

LET'S TALK ABOUT SEX (WORK): THE IRONY OF PARTIAL
DECRIMINALIZATION OF SEX WORK

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Abstract. Sex workers have long fought for the decriminalization of prostitution. Public support for the decriminalization of sex work has increased to the point that legislation to remove the criminal penalties for consensual adult commercial sex have been proposed in at least seven states and the District of Columbia. Competing proposals—full decriminalization and partial decriminalization—both touting to protect sex workers, are described with similar language that obscures significant differences in the proposals. Consequently, partial decriminalization legislation that is just as harmful to sex workers as the current criminal scheme in place in the United States is gaining traction as protective legislation when it in fact is harmful.

Advocates of partial decriminalization like Catherine MacKinnon argue that all sex workers are victims, yet these advocates ignore the voices and lived experiences of consensual sex workers. The dangers created by a partial decriminalization system are well documented among sex workers and their allies. This article explains those dangers, relying on voices of sex workers and their allies to support the argument that the only way to protect sex workers is to remove the criminal penalties surrounding all aspects of their work. Anything less, including partial decriminalization, continues to cause them harm

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The Wolf in Sheep’s Clothing
by Aesop¹

A Wolf found great difficulty in getting at the sheep owing to the vigilance of the shepherd and his dogs. But one day it found the skin of a sheep that had been flayed and thrown aside, so it put it on over its own pelt and strolled down among the sheep. The Lamb that belonged to the sheep, whose skin the Wolf was wearing, began to follow the Wolf in the Sheep’s clothing; so, leading the Lamb a little apart, he soon made a meal off her, and for some time he succeeded in deceiving the sheep, and enjoying hearty meals.

Appearances are deceptive.

INTRODUCTION

Meet two similar fictional couples: Grace and Brian, and Stella and Peter. These couples do not know each other, yet they live in the same neighborhood. Both couples have been married for about fifteen years, share a home and expenses, and have children. At some point in their relationship, Brian and Peter each broach the idea of expanding the respective couple’s sexual experiences by having

¹ AESOP, *The Wolf In Sheep’s Clothing*, in AESOP’S FABLES (1867), <https://etc.usf.edu/lit2go/35/aesops-fables/701/the-wolf-in-sheeps-clothing/> [<https://perma.cc/YAL2-8EBL>] (emphasis added).

their wife engage in sexual relationships with other men. After much discussion with each of their husbands, Grace and Stella each determine that their relationship can handle this exploration and they agree to expand their sexual experiences. Brian and Peter initiate the contact with other men and handle the details of the meetings.

Grace and Brian meet with men together at first, but eventually there are times when Brian sets Grace up on a “date” with another man. In the course of their exploration, they learn that there is a large community of couples with a similarly unconventional lifestyle who engage in this sort of activity. They even learn that what they had referred to as “swinging” is actually called “hotwifing.”² Grace and Brian continue hotwifing because they both enjoy it.

Stella and Peter also meet with men together at first, and like the other couple, their exploration evolves. Stella meets the men that Peter finds for her, even without him being present at the meeting. When the couple discovers that men are willing to pay to have sex with Stella, the lifestyle evolves yet again. Because they need the money, they agree that Stella will continue these activities in exchange for money. Peter collects it, and he uses it to help pay for their living expenses.

Despite the parallel tracks of the two couples, Grace and Brian can continue hotwifing without much worry about running afoul of the law. Sure, they may choose to be discreet. But this is merely to avoid social disapproval—in most states, there is nothing illegal about their behavior.³ Although Stella and Peter are engaging in almost identical activities, this couple faces potential criminal prosecution for prostitution and crimes associated with prostitution. How can this be?

Chances are you know, or you know of, a current or former sex worker. They are mothers and fathers, husbands and wives, students, professors, writers, performers, and the person next door.⁴ Some have gone on to become famous: Cardi B, Lady Gaga, and Roseanne Barr are among a group of well-known artists and actors who acknowledge that they engaged in some form of sex work before becoming famous.⁵ Many sex workers hide what they do because they must: sex work is illegal. But

² See generally, DAVID J. LEY, PH.D., *INSATIABLE WIVES*, at xi (2012) (exploring the practice of cuckolding and hotwifing throughout history and presenting interviews of couples who participate in this lifestyle).

