

# Evaluating Human Rights Advocacy on Criminal Justice and Sex Work

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## Abstract

Between October 2011 and September 2013, we conducted research on the use, by police and/or prosecutors, of condom possession as evidence of intent to engage in prostitution-related offenses. We studied the practice in five large, geographically diverse cities in the US. To facilitate our advocacy on this issue, conducted concurrent to and following our research, we developed an advocacy framework consisting of six dimensions: 1) raising awareness, 2) building and engaging coalitions, 3) framing debate, 4) securing rhetorical commitments, 5) reforming law and policy, and 6) changing practice. Using a case study approach, we describe how this framework also provided a basis for the evaluation of our work, and discuss additional considerations and values related to the measurement and evaluation of human rights advocacy.

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## Introduction

BETWEEN OCTOBER 2011 and September 2013, we conducted research documenting the use, by police and/or prosecutors, of condom possession as evidence of intent to engage in prostitution-related offenses. We studied the practice in five large, geographically diverse cities in the US: New York, Los Angeles, Washington, DC, San Francisco, and New Orleans. Whether official policy or unofficial practice, in each city, sex workers told us that the fear of arrest or harassment by police for carrying condoms led some people to not carry or limit the number of condoms in their possession, resulting in unprotected sex and increased risk of acquiring HIV and other sexually transmitted infections. This practice had a similar effect on many transgender women, LGB youth, and others stopped frequently by police on suspicion of sex work.<sup>1</sup>

Concurrent to and following our research, we engaged in advocacy efforts structured around six key dimensions: 1) raising awareness, 2) building and engaging coalitions, 3) framing debate, 4) securing rhetorical commitments, 5) reforming law and policy, and 6) changing practice. These six dimensions provided an advocacy framework that reflects a theory of how human rights advocacy can achieve change, as well as a structure for evaluating the impact of our efforts.

In this article, using our advocacy on condom possession as evidence of intent to engage in prostitution-related offenses as a case study, we describe our advocacy framework and evaluation strategy and assess our impact based upon the six dimensions described above.

## Theories of change

A theory of change can be simply defined as a “conceptual model for achieving a collective vision” that “drills down from the global picture to create specificity about the strategies and logical outcomes that compose the path to long-term significant changes.”<sup>2</sup> Although legal scholars have developed

nuanced theories of how international human rights law influences domestic political processes, human rights advocacy is often thought of as emphasizing a theory of change simplistically labeled as “naming and shaming”—that is, identifying human rights violators and using public pressure and confrontation to denounce their actions.

This approach, which can be labeled ‘outside track,’ is frequently complemented by intentionally less visible work done in collaboration with decision-makers (‘inside track’). Such work includes participation in formal and informal advisory groups, direct one-on-one advocacy, and roundtable discussions. This dual approach is consistent with Koh’s identification of three forms of norm internalization: embracing social/public, political, and legal acceptance of the legitimacy of a human rights norm.<sup>3</sup>

The six dimensions in our advocacy framework recognize both ‘outside’ and ‘inside’ strategies, and reflect the importance of building coalitions in order to engage stakeholders directly in presenting the impact of policies and enforcement upon their lives and to define the way issues are understood as human rights violations. While the dimensions may be conceptualized as forming a hierarchy of impact, with changes in law, policy, and practice representing the most enduring and highest-level change, the framework should not be understood as rigidly or mechanistically linear, and the dimensions often overlap, both thematically and temporally.<sup>4</sup>

## Assessing impact

Policy change is often unpredictable, and the process by which policies, laws, or practices change can be extremely diverse, reflecting shifting norm internalization in public opinion, political considerations, and judicial engagement. Traditional linear advocacy frameworks based upon predefined indicators at the level of outputs, outcomes, and impact can be difficult to construct,

or lack nuance and specificity.<sup>5</sup>

By contrast, flexible advocacy goals, described at each step or dimension of the advocacy framework, can shift as opportunities change and advocacy targets become more, or less, receptive to specific actions. At Human Rights Watch, our advocacy goals are often defined as our research advances and we discover a more nuanced understanding of what change is possible and what specific barriers to change we must target. At the same time, our research and advocacy can create new possibilities for impact, and we are opportunistic in redesigning our advocacy plans as our work advances.

