to obtain and give a cut of earnings to security or massage businesses is **done in part because there are no labor protections for sex work as a criminalized activity.**<sup>203</sup>
- **Third parties and third-party laws may be excluded from non-prosecution policies due to the improper conflation of third parties with traffickers.** Third parties may provide a range of services that improve sex worker safety and stability, including through management, security, housing, and transportation. However,

third parties being conflated with traffickers and criminalized accordingly, limits sex workers options on who to engage as a third party. Sex workers become less able to safely provide third party services to each other or seek out family, friends, or other trusted individuals to act as third parties, either because these individuals are unwilling to risk serious criminal penalties or sex workers do not want to expose these individuals to such risks. With limited options, sex workers become more, not less, vulnerable to third parties who actually are abusive or exploitative which then feeds into the inaccurate perception that all third parties are traffickers.<sup>204</sup>

#### WASHTENAW COUNTY, MICHIGAN

Washtenaw County's non-prosecution memo states: "The Prosecutor's Office will also continue to pursue charges against those colloquially known as "pimps," as well as any unlawful commercial sexual establishment (e.g., a brothel) and their operators."<sup>205</sup> Washtenaw County DA Savit later explained, "We are not authorizing or condoning commercial sex here in Washtenaw County. There's going to be no brothels. We will shut those down. There's not going to be a street like you have in Amsterdam where folks are openly sold for sex."<sup>206</sup>

- **Third party laws can also affect family members**, including adult children, who may be charged with offenses like promoting prostitution where they are supported through money gained from sex work,<sup>207</sup> which in some states can also be seized, among other penalties, through civil asset forfeiture.<sup>208</sup> Civil asset forfeiture affects children of all ages by removing or disincentivizing the use of proceeds of sex work to pay for housing, food, school expenses, and other necessities.<sup>209</sup>
- **Failure to include third parties in non-prosecution policies also create problems due to blur between sex work-related activities performed by sex workers that prosecutors or police may consider part of selling and buying sex and others that they may consider third party activities, and continue to target for arrest, charging, and/or prosecution.** Critically, sex workers might also take on one or more third party roles for other sex workers or be criminalized under crimes such as "promoting prostitution" simply for associating or working with one another or referring vetted clients.<sup>210</sup>

#### MANHATTAN, NEW YORK

Manhattan DA Alvin Bragg's memo states that the Office will not prosecute Prostitution (PL § 230.00), and requires supervisory approval to prosecute Patronizing a Person for Prostitution (PL § 230.04),<sup>211</sup> but these are only two of a number of "Prostitution Offenses" under New York law.<sup>212</sup> Notably, the lines between sex worker (not prosecuted) and client (subject to supervisory approval) are blurred when sex workers make content together. But even when the lines are not blurred, offenses not covered by the policy could be construed to prosecute sex workers for working and even living together.<sup>213</sup> Sex workers may also be clients of other sex workers, at times, exposing them to prosecution for patronizing if supervisory approval is granted.

## INCLUDE ACTION TO SUPPORT THE DISMISSAL OF CURRENT AND PAST CHARGES AND CASES

Non-prosecution policies should include specific action by DAs to drop current charges, to advocate to courts to support the dismissal of current and past charges and cases related to offenses under the non-prosecution policy, and to advocate to courts or legislatures for the expungement of related convictions. These responses should cover a range of charges beyond those related specifically to the selling and buying of sex.

- **Non-prosecution policies vary in whether they also include action to address current and past charges.** The introduction of a non-prosecution policy for a specific set of offenses is a statement of intention for the way prosecutors are expected to deal with future arrests for said offenses (*prospective* relief). DAs, however, may, as part of their non-prosecution efforts, also seek to remove or mitigate the harms of past charges and convictions under the offenses included in their policy (*retroactive* relief).

Both prosecuting attorneys and judges have the power to end a criminal case, in the situation where a prosecutor has previously brought charges and the case has begun. These options are only available while a case is ongoing, i.e., prior to conviction or acquittal. Separate action, as explored in this section – vacating, sealing, or expunging – is needed to modify any related criminal record.

**Dismissal:** is the decision by a court to terminate a case without imposing liability on the defendant, which may be taken following a request by the defendant or on the court’s own initiative. A dismissal may or may not, at the court’s discretion, bar a prosecutor from refiling charges (or new charges based on the same circumstances) in the future.<sup>214</sup> Reasons given for dismissal may vary. For example, in Seattle, then-City Attorney Pete Holmes successfully requested the dismissal of cases on the basis that each of the cases included only a single charge of the crime of prostitution, in the context of a non-prosecution policy for such charges.<sup>215</sup>

**Nolle prosequi:** Prosecutors can discontinue prosecution by filing a *nolle prosequi* (Latin for “not wish to prosecute”) with the court, indicating that they are voluntarily dropping charges. This may be entered any time after charges have been brought but before a verdict has been made or a plea entered. A *nolle prosequi* does not prevent a prosecutor bringing the same charges in the future.<sup>216</sup> Some states have legislation providing that nolle charges will be erased automatically after a set time period.<sup>217</sup>

**Non-prosecution policies that do not include action to address current and past charges fail to redress the harms of the criminalization of sex work experienced by individuals prior to the policy, and unfairly burden individuals with charges, convictions, and ongoing significant collateral consequences related to past conduct that is now judged not to be deserving of legal penalties.**

- **The specific legal mechanisms available to address current and past charges vary state-to-state, but in most cases, it involves a request made to a court<sup>218</sup> by the person concerned.** A DA may object to this request or make it themselves. For example, several DAs have moved to vacate warrants, dismiss pending charges and cases, and erase convictions. None of these options can undo the harm already experienced, but some can mitigate future consequences of arrest or conviction to a greater extent. Action to erase past convictions has been a formal element of non-prosecution policies in various jurisdictions.<sup>219</sup>

**Each option is considered in turn, along with relevant limitations:**

- **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.<sup>220</sup>** The rule or court order providing for this is referred to as “vacatur.”<sup>221</sup>

### BROOKLYN, NEW YORK

In January and March 2021, Brooklyn DA Eric Gonzalez successfully submitted court motions to vacate 1,119 open bench warrants related to the crimes of prostitution and loitering for the purposes of prostitution, and to dismiss

the underlying cases.<sup>222</sup> A bench warrant is similar to an arrest warrant, but directed at arrest related to the court process, for example, failure to appear in court.<sup>223</sup> Gonzalez noted:

*“[F]irst and most obviously, it doesn’t make sense for someone to have an outstanding warrant for something we no longer prosecute. But beyond that, these warrants have powerful negative consequences for the individual, and they undermine public safety. Because someone with an open warrant is subject to arrest at any time, those engaged in the selling of sex are more likely to be driven underground and be less likely to report abuse or other crimes, which makes both them and others less safe. An outstanding warrant could show up years after it was issued in a background check for an apartment rental or a job application, hamstringing someone’s ability to move on from their past to a more stable and less dangerous way of life.”<sup>224</sup>*

#### SEATTLE, WASHINGTON

Also in 2021, the Seattle Municipal Court approved a motion by then-City Attorney Pete Holmes to quash 37 misdemeanor prostitution bench warrants, and to dismiss, vacate, or close cases – based on their status – against 34 people arrested for selling sex between 2001 and 2019 (when the non-prosecution policy began), on the condition that a future city attorney cannot refile the cases at a later date.<sup>225</sup>

However, there are also processes that **hide charges and convictions from the public and most employers: sealing and expungement.**<sup>226</sup>

- **Sealing removes the conviction from an individual’s public record, but it is still accessible to law enforcement and courts, including as allowed by law or court order.**<sup>227</sup>

#### MANHATTAN, NEW YORK

In April 2021, former Manhattan DA Cyrus Vance, Jr. moved in court to have 914 prostitution and unlicensed massage cases dismissed, the same day he announced that his office would not prosecute these offenses.<sup>228</sup> He also moved to dismiss 5,080 loitering for the purpose of prostitution cases, in light of requirements under the repeal of New York State’s “Walking While Trans” loitering statute.<sup>229</sup> As a result, the court ordered that all warrants, pleas, sentences, and convictions be vacated and the cases dismissed and sealed.<sup>230</sup>

Note that **in the case of both vacating and sealing a charge or conviction, a formal record remains.**<sup>231</sup>

- **Expungement, in some states, takes the extra step of destroying the arrest and/or conviction and related records and, sometimes, additionally returning those records to the person concerned.**<sup>232</sup>

Expungement is usually a process in which an individual petitions a court to remove a specific conviction. Sex worker rights advocates have been supportive of non-prosecution policies, while also pushing for legislation that specifically includes expungement.<sup>233</sup> Such legislation may expunge all past convictions for certain crimes at a set date or create mechanisms for automatic expungement after a certain period, for example, after a period of no subsequent convictions. This reduces barriers related to individual petitions, such as having to navigate a complicated expungement process that often requires the assistance of an attorney.<sup>234</sup>

Working to erase convictions, in addition to vacating warrants and dismissing cases, is critical in reducing the burden on the individual involved, as noted by former Manhattan DA Cyrus Vance, Jr. in a press release on the Office’s policy under his leadership.<sup>235</sup> Convictions carry significant long-term consequences that make it more

difficult for people to participate in social life as full citizens. The consequences of these past convictions are broad and profound, including:

- fines, incarceration, and community supervision (e.g., probation and parole);
- legal consequences depending on the nature of the conviction, such as denial of voting rights, disqualification from serving on a jury, and exclusion from some public benefits, such as food stamps;
- convictions can be used against parents going through custody disputes, child protective services investigations, or other issues in family court;
- individuals with convictions often experience difficulties finding housing or employment, including impacting those looking to get licensed to do other types of work, leaving sex workers more vulnerable to exploitation;
- conviction can lead to the denial of immigration relief and possible deportation for migrants without immigration status, which can also compound vulnerability to exploitation.<sup>236</sup>

It is critical to note that an expungement order concerns legal records in the jurisdiction of specific courts; and will not remove references in court documents and police blotters, or in the press, Google, or social media.<sup>237</sup>

#### WASHTENAW COUNTY, MICHIGAN

The Washtenaw County non-prosecution policy states that “[t]he 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.”<sup>238</sup>

A non-contestation policy still requires individuals to petition a court for expungement, which can be an expensive process that is not guaranteed to be successful.<sup>239</sup> In contrast, in 2021, while moving to vacate warrants related to the crimes of prostitution and loitering for the purposes of prostitution, Brooklyn DA Eric Gonzalez also called on legislators to expunge old prostitution-related convictions.<sup>240</sup> Likewise, in 2020, now-recalled San Francisco DA Chesa Boudin publicly supported a bill that would automatically expunge criminal charges of California residents who had unconvicted misdemeanor charges or had completed a diversion program.<sup>241</sup>

**Non-prosecution policies should also include the elimination of cash bail. The importance of retroactive relief intersects with movements for cash bail reform, as cash bail can keep people with outstanding sex work-related charges in jail in dangerous conditions.**<sup>242</sup> Cash bail has been criticized for fueling pretrial incarceration and punishing individuals for poverty;<sup>243</sup> hence, cash bail reform is crucial to alleviate the criminalization of ‘quality-of-life’ offenses including sex work.

- DAs have included this in their policies, although without making the explicit link to its importance also for sex workers. In 2019, DA Rachel Rollins of Suffolk County, Massachusetts – which comprises the city of Boston, among other towns – announced a new policy to eliminate cash bail unless there is evidence that an individual poses a flight risk.<sup>244</sup> DA Larry Krasner in Philadelphia instructed prosecutors not to request cash bail for specific low-level offenses, and now-recalled DA Chesa Boudin announced a broad policy in San Francisco that instructed prosecutors to never request cash bail and never defend someone’s incarceration on cash bail.<sup>245</sup>

# POINTS OF INFLUENCE IN POLICY IMPLEMENTATION

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**This section explores points of influence on non-prosecution policies, including public accountability mechanisms, such as elections, information sharing and research, and extending to the relationships between DA offices and police, other legal actors with prosecutorial power, legislatures, and judges. DAs have wide discretion and are central actors in shaping the concrete application of the law in their jurisdiction, but they also operate in an ecosystem of criminal legal actors. This section presents how each of these actors can inhibit or support non-prosecution policies and broader goals of mitigating the harms of criminalization on sex workers, relevant both as these actors may be addressed by advocates seeking to impact DA policy or its implementation and in how DAs can and should seek collaboration.**

## **Public Accountability: Elections and Information Sharing**

DAs operate with limited transparency and accountability. In most states, DAs are elected, which provides a means for voters to respond to their performance. However, the electoral process varies state-to-state, and historically DA elections have been largely uncontested, had high rates of incumbent reelection, and low voter turnout. This has shifted recently with the rise in “progressive prosecutors” and several races drawing national attention, but many continue to pass under the radar. DA prosecution policies may also shift once in office, underscoring the importance of continued advocacy. In some states, DAs are appointed, removing electoral pressure and accountability. Other accountability measures are limited and untested, such as professional ethics complaints and constitutional challenges. In any case, there is limited public information on prosecutors’ policies and charging decisions, making it difficult for the public to gauge ‘success.’ This is compounded by limited police data on arrests as a comparison point. External research can fill some of the gaps, and projects are underway in several jurisdictions in partnerships between DA offices and universities. However, impacted groups are not, but should be, centered in defining the scope and metrics of evaluation.

## **Influence by Other Legal Actors with Prosecutorial Power**

DAs function alongside several 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. While both function separately, State AGs in most states have some limited power to prosecute state-law criminal violations as part of their role. This can lead to conflict where DAs decline to prosecute, and State AGs may have the power to prosecute in their place; indeed, some state legislatures have sought to or have granted State AGs that power in response. Some State AGs also engage sex workers in the criminal legal system through raids, often under the guise of “anti-trafficking” operations, which rarely identify people who are being trafficked and often target and arrest both sex workers and clients. Where DAs are city officials, they must deal also with similar dynamics of overlapping power to prosecute with county/parish/borough DAs working over the same area.

### **Influence by Legislative Bodies**

Legislative bodies can also shape DAs' ability to ensure the non-prosecution of sex work-related charges by altering the relationships and conditions that DAs operate in. They can enact bills that enable state AGs to prosecute cases that DAs decline. They can also reduce DAs' budgets, attempt to impose term limits, or require a DA to report statistics and other information to them via legislation or ordinance. State legislatures in Pennsylvania have also sought to impeach and potentially remove a DA from office because of prosecution policy.

### **Influence by police**

DAs have an interdependent relationship with police generally, relying on arrests and evidence collected by police 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 have sought to work with police to reduce arrests in line 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, claiming that they were included in the policy, and using this as leverage against a DA policy they disagreed with, limiting prosecutors' ability to prosecute those crimes. 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**

Judges are key actors in ensuring that important parts of non-prosecution policies can be achieved. Several judges have supported DAs' in granting their requests to have current and past warrants, charges, and convictions withdrawn. But DAs may also face resistance from judges, for example, denying recommendations of non-prosecution even without legal basis, requiring that prosecutors appeal that denial to follow through with non-prosecution. Judges have also limited prosecutors' power in day-to-day work, including through requiring that all dismissals or plea agreements be justified in writing, dismissing "progressive" prosecutors from cases (although this was successfully appealed), appointing a special prosecutor when prosecutors decline to charge, and declining to consider prosecutor initiatives. However, judges may themselves be progressive candidates for election, and may also be supported by progressive coalitions.

