

# THE VALUE OF CRITIQUE AND DISTRIBUTIVE ANALYSIS TO ADDRESSING THE NEEDS OF SEX WORKERS IN THE CONTEXT OF HIV: A RESPONSE TO LIBBY ADLER'S "GAY RIGHTS AND LEFTS"

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## 1. INTRODUCTION

In Libby Adler's article "Gay Rights and Lefts: Rights Critique and Distributive Analysis for Real Law Reform" Adler highlights the need to bring critical tools to bear on legal reform strategies. According to Adler, "Decisionism...consists of making difficult choices about which law reform initiatives to undertake based on broadly informed distributional hypothesis and cost-benefit calculations and then acting on the best information one can get with the best judgment one can muster, always prepared to bear the cost of one's choices."<sup>2</sup>

In my brief response I will focus on the importance of Adler's insights in the context of HIV. In particular I will consider the grave consequences resulting from 1) a refusal to engage in a cost-benefit analysis and 2) developing a legal reform strategy that does not minimize identifiable costs. While it is not possible in the short space offered here to conduct a comprehensive distributional analysis and construct a legal reform strategy based on Adler's idea of decisionism described above, I provide a glimpse of what is revealed through an analysis of costs and how a way forward for sex work and HIV might look when one engages in decisionism.

To accomplish this goal I examine the legal reform agenda of abolitionist feminists<sup>3</sup> who seek to end prostitution through an advocacy agenda that places a limitation on U.S. funding for HIV/AIDS programs known as the "anti-prostitution pledge."<sup>4</sup>

## II. BACKGROUND

### *The Anti-Prostitution Pledge*

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<sup>2</sup> Libby Adler, *Gay Rights and Lefts: Rights Critique and Distributive Analysis for Real Law Reform*, 46 HARV. C.R. – C.L. REV. 1,2 (2011).

<sup>3</sup> For an in-depth examination of the role of feminists in debates on sex work and trafficking see Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006) and Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010).

<sup>4</sup> For a longer analysis on the role of feminists in supporting the anti-prostitution pledge see Aziza Ahmed, *Feminism, Sex Work, Power and HIV/AIDS: Consequences for Women's Health*, 34 HARV. J.L. & GENDER 226 (2011).

In 2003, President George W. Bush announced that the United States (U.S.) would commit 15 billion dollars to address the Global HIV/AIDS epidemic. Soon after the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (also known as PEPFAR) was enacted making the U.S. the largest government donor to HIV and AIDS prevention globally. The U.S. Leadership Act contains within it a limitation on how funds might be spent known as the “anti-prostitution pledge.” This pledge states that no PEPFAR funds can be utilized to “promote or advocate the legalization or practice of prostitution or sex trafficking.”<sup>5</sup> The anti-prostitution pledge language in PEPFAR is seen as a victory for abolitionist feminists who work in coalition with conservative and religious organizations to ensure that the effect of the anti-prostitution pledge is that no U.S. money should or does go toward programs that work with sex workers (without a rescue component). This has included programs that have had proven positive effect for the health of sex workers.<sup>6</sup> The primary concern of the abolitionist feminist legal reform agenda is ending prostitution – an institution understood to be central in the ongoing oppression of women and girls.<sup>7</sup>

### *Feminist Theorizing on Sex Work*

Prabha Kotiswaran offers a summary of the oppositional frameworks that underpin the feminist legal reform projects on sex work.<sup>8</sup> The abolitionist feminist position emanates from the subordination feminist understanding that women do not have agency in sex work; rather, sex work is a product of coercion and violence.<sup>9</sup> The “oppositional” position is individualist/autonomy/or sex worker rights that Kotiswaran suggests is undertheorized and in turn does not adequately examine issues of power in sex markets. Trapped in the bounds of the liberal legal regime these oppositional positions often focus in on criminal law, either criminalizing or decriminalizing sex work, as the primary vehicle for accomplishing their objectives.<sup>10</sup> Kotiswaran argues that it is necessary to shift one’s lens away from criminal law and consider instead local level laws that operate in sex markets. In this way we are able to see how changes in small rules alter a range of bargaining endowments. This understanding may then help understand what a new legal

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<sup>5</sup> United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711 (2003) (current version at 22 U.S.C.A. §§7601 et seq (West 2010)).