³ Adultery is still illegal in eighteen states, though it is rarely charged. The following states continue to have statutes outlawing adultery: Alabama, ALA. CODE § 13A-13-2; Arizona, ARIZ. REV. STAT. ANN. § 13-1408; Florida, FLA. STAT. § 798.01; Georgia, GA. CODE ANN. § 16-6-19; Illinois, 720 ILL. COMP. STAT. 5/11-35; Kansas, KAN. STAT. ANN. § 21-5511; Maryland, MD. CODE ANN. CRIM. LAW § 10-501; Michigan, MICH. COMP. LAWS § 750.29-32; Minnesota, MINN. STAT. § 609.36; Mississippi, MISS. CODE ANN. § 97-29-1; New York, N.Y. PENAL LAW § 255.17; North Carolina, N.C. GEN. STAT. § 14-184; North Dakota, N.D. CENT. CODE § 12.1-20-09; Oklahoma, OKLA. STAT. Tit. 21 § 871-2; Rhode Island, R.I. GEN. LAWS § 11-6-2; South Carolina, S.C. CODE ANN. § 16-15-60; Virginia, VA. CODE ANN. § 18.2-365; Wisconsin, WIS. STAT. § 944.16.

⁴ See Mac McClelland, *Is Prostitution Just Another Job?*, N.Y. MAG.: THE CUT (Mar. 21, 2016), <https://www.thecut.com/2016/03/sex-workers-legalization-c-v-r.html> [<https://perma.cc/9S46-NUJG>] (detailing experiences of sex workers with variety of backgrounds and describing the notion of “prostitutes as streetwalkers” as “dated”).

⁵ *Cardi B: From Stripper to Grammy Award Winner*, BBC NEWS: NEWSBEAT (Feb. 11, 2019), <https://www.bbc.com/news/newsbeat-47197386> [<https://perma.cc/JT23-3RAB>]; Watch What Happens Live with Andy Cohen, *Lady Gaga on Being a Stripper and That Unreleased Cher Track*, YOUTUBE (Apr. 18, 2018), https://youtu.be/o_xU2ZxkuhU?t=187 [<https://perma.cc/Q24U-F7RC>]; Kevin Sessums, *The Real Roseanne*, VANITY FAIR (Feb. 15, 1994), <https://www.vanityfair.com/hollywood/1994/02/the-real-roseanne> [<https://perma.cc/299V-ZV58>]; Natasha Reda, *14 Celebrities Who Worked in Sex Work Before Becoming Famous*, POPCRUSH (May 23, 2019), <https://popcrush.com/celebrities-sex-workers/> [<https://perma.cc/BR6J-RMSN>] (listing several celebrities who worked in sex work before becoming famous).

should it be? These days, this question is a public debate: politicians are weighing in,⁶ advocacy groups are finding ways to become more vocal,⁷ legislators are introducing bills to decriminalize sex work,⁸ and prosecutors are creating policies against prosecuting sex work as a crime.⁹

Sex workers choose to engage in their work just as anyone else chooses a job.¹⁰ Sex work offers flexible hours, control over one's work schedule, and, in many instances, the ability to work independently.¹¹ Especially for those facing challenges in the traditional job market—people with disabilities¹² or people who face other forms of discrimination, such as transgender individuals¹³—sex work provides an employment option in a landscape that may otherwise be devoid of opportunity.