## PUBLIC ACCOUNTABILITY: ELECTIONS AND INFORMATION SHARING

The scope of accountability mechanisms for DAs is very limited.<sup>246</sup>

Elections are the primary means of accountability for DAs, but have some important limitations, alongside few other possible formalized accountability mechanisms that have been, to a variable extent, pursued and tested as part of counterstrategies and backlash to non-prosecution policies.

- **Voters in most states directly elect their DAs.** The United States is the only country in the world where citizens elect their chief prosecutors.<sup>247</sup> About 85% of DAs are elected in four-year terms.<sup>248</sup>
- **As some of the more high-profile DA elections suggest, these elections may serve as opportunities for voters to assess the status and direction of the criminal legal system.** In states where voters directly elect their DAs, elections provide a means for voter input into the reality of the criminal legal system in their jurisdiction. Whereas criminal legal issues may not be a necessarily central focus in elections for state legislators, due to a whole host of policy, political, and ideological issues that may be more present in voters' minds, elections for DAs are more squarely focused on criminal legal issues.
- **The success of "progressive prosecutors" is grounds to complicate the idea that elections push DAs to present a tough-on-crime platform in order to be elected, including as this intersects with simplistic positions that conflate trafficking and sex work.** During the Democratic primary for Manhattan DA in 2021, six of the eight candidates, including eventual winner Alvin Bragg, claimed that they would decline to prosecute sex work if elected.<sup>249</sup> In 2020, Eli Savit – identified by commentators with the "progressive prosecutor" movement – ran for Washtenaw County DA on a platform promising to "end the era of mass incarceration," eliminate cash bail, support mental health treatment, and eliminate inequity in the criminal legal system, although he did not specifically commit to a non-prosecution of sex work policy.<sup>250</sup>

There are nonetheless reasons to be skeptical of elections as a mechanism for DA accountability.

- **Low rates of contested elections and the high rates of incumbent reelection suggest that elections may serve more as means of ratification for existing policies rather than a check on prosecutorial policy.** Because the electoral process varies by state, there is significant variation in elections across the country. As one study of DA elections described, "Some elections gave voters choices in both primary and general elections to choose their local prosecutor. But other elections were entirely uncontested. And some elections did not even have a single candidate on the ballot."<sup>251</sup> **Contested races "were almost unheard-of until the push for progressive prosecution."**<sup>252</sup> **Historically, DA elections have often lacked challengers,** leading to incumbents being reelected at high rates. A 2020 study found that there was a challenger in only 25% of DA elections in which an incumbent was running for reelection.<sup>253</sup> According to a 2014 study, incumbents win in 94% of elections.<sup>254</sup>
- **Voter turnout may also be low.** While several DA races have drawn national attention in recent years, many others pass under the radar. The increased attention paid to DA races, especially in large cities, however, may indicate a shift in the salience of these elections.
- **DAs' platforms, policies, and action may shift once in office and throughout a DA's term.** This underscores the limits of public positioning and strategic communications during elections, as well as the value in advocacy to DAs that have not publicly signaled that they are open to non-prosecution policies, including the possibility for re-evaluation and shift outside of elections as a transparency and accountability mechanism, and in response to new developments. **DAs may not follow through on a commitment to non-prosecution of sex work. But alternatively, they may also evolve on the topic and become more supportive of non-prosecution.**

### BALTIMORE, MARYLAND

Baltimore City's previous SA provides an example of a subsequent positive shift toward non-prosecution while in office. Then-candidate Marilyn Mosby touted herself as a "crime crusader dedicated to keeping repeat offenders off the streets" and spoke of her familial connections to law enforcement in 2014.<sup>255</sup> This indicated that she would be less amenable to non-prosecution policies, but, in fact, her office later enacted one of the more expansive non-prosecution policies in response to the COVID-19 pandemic, to reduce the flow of people in and out of jails and reduce transmission of the virus. While other DAs took similar measures, Mosby was the first to make the policy permanent while she held office,<sup>256</sup> on the basis that the temporary Covid Criminal Justice policies "resulted in a decrease in arrests, no adverse impact on the crime rate, and address the systemic inequity of mass incarceration." The office sought instead "to prioritize the prosecution of public safety crimes over low-level, non-violent offenses."<sup>257</sup> The shift was supported by research in collaboration with the Johns Hopkins Bloomberg School of Public Health to analyze the policy and its impact on public safety.<sup>258</sup>

- **While DA elections arguably provide focus on the DA and criminal legal system, they allow only for a response to performance as a whole, and not the specific scope or limitations of a particular non-prosecution policy. Further, DAs with non-prosecution policies may fail to be re-elected for reasons unrelated to those policies, or for the policies in combination with other factors relevant to their specific context.**

### BALTIMORE, MARYLAND

In Baltimore City, prior SA Marilyn Mosby provides an example of actions other than a non-prosecution policy impacting an election, with Mosby's failed re-election occurring at the primary stage. In July 2022, Mosby was defeated in the Democratic primary against Ivan Bates, a former prosecutor-turned-defense attorney.<sup>259</sup> Separate to specific backlash to her non-prosecution policy, Mosby had also faced scrutiny after being indicted on federal charges of perjury and making a false statement on a loan application.<sup>260</sup> The charges were brought weeks before the filing deadline for candidacy in the primary and before any candidate had filed, although Mosby had already been fundraising.<sup>261</sup> Bates won unopposed in the general election,<sup>262</sup> and revoked Mosby's non-prosecution policy under the inaccurate belief that increased law enforcement surveillance of sex workers will aid in the identification and prosecution of trafficking.<sup>263</sup> This strategy is harmful to sex workers, leads to the arrest and prosecution of people who have in fact been subjected to trafficking, and is ineffective at curtailing trafficking, as it reduces the likelihood that people in the sex industry report crimes they experience or witness due to fear of arrest.<sup>264</sup> While his plan explicitly notes the distinction between sex work and trafficking, Bates's proposed intervention to provide people who have been trafficked with services through a specialized Prostitution Diversion Court conflates sex work and trafficking.<sup>265</sup> Further, past work by GHJP and SWP has underscored how these programs continue to engage sex workers in the criminal legal system, coerce participation in services that may not match participants' needs and goals, and lack meaningful accountability or transparency mechanisms.<sup>266</sup>

### SAN FRANCISCO, CALIFORNIA

The high profile recall of now-former-San Francisco DA Chesa Boudin in June 2022<sup>267</sup> highlights one way that DAs can face scrutiny outside the ordinary election cycle, and how backlash and debate over non-prosecution policies can be complicated: centering concerns unrelated to sex work; involving (at least rhetorically) a commitment to criminal legal reform from both supporters and detractors; and in being highly contextual, suggesting that the recall may not indicate a wholesale swing against progressive candidates, particularly as they succeed elsewhere.

A former public defender, Boudin was elected in 2019 on a platform that included not prosecuting 'quality-of-life' crimes, such as offering or soliciting sex,<sup>268</sup> as part of an effort to reduce mass incarceration.<sup>269</sup> The recall effort was driven by "more politically moderate San Franciscans — a coalition of Democrats, independents and Republicans — who grew agitated by persistent property crimes and open drug use during the pandemic."<sup>270</sup> The

Safer SF Without Boudin campaign also forefronted his decision not to prosecute anti-Asian attacks as hate crimes and the percentage of domestic violence cases prosecuted.<sup>271</sup> Notably, the campaign included two prosecutors who had quit their jobs in his Office: Brooke Jenkins and Don Du Bain.<sup>272</sup> Jenkins was named interim DA in June 2022 and was elected in November 2022.<sup>273</sup> Jenkins has indicated that her position on sex work-related charges would be different from Boudin's, underlining that her office's close relationship and open communication with the police department would bring change, in a community meeting in which police indicated a shift to enforcement related to sex work.<sup>274</sup> The recall led Republican legislators (in the minority) in New York and Illinois to propose legislation to allow prosecutor recalls.<sup>275</sup>

Commentators have speculated the significance of the recall for "progressive prosecutors" and their movement nationwide. They have emphasized risk in drawing conclusions from low-turnout elections and the focus on only one person in recall elections, both considering Boudin's slight victory margin in 2019.<sup>276</sup> One commentator saw the result as part of a "boom in recall efforts across the country, targeting all kinds of officials, of all political stripes" that is "a symptom of a long-standing political disease. Especially at the state and local levels, Americans are asked to vote in many complicated and oddly timed elections—ones more or less designed so that the masses do not show up."<sup>277</sup> They also pointed to the difficulty in identifying patterns from the quite recent push for reformist prosecutors; Boudin's status as a former public defender and outsider (although there is also a recall effort for LA DA George Gascón, Boudin's predecessor and former deputy chief of the LAPD and chief of two other police departments); and limitations in viewing San Francisco electors as representative of progressive movements, given the norm of carceral Democratic mayors in big cities, its "post-tech" identity, its smaller Black population compared to other counties with progressive prosecutors, and consequently its larger white moderate vote.<sup>278</sup> Notably, recall supporters ran an ad underscoring their support for criminal legal reform, but not Boudin;<sup>279</sup> and the San Francisco Mayor's announcement of Boudin's successor's swearing in noted that residents had voiced a desire not to move back on progress made.<sup>280</sup> Further "signs that the Boudin recall hinged on factors particular to the city of San Francisco and may not represent a larger national backlash to the movement" include continued election wins for progressive DA candidates and incumbents across California and the country.<sup>281</sup>

- **Several states are outliers and have an appointment process, instead of using the electoral process, for selecting DAs.**

Connecticut, for instance, has a system in which the Criminal Justice Commission appoints the DAs (referred to as 'state's attorneys' in Connecticut) to eight-year-long terms.<sup>282</sup> The Commission itself is not directly elected but instead "composed of the chief state's attorney and six members appointed by the governor and confirmed by the General Assembly, two of whom shall be judges of the Superior Court."<sup>283</sup> This system creates different incentives for the state's attorneys by removing electoral pressure; indeed, the reappointment hearings that occur at the end of the eight-year term is the only time that experts on the Commission or the public more broadly can weigh in on the state's attorneys' performance.

Similarly, New Jersey and Alaska do not directly elect their local chief prosecutors, instead investing the appointment power in the elected state attorney general.<sup>284</sup>

**Transparency and evaluation efforts are also a limited, but important, means of accountability** beyond the restricted range of formalized accountability mechanisms available, especially given the lack of transparency and information around what DAs are actually doing:

- **DAs' control over charging practices and plea bargaining is done away from public view.** This has allowed prosecutors the leeway to push more punitive outcomes as part of broader "tough-on-crime" politics. Many scholars argue that the broad power of prosecutors has been one significant driver of mass incarceration in regard to charging of felonies, and of police abuse, especially in the use of misdemeanor law, to surveil and control low-income communities and BIPOC communities in particular.<sup>285</sup>

- **DAs share little information on their decision-making.** As the ACLU explains, “In most cities and counties, elected prosecutors **report very little public data on critical decisions**— for example, how they make charging decisions and who is given a second chance, and why. Prosecutors seldom even make public the policies that guide the powers they exercise on a daily basis.” However, legislative bodies on the state and city level can create reporting requirements.<sup>286</sup>
- **Reliable, publicly available information about felonies and (particularly) misdemeanors is often hard to find, even for people who understand a specific local criminal legal system well.** This lack of information makes it difficult for the public to determine whether DAs are “successful” by any metric and hold them accountable.

To aid with informed engagement with DA offices or with the review of policy implementation and impact, advocates and/or evaluators may find it useful to seek out, request or compile data on the number and type of: arrests, cases coming into an office, charges at arrest, final charges, cases declined, cases deferred, cases diverted to social services programs, cases dismissed, cases handled through an alternative court, cases resolved by guilty plea, and cases resolved by trial. To support the analysis of equity and fairness in prosecutorial decision-making, these data should be disaggregated according to relevant demographic information, such as race/ethnicity, gender, and economic status.<sup>287</sup> Notably, currently available arrest data often have limited categorizations, for example, related to race, that do not align with self-identification, erase specific identity categories, and restrain comparisons to other (limited) sources, such as census data.

- **It is important to note that backlash to DA non-prosecution policies has made more data available, including through structured partnerships and external studies, but has also led to the proliferation of weak or partial data instrumentalized to critique these policies.** This underscores the importance of data analysis, particularly in examining data completeness and quality.

#### SAN FRANCISCO, CALIFORNIA

As noted in reporting around the recall of Chesa Boudin in San Francisco, in addition to often being incomplete, subject to significant lags, and dependent on reported crimes, crime data can be selectively presented. Particularly, a focus on a short time span of data, or repeated mentions in news media can create the appearance of increasing crime, and superficially affirm narratives or public perceptions of a crime wave: as Boudin noted, there can be “somewhat of a disconnect between what the data shows us and what people feel.”<sup>288</sup> The perception of growing crime in San Francisco was, in part, fueled by viral videos of property crimes amplified in the media.<sup>289</sup> The recall also highlights how data has been used to comment on DA power, practices, elections and the significance of individual policies and setback to the “progressive prosecutor” movement.<sup>290</sup>

**Collaborative research is one means to counter the small amount of data produced by states on their criminal legal practices, particularly as this shortcoming is compounded by the limited research and evaluation done in this area.** This could support a clearer picture of the impact of non-prosecution policies related to sex work.

- Non-state actor research can play a role in responding to the need for transparency, particularly given that questions may be raised, as a matter of fact or perception, as to data quality or fidelity when managed by DA offices.<sup>291</sup> While academic research fills some of the gap, it is done with great variation in quality. Research should center the groups impacted, who should be the ones defining the scope and metrics of evaluation.

#### COLLABORATION ON RESEARCH AND EVALUATION

Ongoing projects conducted by the University of Michigan and Johns Hopkins University provide two examples of current research seeking to establishing bodies of evidence about the impacts of policing and prosecution on sex

workers. These research reports analyze criminal legal data for specific incidents, arrests, charges, and public complaints. The extent of involvement of sex workers and sex worker rights groups in data gathering, analysis, or other substantial aspects of research related to the projects as a whole is unclear from the project websites.

Researchers from the Bloomberg School of Public Health at Johns Hopkins University, at the request of then-State's Attorney Marilyn Mosby's Office, wrote a report evaluating criminal legal policy reforms, particularly Baltimore's decision to cease prosecutions of the crime of prostitution along with drug and paraphernalia possession, and the policy's impact on vulnerable populations in the city.<sup>292</sup> Though causality cannot be established, findings indicate that non-prosecution policies reduce arrests of vulnerable populations without threatening public safety or increasing complaints. Washtenaw County's 2021 policy ending prosecution of the crime of prostitution is similarly being monitored and evaluated by independent researchers as part of the collaborative [Prosecutor Transparency Project](#) of the Washtenaw Prosecutor's Office, in partnership with the ACLU of Michigan and the University of Michigan Law School. No results have been released to date. The office reports that "[r]esults of the project will be transparently released as they are available."<sup>293</sup>

- Public health research explicitly through a health justice lens can also help make transparent the personal and public health consequences of DAs' choices, and how the distribution of ill health and other negative health effects track the application of the criminal law, including practices of direct and indirect discrimination.