<sup>6</sup> Janie A. Chuang, Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy, 158 U. PA. L. REV. 1655, 1664–69 (2010).

<sup>7</sup> Halley, *supra* note 3, at 339-340. Chuang, *Id.* at 1664–69. For examples of dominance feminist writing on pornography and sex work, see KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 9–13 (1979); ANDREA DWORKIN & CATHARINE MACKINNON, PORNOGRAPHY & CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY 24–25 (1988).

<sup>8</sup> Prabha Kotiswaran, Born unto Brothels—Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area, 33 LAW & SOC. INQUIRY 579, 581 (2008).

<sup>9</sup> *Id.* at 581.

<sup>10</sup> Adler, *supra* note 2, at 14; *Id.* at 581 (2008).

reform project might look and how a new “feminist vocabulary” on sex work might sound.<sup>11</sup> Applying Adler’s method of assessing costs and engaging in decisionsim we also see how to overcome the blindness created by the ideologies animating these various positions on sex work towards a more careful legal reform agenda.

### III. ASSESSING THE COSTS

Adler’s method tells us that a cost benefit analysis is not only necessary but that it is “no longer responsible”<sup>12</sup> to behave as though we do not have access to the analytical tools necessary to understand the consequences of our legal strategy. The importance of the analytical tools offered by decisionism can help us develop a critical legal reform project that minimizes negative consequences. Here I seek to determine a few of the costs of successfully enacting the “anti-prostitution pledge” in the context of HIV. Assessing the costs and consequences of the anti-prostitution pledge makes it apparent that the abolitionist feminist response is negatively impacting women’s health. If abolitionist feminists engaged in a cost analysis a complicated array of negative consequences emerge, I highlight two of these costs:<sup>13</sup>

First, the anti-prostitution pledge has increased funding for organizations who seek to “raid brothels and rescue women and girls.” In order to carry out this mission organizations rely on the state, and in particular the police, who are often implicated in violence against sex workers.<sup>14</sup> In turn, using state agents, including the police, to rescue women into government custody has resulted in physical violence, mistreatment, and lack of access to healthcare once in state custody.<sup>15</sup>

Second, programs that invest in sex workers as part of the HIV response have been instrumental in ending the spread of HIV. The United Nations Joint Programme on HIV/AIDS has highlighted many of these programs as “best practices” to the HIV response. The anti-prostitution pledge requirement results in the de-funding of such initiatives and in turn undermines the ability of organizations to respond to the needs of sex workers. This is largely because the conflation of trafficking and sex work has meant that programs serving sex workers, including health service

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<sup>11</sup> Adler, *supra* note 2, at 15.

<sup>12</sup> Adler, *supra* note 2, at 8.

<sup>13</sup> While I highlight here the costs of one legal reform strategy I am not suggesting that other legal reform are without costs.

<sup>14</sup> See CHERYL OVERS, APNSW, CAUGHT BETWEEN THE TIGER AND THE CROCODILE: THE CAMPAIGN TO SUPPRESS HUMAN TRAFFICKING AND SEXUAL EXPLOITATION IN CAMBODIA (DRAFT) 7, available at [www.aidslex.org/site\\_documents/SX-0046E.pdf](http://www.aidslex.org/site_documents/SX-0046E.pdf), Elizabeth Bernstein, The Sexual Politics of the “New Abolitionism,” 18 DIFFERENCES: J. FEMINIST CULTURAL STUD. 128, 132 (2007)