Consensual, commercial sex work remains illegal everywhere except in a few counties in Nevada, where it is heavily regulated.¹⁴ Sex workers point out that the work is dangerous due to the criminal penalties attached to sex work and the harmful consequences flowing from historical criminalization.¹⁵ These concerns have finally been heard by some legislators. In 2019, Representative Ayanna Pressley introduced a bill to decriminalize sex work at the federal level.¹⁶ At least seven states

⁶ See, e.g., Terrell Jermaine Starr, *Exclusive: Kamala Harris Calls for Decriminalization of Sex Work, Unequivocally Calls Trump a Racist and Wants Reparations (Sort of)*, THE ROOT at 14:40-17:15 (Feb. 26, 2019), <https://www.theroot.com/exclusive-kamala-harris-calls-for-decriminalization-of-1832883951> [<https://perma.cc/GXV2-KNPR>] (showing Vice President Harris—then-presidential candidate Harris—explaining her position on decriminalization of sex work).

⁷ See, e.g., *Why Decriminalization of Sex Work*, DECRIMINALIZE SEX WORK (last visited Nov. 1, 2022) <https://decriminalizesex.work/why-decriminalization/> [<https://perma.cc/XGT7-H8P3>] (including podcasts, videos, briefing papers, and other resources about the decriminalization of sex work).

⁸ See, e.g., Jennifer Lott, *Proposed Bill to Legalize Prostitution Causes Uproar in SWLA*, KPLCTV NEWS (Mar. 11, 2021, 10:42 PM), <https://www.kplctv.com/2021/03/12/proposed-bill-legalize-prostitution-causes-uproar-swla/> [<https://perma.cc/SR9M-7UM4>] (reporting recent state legislation being proposed).

⁹ See, e.g., WASHTENAW COUNTY, OFFICE OF THE PROSECUTING ATTORNEY, POLICY DIRECTIVE 2021-08: POLICY REGARDING SEX WORK (Jan. 14, 2021), <https://www.washtenaw.org/DocumentCenter/View/19157/Sex-Work-Policy> [<https://perma.cc/X92V-MDRH>] (stating a policy that the Prosecutor's Office will not bring charges related to consensual sex work per se).

¹⁰ See SEX WORKERS' RIGHTS ADVOCACY NETWORK, SEX WORK AND FEMINISM: A GUIDE ON THE FEMINIST PRINCIPLES OF SEX WORK ORGANIZING 14 (2021) [hereinafter SWAN] (“Sex workers decide to engage in sex work for a myriad of reasons, similarly to how anyone considers taking on a job . . . [some] cannot take on a wide range of jobs being disabled, some prefer working independently or together with other peers, e.g. trans women.”).

¹¹ See MARIA NENGEH MENSAH, SEX WORK: 14 ANSWERS TO YOUR QUESTIONS 3 (2007) (describing the benefits of sex work for workers, including the flexible schedule, meeting people, independent work, and contract negotiation).

¹² See Katie Transom, *Sex Work is a Disability Issue. So Why Doesn't the Disability Community Recognize That?*, ROOTED IN RIGHTS (Jan. 4, 2019), <https://rootedinrights.org/sex-work-is-a-disability-issue-so-why-doesnt-the-disability-community-recognize-that/> [<https://perma.cc/2V9R-8WQS>].

¹³ ERIN FITZGERALD ET AL., MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE 5 (2015).

¹⁴ *US Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG (May 4, 2018), [<https://perma.cc/ND2H-73UK>].

¹⁵ RED CANARY SONG, *Rights, Not Rescue: A Response to AF3IRM in Defense of DSA Resolution #53*, (Aug. 2, 2019), <https://medium.com/@Redcanarysong/in-support-of-dsa-res-53-decim-platform-8eb4d164588> [<https://perma.cc/VJ35-2WBS>] (“While we understand that sex work can often be violent and risky, and that the stories and voices of survivors and youth are extremely important, the violence we all experience stems from the criminalization of not just the trade, but of LGBTQ folks, non-citizens, poor people, people of color, and other marginalized communities.”).

¹⁶ H.R. 702, 116th Cong. § (2)(A)(ii) (2019); Press Release, Office of Rep. Ayanna Pressley, Rep. Pressley Launches a

and the District of Columbia have considered bills to decriminalize sex work or to study whether to do so.¹⁷ To date, no legislative efforts have succeeded, but they still continue to garner support.