#### USE OF PUBLIC HEALTH DATA: BALTIMORE SAPPHIRE STUDY

Public health data, and its effective publicization and communication, is critical in demonstrating the negative impacts of criminal law and the role that non-prosecution policies can play in mitigating those impacts on sex workers' health. Research can be used to show vulnerabilities of sex workers to criminalization, and could lend evidence to support future non-prosecution policies. One example is SAPPHIRE (Sex Workers and Police Promoting Health in Risky Environments), a collaboration between law enforcement and sex workers in Baltimore aimed at conducting research to align public health, public safety, and the rights of cisgender and transgender women in sex work, with the broad goal to examine the role of the police in the HIV risk environment of street-based sex workers.<sup>294</sup> The SAPPHIRE study was a prospective, longitudinal cohort study which consisted of 250 cisgender women and 62 transgender women engaged in street-based sex work, recruited through targeted sampling from street-based locations in Baltimore. The cohort was followed up with at the 3-, 6-, 9-, and 12-month mark to complete a personal interview survey and test for HIV, gonorrhea, trichomoniasis/trich, and chlamydia.<sup>295</sup> The authors of a resulting publication noted that transgender women sex workers were more likely to have police as clients than cisgender women sex workers, but both groups "had high levels of police encounters and reported having given information to the police, mostly to "avoid arrest or trouble." Both groups also "reported changes to their routine work due to policing," including avoiding carrying condoms, moving to an unfamiliar area to avoid police, and rushing negotiations with clients, and had experienced a similar number of "egregious behaviors and assaults at the hands of the police." The authors suggested that this "underscor[ed] women's situational vulnerability to police exploitation. Police culture is complicit in these transgressions that not only rarely result in punishment but also erode women's ability to self-protect (e.g., selling sex in a familiar area and time for safer negotiations) and further compromises their safety."<sup>296</sup>

**DAs can also be structurally limited in their actions by other actors in the criminal legal system.** If other legal actors – such as police, judges, attorneys general, and legislatures – do not agree with discretionary decisions made by DAs, they can use their power in the day-to-day functioning of the criminal legal system to obstruct DAs' work, both regarding the specific decision and in general. These dynamics are explored in the following parts of this section.

## OTHER FORMALIZED ACCOUNTABILITY MECHANISMS ARE LIMITED AND UNTESTED

**DAs may be subject to complaints under the ethical rules for attorneys** in their state lodged by those that do not agree with their actions, including non-prosecution policies. Ethics complaints, which can be lodged by mail, and sometimes even over the phone or online, are submitted to the relevant state disciplinary board or committee, usually part of the state's supreme court, which may then investigate. These complaints may be submitted by anyone, but the process is generally undertaken by, and targeted towards, a lawyer's client when dissatisfied with legal services. In 2018, Rachael Rollins, then recently elected DA for Suffolk County in Massachusetts, had a complaint filed against her by a national police group before even taking office, based on her plans not to prosecute minor crimes (notably this did not include sex work-related charges).<sup>297</sup> Legal scholars have suggested that ethics complaints are weak in substance, particularly since they do not impose an affirmative charging requirement. However, claims could theoretically be based on the establishment of the policy itself through provisions on conflicts of interest or prejudice to the administration of justice, as well as on the communication of the policy under rules restricting prosecutors' comments about current cases that may influence the outcome, or restrictions on conduct involving "dishonesty, fraud, deceit or misrepresentation" on the suggestion that individuals might rely on the statements to conduct criminalized conduct and then be prosecuted.<sup>298</sup>

**DAs could be subject to constitutional challenges** under state constitutions on the basis of separation of powers concerns, but the law is untested and would depend on how flexibly separation of powers doctrine is interpreted.<sup>299</sup> As noted in the beginning of this section, prosecutorial discretion and non-prosecution policies may raise concerns about the separation of powers, according to the idea that in choosing not to prosecute certain crimes, prosecutors are not giving effect to, and therefore exercising a de facto repeal of, the law as set forth by legislatures.<sup>300</sup>

**DAs may be forced to engage with an impeachment process**, although its use against DA Larry Krasner in Philadelphia has been critiqued as extreme and unconstitutional.<sup>301</sup>

**DAs may be subject to state-level victims' rights statutes** that may be impacted by non-prosecution policies, for example, on the basis that declining to proceed with the case prevents victims from being able to provide input into the case and receive restitution payment from the defendant. However, formal rights and requirements under these statutes are minimal (e.g., requiring that the prosecutor prove information to victims) and are also subject to prosecutorial discretion, only becoming available once the prosecutor actually moves forward with the case.<sup>302</sup>

## INFLUENCE BY OTHER LEGAL ACTORS WITH PROSECUTORIAL POWER

DAs function alongside other legal officials with the power to prosecute, complicating the ability of an individual DA to ensure that sex workers are not prosecuted. This suggests that efforts to end arrests and prosecution of people in the sex sector will also have to monitor and target these officials, from the state to the local level, along with the range of criminal legal actors discussed in this section who complicate local decisions about policing, charging, and prosecution.

**County DAs have overlapping prosecutorial power with State Attorneys General, who may be able to step in where DAs decline to prosecute charges related to sex work.**

- Where the DA implementing the policy is a county/parish/borough official, the state might also have jurisdiction over the same geographical area. **In most states, the state AG has some limited power to prosecute state-law criminal violations,**<sup>303</sup> which are the key domain of DAs.

**State Attorneys General:** are in each state the chief law enforcement officer of the state government. While specific functions of AGs vary from one state to another according to how their role is defined in state statutes and constitutions. AGs “occupy the intersection of law and public policy, dealing with very diverse areas of the law,” from criminal law and human trafficking to consumer protection, public health, and environmental law.<sup>304</sup> Common tasks include representing the state and state agencies in litigation, providing advice to government agencies and legislatures, providing formal opinions to clarify the law, acting as a public advocate in areas such as child support enforcement and consumer protection, running awareness campaigns, law reform and legislative advocacy, as well as criminal law enforcement, mostly at the appellate level, handling serious statewide prosecutions, and, in some states, overseeing state prosecutors.<sup>305</sup>

- **AGs are elected or appointed separately to DAs.** Like DAs, almost all state AGs in the country are elected, although those in New Hampshire, New Jersey, Wyoming, Alaska, and Hawaii are appointed by the governor. The AG in Tennessee is appointed by the state Supreme Court, and the AG of Maine is appointed by the state legislature.<sup>306</sup> Because AGs and DAs in most states are separately elected, **the DA does not “work for” the AG, despite the overlap in their duties and powers. Without a formal relationship of subordination, the dynamic between the two roles, which is ordinarily in practice one of accommodation, can give into conflict.**

The dynamic between AGs and DAs varies state to state. In 21 states, AGs can initiate local prosecutions on their own initiative (and in Alaska and Delaware, the AG acts as the local prosecutor), while in 14 states, AGs can also supersede (i.e., assume responsibility for) local prosecutions by DAs. For example, in New Jersey, the AG not only oversees the state’s prosecutors and holds the power to take over prosecutions, but also oversees the Police Training Commission and has broad authority under statute for the “administration of criminal justice,” which includes the power to issue binding directives to law enforcement.<sup>307</sup> On the other hand, in seven states, the AG has no power to intervene at all.<sup>308</sup> For example, in Connecticut, the AG has no jurisdiction to prosecute criminal violations, as the state Constitution provides that criminal prosecution is the sole responsibility of the Division of Criminal Justice: the Chief State’s Attorney and thirteen State’s Attorneys.<sup>309</sup>

- **But most AGs focus on supplementing the work of DAs** rather than engaging, in concert or conflict, in the more day-to-day matters that DAs do (e.g., charging, reviewing files, prosecuting cases).<sup>310</sup> It is also common for State AG offices to oversee some criminal appeals from convictions secured by local DAs. Most typically, state AGs may engage in longer-term investigations around policy-oriented approaches to issues such as consumer or environmental protection or drug trafficking.

### WASHTENAW COUNTY, MICHIGAN

Although in Washtenaw County DA Savit is the prosecutor at the county level, the state of Michigan has concurrent jurisdiction, and the state AG could ostensibly choose to charge under the state prostitution law. Since

DA Savit took office, the state of Michigan has not intervened – in part because the AG is not hostile to the non-prosecution agenda – but the possibility remains that a subsequent AG might choose to prosecute in the future.<sup>311</sup>

- **Conflict between DAs and AGs has recently arisen primarily where a DA has a more lenient approach to law enforcement generally than the state AG, reflecting the fact that, due to their dynamic of overlapping prosecutorial power, DAs are free to pursue *more aggressive enforcement* but not always free to be less aggressive, as the AG may have or be granted power to step in when the DA declines to prosecute.**<sup>312</sup>

Legislatures play a role in this dynamic too. As a response to certain DAs, **some state legislatures have enacted bills that enable state AGs to prosecute cases that DAs decline.**<sup>313</sup> For instance, conservative legislators in Pennsylvania and Missouri have introduced bills to grant the state AGs concurrent (i.e., overlapping) jurisdiction over Philadelphia and St. Louis, respectively.<sup>314</sup> Bills like this have the effect of undermining the DAs' announced policies not to prosecute certain laws, as the state AG can simply take them up instead.<sup>315</sup> **There is often a racial subtext at play** as well, as these bills target prosecutors in cities that have much larger Black populations than the states in which they are situated, as a whole, and some have arisen specifically in response to Black Lives Matter protests, indicating a "subtextual, if not explicit" intent to predominately target Black people, and non-Black people who support their civil rights, for prosecution.<sup>316</sup>

- **Some state AGs have also, separately or in concert with DAs, been key enforcers of laws against sex work through aggressive raids, often under the guise of "anti-trafficking" operations,** that arrest both sex workers and clients. These raids are rarely effective in addressing trafficking; instead, they target and detain people engaged in the sex trades.<sup>317</sup> For instance, in Ohio, Republican AG Dave Yost has embarked on an ongoing anti-trafficking operation called Operation Ohio Knows.<sup>318</sup> Yost indicated that while he previously believed sex workers should be arrested too, the campaign's focus was primarily on arresting "johns"<sup>319</sup> and on saving what he called "potential human trafficking victims."<sup>320</sup> Nonetheless, in October 2021, Ohio law enforcement arrested 161 alleged clients as well as 50 alleged sex workers.<sup>321</sup>
- **AGs, more generally, have a prominent platform to criticize DAs.** For instance, Texas AG Ken Paxton described Dallas DA Creuzot's announcement that he would not prosecute certain crimes as promoting "lawlessness."<sup>322</sup>

**The presence of DAs at the city level creates a more complicated dynamic of overlapping prosecutorial power with county DAs and state AGs.**

- The ability for an individual DA to ensure that sex workers are not prosecuted within a specific jurisdiction becomes more complicated in instances where the DA is a city official, such as in Baltimore and Seattle, as both county and state authorities might also be able to arrest and prosecute sex workers.

#### **BALTIMORE, MARYLAND**

In Baltimore, where the previous Baltimore *City* State Attorney Mosby implemented a non-prosecution policy, the policy did not bind county or state authorities. In fact, Baltimore County indicated that it would continue to prosecute prostitution and some of the 'quality-of-life' offenses that then-SA Mosby indicated she would not prosecute.<sup>323</sup> Coordination between the Baltimore City SA's Office with the county was limited by the county's more conservative positioning, while the Maryland State AG's claim to be interested primarily in trafficking meant there did not appear to be conflict in action on the state level.<sup>324</sup> However, legal enforcement activities related to trafficking can often lead to the targeting, surveillance, arrest, and prosecution of sex workers under sex work-related charges, such as prostitution, so the potential for concurrent action by the State AG remained.<sup>325</sup>

## SEATTLE, WASHINGTON

Seattle has not implemented a general non-prosecution policy like Baltimore – instead arresting clients and sometimes sex workers under its End Demand-oriented model – and dynamics of prosecution at both the Seattle City and King County level are critical.

The Seattle City Attorney’s Office has oscillated on prosecuting people for selling sex, charging dramatically fewer sex workers for prostitution in 2012 and 2013, after which point charges increased slightly.<sup>326</sup> The City then ramped up arrests and charges in 2019 in response to public pressure around street-based sex work along Aurora Avenue North.<sup>327</sup> After public backlash and capacity issues with the pre-arrest diversion programs, the City Attorney’s Office backed down and quashed all outstanding warrants for misdemeanor prostitution in 2021.<sup>328</sup> Simultaneously, the King County Prosecutor’s Office has also been targeting clients under the “Buyer Beware” program launched in 2014.<sup>329</sup> During that period, King County cooperated closely with the City, as the City accounted for 42% of all arrests statewide for patronizing a prostitute.<sup>330</sup> The State AG’s Office has also collaborated with both the Seattle City Attorney’s Office and the King County Prosecuting Attorney’s Office to create the “Ending Exploitation Collaborative,” an initiative to “reduce the criminalization of survivors and redirecting the focus of law enforcement and prosecution toward sex buyers.”<sup>331</sup>

These three levels of policing and prosecution imply that advocacy must be targeted at several offices and through several mechanisms, including elections for both Seattle City and King County prosecutors.

### **DAs may also face resistance from the prosecutors in their office bound by their non-prosecution policies.**

- In addition to potentially shifting the scope of policies and possibilities for implementation, this resistance can also be mobilized or called up by others. In a memo to NYPD employees about Manhattan DA Alvin Bragg’s non-prosecution policy, police commissioner Keechant Sewell stated, “I am concerned about sweeping edicts that seem to remove discretion, not just from police officers, but also from Assistant District Attorneys regarding what crimes to prosecute and how to charge them.”<sup>332</sup>

## SAN FRANCISCO, CALIFORNIA

The recall campaign in San Francisco against former-DA Chesa Boudin included Brooke Jenkins, who resigned from working in his office and stated as part of the campaign: *“He refuses to uphold his duty to protect public safety and has failed at managing the San Francisco DA’s office. He has placed the rights of criminal offenders over victims and has failed to hold offenders accountable or require them to meaningfully engage in rehabilitative programming. It’s why nearly HALF of the prosecutors have resigned from the office. They have lost trust and have felt unable to serve victims or the community adequately. I am one of them.”*<sup>333</sup>

## INFLUENCE BY LEGISLATIVE BODIES

Legislative bodies can also shape DAs' ability to ensure the non-prosecution of sex work-related charges.