Reflecting this approach, we often use a retrospective case study analysis, such as described below, to evaluate our impact. This approach allows us to document unanticipated impacts, in addition to tentative policy changes that can become the focus of follow-up advocacy. However, the absence of pre-specified goals can lack rigor, and because the definition of a ‘realistic’ goal—and the assessment of the success in achieving it—are contemporaneously defined, hindsight can generously fill in or obscure any shortcomings. In our case study evaluation approach, we seek to be objective in our assessment while recognizing that we are not neutral in our goal, or content to ever consider our work finished: even after achieving sought-after changes, monitoring implementation and ensuring that there is not retrogression is key.

## Case study: Condoms as evidence of prostitution

### *Background*

Criminal laws and policing policy can have a direct impact on vulnerability to HIV infection, especially among criminalized populations such as people who use drugs and street-based sex workers.<sup>6</sup> Criminal “laws on the books” and law enforcement practices (“laws on the streets”) shape HIV risk by limiting access to HIV prevention and driving heavily policed populations away from care and to more dangerous and isolated settings.

Advocacy in support of harm reduction policies

has been described frequently in the public health and human rights literature.<sup>7</sup> Such policies include sterile syringe access, safe injection sites, and policies to prevent opioid overdose fatalities, including Good Samaritan laws to provide immunity from criminal prosecution for individuals who call emergency medical services to report an overdose.<sup>8</sup> By contrast, few publications have described efforts to address criminal law and police policies affecting sex workers.<sup>9</sup>

To address the use of condoms as evidence of prostitution-related offenses, which we identified as a violation of the human rights to health, to liberty and security of the person, and to freedom from arbitrary detention, we sought to engage a wide range of stakeholders and policymakers, including officials at the city, state, and federal level, as well as NGO officials working on public health, public policy, and law enforcement. Our objective was to reform policies and end the practice by police of harassing sex workers and transgender women for possessing condoms or confiscating condoms from them, and to stop the practice by prosecutors of using condoms as evidence of prostitution-related offenses.

### *Raising awareness*

As part of the first dimension, raising awareness, we sought to increase understanding among key advocacy targets—such as government officials, police, and prosecutors, as well as the general public—of abuses against sex workers and transgender women that result from carrying condoms. By elevating the voices and experiences of individual sex workers and transgender women through their direct testimony in our reports and multimedia, we sought to personalize the issue and demonstrate how this practice affected individuals directly.

Next, we sought to generate press coverage about abuses and to persuade governments to engage directly with stakeholders and advocates. Our efforts to raise awareness of the use of condoms as evidence of prostitution-related offenses were not unprecedented. Rather, our work followed, and built upon, years of advocacy by local partner

organizations in all five cities.

Before and directly after our research was published, we shared our findings and requested meetings with advocacy targets in each city including police, prosecutors, health officials, and city and state policymakers. We also presented our research at national and international conferences. Through strategic engagement with media, including the release of a short video and placement of opinion pieces in newspapers and news websites, we disseminated our research and generated significant press coverage.<sup>10</sup> Local, national, and international press coverage, in turn, helped to raise awareness (and build pressure to respond) among our primary advocacy targets within federal, state, and local governments.

In addition, throughout the campaign, we sought to link the use of condoms as evidence to other policy priorities. At the federal level, we presented our research to the Presidential Advisory Council on HIV/AIDS (PACHA), and urged them to include the issue in their review of legal barriers to HIV prevention.<sup>11</sup> At the local level, we sought to link police confiscation of condoms to ongoing debates about “stop-and-frisk” tactics in New York, and the development of new police guidelines on interaction with transgender individuals in Los Angeles.<sup>12</sup>

#### *Building and engaging coalitions*

The second dimension of our advocacy framework is building and engaging coalitions of stakeholders. Each of the five cities has a vibrant and diverse activist community working on issues related to sex work, HIV prevention, and LGBTQ rights. In both our research and advocacy, we sought to work with these partnerships, and to expand upon them with our own contacts.

