



The Intersection of Sex Work and HIV Criminalization

An Advocate's Toolkit



This a joint publication from the Center for HIV Law and Policy and the National LGBTQ Task Force.

Acknowledgements

CHLP and the Task Force are grateful to the following individuals for reviewing this toolkit and sharing their expertise, perspective, and feedback throughout the drafting process:

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Matthew Rose (NMAC)
Breanna Diaz (Human Rights Campaign)
Kate D'Adamo (Sex Worker Rights Advocate)
Anna Forbes (US Women & PrEP)
Kiefer Paterson (Harm Reduction Coalition)
Arnetta Rogers (PWN-USA)
Magalie Lerman (NASTAD)
Meghan Maury (National LGBTQ Task Force)
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The Center for HIV Law and Policy is a national resource and advocacy organization working to advance the rights of people affected by HIV. We combine an online HIV Policy Resource Bank, a creative national advocacy agenda, and case assistance focused on systems and institutions with significant impact on marginalized communities.

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The mission of the National LGBTQ Task Force is to build the grassroots power of the lesbian, gay, bisexual and transgender (LGBTQ) community. By training activists and building the organizational capacity of our movement, we work to create a nation that respects the diversity of human expression and identity and creates opportunity for all.

Understanding the Intersection between Sex Work and HIV Criminalization

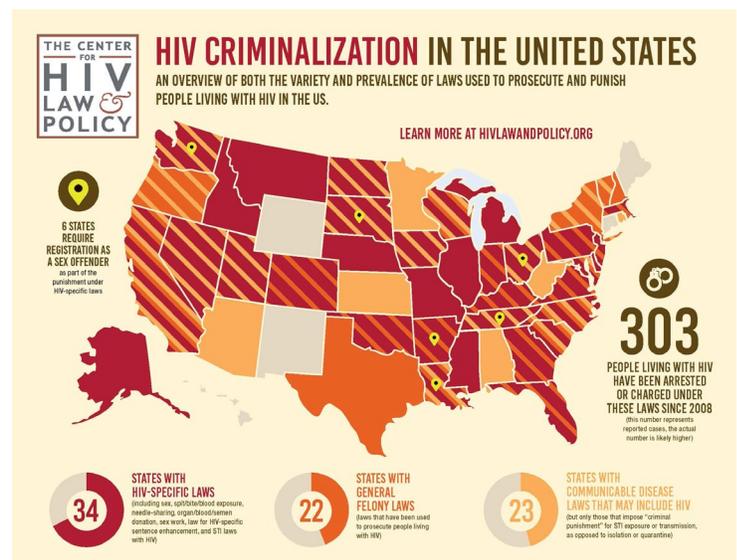
HIV criminalization reform has focused on laws criminalizing non-disclosure of a person's positive HIV status prior to consensual sex. Available data, while limited, indicates that sex workers living with HIV are disproportionately affected by HIV criminal laws; often, this occurs through criminal law provisions that increase sentences for sex workers living with HIV.

Despite this, the movement for HIV criminal law reform has yet to meaningfully engage in advocacy for sex work decriminalization. This toolkit highlights the connections between sex work and HIV decriminalization advocacy, and outlines ways to improve collaboration that strengthen our efforts to change these laws.

Overview

More than 30 U.S. states and territories have HIV-specific criminal laws that punish alleged exposure, non-disclosure, or transmission of HIV.¹ Twelve states and one U.S. territory have laws that increase penalties for PLHIV who are convicted of prostitution or solicitation offenses.^{2*} Every jurisdiction in the United States criminalizes sex work in some way.³

* Definitions vary around prostitution, solicitation, and loitering to engage in solicitation. Typically, "prostitution" will refer to engaging in particular sexual activities in exchange for money or other resources. Solicitation means offering to engage in such activities and "loitering to engage in solicitation" can encompass a wide range of activities such as standing in a public place, beckoning to someone, or approaching a vehicle, if it is presumed by the arresting officer that the person's purpose in doing so is to solicit another to engage in sexual activity.



The result is intersecting forms of criminalization that:

- reflect and reinforce stigma and discrimination against sex workers and PLHIV;
- conflict with evidence-based public health efforts;
- undermine the bodily and economic autonomy, health, and rights of sex workers living with HIV.

HIV criminal laws and criminalization of sex work both disproportionately affect already-marginalized communities, such as people of color, lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, and immigrants.