In addition to legislation that would fully decriminalize sex work, other proposals have been introduced that ostensibly protect sex workers.¹⁸ These proposals purportedly protect those who sell sex by making the sale of sex legal but its purchase illegal. This criminalization scheme is called the end demand model, the equality model, or the Nordic model.¹⁹ Though some describe end demand schemes as decriminalization, they must not be confused with efforts to remove the legal prohibitions against sex work—these efforts are opposite.²⁰

Ambiguity in the use of the word “decriminalize” allows advocates of the end demand system to portray this legislative scheme as one that sex workers and others support. In fact, most sex worker organizations do not support end demand models,²¹ and advocates who understand the difference between the two positions also understand that the end demand model, touted as a way to protect sex workers, is as harmful as the current status of criminalizing sex work.²² This article explores why sex workers take this position,²³ and examines the implications of continuing to criminalize consensual, commercial sex between adults.

For years, academics have discussed, written, and published on topics related to sex work—without referencing any personal experience in sex work or without citing those with such experience.²⁴

Bold, Progressive Criminal Legal Reform Resolution: The People’s Justice Guarantee (Nov. 14, 2019), <https://pressley.house.gov/> [<https://perma.cc/E4G7-4AAU>] (choose “Media” from dropdown; then choose “Press Releases”; then search “People’s Justice Guarantee”; then follow titular hyperlink).

¹⁷ H.P. 3499, 190th Sess. (Mass. 2017-2018); H.P. 251, 129th Sess. (Me. 2019); S. 6419, 2019-2020 Reg. Sess. (N.Y. 2019); B. 23-0318, 23rd Council (D.C. 2019); H. 529, 2019-2020 Sess. (Vt. 2020); H. Res. 5250 Substitute A, 2021 Jan. Sess. (R.I. 2021); H.B. 67, 2021 Regular Session (La. 2021); H.B. 3088, 2021 Reg. Sess. (Ore. 2021).

¹⁸ See discussion *infra* Section II.B.

¹⁹ See GLOB. NETWORK OF SEX WORK PROJECTS, CHALLENGING THE INTRODUCTION OF THE NORDIC MODEL 6 (2017) (defining the Nordic Model as a framework that uses criminalization to eradicate sex work in both the short term and long term) [hereinafter CHALLENGING THE NORDIC MODEL].

²⁰ *Id.* at 9.

²¹ *Id.* at 7 (quoting SCOT-PEP, THE SWEDISH MODEL: A BRIEFING FROM SCOT-PEP (2015)) (“If this legal model had no negative effects – or even improved the lives of people who sell or trade sex – sex workers and sex worker-led organisations would support it. However, sex worker-led organisations worldwide . . . oppose the Swedish model.”).

²² See Statement on Prohibitionist Nordic Model Legislation in New York 1, Sex Workers Project of Urban Justice Ctr. (Jan. 28, 2021) [<https://perma.cc/W7P9-XLL2>] (“[W]e know first-hand that the so-called Nordic, End-Demand, or “Equality” model is simply a modern-era prohibitionist model that seeks to further stigmatize and criminalize our customers and clients and the sex trades in general.”); DECRIMINALIZE SEX WORK, DEBUNKING THE ENTRAPMENT MODEL, A.K.A. THE END DEMAND MODEL, (last updated Dec. 30, 2020), <https://decriminalizesex.work/why-decriminalization/briefing-papers/debunking-the-entrapment-model/> [<https://perma.cc/3PA5-URCA>].