- **Legislatures can alter the relationship of actors that can intervene and prosecute sex work-related charges.** As explored in the previous section, in places where AGs and DAs do not have overlapping jurisdiction, legislatures can enact bills that enable state AGs to prosecute cases that DAs decline.
- **Legislatures can also shift the conditions that DAs operate in**, for example, through reducing their budgets, as occurred in Florida when Orange-Osceola State Attorney Aramis Ayala announced that she would not seek the death penalty.<sup>334</sup> They can also attempt to impose term limits, as sought in Pennsylvania.<sup>335</sup>
- **Legislatures can require DAs to report statistics and other information to them through statutory reporting requirements.**<sup>336</sup> Legislative bodies that are more local, such as city councils, may also create oversight mechanisms for DAs working at the city level. For example, the Seattle City Council passed an ordinance in late 2021 requiring the city attorney to report quarterly on the office's criminal division and its Law Enforcement Assisted Diversion (LEAD) program with the goal of increasing oversight and transparency.<sup>337</sup>
- **State legislators may seek to impeach and potentially remove DAs from office if they do not agree with non-prosecution policies.**

**Impeachment is rare, and meant only for extreme cases.**<sup>338</sup> The use of impeachment against Philadelphia DA Larry Krasner for reasons including his non-prosecution policy has been criticized as leveraging “a tool of last resort that exists to preserve the integrity of government” for “little more than a policy disagreement.”<sup>339</sup>

**Impeachment proceeds in two stages.** The first stage is usually assigned to the “lower” legislative chamber (House or Assembly) in which accusations are heard and investigated. Based on this, the chamber can develop and vote upon a formal accusation or statement of charges: the articles of impeachment. These are then forwarded to the responsible body, usually the “upper” legislative body (Senate), for the second stage. This second stage resembles a trial, and both sides may call witnesses and present evidence in the consideration of the charges laid out in the articles of impeachment. At its conclusion, the body votes on whether to find the official guilty of the charges, and a supermajority (two-thirds majority of the vote) is usually required for conviction. Officials often resign before the process begins or is completed.<sup>340</sup>

### PHILADELPHIA, PENNSYLVANIA

In November 2022, the Republican-led state House in Pennsylvania voted to impeach DA Larry Krasner for a number of reasons, including his non-prosecution policy and the directive not to charge sex workers for the crime of prostitution.<sup>341</sup> The amended bill, in different parts, classifies the policy as the “decriminalization” and “de facto legalization” of prostitution, claiming that it is “effectively destroying programs designed to rescue women from addiction and human trafficking” with “a devastating impact on women who are victims of sex trafficking and the communities where they are trafficked.”<sup>342</sup> The resolution followed a report by the Republican-led House Select Committee on Restoring Law and Order, tasked to look into Krasner's tenure as district attorney.<sup>343</sup> The Senate trial was set to begin in mid-January 2023, but the Senate unanimously approved its indefinite postponement earlier in the month, following a state Commonwealth Court decision finding that the assertions in the articles of impeachment did not support the conclusion, required for impeachment, that Krasner failed to perform his duties or that he acted with improper or corrupt motive.<sup>344</sup>

Krasner's impeachment followed his re-election with 69% of the vote.<sup>345</sup> Only two officials (both judges) have ever been removed through impeachment in Philadelphia.<sup>346</sup> Krasner noted in an official statement, “In the

hundreds of years the Commonwealth has existed, this is the only time the House has used the drastic remedy of impeachment of an elected official because they do not like their ideas. Those ideas are precisely why Philadelphia voters elected and re-elected me to serve as the Philly DA – in two landslides.”<sup>347</sup> Despite Krasner’s re-election, a sponsor of the impeachment resolution, State Rep. Martina White stated, “No public official is above accountability, and if not for us in this chamber, he would have no oversight.”<sup>348</sup>

Krasner has suggested that his impeachment was part of a new strategy of opponents of “progressive prosecutors” in the face of their rising numbers nationwide: “since they cannot win elections, they need to win in between elections,” referencing also the recall of former-San Francisco DA Chesa Boudin, and classifying it as a “a very, very low turnout, billionaire-funded loss.”<sup>349</sup> Rep. Mike Puskaric, the only Republican to vote against impeachment, described it as a dangerous precedent and lowering the bar for removal from office.<sup>350</sup> The use of impeachment mimics its increased use and visibility in national politics in recent years on the federal level.<sup>351</sup>

## INFLUENCE BY POLICE

The relationship between prosecutorial policy and policing is highly interdependent, and lines of influence both in favor or against policies to mitigate the harms of criminalizing sex work are complex.

**DAs need the cooperation of police in all aspects of their work, including relying on the police in many cases to arrest people so that they can bring charges.**

- Under the typical division of labor between prosecutors and police, police generally make arrest decisions – seizing someone and taking them into custody – and then DAs handle the charging decisions, i.e., whether or not to proceed with prosecution. This interdependent relationship with the police is often symbiotic and convergent, but their interests may at times diverge.<sup>352</sup> While prosecutors appear to hold much of the punitive power in the criminal legal system, this power can be limited, constrained, or undermined by a jurisdiction’s police. Without police responding to reports of crime, collecting evidence, keeping good records, and presenting themselves in court to testify, DAs are limited in their ability to prosecute offenses.

**Police arresting practices are not required to conform to DA prosecution policies, meaning that police-prosecutor collaboration or contention is key in determining how the criminal legal system is experienced on the ground.**

- When DAs announce a policy detailing offenses they will charge and prosecute and others they will drop, police may adjust their practices for practical reasons, preferring not to make arrests and write-ups that will not be pursued. However, local police, as an institution or as individual officers, can choose to initiate a lawful arrest for any offense that remains on the books, even if they know or suspect that no prosecution will result.
- This is an important limitation on non-prosecution policies, as **while sex workers may not face the legal effects of prosecution, they might still face contact with the police** through both formal mechanisms of arrest for the offenses under the policy and/or other offenses, such as disorderly conduct; or more informal actions short of arrest, such as ongoing surveillance, being told to move-on under the threat of arrest (according to formal or informal policies or individual police behavior), and harassment.<sup>353</sup>
- Contact with police can involve **highly variable treatment**, this may include connecting individual with services but also may involve harassment, abuse, or indifference to harm.<sup>354</sup> The potential for violence committed by arresting officers or in the course of detainment has the potential to cause lasting physical and emotional trauma. Sometimes arrests can be inflicted with misogyny, for example, locking up cis and trans women sex workers with the paternalistic goal of forcing reflection to ‘figure out how not to go back’ to sex work, whereas those arrested under drug charges are connected to case management and services.<sup>355</sup> Notably, **police are often responsive to small businesses who complain of “non-family friendly” people around their premises,<sup>356</sup> as well as complaints from private residents.<sup>357</sup>**

**The police-prosecutor relationship is differentially addressed and claimed in non-prosecution policies.**

- Some DAs have claimed only the limited scope of non-prosecution, and expect police to continue to arrest under the law as written. More proactive DAs and their offices have sought to act in ways that also reduce arrests and other police practices.

### WASHTENAW COUNTY, MICHIGAN

In Washtenaw County, DA Savit’s policy directive on non-prosecution of sex work stated that it “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."<sup>358</sup> Police were reportedly not arresting sex workers, before or after the policy announcement.<sup>359</sup> Arrest data from the FBI indicate no arrests for "prostitution violations" in 2021 in Washtenaw County,<sup>360</sup> while Washtenaw's [Prosecutor Transparency Project](#) has not yet released data on sex work.<sup>361</sup> The lack of up-to-date data underscores the importance of avenues for public monitoring of arrests and charging decisions.

### BALTIMORE, MARYLAND

Proactive DAs and their offices have sought to act in ways that also reduce arrests and other police practices. In Baltimore, after then-City SA Mosby's Office announced its temporary non-prosecution policies in March 2020, prosecutors met with police to explain that they would be wasting their time arresting people that the SA's Office would not charge.<sup>362</sup> Police reportedly had difficulty accepting the policy, and the Police Commissioner publicly stated that he expected crime to rise.<sup>363</sup> In March 2021, two weeks after the SA's Office made the policy permanent within her administration, the Baltimore Police Department (BPD) independently announced internal guidelines telling officers that they could make an arrest for offenses like prostitution, drug possession, and trespassing only after consulting with a superior who is a lieutenant or above.<sup>364</sup> Mosby's policy was supported by Mayor Brandon Scott and Baltimore City Police Commissioner Michael Harrison.<sup>365</sup> Despite opposition from rank-and-file police and a tweet from the Fraternal Order of Police (FOP) accusing Mosby of giving drug users and sex workers free reign, the FOP made public a police memo confirming that the department would continue to align its practices with Mosby's policy.<sup>366</sup> As research from Johns Hopkins University has shown, BPD prostitution arrests declined from 672 between 2018 and March 2020 to zero between April 2020 and May 2021.<sup>367</sup>

**Where police do not align their practice with non-prosecution policies, continued police arrests and surveillance maintain many of the harms of criminalization even if prosecution is not pursued.**

- These harms include loss of income and employment, poorer mental health outcomes and trauma, and increased violence from clients and law enforcement.<sup>368</sup>
- **This has the most impact on BIPOC sex workers and trans and gender nonconforming sex workers, who are more likely to be engaged in street-based sex work, and thereby disproportionately affected by law enforcement harassment, profiling, and violence.** The APHA's 2018 statement on law enforcement violence recognized this disparity, noting that the physical and psychological harms from policing disproportionately affect marginalized populations, including sex workers and those assumed to be sex workers, such as BIPOC transgender women.<sup>369</sup>
- There is a lack of data around criminal enforcement, especially low-level misdemeanor arrests and dispositions,<sup>370</sup> meaning there is **virtually no way to systematically assess whether police are reinforcing or undermining a prosecutorial policy to not enforce laws criminalizing sex work.**

### MANHATTAN, NEW YORK

In New York City, marginalized populations—at the intersection of race, class, gender, and immigration status—are often disproportionately targeted by law enforcement. The bill repealing New York's "walking while trans ban" noted that arrests under the law "disproportionately impact[ed] women, particularly cisgender and transgender women of color and women who have previously been arrested for prostitution offenses," and that "[e]ighty-five percent of the individuals arrested under Section 240.37 between 2012-2015 were Black or Latina."<sup>371</sup> Over the last ten years, 90% of individuals arrested for the crime of "patronizing a prostitute in the third degree" were Black, Indigenous, and people of color (BIPOC).<sup>372</sup> Such a discrepancy may be due to the targeting of lower-income areas—which are overwhelmingly BIPOC communities—instead of sex work that occurs in higher-end hotels, which overwhelmingly serve wealthy, white clients; individuals who are in general not arrested.<sup>373</sup>

Though sex work-related offenses are included in non-prosecution policies in Manhattan,<sup>374</sup> Brooklyn,<sup>375</sup> Queens,<sup>376</sup> and the Bronx,<sup>377</sup> law enforcement is able to circumvent the policy by arresting sex workers on alternative charges, resulting in increased contact with policing of those communities, including East Asian massage workers, generally.<sup>378</sup> The rise in anti-Asian hate crimes has further resulted in increased deployment of undercover (“plainclothes”) officers of Asian descent to “stop hate crimes at the source;”<sup>379</sup> a controversial new strategy which has led to immigrant workers feeling the pressure to increase efforts to evade law enforcement.<sup>380</sup>

The NYPD Vice unit is “tasked with policing so-called ‘quality-of-life’ offenses,” including sex work.<sup>381</sup> Almost 90% of those targeted for sex work are people from marginalized groups.<sup>382</sup> Despite the stated intention to police hate crimes, Asian massage workers have been subject to increased police surveillance due to the criminalization of massage work and related community-based solidarity – i.e., common community organizing principles for immigrants, including shared living and eating arrangements such as sleeping at one’s place of work or keeping food in a work fridge, and working long hours to pay off debt – as signs of trafficking or organized crime.<sup>383</sup>

Indeed, apparent police response even to legislative change does not bode well for non-prosecution policies. Despite the repeal of the “walking while trans ban” (i.e., loitering for the purposes of prostitution), it is unclear if the number of non-prostitution-related loitering arrests for BIPOC trans individuals has decreased accordingly. Indeed, in the moment, individuals must know about the change, as well as their rights, and be able to assert them in order to shift encounters with police.<sup>384</sup> According to anecdotal evidence, arrests still occur,<sup>385</sup> and the rate may have even stayed the same.<sup>386</sup> However, formal reporting that tracks arrest records for trans individuals, and that could be compared before and after such legislative changes is complicated due to arrest records using one’s “dead name,”—i.e., the name a trans person is given at birth and no longer uses.<sup>387</sup>

**Police can, and have, used their (non)cooperation as leverage against DA policies that they disagree with.<sup>388</sup>**

#### **BALTIMORE, MARYLAND**

In Baltimore, police engaged in a deliberate slowdown, with fewer officers on patrol and in public space in a “virtual strike against the city” after then-SA Marilyn Mosby prosecuted six officers in the death of Freddie Gray. Police leaders reported that officers were still at work but feared prosecution and public attack.<sup>389</sup> Following the establishment of Mosby’s non-prosecution policy, police would often cite the policy as the reason for not responding to 911 calls in the city, including calls requesting assistance for violence and property offenses not in fact covered by the policy. This exacerbated the longer-standing issue of non-response.<sup>390</sup> Low morale and the unwillingness to respond to calls were also due to a Consent Decree entered into in 2016 between the Baltimore Police Department, the City and the United States Department of Justice; a federal court order overseen by a judge and group of experts requiring the police department to shift practices to police in line with the U.S. Constitution.<sup>391</sup> Notably, a Johns Hopkins Bloomberg School of Public Health report found that Mosby’s policies did not result in increased public complaints about sex work.<sup>392</sup> Yet plans by new SA Ivan Bates to resume prosecution of sex work-related charges, in the name of anti-trafficking work and connecting individuals to resources, are in part due to a *perceived reduction* in calls by residents under Mosby’s policy and a desire by the new SA to facilitate reporting.<sup>393</sup> These dynamics of engagement with residents highlight how police (in)action and resident complaints can be claimed, and data reframed and mobilized, to rationalize arrests and prosecution as part of a shift in policy despite critiques from criminal justice reform experts, including David Jaros, faculty director of the University of Baltimore School of Law’s Center for Criminal Justice Reform who expressed concern with SA Bate’s plans: “It sounds like a return to the kind of broken windows policing that led to mass incarceration and didn’t improve public safety for years.”<sup>394</sup>

#### **SAN FRANCISCO, CALIFORNIA**

There were reports in San Francisco – contested by officials – of “purposeful police inactivity” while now-recalled DA Chesa Boudin was in office. This contrast with significantly “stepped up street enforcement” and “public order” stops

under his successor DA Brooke Jenkins, who has walked back Boudin’s non-prosecution policy, which included some ‘quality-of-life’ offenses. However, “in the immediate period after Jenkins took office, residents made fewer calls to police related to public order offenses, suggesting that the increase in enforcement likely wasn’t due to a surge in these crimes.”<sup>395</sup> Notably, alleged police inaction extended beyond the scope of crimes covered by Boudin’s policy to vandalism, assault and burglary, with a letter of inquiry from San Francisco Supervisor Hillary Ronen to Police Chief Bill Scott indicating that she was “concerned that a political divide between the San Francisco Police Department and Boudin’s office,” which notably extended to disputes also about the DA’s role in police brutality investigations, “could be “causing a deliberate work stoppage” from police officers.”<sup>396</sup> Police unions were also at the heart of the opposition to and recall efforts against Boudin.<sup>397</sup>

**Police can, alternatively, work to mitigate the harms of sex work criminalization, even without a non-prosecution policy in place.**

- In the absence of a formal non-prosecution policy, police can initiate specific non-arrest policies, blocking charges by not bringing cases to prosecutors in the first place. This can occur with the tacit or explicit support of local prosecutors, and be in service of the reduced criminalization of sex workers.