These laws—together with many other discriminatory features of the U.S. criminal legal system—increase sex workers' risk of violence and vulnerability to HIV. A 2016 systematic

review found that U.S. female sex workers bear a high burden of HIV—the combined estimated prevalence across 14 studies was 17.3%.⁴ However, very few of the studies in the review were recent and most relied on a limited sample, meaning the accuracy of the review's 17.3% finding are unknown. U.S. public health surveillance also excludes sex workers. The result is a problematic lack of data on sex workers and HIV in the U.S.⁵

Transgender people engaged in sex work are nearly six times as likely to be living with HIV (15.32%) than the general trans population, and 25 times as likely relative to the general population.⁶ Sex workers who use drugs may experience enhanced risk due to the inaccessibility of safe syringes and the multiple layers of stigma they encounter as both sex workers and PWID, which together create insurmountable barriers to services essential to their health and safety.⁷

Penalty enhancements for sex workers living with HIV

California, Florida, Georgia, Kentucky, Missouri, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Utah impose enhanced penalties for prostitution and solicitation offenses when a sex worker is living with HIV.

Florida is an example. On the basis of HIV status alone, the punishment in Florida for offering to exchange sex for any form of resources—an act that does not require any physical contact—jumps from a misdemeanor punished by 60 days in jail to a felony punished by up to five years of incarceration.⁸

These draconian penalty enhancements typically do not require behavior that poses any risk of HIV transmission, let alone an intent to harm or infliction of harm to another person.

FLA. STAT. ANN. § 796.08(5) (2017)

Screening for HIV and sexually transmissible diseases; providing penalties

(5) A person who:

(a) Commits or offers to commit prostitution; or

(b) Procures another for prostitution by engaging in sexual activity in a manner likely to transmit the human immunodeficiency virus,

and who, prior to the commission of such crime, had tested positive for human immunodeficiency virus and knew or had been informed that he or she had tested positive for human immunodeficiency virus and could possibly communicate such disease to another person through sexual activity commits criminal transmission of HIV, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. A person may be convicted and sentenced separately for a violation of this subsection and for the underlying crime of prostitution or procurement of prostitution.

These draconian penalty enhancements typically do not require behavior that poses any risk of HIV transmission, let alone an intent to harm or infliction of harm to another person. Activities that pose no possibility of HIV transmission—such as erogenous touching or merely offering to engage in sex—are punished as felonies. It normally does not matter whether HIV status was disclosed.

Moreover, these laws typically exclude consideration of other forms of risk reduction, such as condom use or anti-retroviral treatment as prevention. In some jurisdictions, possession of condoms is used as evidence of intent to solicit or of a person's knowledge of their HIV status, which can disincentivize carrying or accepting condoms from outreach workers.⁹ This approach conflicts with public health recommendations that encourage risk reduction and shared responsibility for sexual health.¹⁰

Mandatory testing for HIV

Mandatory HIV testing is another intersection between HIV criminalization and sex work. A number of states require HIV testing upon a person's arrest or conviction for prostitution or solicitation offenses.¹¹ The results of mandatory screening may in turn be used to support prosecution under HIV criminal laws, either because this is specifically authorized by statute¹² or because the law does not clearly protect the confidentiality of the information from use in a prosecution.¹³ Due to the lack of clear, consistent guidance on confidentiality in HIV testing during criminal cases, norms vary across jurisdictions regarding access to information about an individual's HIV status. While some jurisdictions consider a person's HIV status protected as between a health practitioner and the individual, other jurisdictions have released the information to the media with the individual's name, mug shot and other identifying information.¹⁴

Mandatory testing violates the fundamental right to privacy and fails to promote the health of sex

Over-policing and the criminalization of people of color, non-conforming identities and sexualities, and those experiencing poverty and homelessness make sex workers a highly visible target for law enforcement.

workers living with HIV.¹⁵ Unlike opt-out testing and even mandatory testing of pregnant women, which eliminate the provision of pre-test counseling that normally ensures an individual's choice to test is informed, HIV testing of sex workers is not performed to protect their health but rather to establish a basis for prosecution and incarceration or other coercive measures. Mandatory testing also stigmatizes sex workers as "vectors of disease" who are not entitled to the same rights to bodily autonomy, informed consent, and protection from nonconsensual medical procedures as people who do not sell sex.¹⁶