²³ For the opinion of an individual former sex worker, see Laura LeMoon, *Opinion: Prostitution and the City – Seattle’s End Demand Problem*, SOUTH SEATTLE EMERALD (Nov. 18, 2021) <https://southseattleemerald.com/2021/11/18/opinion-prostitution-and-the-city-seattles-end-demand-problem/?amp> [<https://perma.cc/3Y9U-2M36>] [hereinafter LeMoon, *Prostitution and the City Part 1*]; Laura LeMoon, *Opinion: Prostitution and the City Part 2: The ‘Good’ Survivors and the Troublemakers*, SOUTH SEATTLE EMERALD (Dec. 9, 2021) <https://southseattleemerald.com/2021/12/09/opinion-prostitution-and-the-city-part-2-the-good-survivors-and-the-troublemakers/?amp> [<https://perma.cc/UJ34-DGFZ>].

²⁴ See Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 25-26 (1993) for a discussion including unsupported descriptions of actions pimps take to dominate prostitutes (“In addition to being able to inflict physical

Today, “nothing about us without us” is a mantra among sex workers, especially those involved in advocacy.²⁵ I enthusiastically endorse this directive, so throughout this article I rely heavily on assertions directly attributed to sex workers themselves—especially where it concerns their lived experiences and political desires.

I am not the first to recognize that decriminalization requires unpacking. In his critique of American criminal law policy, Professor Darryl K. Brown describes the process of decriminalization as “[s]tate legislatures . . . repealing or narrowing criminal statutes, reducing offense severity, and converting low-level crimes to civil infractions.”²⁶ Addressing misdemeanor decriminalization, Professor Alexandra Natapoff points out that organizations such as the American Bar Association and the National Association of Criminal Defense Lawyers advocate “for decriminalizing minor offenses as a solution to a wide array of systemic problems.”²⁷ Within the discussion of the decriminalization of misdemeanors, such nuanced use of the term results in meaning ranging from that which is synonymous with “legalization” to meaning that “the state should get out of the business of regulating . . . conduct altogether.”²⁸ To avoid any potential ambiguity, I will take a moment to identify the way the term “decriminalize” is used in connection with sex work.

In connection with intimate behavior, decriminalization is often contrasted with legalization.²⁹ Misdemeanor decriminalization involves reducing penalties and removing the potential for incarceration for conduct while continuing to prohibit that conduct.³⁰ When used in connection with things like same-sex intimacy, contraception, interracial marriage, or political speech, many would say “legalize” rather than “decriminalize,” since the “elimination of state power to punish certain individual choices” is central in such intimate contexts.³¹ This flexibility and variation make it important to understand how both terms (“decriminalize” and “legalize”) are used in connection with sex work.

There are four different ways the legal status of sex work is described by the people involved in advocacy efforts. Each is present in some form throughout the world, and three of the four forms are present in parts of the United States. At times, these definitions conflict with the way advocates for other issues (such as drug policy reform) use the terms “decriminalize” and “legalize.”

abuse with impunity, pimps confiscate the women’s earnings and isolate them even beyond the stigma they carry. The women then have nowhere but pimps to turn to bail them out after arrest, leaving them in debt for their fines which must be worked out in trade.”); *see generally* Ronald Weitzer, *The Movement to Criminalize Sex Work in the United States*, 37 J. OF L. AND SOC. 61 (2010) (examining the impact of the moral crusade against prostitution).

²⁵ See Nadia Van Der Linde, *Nothing About Us, Without Us: Reversing the Power Dynamics of Philanthropy*, OPEN DEMOCRACY (Mar. 18, 2014), <https://www.opendemocracy.net/en/transformation/nothing-about-us-without-us-reversing-power-dynamics-of-philanthr/> [https://perma.cc/4X8C-9BK2].

²⁶ Darryl K. Brown, *Democracy and Decriminalization*, 86 TEXAS L. REV. 223, 225 (2007).

²⁷ Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1058 (2015).

²⁸ *Id.* at 1065.

²⁹ *See id.* at 1065.

³⁰ *See id.* at 1066-67 (describing the way decriminalization was used in the effort to reduce penalties for marijuana possession).

³¹ *Id.* at 1066 (“Legalization represents a roll-back of the state’s regulatory authority, the elimination of state power to punish certain individual choices, and the concomitant expansion of liberty and privacy zones. By contrast, decriminalization maintains the full scope of the state’s intrusive powers, softening the consequences of violations even while validating the underlying prohibition.”).