**NEW HAVEN, CONNECTICUT**

The New Haven police department implemented an informal/de facto non-sting policy toward people who sell sex. After a 2016 sting led to the arrest and public shaming of thirteen people for allegedly engaging in sex work, local advocates formed the Sex Workers and Allies Network (SWAN) and directly lobbied the police chief not to engage in any further stings against sex workers.<sup>398</sup> They succeeded, and as a result arrests on sex work-related charges in New Haven dramatically decreased, without ever requiring the local district attorney to implement an official non-prosecution policy for prostitution charges. As a top-down discretionary policy, however, it is limited to the specific police department (and is therefore vulnerable in cases of concurrent jurisdiction, although there have not been issues in New Haven); does not necessarily translate to the respectful treatment of sex workers, generally, by rank and file officers, with noted cases of abuse;<sup>399</sup> and activists must meet with new police leadership to discuss and ensure the continuation of the policy.<sup>400</sup>

## INFLUENCE BY JUDGES

**Judges are key actors in ensuring that important parts of non-prosecution policies can be achieved.**

- Notably, in the context of non-prosecution policies related to sex work, several judges have granted DAs' motions to dismiss warrants and cases.<sup>401</sup>

**DAs may also face resistance from judges**, which to date has not been specifically related to sex work-related charges, but the dynamic is explored here due to their power and scope for influence, generally.

- **DAs have great influence in suggesting bail, negotiating plea agreements, and recommending sanctions for parole and probation violations, but judges and magistrates make the ultimate decisions.**<sup>402</sup> This power in decision-making can create conflict in the implementation of non-prosecution policies, among progressive policies generally. Notably, reform efforts that preceded the “progressive prosecutor” movement focused, in part, on limiting judicial discretion, among other actors.<sup>403</sup> For example, judges have refused to accept motions to strike past convictions, and opponents of progressive DAs cited this in other action against them.<sup>404</sup>

### SUFFOLK COUNTY, MASSACHUSETTS

In 2019, a Boston Municipal Court judge denied the assistant district attorney's recommendation of non-prosecution for disorderly conduct charges against protesters. However, the office of then-DA Rollins filed an emergency appeal, and it was found that the judge acted without authority and the protesters' records were ordered expunged.<sup>405</sup>

- **Judges may also criticize, sanction, or limit prosecutors' power in other ways.** For example:
  - A judge in Virginia found that a DA lacked authority to decline a prosecution on policy grounds (routinely upheld across other jurisdictions), while judges have also required prosecutors “to justify, in writing, every single dismissal or plea agreement they proposed, and to do so days in advance of the hearing,” rejecting many of the plea deals.<sup>406</sup>
  - A judge in Loudon County, Virginia removed a progressive prosecutor from a high-profile misdemeanor case, although this was successfully appealed.<sup>407</sup>
  - A state appeals court has upheld a lower court's injunction of LA County DA George Gascón's directive not to pursue prior-strike allegations or sentencing enhancements.<sup>408</sup>
  - In Philadelphia, “judges have openly chastised [DA] Krasner's line prosecutors as too lenient, even appointing a special prosecutor in a case where one refused to charge a probation violation for a new arrest.”<sup>409</sup>
  - A judge threatened to hold an assistant district attorney in contempt of court if he again raised the cost of incarceration, a strategy set by DA Krasner, leading line prosecutors to stop the practice.<sup>410</sup>
  - During the onset of the COVID-19 pandemic, judges delayed reducing jail populations on the request of DA Krasner, rejecting the suggestion to handle lists of inmates without using time-consuming written motions, and, in one case, claiming that not receiving lists from the DA caused the delay.<sup>411</sup> Judges in Philadelphia have also overruled resentencing agreements and declined to consider an initiative to seek shorter probation sentences.<sup>412</sup>

**However, judges may themselves also be progressive candidates.**

- Most state-court judges are elected officials, yet judicial elections are traditionally low profile.<sup>413</sup>
- In response to judicial resistance in Philadelphia, a coalition of organizations supported progressive judicial candidates running for open benches, in the lead up to Philadelphia's 2019 primary election. The coalition's "platform include[d] eliminating cash bail, increasing sentences to rehabilitation-focused programs rather than prison, barring U.S. Immigrations and Customs Enforcement from courts, and decriminalizing sex work and drug use." Similar efforts have been undertaken in Harris County, Texas, Clarke County, Nevada, New Orleans, and Cincinnati, with some candidates working previously as public defenders or civil rights attorneys.<sup>414</sup>

# PRIMER ON DISTRICT ATTORNEYS, CRIMINAL LAW, AND SEX WORK

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**This section provides important background information on the power of district attorneys; their role in the criminal legal system; the scope, rationales, and critiques of prosecutorial discretion; and the ways that DAs can enhance or mitigate the harms of criminal law, particularly regarding sex workers' health and rights. This section is intended to build foundational understanding of this area and should be the first section consulted for those new to engaging with DAs. Similar to the information sheets, it may also be used as a stand-alone resource to share with stakeholders or other audiences in advocacy or education.**

## **What is a Prosecutor? What is a District Attorney?**

Prosecutors are attorneys working for the government responsible for starting legal procedures and securing a conviction against someone accused of a crime. At the state and local level, the head prosecutor in a specific judicial district at the state level (county/parish/borough) is commonly called a district attorney ("DA"). DAs lead a team of prosecutors, and direction given by DAs to the prosecutors working under them can be communicated informally or through a formal written policy, such as a *non-prosecution policy*. As the criminalization of sex work occurs mainly at the state level, DAs are thus the central actors in bringing forward a vast number of sex work-related charges. Many scholars consider prosecutors to be the most powerful officials in the criminal legal system, both due to their central role within the criminal legal system, and the broad power afforded to DAs within it, including *prosecutorial discretion*.

## **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 (diversion program.) They have the power to negotiate with individuals to charge them with less serious crimes if they agree to plead guilty. They can also request that a court grant bail, meaning that those who can afford it may pay an amount of money to be released from custody before trial, or revoke bail, meaning that this option is not available. These decisions can be based on a range of factors, and courts rarely intervene to limit them. As chief prosecutors, DAs can make these choices on an institutional level across categories of crimes, instructing all prosecutors in their offices to make specific decisions according to detailed policies. The wide scope of prosecutors' ability to decide on how the law is enforced, including the crimes a person will be charged with and whether to move forward with a case at all or drop charges, has been criticized as interfering with the role of legislators in creating binding law. But DAs must make these decisions because they do not (and should not) have the time or resources to prosecute every case.

## **How Can Discretion Increase or Mitigate the Harms of the Criminal Legal System?**

DAs' power can enable them to pursue specific priorities, including systematically reducing criminal legal engagement for certain offenses, with a movement of "progressive prosecutors" seeking such goals. Yet, the broad power that enables

these decisions is often unchecked, which creates scope to entrench or increase the harms of the criminal legal system. It is important to examine the specific choices they make regarding who and which crimes are prosecuted, as DAs' choices can be shaped by and perpetuate intentional or unconscious racism and other biases. In seeking to mitigate the harms of the criminal legal system, "progressive prosecutors" must engage with the drivers of racism and racial inequality in the criminal legal system, including through questioning elements of conventional criminal legal system reform, and seeking to influence racist, classist policing. Due to DAs' power and place as a "systemic component" in the system and its racialized social surveillance, control, and harm, some view the reform project of "progressive prosecutors" as a contradiction of terms. How DAs choose to exercise their broad powers is consequential for those engaged in either the buying or selling of sex generally, and for how BIPOC sex workers are treated, specifically.

### **Prosecutorial Discretion and the Impact of Criminal Law on Sex Workers' Health and Rights**

DAs operate at the local government level within states, and so their prosecution choices particularly impact street-based and in-person sex workers because much of the law criminalizing sex work, including both prostitution offenses and laws like vagrancy or loitering that criminalize poverty and being in a public place without a reason, are found in state law and municipal codes. These lower-level crimes function as a form of social control, surveillance, and discipline, creating continued arrest and involvement in criminal legal processes, particularly in poorer communities and BIPOC communities, where the most visible and policed forms of sex work are concentrated, and also impact people assumed to be sex workers, such as BIPOC transgender women. 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 its implications for individual and public health, such as 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. Public health data is critical in demonstrating any positive impacts of non-prosecution policies on health and rights.

## WHAT IS A PROSECUTOR? 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.

**Crime:** 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: felonies, misdemeanors, or infractions (also known as violations).<sup>415</sup>

**The head prosecutor in a specific judicial district at the state level (county/parish/borough) is commonly called a district attorney (“DA”),** but depending on the place, they may alternatively be called a county attorney, state’s attorney, prosecuting attorney, commonwealth’s attorney, or state attorney. **DAs are either elected or appointed.**

**DAs lead 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 — the geographic area where a body of law is binding — and so has influence over the work of other prosecutors. **The direction given by DAs to prosecutors working under them can be communicated informally or through a formal written policy, such as a *non-prosecution policy*.**

***DAs bring about 95% of the nation’s criminal charges.***

**The criminalization of sex work occurs mainly at the state level. DAs are thus the central actors in bringing forward a vast number of sex work-related charges.** In fact, the vast majority of criminal cases proceed at the state or local level, rather than the federal level. This makes DAs especially important, as the chief prosecutors who handle primarily state-law crimes in their jurisdiction.<sup>416</sup> DAs bring about 95% of the nation’s criminal charges.<sup>417</sup>

**Many scholars consider prosecutors to be the most powerful officials in the criminal legal system.**<sup>418</sup> Prosecutors hold particular importance in the United States, which is a particularly carceral society, with over two million of its citizens in jail or prison, the largest aggregate number in the world and a rate higher than any other nation.<sup>419</sup>

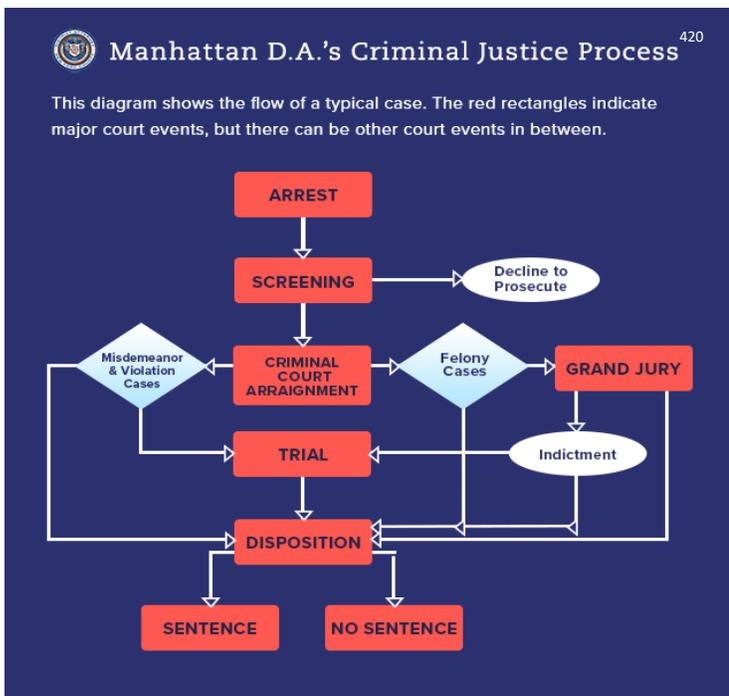
Beyond the size of the criminal legal system and the DA’s central role within it, **the U.S. system grants DAs an enormous range of powers through the criminal process. This includes *prosecutorial discretion*.**

## WHAT IS PROSECUTORIAL DISCRETION?

Prosecutors have what is known as **prosecutorial discretion**: the wide and hard-to-review authority to make choices regarding what enforcement actions to take, both as a matter of charging in **individual cases** and **policy-setting for their office**, for prosecutions within their jurisdiction.

### Individual cases

In individual cases, prosecutorial discretion extends through multiple stages of the criminal process, dependent on the choice of the DA at every stage of that process to continue the prosecution. The details of this process vary state-to-state, but follow a general model:



Who is subject to **ARREST** for sex work-related offenses depends on both:

- the scope of the law (which types of **sex work** are criminalized under **prostitution law/s**); and
- the extent of its enforcement by police (which types of sex work and sex workers are subject to police surveillance and arrest).

Exposure to arrest is related both to which types of sex work put sex workers in physical proximity to police, particularly street-based sex work, and stereotypes about who is a sex worker, which compound with stereotypes about gender and race to expose BIPOC trans women and women working in massage businesses to increased police targeting.<sup>421</sup>

**While the police may make arrests and take a defendant into custody, it is the DA's office that determines whether or not to file charges and start a criminal case, and which charges to bring.**

**Sex work**, broadly defined, is the exchange of sexual, romantic, emotional, spiritual, and/or erotic services for money or goods, including housing, food, drugs, or basic necessities. It may involve working independently, with others, or for a third party. Work in the sex sector/sex trades occurs in many different forms and settings, including street-based or web-based settings, escort services, and video camera work (or "camming"), among others. Some forms of sex work, such as the exchange of sexual conduct, are criminalized through prostitution laws; others, such as erotic dancing (i.e., 'stripping') or the portrayal of sexual activity through visual material (i.e., 'pornography' or 'erotica'), are regulated but not prohibited by criminal law.<sup>422</sup>

**Prostitution laws** are 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, as well as those who assist, support or are supported by sex workers.<sup>423</sup> 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. Using the term "sex work" reinforces the idea that sexual labor is work and supports the discussion of applying labor rights and concern for the conditions of work to sex work.

These decisions are part of the **SCREENING** process. They are supposedly based on what the evidence can support, but also often includes wider considerations, such as the severity of the offense, the criminal history of the defendant, the personal characteristics and circumstances of victims and defendants, as well as engaging a balancing of resources of constraints.<sup>424</sup> As the Supreme Court has explained, "Whether to prosecute and what charge to file or bring before a grand jury are **decisions that generally rest in the prosecutor's discretion.**"<sup>425</sup>

DAs can opt to **prosecute** or **decline to prosecute**. Declining to prosecute may mean that the DA seeks to have the case **dismissed** entirely or **divert** the accused person to a program, among other options.