Disparities in Action

A 2015 report examining the application of HIV-criminal laws in California demonstrated that the overwhelming majority (95%) of all HIV-criminal interactions from 1988-2014 involved sex workers living with HIV.²⁵ California's HIV-specific laws disproportionately affect women and people of color. Although Black women constitute only 4% of people diagnosed with HIV in California, they made up 21% of people who had contact with the criminal justice system on the basis of HIV status.²⁶

An additional study in Nashville, Tennessee found that about 48% of individuals charged under HIV-related criminal laws over a ten-year period were charged with aggravated prostitution—or engaging in sex work while living with HIV.²⁷ Of those charged with aggravated prostitution, nearly half were also charged with illegal drug activities. Nearly a third of those charged with aggravated prostitution were also homeless.²⁸



HIV criminal laws used against sex workers living with HIV

Although there is limited information on how HIV criminal laws are applied in different states, sex workers living with HIV also face the threat of prosecution under laws criminalizing HIV exposure, non-disclosure, or transmission.¹⁷

Over-policing and the criminalization of people of color, non-conforming identities and sexualities, and those experiencing poverty and homelessness make sex workers a highly visible target for law enforcement. Research in New York City has described a “revolving door” of arrests and recurrent interactions with the criminal legal system.¹⁸ In states where HIV testing is mandatory following arrest or charges for prostitution and solicitation crimes, law enforcement may have access to this information, making it easier to charge sex workers with HIV non-disclosure or exposure.

Criminalization of sex work and of PLHIV affect the same people

Sex workers likely are at increased risk for HIV¹⁹ as a result of multiple factors and limited choices related to poverty, the criminalization of sex work, and associated biological risk. This heightened risk is exacerbated by the larger crisis of over-criminalization, the social and political marginalization of individuals who rely on sex work to make a living, and resulting exclusion from and discrimination in health systems.²⁰

LGBTQ people and people of color—overrepresented in the criminal legal system generally—are also more likely to be affected by criminalization of sex work.²¹ This is due in

part to law enforcement’s common practice of profiling LGBTQ people—particularly transgender women of color and LGBTQ youth of color—as being engaged in the sex trade.²² Trans women of color are also more likely to be engaged in street-based sex work due to extreme employment discrimination and exclusion from more mainstream workforces, and in turn are routinely targeted by police for harassment and arrest.

High levels of discrimination and marginalization—not only in employment, but in housing and education—place LGBTQ people at higher risk of poverty and housing instability, which can lead to a reliance on informal or otherwise criminalized economies, including commercial sex. The recent 2015 U.S. Transgender Survey documented particularly severe discrimination against trans people and found that 12% of respondents had engaged in sex work.²³

HIV criminal laws in turn have been shown to most severely affect people that already experience disproportionate harm within the criminal legal system, including Black and LGBTQ communities.²⁴

Criminal approaches directly contradict proven HIV prevention campaigns and hurt public health

Supporters of laws criminalizing PLHIV and sex workers often rely on unfounded claims about such laws being necessary to protect the public health.²⁹ However, evidence plainly demonstrates the opposite result. Criminal approaches to HIV and sex work are counterproductive to advancing public health and detrimental to the health and wellbeing of those in the sex trade.³⁰

One important 2015 study found that *decriminalization of sex work could avert 33-45% of new HIV infections among sex workers, clients, and their ancillary partners globally over the next decade*.³¹ The same study found that decriminalization of sex work would make more of a difference in reducing HIV infections than any other single intervention, including increased treatment access, better work environments, or the elimination of sexual violence.³² In recognition

Criminal approaches to HIV and sex work are counterproductive to advancing public health and detrimental to the health and wellbeing of those in the sex trade.

of this reality, a growing number of public health and human rights organizations have joined the call for decriminalization of sex work.³³ More recently, researchers from the Division of HIV/AIDS Prevention (DHAP) at the Centers for Disease Control (CDC) found that “[HIV criminal laws] have had no detectable HIV prevention effect in the United States.”³⁴

Both criminalization of PLHIV and of sex workers can compromise quality of health care and access to important services. The laws tend to erode the provider-patient relationship³⁵ or negatively affect provider attitudes, resulting in discriminatory healthcare delivery that drives people away from essential services, including prevention, treatment, and care for HIV.³⁶ The stigma associated with engaging in sex work has been shown to decrease an individual’s ability to access care, including health care services.³⁷