From the start, we recognized that successful advocacy hinged on working with existing coalitions and with individuals from communities directly affected by the issue. Sex workers, individuals profiled as sex workers, transgender women, and LGBTQ youth, among others, joined most advocacy meetings and their involvement kept our campaign both relevant and accountable to those whose

lives were affected most profoundly by the use of condoms as evidence. In New Orleans, current and former sex workers served as peer interviewers in our research and helped to document the use of condoms as evidence of prostitution by police officers.

Engaging existing coalitions was an effective way to mobilize advocacy partners. In Los Angeles, for example, many activists and government representatives concerned with the use of condoms as evidence were already serving on the Transgender Service Providers Network and the Transgender Working Group of the City of Los Angeles Human Relations Commission. In San Francisco, the Human Rights Commission was well-positioned to call a meeting with key stakeholders to discuss the use of condoms as evidence. In New York, we worked with members of the police department and the district attorneys’ offices through a committee to address issues around policing in LGBTQ communities.

#### *Framing debate*

In framing the debate around the use of condoms as evidence of prostitution, we sought to make it clear that confiscating condoms was a public health and human rights concern and that these issues were more important than the criminal justice interests at stake. We argued that the use of condoms as evidence violates human rights principles and undermines HIV prevention by taking condoms out of the hands of those who need them. We highlighted the clear contradiction between efforts by municipal health departments to distribute condoms to sex workers and transgender women, and the actions by law enforcement to confiscate condoms and use them as evidence of prostitution, and asserted that as with harm reduction efforts, precedence must be placed on protecting individuals from HIV infection.

These arguments often resonated with audiences well-versed in public health and human rights, but they did not always help us gain traction with prosecutors and law enforcement officials. While some prosecutors and law enforcement officials accepted our framing of the debate in relation to prostitution generally, they persistently raised

concern about the inability to use condoms as evidence of sex trafficking.

Therefore, in collaboration with anti-trafficking groups, we responded to these concerns by explaining that “criminalizing” condoms could result in traffickers denying trafficking victims access to condoms, and that trafficking victims may see the availability of condoms as one of the few measures of protection and control available to them. This was not an argument easily accepted by prosecutors; nor was it easily conveyed in the media. However, we worked with a prominent anti-trafficking advocate to write and publish an op-ed outlining the reasons why trafficking offenses could not be excluded from policies to end the use of condoms as evidence.<sup>13</sup> The arguments we advanced, and our partnership with anti-trafficking advocates, addressed a key concern of prosecutors and policymakers, and was intended to help provide the political cover they believed they needed to support a comprehensive policy change.

#### *Securing rhetorical commitments*

Rhetorical commitments represent the fourth dimension of the framework. These include pledges by governments and other actors to make legal and policy changes, or changes in enforcement practice. These commitments not only provide momentum to an advocacy campaign, but also set a marker for future dialogue around the pace, and barriers, to effectuating demonstrable changes. In addition, they provide an example for other advocacy targets (in our case study, officials from other cities) on effecting change.

At the national level, the resolution of PACHA was a rhetorical commitment demonstrating to state and local advocacy targets that the federal government agreed with the need to end the practice of condoms as evidence, and was willing to engage federal agencies such as the Centers for Disease Control and Prevention (CDC) and the Department of Justice (DoJ) to address the issue. Engagement with the CDC and DoJ was particularly important as the former is a major donor to states and municipalities for HIV programs, and the latter has the power to pursue legal action against state and local governments for discriminatory practices.