LET'S TALK ABOUT SEX (WORK)

- **Legalization.** Legalization refers to situations where buying and selling sex is legal, but only if those doing so comply with government regulations and restrictions.³² This model exists in some counties in Nevada, most of Australia, most of the United Kingdom, and several other European countries.³³
- **End Demand.** The end demand model, also known as the Nordic model or equality model, eliminates the criminal penalties for selling sex, but maintains the penalties for purchasing sex or facilitating its sale.³⁴ This model gets its name because it originated in Sweden.³⁵
- **Full criminalization.** Full criminalization imposes criminal penalties on all aspects of commercial sex: buying, selling, facilitating, and profiting from the sale of sex.³⁶ This form of criminalization is prevalent in most of the United States.³⁷
- **Decriminalization.** Decriminalization, or full decriminalization, refers to situations where the consensual, adult purchase and sale of sex and related activities are not subject to criminal restriction or civil penalties but are left to individual choice.³⁸ Full decriminalization is found in New Zealand and New South Wales, Australia.³⁹

After this Introduction, Part I explores conflicting viewpoints about sex work in connection to the issue of whether all sex work is a form of human trafficking. Part I clarifies that human trafficking has a specific legal definition when commercial sex is involved and examines the evidence available to support assertions about the prevalence of human trafficking, especially sex trafficking. Additionally, it distinguishes between consensual adult sex work and sex trafficking that qualifies as human trafficking. In Part II, I explain recent legislative efforts, both enacted and proposed, that governments are using to address perceived problems with sex work and human trafficking. Part III exposes the fundamental problem with the criminalization of sex work by naming the harms of the end demand model. In this section, I also explain the harms of the American tendency to conflate sex work and trafficking. Finally, Part IV concludes by pointing out that the most effective way to protect sex workers is to remove all criminal penalties and stop considering those who engage in voluntary sex work as victims who need rescuing, but rather as individuals who choose how they will earn money the same way anyone chooses whether to work in any other industry.

In the years-long battle over the legality of sex work, two main positions have been in conflict. On one side are those who want to remove the criminal consequences for engaging in commercial sex work and advocate for decriminalizing sex work. On the other side are those who view all sex work as

³² Alexandra Lutnick & Deborah Cohan, *Criminalization, Legalization or Decriminalization of Sex Work: What Female Sex Workers Say in San Francisco, USA*, 17 REPRODUCTIVE HEALTH MATTERS 34, 38-39 (2009).

³³ *Id.* at 38-39 (describing Nevada's brothel system). See also Kris Rosentel, et. al., *Police Enforcement of Sex Work Criminalization Laws in an "End Demand" City: The Persistence of Quality-of-Life Policing and Seller Arrests*, 50 ARCHIVES OF SEXUAL BEHAVIOR 1973, 1974-75 (2021); ELAINE MOSSMAN, INTERNATIONAL APPROACHES TO DECRIMINALIZING OR LEGALISING PROSTITUTION 12 (2007).

³⁴ *Why Sex Work Should be Decriminalized*, HUMAN RIGHTS WATCH (Aug. 7, 2019) [<https://perma.cc/A76T-XL4M>] ("The "Nordic model," first introduced in Sweden, makes buying sex illegal, but does not prosecute the seller, the sex worker.").

³⁵ *Id.*

³⁶ Lutnick, *supra* note 32, at 38.

³⁷ *Id.*

³⁸ Rosentel, et. al., *supra* note 33, at 1974.