Enrollment into optimal care and treatment may also be less likely for sex workers who learn their HIV status through mandatory testing rather than through voluntary testing and counseling. Mandatory testing is not done as part of the sex worker’s health care; the testing is conducted for potential prosecution, not protection, of the sex worker. Not surprisingly, the World Health Organization (WHO) and UNAIDS specifically oppose the use of compulsory testing with sex workers.³⁸

Criminalization of sex work by PLHIV perpetuates violence, stigma, and discrimination

HIV-specific penalty enhancements intensify stigma by classifying sex workers living with HIV as serious felons and a special danger to society. Stigma is well-recognized as a barrier to an effective HIV response.³⁹ Punitive laws that focus on HIV status and disclosure further encourage HIV-related fear and stigma.⁴⁰

† Enforcement activities by police in criminalized settings can push sex workers to isolated areas where it is more difficult to screen clients and there is a higher likelihood of client violence, both of which reduce control over condom negotiation.

A better understanding of the linkages between HIV criminalization and criminalization of sex work can help us mount a stronger movement against stigma, barriers to essential public health programs, and criminalization.

Criminalization of sex work increases sex workers’ risk of harm by limiting their options to report or fight back against violence from clients, intimate partners, and law enforcement.⁴¹ Criminalization severely limits the ability of sex workers to work in reasonably safe environments and to control their choices about HIV and STI transmission risk reduction such as condom use.^{42†} Law enforcement officials in a number of jurisdictions also routinely use the possession of condoms as evidence of intent to solicit, further undermining sex worker safety.⁴³

A better understanding of the linkages between HIV criminalization and criminalization of sex work can help us mount a stronger movement against stigma, barriers to essential public health programs, and criminalization. And a united defense of basic human rights can build the momentum needed to ensure our common goals become a reality. See the following tipsheets for concrete steps you can take to build and advance intersectional advocacy.

What Can You Do?

Advocates working to end HIV criminalization and those fighting for the decriminalization of sex work are natural allies. Building stronger linkages across these movements will support advocacy that is more inclusive, effective, collaborative, and transformative.



NETWORK

In addition to HIV criminalization and sex workers' rights advocates, reach out to other social justice movements with shared values: LGBTQ organizations, public health advocates, and groups focused on mass incarceration, labor rights, reproductive justice, immigrant rights, and racial justice are but a few examples. These are intersectional issues and you can each help amplify each other's projects and form connections that will last in the future. Ensure that the sex workers' rights groups remain central to the process. Since they may send fewer representatives and are generally less well-known than other groups, ensuring that they have strong visibility is important.



CREATE

Make shareable resources that are designed with each group and their stakeholders in mind and distribute it. Encourage everyone to share these materials through your networks. Create flyers. Create slogans. Create stickers. Whatever you need to get the message across, create it.



BE STRATEGIC

Look for strategic opportunities to share your message. Try to attend or distribute flyers to attendees at conferences about LGBTQ rights, women's health issues, or other related issues. Show up to events with your legislator to introduce yourself and your cause. Reach out to media outlets. Write op-eds for local newspapers, web publications, and magazines that support you. Be anywhere and everywhere that will get you closer to your goal.



BE SENSITIVE

Stigma often makes it is harder to publicly identify as a sex worker than it is, for example, to publicly identify as an advocate for one's gender, sexual orientation, or color. Some sex workers rights advocates may choose to identify as advocates for people living in street economies or use other terms. Ask people how they prefer to be identified and follow their lead. Some may also prefer not to be out publicly as a sex workers rights activist because of the stigma it could inflict on their children, families, etc. Make an effort not to assume anyone's gender pronouns.

General Organizing Tips

In general, look for common frameworks and language that can cover both advocacy communities. Hold safe-space forums to discuss criminalization. Ensure that these forums are planned from the outset in collaboration with the local leadership of sex workers' rights and other organizations serving sex workers. Use a holistic lens that incorporates public health, reproductive justice, and racial justice.