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

One strand of diversion processes are “prostitution diversion programs” (PDPs). These programs claim to move persons facing arrest, conviction, or detention from low-level prostitution offenses out of the criminal legal system and into services. PDPs vary widely, and deploy a disparate set of day-to-day practices, almost all unstudied, unverified, and rarely accountable to larger justice principles or institutional review. Our past work has made visible persistent features of concern, including: a fundamental mismatch between (generally insufficient) services and the needs and goals of people sent through PDPs. This is made worse by the use of the threat of arrest or conviction to coerce uptake when services could be accessed (and better outcomes met) without arrest or court surveillance, as well as the lack of engagement with and meaningful accountability to persons in the street-level sex trade sector, their priorities, and decision-making. PDPs often involve the ad hoc/personality-driven initiation and operations of programming, including religious or savior conceptions of mission, instead of evidence-based approaches, including treating sex workers as victims (sometimes “trafficking victims”) in public rhetoric but as criminals in practice. PDPs also have questionable funding support and sustainability; and, fundamentally, misuse the concept of “diversion” as in all post-booking programs, defendants are already engaged by the criminal legal system, and at best their detention may simply be deferred.<sup>426</sup>

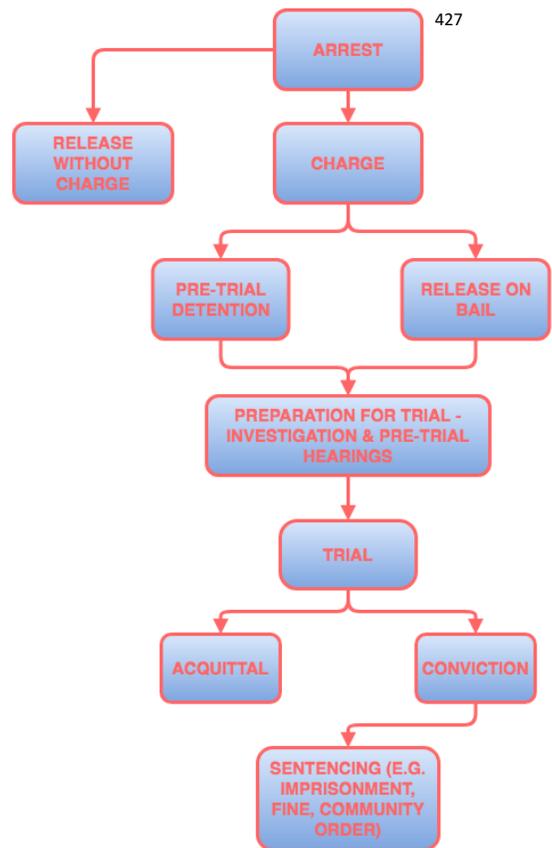
**Some DAs have policies not to file charges for categories of conduct, including prostitution charges.** If DAs choose to proceed with charges, they represent the state in the prosecution and the magistrate or judge informs the defendant of the charges at the arraignment.

At the **ARRAIGNMENT** (or the defendant’s first appearance in front of a judge, if prior to arraignment), the DA can seek a request for bail or revocation of bail, which judges often respect.<sup>428</sup> Bail, a sum of money that defendants must post to be released between their initial custody after arrest to their trial, is a particularly important issue for low-income people: those who cannot post bail must wait in jail for their trial, even though they have not yet been convicted of any crime.<sup>429</sup>

If the DA decides to bring the case to **TRIAL**, the DA is responsible for choosing which evidence to present against the accused in that trial.

Importantly, the DA can engage with a defendant in **plea bargaining** throughout most of this process.

**Plea bargaining:** 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, which means less than 10% of criminal cases end up in trials.<sup>430</sup>



Plea bargaining usually happens prior to trial, but DAs can seek and accept plea bargains at any point in the process, as early as immediately following arrest and prior to filing charges, and right up until a verdict is reached.<sup>431</sup> Plea bargaining has increasingly served as a substitute for jury trials.<sup>432</sup> This shift from jury trials to plea bargaining has increased the power of DAs: they decide if and when to seek a bargain and what terms to offer, in the context of alternative charges that they themselves have brought. These bargains often become entry points into the criminal legal system, ensnaring low-income defendants through fees and fines and those who do not want to be part of, or are unable to complete, diversion programs.

The **DISPOSITION** is the decision (verdict) of a jury or judge to convict or acquit a defendant.<sup>433</sup> If the defendant is convicted, the DA makes recommendations, which are highly influential, to the judge for **SENTENCING**. Sentences can include fine or jail time, or alternatives like probation or community service.<sup>434</sup>

## Policy-setting

DAs can also set larger-scale prospective policies for the work of all the prosecutors in their office across the entire jurisdiction, and their decisions in individual cases, by setting priorities for certain charges or types of charges, leading to greater or lesser enforcement, in some cases with a view to supporting changes to the criminal legal system. DAs can announce that they will not prosecute certain conduct through **non-prosecution policies**.

## Rationales

A conventional rationale for prosecutorial discretion claims that it enables DAs to best **allocate their sparse resources and enables flexibility and even leniency and mercy** in deciding to proceed in some cases and not others.<sup>435</sup>

Prosecutorial discretion also flows from the principle of legal **adversarialism** in the U.S. legal system: the idea that each party should present its case or position in a tribunal to contest the competing claims, arguments, and evidence, and have the issue decided in a process where the assertion of the claims, search for legal arguments, and gathering and submission of evidence is led by parties through their lawyers.<sup>436</sup> Under this idea, the DA, as the party representing the government, has broad latitude in choosing whether to commence an action and how to make that case.

## Critique: Separation of powers

Courts will generally not review and overturn prosecutors' decisions on the grounds that it would represent a violation of separation of powers.<sup>437</sup> Nonetheless, a critique often leveraged is that prosecutorial discretion complicates the standard account of the separation of powers, which underscores the role of the legislature to enact and change law and the role of the executive branch to enforce,<sup>438</sup> meaning the proper mechanism for legal reform around the law of prostitution is through the state legislature, which can enact binding law that DAs should then duly enforce.<sup>439</sup>

**Separation of powers:** The fundamental principle that the three branches of government – legislative, executive, judicial – are kept separate, with distinct functions and powers in order to create checks and balances on each other. The legislature is tasked with creating law, the executive with enforcing it, and the judiciary reviewing each to ensure that they do not exceed their power.<sup>440</sup>

**According to this account, DAs usurp the law-making function of the legislative branch** when they create policy about which laws they will (or will not) enforce or prioritize, and undermine the desired relationship between the legislature and public by shifting law-making power away from the legislative body. Critics argue that mechanisms of accountability for prosecutors are often weak,<sup>441</sup> and if prosecutors can choose not to enforce certain laws, the connection between the legislature's democratic authority and accountability to citizens fractures. Leveling this critique against now-recalled San Francisco DA Chesa Boudin, due to his non-prosecution policy, Don Du Bain, an attorney who quit his job in the office to join the recall effort stated: "He basically disregards the laws that he doesn't like, and he disregards the court decisions that he doesn't like to impose his own version of what he believes is just - and that's not the job of the district attorney."<sup>442</sup> In Pennsylvania, Rep. Tim Bonner, a former prosecutor, said of DA Larry Krasner as part of the impeachment process, "No one individual has the right to set aside the laws of Congress or the General Assembly because they simply do not like the law. No one has that degree of absolute power."<sup>443</sup>

But, in most states **DAs are also elected officials**.<sup>444</sup> Moreover, **prosecutors must make policy choices** to allocate scarce resources because they do not, should not, and could not as a matter of budgeting or feasibility have the time or resources to prosecute every case. Given this necessary gap between the law on the books and law as enforced and lived reality, the line between legitimate law made by the legislature and supposed illegitimate non-enforcement by DAs — or any other part of the executive branch, such as police — is not a bright one. Denying this reality stops the argument and buck at the general idea of incomplete enforcement, and prevents real engagement and scrutiny of the policy choices made by prosecutors in how they decide to enforce the law. While policy choices are always at hand and there is no simple equation of "enforcing the law" with any particular policy, DAs should not have unfettered discretion to do whatever they may please.

## HOW CAN DISCRETION INCREASE OR MITIGATE THE HARMS OF THE CRIMINAL LEGAL SYSTEM?

Prosecutorial discretion has sparked both praise and criticism from across the political spectrum for the impact it can have on what prosecution and contact with the criminal legal system looks like on the ground. Notably, the elimination of the constitutional right to abortion by the Supreme Court has generated a new version of the struggle examined here. As states create new criminal laws which are fiercely contested as rights-violating, DA claims to not enforce unfair laws are rising in ways that could be useful to sex worker rights advocates.<sup>445</sup>

**Prosecutorial discretion enables DAs to pursue specific priorities in regard to crime, including systematically reducing criminal legal engagement for certain offenses.**

- **Collectively, prosecutors seeking to use discretion for this type of reform have been dubbed “progressive prosecutors.”**<sup>446</sup> For supporters of prosecutors as agents of reform, this power and discretion has the capacity to “reduce the prison and jail population and make the system fairer for all involved, including the accused.”<sup>447</sup> Since 2015, a number of lawyers have won DA elections – particularly in large blue cities on the coasts – on the platform of ending mass incarceration and bringing “fairness” to the criminal legal system through, for example, reforming cash bail, not prosecuting a number of low-level crimes, including prostitution, expanding diversion programs, and bringing in “reform-minded outsiders.”<sup>448</sup> Several high-profile “progressive prosecutors” have announced that they would not prosecute sex work-related charges, among others.<sup>449</sup> **While commentators have labeled many DAs progressive prosecutors, they vary in their policies and their willingness to use their discretion to change the status quo of prosecution.**
- While these policies are important, the **lived reality of the criminal legal system for sex workers depends not only on prosecutorial policy but also on how policing practices actually operate and whether prosecutors are bringing charges on other grounds** (e.g., other ‘quality-of-life’ offenses).<sup>450</sup>
- **A further limitation to these policies flows from the nature of discretion: what one prosecutor can grant, another can take away.** For example, non-prosecution policies have been walked back with the election of new DAs Ivan Bates in Baltimore City and Brooke Jenkins in San Francisco.<sup>451</sup> More permanent change requires legal reform at the level of the legislature to reform or remove relevant criminal provisions.

**But prosecutorial discretion is both a symptom and cause of the broad power that DAs have in the criminal legal system, often without significant checks from other actors, which creates scope to entrench or increase the harms of the criminal legal system, and substantial issues of accountability and racism in prosecution and policing.**

- **Prosecutorial discretion can perpetuate racism and white supremacy.** Because prosecutorial power is unilateral and nearly unchecked, individual choices shaped by racism can create and further racist outcomes.
- **Prosecutors may influence racist arrest practices.** With the exception of announcing prospective policy, prosecutors usually get involved with the accused after the police make the initial arrest, and are preceded by any racial disparities in policing. However, prosecutors’ policies may affect the arrest practices of the police and the volume of cases.<sup>452</sup> Moreover, prosecutors may facilitate racial disparities in policing and arrests by bringing charges forward and prosecuting individuals in cases involving racialized policing and surveillance, and in doing so legitimizing and incentivizing such practices.
- **After arrest, prosecutorial power in the criminal process is more direct, and intentional discrimination or unconscious racism in decision-making can further racial disparities and white supremacy.** For instance:
  - **Prosecutors may choose to go forward with charges against Black would-be defendants more often than white defendants.** For example, in examining prostitution cases referred to the Milwaukee

County District Attorney's Office between January 2009 and June 2010, the Prosecution and Racial Justice Program of the Vera Institute of Justice found that Black defendants were much more likely to be charged than white defendants, but were also more likely to be offered diversion.<sup>453</sup>

Diversion programs offer the possibility of a defendant's case being dismissed, if they meet set conditions, such as not being re-arrested, or completing mandated services, such as drug treatment or therapy, or even pleading guilty. In addition to being coercive, these programs maintain individuals under state surveillance and have low completion rates, meaning that many individuals, even if diverted pre-trial, end up *more* engaged with the criminal legal system through involvement in mandated services in addition to engagement in the criminal legal process and/or a conviction.<sup>454</sup>

- **Prosecutors may seek harsher charges and sentences, deny bail, or ask for large cash amounts for bail, or withhold more lenient terms during the plea-bargaining process.** One recent study found "significant racial disparities in plea deals that suggest that prosecutors may be using race as a proxy for criminality."<sup>455</sup> **In considering a defendant's criminal history, prosecutors may also ignore the role and effects of racism in the defendant's prior arrests, charging, or sentencing.**<sup>456</sup>
- **Prosecutors may invest more time and resources into prosecuting cases based on racialized stereotypes about BIPOC defendants,** while disinvesting from cases with white defendants.

**Those claiming to be "progressive prosecutors" and using their power to challenge racism must intentionally address the drivers of racism, racial inequality, and white supremacy in the criminal legal system in their policies.**

- **This includes questioning the value and impact of elements of conventional criminal legal system reform** that may be available as alternatives to prosecution, such as diversion programs and electronic monitoring.<sup>457</sup> Further, to the extent possible, any DA influence on police practices is one of many tactics needed to effectively address racist, classist policing.

**Nonetheless, for many, "progressive prosecutor" is a contradiction in terms, and their power, role, and harm in that system, persists "no matter the personal politics of an individual candidate or officeholder."**<sup>458</sup>

- **"Progressive prosecutors" as a "reform" project, with its possibilities and shortcomings, rests on the broad prosecutorial powers at the foundation of mass incarceration, prosecution, and policing.**<sup>459</sup> This large degree of power held by prosecutors forms the basis for the more foundational critique of prosecutors as law enforcement and as a "systemic component" of the racialized social surveillance, control, and harm of the criminal legal system.

**Accordingly, for those engaged in either the buying or selling of sex, how prosecutors choose to exercise their broad powers is consequential, generally, and for how BIPOC sex workers are treated, specifically.**

- As the criminalization of sex work occurs primarily under state law, those decisions rest broadly in the hands of district attorneys. The decision by DAs to pursue more punitive, coercive policies will create more precarious, unsafe working conditions for sex workers. Alternatively, choosing not to prosecute the buying and selling of sex in practice could arguably contribute, in part, to the opposite effect, through the direct impact of decreased incarceration, criminal records, and time spent in the criminal legal process, as well as indirect impacts, such as any impact DAs have on police in reducing contact with officers and arrest, and, in turn, potentially enabling sex workers to adopt more safety strategies (e.g., spending more time screening clients and negotiating) if they are less preoccupied by fear of criminalization.