In advocacy meetings with prosecutors and law enforcement, we were often asked what other jurisdictions were doing to address the use of condoms as evidence. Pledges from prosecutors and police departments in other cities were essential to respond to this question, as we often found that city leaders were reluctant to be the first to undertake what they saw as a significant policy change. As our campaign progressed, we had more and more examples to present. Early in the campaign, however, the commitment of the San Francisco District Attorney to exclude condoms as evidence from misdemeanor prostitution and loitering cases for a period of 90 days as a “pilot” program (later extended to 180 days) was especially important. The concept of a trial period was clearly more palatable for most prosecutors than a permanent policy change and allowed prosecutors to gain confidence in their ability to maintain their prosecutorial priorities without disruption and to avoid political backlash. Following the 180-day trial period, the San Francisco pilot was adopted as a permanent policy.

#### *Reforming laws and policy and changing practice*

The fifth and sixth dimensions of the advocacy framework are reforming laws and policy and changing practice. In the context of ending the use of condoms as evidence, changes in law, policy, and practice could take one of several forms: 1) a change in police policy, achieved through an order by a mayor, police commissioner, or other body with jurisdiction over local police actions; 2) a change in prosecutor policy, achieved when a prosecutor issues an evidentiary exclusion for condoms in prostitution-related cases; or 3) a legislative change, achieved through enactment of a law to prohibit the use of condoms as evidence.

Changes in practice can occur prior to or following changes in laws or policies, which may or may not be implemented or directly affect vulnerable populations. Actions taken by the Metropolitan Police Department (MPD) in Washington, DC, provide a useful example of a change in practice. Unlike New York, San Francisco, and Los Angeles, we found no evidence that condoms were introduced

in criminal proceedings to support charges of a prostitution-related offense in the District of Columbia. Rather, our research found that police commented on, confiscated, or destroyed condoms in the possession of sex workers—or those profiled as such—during stops for street-based prostitution enforcement. This practice strongly deterred sex workers from carrying condoms and contributed to a pervasive belief among sex workers in a “three-condom rule,” whereby any person in possession of more than three condoms could be charged with prostitution. Despite our findings, the MPD denied that police officers were using condoms as evidence of prostitution-related offenses or confiscating or destroying condoms.

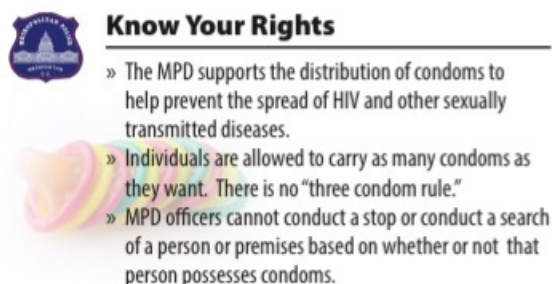
In this climate, it was essential that the MPD provide public clarification of their position regarding the use of condoms. Together with colleagues, we urged the MPD to meet with key advocates to discuss solutions. During the meeting, MPD officials agreed to issue cards to sex workers clarifying that condoms are not considered evidence by the MPD and that there is no “three-condom rule” in Washington, DC (see Figure 1). The cards included details on how to file a complaint if a person is harassed for carrying condoms. NGOs serving sex workers, women, LGBTQ communities, and people living with HIV agreed to disseminate the cards to affected populations.

Prosecutors’ actions in other jurisdictions illustrate additional impact. For example, in October 2012, the district attorney of Nassau County, New York, issued a policy directive to all prosecutors in her office prohibiting the use of condoms as evidence of any prostitution-related offense, including higher-level crimes like promoting prostitution and sex trafficking. In the wake of her decision, we worked closely with her policy advisors, and she became a strong advocate opposing the use of condoms as evidence in criminal proceedings. She also had quiet conversations with colleagues in other counties, helping to persuade district attorneys in Brooklyn and Manhattan to adopt similar policies.