LEARN MORE

- **Connect with national and local advocacy organizations.** Identify and support organizations focused on HIV criminalization and the rights of sex workers. Some examples are the Center for HIV Law and Policy/Positive Justice Project, Red Umbrella Fund, SWOP-USA, Lambda Legal, and Desiree Alliance.
- **Educate yourself about your city, county and state's policies.** Use the Center for HIV Law and Policy's *Sourcebook* (hivlawandpolicy.org/sourcebook) and other resources to find out about the laws and policies in your state.
- **Know who your elected officials are and how to contact them.** Find your federal, state and local elected officials' names and contact information at act.commoncause.org



ADVOCATE AND EDUCATE

- **Organize in your community.** Organize town halls, community forums, and other events to educate your community and build awareness about these issues.
- **Set shared priorities:** Be aware that sex workers rights organizations often do not see HIV as their top priority. They may be much more concerned about police abuse, lack of access to sex-worker-friendly health care, etc. Find some priorities you can all agree on and organize around those.
- **Advocate with policy-makers.** Attend lobby day at your state capital and meet with legislators to provide education and build support.
- **Educate law enforcement and legislators.** Educate law enforcement on the routes and risks of HIV transmission and how criminalization of sex work causes harm.
- **Get the word out.** Use social media to educate others about the intersection between criminalization of sex work and HIV criminal laws. Contact the media and write op-eds to encourage responsible reporting on these topics. Encourage non-stigmatizing, people-first language.
- **Create resources.** Create simple resources (you can use the facts and bullet points in this toolkit!) to use in education and outreach efforts like a fact sheet or talking points.
- **Communicate and stay connected.** For example, create a Google group or Facebook page to communicate, exchange resources, and share breaking events.



INCREASE VISIBILITY

- **Encourage research.** Support efforts to learn more about consequences of criminalization of sex work and PLHIV. Also make sure to consult existing resources, such as the Global Network of Sex Work Projects (nswp.org)
- **Start a campaign.** Start a campaign that highlights the intersection between criminalization of HIV and sex work, with an emphasis on cross-movement collaboration.
- **Amplify voices.** Support the leadership development of PLHIV and other disproportionately affected communities to lead campaigns against HIV criminalization and the criminalization of sex work.

Media Tips for Activists

Here are some ways to engage the media in your work. Media culture varies from place to place, so your strategy and talking points should be adapted accordingly.



KEEP UP WITH THE MEDIA

- **Track the news.** Keep tabs on the latest developments and jump on opportunities to educate and share information.
- **Prioritize safety.** When working with issues of privacy and identities that are stigmatized and criminalized, make sure to have a plan on how to protect individuals and their rights, and uphold the dignity of PLHIV and people engaged in sex work.
- **Share information.** Usually it is only the more sensational stories that wind up in mainstream news. Use social media and your networks to amplify the stories that aren't being told.



TALK TO THE MEDIA

- **Write letters to the editor in response to published stories or articles.** Be concise, state your case, and make sure to include your contact information.
- **Op-eds are longer, standalone opinion pieces that we write on a topic.** Learn which outlets are HIV- and sex worker-friendly. Be persuasive and offer clear recommendations on how to make things better. Find opportunities for PLHIV and sex workers to safely share their stories as subject matter experts.
- **Conduct interviews and respond to media inquiries.** Be knowledgeable about your subject matter and have an outline of the main points you want to cover in advance. Connect media contacts to other resources and allies in the movement.