## DISCRETION AND THE IMPACT OF CRIMINAL LAW ON SEX WORKERS' HEALTH AND RIGHTS

DAs' decisions to not prosecute can play an important role in mitigating the harms of criminalization faced by sex workers, clients, and third parties, because DAs operate at the local government level (county/parish/borough) within states and much of the law criminalizing sex work is based in municipal codes and state law.<sup>460</sup> Each state has its own set of laws around sex work, and differences in law are also shaped by how DAs in each jurisdiction interpret and apply that law, including as expressed in their policies. A range of laws can be implicated:

- With the exception of certain counties in Nevada, all US states explicitly **ban the selling and buying of sexual services for material or financial compensation, which is referred to by criminal law as 'prostitution'**.<sup>461</sup>
- While the law around prostitution varies by state, **state statutes generally define prostitution by three elements:** 1) sexual activity or conduct, 2) compensation, and 3) intent to commit prostitution.<sup>462</sup> People under the age of 18 years who are involved in the selling of sex are, under federal and some state laws, formally deemed to have been trafficked (although in practice they are often treated as if criminal).<sup>463</sup> The majority of relevant cases are handled at the state level, yet only about half of states have some form of safe harbor law, i.e., a law removing punitive sanctions for children involved in commercial sex acts, through immunity from arrest and prosecution for prostitution offenses, diversion programming and/or mandated referral to services. This means that children in states without such laws can be arrested, charged, and placed in the juvenile justice system under prostitution offenses. Indeed, some advocates against safe harbor laws do so under the misguided idea that law enforcement and prosecutors using the threat of arrest and prosecution, and collateral consequences, may encourage children to testify against traffickers.<sup>464</sup> Yet even in states that have passed such laws, studies have indicated mixed results in terms of whether they reduce the number of children arrested for the crime of prostitution.<sup>465</sup> A youth may also be charged with trafficking another youth if they are involved in commercial sex together.<sup>466</sup>
- **Prostitution is often classed as a misdemeanor**, rather than a felony, a more serious category of crimes that result in long prison sentences. In most states, trafficking is defined as a felony. In some jurisdictions, prostitution will be classed as a more serious misdemeanor or felony, leading to a higher fine and longer jail time, if the person has previous prostitution convictions.<sup>468</sup> It may also be classed as a felony if the person has HIV and knew they had HIV when engaging in sex work.<sup>469</sup>
- **Prostitution and solicitation are among several misdemeanors often classed as so-called 'quality-of-life' offenses.** These laws, which also include offenses like vagrancy or loitering, make it an offense to be in a public place without a reason and criminalize poverty, homelessness, and gender nonconformity, with particular impact on Black and/or transgender women, and young, homeless and poor women.<sup>470</sup> These offenses also draw immigrant women into the criminal legal system, which can lead to deportation.<sup>471</sup>

**Sex workers, particularly street-based sex workers, face harassment from police, and are drawn into the reach of the criminal legal system through the whole range of these "quality-of-life" offenses, beyond the criminalization of sex work through prostitution law and prohibitions specifically on selling and buying sex.**<sup>472</sup>

- **And sometimes "quality-of-life" offenses are made definitionally sex work-specific.** One notable example was New York's loitering for the purposes of prostitution law, known as the "walking while trans ban," which police

**Crimes** are usually divided into three categories, based on severity of punishment: felonies, misdemeanors, or infractions.<sup>467</sup>

**Infractions** (also known as violations) are the least serious violation, typically punished with a monetary fine and in some cases a few days in jail. Traffic offenses are the most common form of infraction.

**Misdemeanors** are criminal offenses that carry up to a year in jail in most jurisdictions. Punishment for misdemeanors can also include payment of a fine, probation, community service, and restitution.

**Felonies** are the most serious offenses. Punishment for a felony generally ranges from more than a year to life in prison without parole or, in some states, the death penalty. Offenses that are classified as misdemeanors can sometimes be elevated to felonies for someone who has been repeatedly convicted. In some cases, judges and prosecutors have the authority to decide whether to charge a crime as a misdemeanor or a felony.

used to harass BIPOC trans and cis women,<sup>473</sup> including through soliciting sexual acts before arrest, blackmail, and invasive body searches.<sup>474</sup> New York repealed this law in 2021, alongside moves to do the same in Seattle and California in 2020 and 2022.<sup>475</sup> In signing the repeal in California, Governor Newsom noted the disproportionate harassment under the law of trans people and cis women, and its particular impact on “Black and Latino women.”<sup>476</sup> But despite the repeal in New York, incidents of ongoing police harassment in New York City persist, particularly of trans Latina women.<sup>477</sup> Similar laws across the country remain on the books.<sup>478</sup>

**The significant power DAs possess in the criminal legal system means DA policies, including non-prosecution policies, significantly impact the extent of a person’s involvement with the criminal legal system.** Prosecutors’ choices impact a **wide range of rights and opportunities**, and have far-reaching **personal health consequences** for people engaged in sex work, particularly for street-based and in-person sex workers, as well as **broad implications for public health**.

- Misdemeanors can result in **criminal records, fines and even prison time, along with collateral consequences**:

Fines and lost work time resulting from arrests and prosecution affect sex workers’ socioeconomic resources, which increase vulnerability to housing and food insecurity. Jail time and criminal records also make it difficult for people to seek educational opportunities or alternative employment, if desired,<sup>479</sup> as well as discrimination by employers, loss of access to public benefits, including public housing, and the loss of the right to sue the police if sex workers are victims of police violence.<sup>480</sup> Arrests and jail time disrupt families, particularly care and connection to children, and charges and convictions can negatively impact custody, adoption, and other family court matters.<sup>481</sup> They can also lead to denial of immigration relief and possible deportation for migrants without immigration status. Depending on the conviction, sex workers may face consequences for travel and voting.<sup>482</sup> All together, these structural barriers to health further exacerbate the harms from the denial of legal rights, as well as any physical violence, psychological harm, and stress experienced by sex workers.

- **On the aggregate level, over-policing and prosecution of sex work results not only in mass incarceration, but also bringing sex workers into dynamics of regulation under the broader problem of mass misdemeanors.**

While misdemeanors are lower-level crimes, and carry much less significant penalties than felonies, their pervasiveness **entangles many more people in the criminal legal system** than the phenomenon of mass incarceration suggests. Prosecutors and other actors in the criminal legal system use misdemeanors, the “lower reaches” of the system, as **mechanisms for social control, surveillance, and discipline**.<sup>483</sup> In particular, **misdemeanors disproportionately affect low-income communities, Indigenous communities, and Black and other communities of color**.<sup>484</sup>

**Poorer sexual and mental health outcomes are observed under such repressive policies and practices around sex work.** Sex workers have twice the odds of contracting HIV/STIs when they are surveilled and policed, and their risk increases even more when syringes or condoms are confiscated from them.<sup>485</sup> Several factors related to criminalization — including recent incarceration, work stress, and stigma — are also correlates of emotional ill health observed among sex workers.<sup>486 487</sup>

- **Direct and indirect criminalization of sex work, as well as related policing, are associated with significantly increased risk of sexual and physical violence against sex workers by clients and police**.<sup>488</sup>

Even under End Demand policies – which ostensibly criminalize only clients and third-party facilitators, and not sex workers – laws against solicitation make client screening difficult, limit sex workers’ choice around clients, and restrict their negotiating power with regards to safe sex practices.

Abuses of power by police have been reported across diverse contexts as well. The APHA 2018 statement on law enforcement violence as a critical public health issue highlighted that the physical and psychological harms

of policing disproportionately affect marginalized populations, including sex workers, BIPOC individuals, people who are undocumented, those experiencing houselessness, people with disabilities, LGBTQ people, people with mental illness, people who use substances, and people who are economically disenfranchised.<sup>489</sup>

Additionally, there are few, if any, reliable systems for reporting violence experienced by sex workers. In fact, criminalization often deters sex workers from seeking out legal recourse, social services, and health care.

- **Direct and indirect criminalization of sex work undermines sex workers' stability and safety practices.**

Even under End Demand policies, there is the risk of eviction, as landlords often kick out sex workers due to the fear of being charged with promoting prostitution or allowing trafficking. These charges are also a risk for sex workers who work together, preventing community safety practices, such as coworking.<sup>490</sup>

- **Historically differential application of prostitution laws across both sex workers and clients according to race, gender, and related stereotypes about sex work, raises concerns that inequities will continue to be reproduced in decisions about which forms of sex work, done and used by whom, will be prosecuted.**

White cisgender women in the sex trade are more likely to be seen as victims of gender-based violence, while BIPOC cis and trans women are more likely to be seen, and treated, as criminals.

#### NEW YORK, NEW YORK

In New York City, for instance, data from the New York State Division of Criminal Justice Services shows that Black individuals represented 41% of individuals arrested for selling sex and 55% of individuals convicted for selling sex.<sup>491</sup> By contrast, white individuals represented only 13% of arrests and 8% of convictions.<sup>492</sup> The enforcement of New York's now-repealed "walking while trans ban" loitering statute functioned according to racialized and gender stereotypes of sex workers, leading to the arrest of people both working in the sex trade and not, with a disproportionate impact on "cisgender and transgender women of color and women who have previously been arrested for prostitution offenses." Notably, "[e]ighty-five percent of the individuals arrested under Section 240.37 between 2012-2015 were Black or Latina."<sup>493</sup>

These disparities also affect who is seen as a trafficking victim: according to FBI arrest data, in 2019, 50.7% of individuals under 18 arrested for prostitution were Black,<sup>494</sup> even though, as noted above, under federal and some state laws, any minor involved in the sex trade is considered a victim of trafficking.<sup>495</sup>

Migrant Asian unlicensed massage workers, particularly, face compounded contact with the police due to their immigration status and police efforts to curtail perceived sex trafficking,<sup>496</sup> informed by stereotypes of massage businesses, especially those employing Asian people, which are "assumed by some to be places where consensual sex is bought and sold, and painted by others as epicenters for exploitation."<sup>497</sup> This highly contingent victim/criminal classification is reflected in the fact that anti-trafficking operations identify few trafficking victims, and, in fact, often target sex work,<sup>498</sup> and result in immigration-related charges.<sup>499</sup>

Cis male full-service workers have less interaction with police than cis and trans women working in the sex trades, but the male sex workers who do face police violence, including arrest, are usually young BIPOC men and/or street-based sex workers.<sup>500</sup> The sexual and gender diversity among individuals in the sex trade, whether workers or as clients, is often ignored,<sup>501</sup> impacting practices of enforcement and criminalization.

On a geographical level, local non-prosecution policies that rely on discretion have the potential to create a two-tiered system where whiter and wealthier jurisdictions within a state do not enforce prostitution law, but poorer communities and BIPOC communities, where the most visible and policed forms of sex work are

concentrated, continue to experience harsh criminalization of both sex workers and clients. Furthermore, there exists the possibility that street-based sex workers in a “non-prosecution” jurisdiction continue to be targeted and prosecuted for adjacent crimes while others enjoy protection from prosecution. As more jurisdictions have moved toward non-prosecution policies in recent years, and **it is important that safety from prosecution in these jurisdictions is offered equally to low-income, trans, and/or BIPOC sex workers.**

#### NEW YORK, NEW YORK

In New York, sex workers whose clientele are high income—and receive services in similarly situated high-income locations—are often not the target of law enforcement interventions and thus not subject to prosecution, with distinct pattern across the boroughs.<sup>502</sup>

This aligns with reports of differential police contact for clients. An investigation by ProPublica shows that since the New York Police Department (NYPD) announced a shift in its arrest target from sex workers to clients in 2017, increased numbers of arrests of clients “only happened in Black and Latino neighborhoods.”<sup>503</sup> One study conducted among youth involved in the sex trade in New York city highlighted that white individuals represented only 9.8% of arrests for purchasing the services of a sex worker in New York City between 2008-2018.<sup>504</sup> While this data, and data on the policing of sex work in general, is notoriously limited, this evidence matches what one would expect if patterns in sex work enforcement followed the patterns of racial disparities in street-level policing overall. In 2019, a New York Civil Liberties Union report identified the continued targeting of Black and Latino men in the vast majority of stops and frisks in New York City, despite those stops yielding weapons or charges less frequently than stops of white men.<sup>505</sup>

**In analyzing the impact of DA policies and the criminal law, a health justice lens underscores how criminal law affects the health of populations,** highlighting how the distribution of ill health and other negative health effects track the enforcement of criminal law, and is exacerbated by practices of direct and indirect discrimination in that enforcement.

**Public health data, and its effective publicization and communication, is critical in demonstrating the negative impacts of criminal law and the role that non-prosecution policies can play in mitigating those impacts on sex workers’ health.** Research can be used to show vulnerabilities of sex workers to criminalization, and could lend evidence to support future non-prosecution policies.

#### BALTIMORE, MARYLAND

SAPPHIRE (Sex Workers and Police Promoting Health in Risky Environments) is a collaboration between law enforcement and sex workers in Baltimore aimed at conducting research to align public health, public safety, and the rights of cisgender and transgender women in sex work, with the broad goal to examine the role of police in the HIV risk of street-based sex workers.<sup>506</sup> The SAPPHIRE study was a prospective, longitudinal cohort study which enrolled 250 cisgender women and 62 transgender women engaged in street-based sex work, recruited through targeted sampling from street-based locations in Baltimore. The cohort was followed up with at the 3-, 6-, 9-, and 12-month mark to complete a personal interview survey and test for HIV, gonorrhea, trichomoniasis/trich, and chlamydia.<sup>507</sup> In one of the publications resulting from the study, the authors noted that transgender women sex workers were more likely to have police as clients than cisgender women sex workers, but both groups “had high levels of police encounters and reported having given information to the police, mostly to “avoid arrest or trouble.” Both groups also “reported changes to their routine work as a result of policing,” including avoiding carrying condoms, moving to an unfamiliar area to avoid police, and rushing negotiations with clients, and had experienced a similar number of “egregious behaviors and assaults at the hands of the police.” The authors suggested that this “underscor[ed] women’s situational vulnerability to police exploitation. Police culture is complicit in these transgressions that not only rarely result in punishment but also erode women’s ability to self-protect (e.g., selling sex in a familiar area and time for safer negotiations) and further compromises their safety.”<sup>508</sup>

## CONCLUSION

This handbook seeks to support sex worker rights advocates, prosecutors, policy makers and other stakeholders to develop, influence, track and assess the operation and impact of DA non-prosecution policies so that they protect and promote sex workers' rights and health, and mitigate the harms of the criminal law, to the greatest extent possible in the context of sex work criminalization. It presents the scope of charges that DAs should decline to prosecute under a Model Policy, underscoring the importance of not prosecuting the range of offenses that may be used to surveil, control, and punish sex workers, clients and third parties. It also provides a series of Landscape Analysis Questions to support readers in navigating the thematic sections of the handbook, which compile issues or factors that have arisen in the implementation of existing policies to date, across policy development and communication, key elements, points of influence, and foundational information in a Primer on district attorneys, criminal law and sex work.

**This handbook, and the information it contains, is intended to be used and shared widely by those engaged in varied DA non-prosecution policies and the different contexts of their implementation to support sex workers' rights.**

- Particularly, it contains **Information Sheets** summarizing background conditions that have informed non-prosecution policy development, which are formatted as stand-alone documents that advocates may print or send as part of advocacy or education efforts with DAs or other stakeholders. These are available as separate PDFs on [GHJP's website](#).
- It also contains a **Primer on District Attorneys, Criminal Law and Sex Work** that advocates can use and share to enhance their own or others' understanding of the role and powers of DAs, both generally and with regard to the harms of criminal law and its impact on sex workers' health and rights.