A year and a half later, in May 2014, the New York Police Department announced that it would stop the practice of confiscating condoms as a part of prostitution cases. In his remarks, New York City Mayor Bill de Blasio reflected the framing of public health priority over criminal justice, saying: “A policy that inhibits people from safe sex is a mistake and dangerous.”<sup>14</sup>

Changes adopted by police and prosecutors represented important steps forward in our campaign and helped to chip away at the practice of using condoms as evidence. Legislative change, however, can be a more effective way to ensure that change is sustained. It can also take considerable time and effort to educate lawmakers on an issue that could appear to be politically challenging. Bills prohibiting the use of condoms as evidence in New York have been introduced since the early

FIGURE 1 Condom awareness card front (top) and back (bottom)



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1990s, but had never made it out of committee for a floor vote. In 2013, a bill on prohibiting the use of condoms as evidence passed in the New York State Assembly for the first time, but did not pass in the Senate.<sup>15</sup> By contrast, in September 2014, California Governor Jerry Brown signed legislation requiring district attorneys to get a court's permission to use possession of more than one condom as evidence that a defendant was engaged in prostitution or loitering with intent to commit prostitution.<sup>16</sup> While not completely outlawing the practice, the requirement of judicial approval may make the practice less common.

Litigation can also be an important strategy for achieving changes in law, policy, practice, implementation, and monitoring, particularly on issues that have strong legal grounding but weak popular or political support. In past work, in collaboration with the National Prison Project of the American Civil Liberties Union (ACLU), we documented the devastating effects of segregation of prisoners living with HIV in Alabama and South Carolina.<sup>17</sup> The ACLU followed the report with a successful legal action to eliminate the segregation policy in the Alabama prison system, and South Carolina has since stopped segregating prisoners with HIV as well. If legislative efforts to prohibit the use of condoms as evidence stall, a legal challenge alleging the violation of constitutional rights to privacy and access to contraceptive devices may be considered.

### The challenge of human rights advocacy and evaluating policy change interventions

The advocacy framework is based upon pursuing multiple and diverse strategies for achieving impact, including working closely with decision-makers ('inside track'), applying pressure and confrontation ('outside track'), and articulating evidence- and interest- (or values-) based arguments.<sup>18</sup> Beyond previous frameworks for policy change, our model emphasizes the central role of coalition building and carefully framing issues in human rights terms as critical steps in the development of advocacy strategies and campaigns.

Describing the process and outcomes of policy change in relation to the framework is relatively straightforward. By contrast, attributing policy change to the specific interventions and strategies undertaken is complex, resource-intensive, often impossible, and can be counterproductive.<sup>19</sup> Even more challenging than attributing positive change to our work is attributing "the absence of negative change" (showing that "things did not get worse").<sup>20</sup>

At each dimension of the framework, it is possible to have broadly defined, predetermined goals. For example, *raising awareness* can be measured through indicators such as the number of high-level advocacy meetings or press reports. However, more specific indicators, which can meaningfully assess progress or identify barriers, can often only be developed after a significant amount of research and advocacy has determined what kind of change is feasible, particularly in response to political opportunities that might emerge suddenly and unexpectedly.

In addition to evaluating impact within the framework outlined above, we felt it was important to keep in mind our broader goal of advancing human rights. Beyond the project-specific goals of changing law, policy, and practice around condoms as evidence, we saw our advocacy as part of an effort to reduce stigma against individuals who exchange sex for money or other life necessities—a longer-term and difficult-to-measure goal, particularly in the context of the criminalization of sex work. In the fight against HIV, objectives such as respect for human rights, the engagement of civil society, and the empowerment of criminalized populations (such as sex workers and people who use drugs), have often been excluded from evaluation frameworks in favor of more easily quantifiable measures, such as the numbers of condoms distributed or HIV tests performed. The lack of specific indicators for these goals often leads to a lack of investment in these efforts, and a lack of research into their relative contribution to successful HIV programs.