<sup>15</sup> CHERYL OVERS, APNSW, CAUGHT BETWEEN THE TIGER AND THE CROCODILE: THE CAMPAIGN TO SUPPRESS HUMAN TRAFFICKING AND SEXUAL EXPLOITATION IN CAMBODIA (DRAFT) 7, available at [www.aidslex.org/site\\_documents/SX-0046E.pdf](http://www.aidslex.org/site_documents/SX-0046E.pdf)

providers and health oriented drop-in centers, are construed to be involved in trafficking women. Many such stories have emerged in the aftermath of the “anti-prostitution pledge” including the closure of sex worker programs in Cambodia and Bangladesh. Several of these programs were shut as a result of direct attacks by abolitionist feminists on the programs despite the fact that the programs were the only in existence that adequately served the needs of sex workers and other vulnerable populations.<sup>16</sup> The closure of these programs has resulted in lack of access to education, care, support services, and medication. The costs are grave.<sup>17</sup>

#### IV. DECISIONISM

Adler offers critical analytical methods as a way out of ideology and towards a real legal reform project. She offers decisionism as a way of establishing a set of tangible law reform tasks that builds on an assessment of the costs of the strategy. Applied to the anti-prostitution pledge, a legal reform victory for some, it becomes clear that if goal is to make women’s lives healthier and safer the costs may outweigh any perceived benefit of such a pledge. Utilizing Adler’s method brings the activism to maintain the anti-prostitution pledge in focus: if one is truly concerned about the vulnerability of sex workers to violence it may not be the anti-prostitution pledge that will accomplish this goal. Instead it becomes necessary to shift towards an examination of the “small rules” that alter the bargaining endowments of sex workers. If the goal is to make sex workers less vulnerable to contracting HIV, a decisionist posture might illuminate a range of different legal reform options (some of which reflect the current work of sex worker networks and harm reduction organizations). These include working to eliminate prostitution free zones that facilitate the arrest and harassment of sex workers, ending the use of condoms as evidence of sex work that disincentivize carrying condoms, utilizing sex worker networks to document police and client violence against sex workers and assist in condom distribution.<sup>18</sup> These efforts move away from the ideological abolitionist

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<sup>16</sup> Joanna Busza, Having the rug pulled from under your feet: one project’s experience of the US policy reversal on sex work, 21 HEALTH POL’Y PLAN 329, 330–31 (2006)

<sup>17</sup> Earlier insights on the operation of power in sex working communities are instructive in seeing how this is not the case. In fact, punishing or criminalizing a behavior simply shifts the balance of power (not always in ways that will benefit the sex worker) without necessarily ending the targeted behavior see Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism, 29 HARV. J.L. & GENDER 335, 337 (2006) (“We take it as a given, for a distributively focused legal analysis, that punishing conduct as a crime does not “stop” or “end” it, as governance feminists (“GFeminists”) sometimes seem to imagine. Rather, it enables a wide range of specific institutional actors to do a wide range of things.”)

<sup>18</sup> Meena Menon, INDIA-AIDS: An NGO Gets Sex Workers to Enforce Condom Use, available at <http://www.aegis.org/news/ips/1997/IP970806.html> (last visited February 23, 2011);

position of saving women and instead look to change the bargaining relationships that emerge from smaller rules making sex work safer.<sup>19</sup>

## V. CONCLUSION

Adler stresses understanding costs, recognizing them, and creating a legal reform agenda that recognizes and minimizes these costs. The assessment above shows us that it is necessary to take Adler's decisionist posture to a legal reform agenda pertaining to sex work in the context of HIV in order to minimize vulnerability to HIV. The use of critical tools has not led us to nihilism as argued by some.<sup>20</sup> Much to the contrary, in the case of this analysis, critique enriches our ability to move a more concrete legal reform project and towards healthier lives.

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Global Network of Sex Work Projects, Making Sex Work Safe, available at <http://www.nswp.org/makesexsafe/> (last visited February 23, 2011) [hereinafter NSWP]

<sup>19</sup> NSWP, *supra* note 18.

<sup>20</sup> For a description of the critique of critical theory suggesting that the latter leads to nihilism see Adler, *supra* note 2, at 4.