**A core theme of this handbook is that DA non-prosecution policies are a mitigation strategy that cannot undo all the harms of criminalization experienced and navigated by sex workers. The full decriminalization of sex work is essential** to protecting the rights, safety and health of sex workers, reducing stigmatization, as well as ensuring that sex workers receive compensation for labor, have access to a stable livelihood, can access social services responsive to the needs of sex workers, and have the ability to organize and exercise collective powers. Full decriminalization includes the complete removal of criminal penalties related to the sex trade, including lifting penalties for sex workers, clients, and third parties, as well as for related activities, such as penalties for loitering and other 'quality-of-life' offenses. Without this, police and prosecutors hostile to sex work can lawfully continue to harass, arrest, and prosecute sex workers, and sex workers continue to be subject to police and state surveillance, arrests, court cases, criminal penalties, incarceration, and the collateral consequences of criminal records, as well as a context in which it is difficult, if not impossible, for sex workers to seek protection from violence and report it when it occurs.

# APPENDICES

## APPENDIX A: GLOSSARY

### General terms

**Cisgender, transgender:** Cisgender (or “cis”) is a term used to describe someone who identifies with the sex they were assigned at birth. Transgender (or “trans”) is a term used to describe someone whose gender expression and/or gender identity are different than the sex they were assigned at birth.<sup>509</sup>

**Criminal legal system:** is the phrase we use, rather than “criminal justice system,” as an acknowledgement that the system does not deliver justice for many individuals and communities. The phrase “criminal punishment system” is also used by advocates to highlight how it functions as an apparatus of racist violence, serving aims of surveillance, control, punishment, and retribution.<sup>510</sup>

### Sex work-related terms

**Sex work:** Sex work, broadly defined, 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. Work in the sex sector/sex trades occurs in many different forms and settings, including street-based or web-based settings, escort services, and video camera work (or “camming”), among others. Some forms of sex work, such as the exchange of sexual conduct, are criminalized through prostitution laws (see below); others, such as erotic dancing (i.e., ‘stripping’) or the portrayal of sexual activity through visual material (i.e., ‘pornography’ or ‘erotica’), are regulated but not prohibited by criminal law.<sup>511</sup>

**Prostitution laws:** are 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, including those who assist, support or are supported by sex workers.<sup>512</sup> 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.” Using the term “sex work” reinforces the idea that sexual labor is work and supports the discussion of applying labor rights and concern for the conditions of work to sex work.

**Full decriminalization:** is the complete removal of criminal laws prohibiting sex work. It lifts penalties for sex work (i.e., soliciting / selling sex or “prostitution”), as well as for related activities, such as loitering and other ‘quality-of-life’ offenses often applied against street-based sex workers.<sup>513</sup> It also removes penalties for clients (e.g., patronizing a prostitute) and ‘third party’ activities including promotion, management, security, transportation, and organizing (criminalized under offenses such as “promoting prostitution.”) Under this framework, there are no criminal penalties for selling or buying sexual services absent other crimes. This means that trafficking (i.e., selling sex induced by force, fraud or coercion, or by an individual under 18 years old), violence and victimization, and intimate partner violence all remain illegal. Labor laws that promote sex workers’ rights remain applicable, with a shift to their protections governing sex work as labor, in the place of governance under criminal law.<sup>514</sup>

**End demand / Nordic / Swedish / Equality / Entrapment / “partial decriminalization” model:** This model, which has been presented using a multitude of names, criminalizes buying sexual services but not selling sexual services. In other words, clients and anyone who facilitates selling and buying sex are subject to criminal penalties, while persons selling sex technically are not.<sup>515</sup> The label “partial decriminalization” for this model (on the assumption that it does not criminalize sex workers) is overinclusive, as a focus on buyers nevertheless directs police action to areas where sex workers conduct business, exposing sex workers to police harassment, and arrest and prosecution under other charges. It also ignores that sex workers may buy sex and therefore be criminalized.

**Legalization:** Under legalization, city or state government is the primary regulator of the sex trade. The government sets specific conditions, such as licensing and registration requirements, under which the exchange of sexual services could take place. Sex work occurring outside of these conditions remains criminalized.<sup>516</sup>

**Human 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.<sup>517</sup> The U.S. Trafficking Victims Protection Act of 2000 (TVPA) defines trafficking to include inducement of a commercial sex act by a minor, regardless of whether there is evidence of force, fraud, or coercion, as one of the “severe forms of trafficking in persons.”<sup>518</sup>

## Law-related terms

**Crime:** 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: felonies, misdemeanors, or infractions (also known as violations).<sup>519</sup>

**Infraction:** are the least serious violations that are typically punished with a monetary fine and in some cases a few days in jail.<sup>520</sup> Traffic offenses are the most common form of infraction.

**Misdemeanor:** are criminal offenses that carry up to a year in jail in most jurisdictions. Punishment for misdemeanors can also include payment of a fine, probation, community service, and restitution.<sup>521</sup>

**Felony:** are the most serious kinds of criminal offenses. Punishment for a felony generally ranges from more than a year, to life in prison without parole or, in some states, the death penalty. Offenses that are classified as misdemeanors can sometimes be elevated to felonies for someone who has been repeatedly convicted. In some cases, judges and prosecutors have the authority to decide whether to charge a crime as a misdemeanor or a felony.<sup>522</sup>

**Dismissal:** is the decision by a court to terminate a case without imposing liability on the defendant, which may be taken following a request by the defendant or on the court’s own initiative. A dismissal may or may not, at the court’s discretion, bar a prosecutor from refiling charges (or new charges based on the same circumstances) in the future.<sup>523</sup> Reasons given for dismissal may vary. For example, in Seattle, then-City Attorney Pete Holmes successfully requested the dismissal of cases on the basis that each of the cases included only a single charge of the crime of prostitution.<sup>524</sup>

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

One strand of diversion processes are “prostitution diversion programs” (PDPs). These programs claim to move persons facing arrest, conviction, or detention from low-level prostitution offenses out of the criminal legal system and into services. PDPs vary widely, and deploy a disparate set of day-to-day practices, almost all unstudied, unverified, and rarely accountable to larger justice principles or institutional review. Our past work has made visible persistent features of concern, including: a fundamental mismatch between (generally insufficient) services and the needs and goals of people sent through PDPs. This is made worse by the use of the threat of arrest or conviction to coerce uptake when services could be accessed (and better outcomes met) without arrest or court surveillance, as well as the lack of engagement with and meaningful accountability to persons in the street-level sex trade sector, their priorities, and decision-making. PDPs often involve the ad hoc/personality-driven initiation and operations of programming, including

religious or savior conceptions of mission, instead of evidence-based approaches, including treating sex workers as victims (sometimes “trafficking victims”) in public rhetoric but as criminals in practice. PDPs also have questionable funding support and sustainability; and, fundamentally, misuse the concept of “diversion” as in all post-booking programs, defendants are already engaged by the criminal legal system, and at best their detention may simply be deferred.<sup>525</sup>

**Nolle prosequi:** Prosecutors can discontinue prosecution by filing a *nolle prosequi* (Latin for “not wish to prosecute”) with the court, indicating that they are voluntarily dropping charges. This may be entered any time after charges have been brought but before a verdict has been made or a plea entered. A *nolle prosequi* does not prevent a prosecutor bringing the same charges in the future.<sup>526</sup>

**Plea bargaining:** 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, which means less than 10% of criminal cases end up in trials.<sup>527</sup>

**Separation of powers:** The fundamental principle that the three branches of government – legislative, executive, judicial – are kept separate, with distinct functions and powers in order to create checks and balances on each other. The legislature is tasked with creating law, the executive with enforcing it, and the judiciary reviewing each to ensure that they do not exceed their power.<sup>528</sup>

**State Attorneys General:** are in each state the chief law enforcement officer of the state government. While specific functions of AGs vary from one state to another according to how their role is defined in state statutes and constitutions. AGs “occupy the intersection of law and public policy, dealing with very diverse areas of the law,” from criminal law and human trafficking to consumer protection, public health, and environmental law.<sup>529</sup> Common tasks include representing the state and state agencies in litigation, providing advice to government agencies and legislatures, providing formal opinions to clarify the law, acting as a public advocate in areas such as child support enforcement and consumer protection, running awareness campaigns, law reform and legislative advocacy, as well as criminal law enforcement, mostly at the appellate level, handling serious statewide prosecutions, and, in some states, overseeing state prosecutors.<sup>530</sup>

**Supervisory approval:** A procedure under which the prosecutors in a DA’s office must seek approval of specific types of decisions from a supervisor before proceeding with them, which may include their unit’s supervisor and/or the DA. This can include decisions, for example, to charge a person with certain crimes, such as patronizing a person for prostitution, not to charge specific crimes, or to seek incarceration beyond a set number of days or years for certain offenses.<sup>531</sup>

**Quality-of-life offense:** 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, including social prohibitions, as underscored by the categorization of certain quality-of-life offenses in some contexts as “crimes against society.” Examples of quality-of-life offenses include excessive noise, loitering, vandalism, panhandling, drug use, prostitution, and others.<sup>532</sup> “Quality-of-life” policing appeared as a term in New York City in the 1980s, to refer to “a practice of heavily policing a number of normally non-criminal activities such as standing, congregating, sleeping, eating and/or drinking in public spaces” in addition to such minor offenses under ideas linked to “broken windows” theory suggesting that allowing signs of “disorder” to exist in a neighborhood will lead to more serious crime.<sup>533</sup> Quality-of-life offenses serve many of the functions of vagrancy laws, which targeted “objectionable out of place people” rather than any particular conduct, and were found unconstitutional in the early 1970s following the social upheaval of the 1960s and concerted efforts against the “vagrancy regime.”<sup>534</sup>

## **APPENDIX B: METHODOLOGY**

This project, carried out after its scope and methods were approved by Yale University's Institutional Review Board<sup>535</sup> for all academic and NGO researchers, was conducted using two main research methodologies across multiple phases.

### **Desk research and literature review**

GHJP and SWP conducted background research, including preliminary desk research and literature review, to understand key issues in the non-prosecution of sex work-related charges.

The first focus area of this research was literature related to prosecution in the United States, including scholarly articles, reports, and news articles related to the role of prosecutors in the criminal legal system; the scope of prosecutorial discretion and its impact on mass incarceration; critiques of prosecutorial discretion and proposals for reform; the specific role of prosecutors in enforcing sex work-related charges; and the interactions between prosecutors and the landscape of other actors within the criminal legal system that impact the enforcement of sex work-related charges, including police and state attorneys general (AGs).

The second focus area of our research concerned public health issues related to the criminal legal system, policing, and incarceration; specifically, the health implications for individuals related to criminal legal system outcomes linked to prosecutorial policies and practices, including police surveillance, arrest, incarceration, and having a criminal record. We reviewed both legal and social science scholarly articles and policy statements by public health organizations. Notably, the social science literature on health effects of enforcement of prostitution law in the U.S. is scarce, signaling a lack of empirical evidence to ground evaluation of the impact on the law and its enforcement on the individuals affected by it.

The third focus area of research was to survey the current landscape of non-prosecution policies engaging with sex work-related charges across the United States. We relied on news articles, press releases and policy statements by DA offices, and reports by non-profits, government and policy makers to map existing jurisdictions where DAs have announced a non-prosecution policy including at least some sex work-related charges, and gathered publicly-available information about the scope of such policies.

### **Interviews with key stakeholders**

To supplement the information gathered through our background research, we conducted a preliminary round of key stakeholder interviews with scholars, civil society representatives, and advocates who study or observe prosecutorial policies and their impact in their work, either at the national or local level. The goal of these interviews was to understand the many issues related to the role of prosecutors in the criminal legal system and how the current conversation around criminal justice reform and prosecution relates to the non-prosecution of sex work-related charges. Some interviews also concerned prosecutorial policies in jurisdictions of interest, including the contextual factors shaping local prosecutorial priorities; the interactions between different local actors; and the dynamics involved in the implementation of prosecutorial policies on the ground.

We then conducted a further round of interviews with representatives from DA offices as well as sex worker rights advocates and sex worker-led groups, to further understand the context, scope, implementation, and impact on sex workers of non-prosecution policies in jurisdictions of interest. These interviews inform several of the case studies throughout the toolkit, which are intended to provide context and more detailed examples of specific concepts and practices explored in the toolkit, and to examine how the context and policy model of non-prosecution policies may affect their implementation, outcomes, and impact on sex workers. The case studies are primarily drawn from five focus jurisdictions, chosen in order to represent varied approaches to implementing a non-prosecution policy for sex work-related charges:

- Baltimore, Maryland, due to the adoption of the policy in response to COVID-19;
- Manhattan, New York, due to the context of heavy sex worker rights organizing;
- New Haven, Connecticut, because of local advocacy to police, and the establishment of a non-arrest policy for prostitution offenses;
- Seattle, Washington, because policies in effect explicitly maintain the prosecution of clients; and
- Washtenaw County, Michigan, due to the DA's explicit positioning in favor of decriminalization and public health approaches.

## **Expert Review**

Following rounds of initial drafting of the handbook, it was circulated for review to various stakeholders involved in the project, including sex worker rights advocates working in jurisdictions with non-prosecution policies and engaged in advocacy with DA offices. The handbook was subsequently revised to incorporate their comments and feedback. See [Acknowledgements](#) for information on researchers, authors, and reviewers.

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Use hyperlinked titles to return to the relevant section.

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## ACTION SHEET: MODEL POLICY AND LANDSCAPE ANALYSIS

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## KEY ELEMENTS OF A NON-PROSECUTION POLICY

### DECLINE PROSECUTION FOR ALL OFFENSES RELATED TO THE SELLING AND BUYING OF SEX

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## DECLINE PROSECUTION OF 'QUALITY-OF-LIFE' AND OTHER OFFENSES THAT ENGAGE SEX WORKERS

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## POINTS OF INFLUENCE IN POLICY IMPLEMENTATION

### PUBLIC ACCOUNTABILITY: ELECTIONS AND INFORMATION SHARING

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## PRIMER ON DISTRICT ATTORNEYS, CRIMINAL LAW AND SEX WORK

### WHAT IS A PROSECUTOR? WHAT IS A DISTRICT ATTORNEY?

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## HOW CAN DISCRETION INCREASE OR MITIGATE THE HARMS OF THE CRIMINAL LEGAL SYSTEM?

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## DISCRETION AND THE IMPACT OF CRIMINAL LAW ON SEX WORKERS' HEALTH AND RIGHTS

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## APPENDICES

### APPENDIX A: GLOSSARY

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## APPENDIX B: METHODOLOGY

<sup>535</sup> An Institutional Review Board is a committee that reviews all research studies involving human subjects to ensure the respect of research ethics. This project was granted an exemption from further review by the Yale Institutional Review Board on November 3, 2021. Projects granted an exemption are subject to an initial review by the IRB but are exempt from further reviews unless substantial changes altering the nature of the study are made.