We sought to acknowledge this tension between more easily measured and shorter-term changes identified within our framework, and more difficult to measure and longer-term changes outside of

it, by articulating four key beliefs central to our evaluation approach:

- We care intensely about our work. Our approach is objective but not neutral and focuses upon improving our understanding of where our work has been effective, what we might have done differently, and how we can continue to identify new opportunities for impact.
- We struggle to balance the “cost” of evaluation (especially in terms of time away from our research and advocacy) with the important contribution the evaluation of results can provide to improve our work. This tension means that we integrate evaluation into every step of our work and seek to make it a part of our ongoing learning process and strategy development.
- We recognize that our impact comes from collaborative efforts and it is difficult—and often counterproductive—to attribute changes in policy, law, or practice to our work alone. In addition, the long-term nature of policy or legal change makes it difficult to track the specific antecedents and contributions of actions that set the stage for later, potentially more visible, work.
- We believe that respecting, and elevating, the voices of individuals directly affected by human rights abuses must be as central to our evaluation approach as it is to our research and advocacy. It is often only through the testimony of individuals directly affected by our work that our true impact can be understood.

These beliefs build upon the critique of traditional HIV evaluation put forward by Patton, and allow for the inclusion of additional ‘indicators’ of impact.<sup>21</sup> For example, individuals who had experienced police harassment for carrying condoms or who had fought back against such practices told us that our work “validated” their experiences, and that our report empowered their own efforts to seek change and improved their sense of self-worth. Capturing these examples of impact expand our evaluation framework, give value to individual experiences and

dignity, and demonstrate respect for the individuals who are our partners in our work.

While our approach to evaluation is maturing, it is still a work in progress. We rigorously map our work across the dimensions described above, but often are less assiduous about documenting the feedback we receive from key stakeholders on their perspective of the changes achieved and experienced. This limitation is not unique to our work: traditional monitoring and evaluation frameworks often describe stakeholder participation as essential, but frequently fail to ensure adequate consultation.<sup>22</sup> Consultation is difficult: it requires long-term engagement (which may go beyond the funding for specific projects) and power dynamics between groups of different sizes, resources, objectives, and methodologies cannot be ignored. Collaborative projects such as the one described in this paper involve multiple stakeholders with divergent views, priorities, and goals. Because changes in law, policy, and practice occur unevenly and at uncertain times, the process of getting stakeholder feedback needs to be ongoing, and is rarely ever final.

With advocacy targets at multiple levels of government and in five cities, each with distinct criminal laws and police forces, our advocacy strategy for ending the use of condoms as evidence is continually evolving. The six-dimension framework presented here is a tool for evaluating progress in achieving desired impact, but only a starting point.

### Next steps

As with almost all policy advocacy, our work to end the use of condoms as evidence is ongoing. Nonetheless, the examples of impact presented in this article represent small, though important, steps forward. We encountered many challenges, chief among them framing the debate around trafficking. Despite our best attempts to argue that comprehensive laws and policies that ban the use of condoms as evidence of *all* prostitution-related offenses are the only way to undo the chilling effect on condom use, at this writing, only one prosecutor—the district attorney of Nassau County, New York—had adopted a comprehensive policy.



Our work on the use of condoms as evidence also illustrated a common tension advocates face working for a more immediate and achievable change while remaining committed to larger, long-term goals of a movement. The use of condoms as evidence is a harmful symptom of the larger problem of the criminalization of sex work. Even if we succeed in ending the use of condoms as evidence, the criminalization of adult, consensual sex work in the US will continue to leave sex workers—and communities targeted by police for prostitution enforcement—vulnerable to arrest, abuse, harassment, and profiling. In this climate, any solution short of decriminalization seems inadequate, or at best, piecemeal. With domestic policymakers far from engaging any meaningful debate about the decriminalization of sex work, we felt that ending the criminalization of condoms could be an achievable step forward.

## Conclusion

The use of condoms as evidence of prostitution exists at the intersection of criminal law and public health, an intersection rife with tensions that emerge from the distinct lenses employed in each field. Advocacy around this issue requires navigating this intersection, acknowledging these tensions, and pushing the conversation toward shared understandings of human rights and the public good.

The framework presented here is a useful model for evaluation of human rights advocacy efforts, but not a template for assessing the effectiveness of specific advocacy efforts or attributing impact to specific actors. Policy change is a complex process and evaluating advocacy requires nuanced, non-linear, and sensitive methods for evaluation.

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