Endnotes

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- ³ Sienna Baskin, Aziza Ahmed, & Anna Forbes, *Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws, Considering the Consequences*, 94 *ENV. L. REV.* 355, 361 (2015).
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- ⁵ See Anna Forbes, *Speaking of Sex Workers: How Suppression of Research Has Distorted the United States' Domestic HIV Response*, 23 *REPROD. HEALTH MATTERS* 21, 21 (2015).
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- ⁸ FLA. STAT. ANN. §§ 796.08(5), 775.082(3)(e), (4)(b) (2017) ("prostitution" is defined in § 796.07 as "the giving or receiving of the body for sexual activity for hire."); See also Carol Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution filed in the Nashville, Tennessee Prosecutorial Region 2000-2010*, 17 *AIDS & BEHAV.* 2624, 2625 (2012).
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- ¹⁰ See Carol Galletly & Steven Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 *AIDS & BEHAV.* 451, 458 (2006).
- ¹¹ Baskin et al, *supra* note 3, at 371.
- ¹² California is an example of this model. See CAL. PENAL CODE § 647f (2017).
- ¹³ Michigan is an example of this model. Defendants in any prosecution for a range of prostitution- or solicitation-related charges are subject to mandatory testing for sexually transmitted infections (STIs), hepatitis B, hepatitis C, and HIV. The results of this testing are not explicitly barred from use in a prosecution. MICH. COMP. LAWS ANN. §§ 333.5129(1), 333.5101, 333.5111, 333.1111(2) (2016). In Michigan, it is a felony for a person who knows their HIV status to engage in "sexual penetration" without disclosure. MICH. COMP. LAWS ANN. § 333.5210(1), 777.13k (2016).
- ¹⁴ "HIV positive Prostitute arrested again, customers advised to get tested," *WDEF.com*, Dec 09 2015, wdef.com/2015/12/09/hiv-positive-prostitute-busted-again-customers-advised-to-get-tested.
- ¹⁵ Michele Decker et al., *Human rights violations against sex workers: burden and effect on HIV*, 385 *LANCET* 186 (2015).
- ¹⁶ Elena Jeffreys, Janelle Fawkes, & Zahra Stardust, *Mandatory Testing for HIV and Sexually Transmissible Infections among Sex Workers in Australia: A Barrier to HIV and STI Prevention*, 2 *WORLD J. AIDS* 203, 204 (2012); See this attitude on clear display in *People v. Adams*, 149 Ill. 2d 331 (Ill. 1992).
- ¹⁷ See, e.g., Robert Joseph Baker, *Lake City man charged with exposing others to HIV through prostitution*, *MANNINGLIVE*, July 3, 2014, manninglive.com/2014/07/03/lake-city-man-charged-exposing-others-hiv-prostitution.
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- ²³ National Center for Transgender Equality, *2015 U.S. Transgender Survey: Executive Summary* 12 (2017), ustranssurvey.org.
- ²⁴ See, e.g., Amira Hasenbush et al., *HIV Criminalization in California: Penal Implications for People Living with HIV/AIDS* 2 (2015), hivlawandpolicy.org/resources/hiv-criminalization-california-penal-implications-people-living-hivaids-amira-hasenbush-et; Galletly & Lazzarini, *supra* note 8 ("The sentences of black individuals arrested for HIV exposure were significantly more severe than the sentences of their white counterparts.").
- ²⁵ Hasenbush et al, *supra* note 24.
- ²⁶ *Id.* at 3.
- ²⁷ Galletly & Lazzarini, *supra* note 8 (There were 27 total charges for HIV exposure and 25 total charges for aggravated prostitution).
- ²⁸ *Id.*
- ²⁹ See, e.g., Mark DeMarino, *A crime not to tell: HIV laws debated in wake of high-profile arrest*, *EYEONOHIO*, Dec. 26, 2013, eyeonohio.org/a-crime-not-to-tell-hiv-laws-debated-in-wake-of-high-profile-arrest. (Comments by a state legislator illustrate this attitude: "It's an issue of public safety...I want the public to be protected at all times from people who want to hide the fact that they are HIV infected.")
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- ³⁷ See, e.g., Fiona Scorgie et al., *'We are despised in the hospitals': sex workers' experiences of accessing health care in four African countries*, 15 *CULTURE, HEALTH & SEXUALITY* 450, 454-459 (2013); L. Lazarus et al., *Occupational stigma as a primary barrier to health care for street-based sex workers in Canada*, 14 *CULTURE, HEALTH & SEXUALITY* 139, 139 (2012).
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- ³⁹ See generally Anish Mahajan et al., *Stigma in the HIV/AIDS epidemic: a review of the literature and recommendations for the way forward*, 22 *AIDS* 67 (2008).
- ⁴⁰ See generally Open Society Foundations, *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission* (2008), opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf.
- ⁴¹ See, e.g., Susan Dewey et al., *Systematic Collusion: Criminalization's Health and Safety Consequences, in Sex Workers and Criminalization in North America and China: Ethical and Legal Issues in Exclusionary Regimes* 27, 27- 50 (2016).
- ⁴² See, e.g., Kate Shannon & Joanne Csete, *Violence, Condom Negotiation, and HIV/STI Risk Among Sex Workers*, 304 *JAMA* 573 (2010); Kate Shannon et al., *Structural and Environmental Barriers to Condom Use Negotiation With Clients Among Female Sex Workers: Implications for HIV-Prevention Strategies and Policy*, 99 *AM. J. PUB. HEALTH* 659 (2009).
- ⁴³ Human Rights Watch, *supra* note 9.



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