³⁹ *Id.* at 1974-75.

a form of human trafficking.⁴⁰ This latter group is composed of individuals and organizations that advocate for full criminalization, legalization, or end demand. But not everyone has staunch opinions about whether sex work should be illegal. In fact, a recent national poll conducted by Data for Progress found that a majority of all voters support decriminalizing sex work,⁴¹ with the strongest show of support from those between ages 18 and 44.⁴² Conducted in November 2019, the poll shows support for decriminalization; however of those polled, 26% responded as “only somewhat” supportive, 12% were “only somewhat” opposed and 13% indicated they were unsure.⁴³ So although 26% of respondents strongly support decriminalization and 23% strongly oppose it, there are still 51% of the total respondents who do not have strongly held opinions either way.⁴⁴

I. AMBIGUITIES BETWEEN HUMAN TRAFFICKING, SEX TRAFFICKING AND SEX WORK DECRIMINALIZATION

Remarkably, even some feminists share the goal of eradicating sex work through criminalization, and therefore find themselves the “strange bedfellows” of the very patriarchy-supporting groups they fight against on other issues.⁴⁵ Before analyzing the two forms of legislation that are being considered in several state legislatures and the parallel positions taken by advocates, this section will look closely at the opponents to decriminalization and the ambiguities between human trafficking and sex work at the heart of their opposition.

A. Opponents of sex work decriminalization

Both abolitionist feminists and conservative traditionalist feminists oppose sex work.⁴⁶ This is an unlikely alliance of feminists: the former considers any benefits of sex work outweighed by the tendency to “to sustain and perpetuate patriarchal structural equality,”⁴⁷ and the latter, traditionalists, want to protect the traditional marital relationship—including prescribed, gendered roles within that relationship.⁴⁸

Abolitionist feminists, sometimes also referred to as radical feminists, refuse to accept that any woman could consent to engage in sex work because they believe sex workers cannot freely consent within a system that victimizes them by sexually objectifying all women.⁴⁹ Led by notable scholars and

⁴⁰ See *id.* at 1973.

⁴¹ The survey question explained decriminalization as: “remov[ing] criminal penalties for adults to sell and pay for consensual sex while also maintaining laws that criminalize violence.” NINA LUO, DECRIMINALIZING SURVIVAL: POLICY PLATFORM AND POLLING ON THE DECRIMINALIZATION OF SEX WORK 21 (2020).

⁴² *Id.* at 23.

⁴³ *Id.* at 22.

⁴⁴ *Id.*

⁴⁵ See Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV., 1729, 1740 (2010) (citing Julia O’Connell Davidson, ‘Sleeping with the Enemy’? Some Problems with Feminist Abolitionist Calls to Penalise Those Who Buy Commercial Sex, 2 SOC. POL. & SOC’Y 55, 62 (2003)).

⁴⁶ See Rosentel et. al., *supra* note 33, at 1973.

⁴⁷ Dempsey *supra* note 45, *passim*.

⁴⁸ See *id.* at 1744-45.

⁴⁹ See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform*, 158 U. PA. L. REV. 1655, 1664-65

activists like Catharine MacKinnon and Andrea Dworkin, radical feminists view sex work as a form of violence against women that violates any semblance of consent.⁵⁰ They argue that the sex workers' choice to operate in a system based on male subordination of women compromises all women's agency.⁵¹ When challenged, some radical feminists acknowledge that women who choose sex work do exist, but still assert that the harm to women who engage in sex work without full consent outweighs the imposition on their free choice.⁵²

The fact that MacKinnon and others argue that patriarchy is the force that subordinates women contradicts their position about sex work by subordinating a specific group of women: those who freely choose to engage in sex work.⁵³ Radical feminists' goal of abolishing prostitution is as paternalistic as the ideology they rail against in any other setting. Their position is black or white—violence or no violence, sex work or no sex work. But the sex work industry is much more nuanced, so seeking its eradication by treating all sex workers as victims reinforces the stereotype of women as victims—the very stereotype radical feminists fight to overcome.

In addition to the hypocrisy issue, the radical feminists' position attempts to speak for all women. By failing to recognize that women do not all share the same position, radical feminists silence the voices of many women, especially those who have different lived experiences than those doing the advocacy. Criticizing the work of MacKinnon and other radical feminists, Angela Harris notes how MacKinnon's work relies on the idea that there is one "essential" woman's experience.⁵⁴ In doing so, Harris suggests MacKinnon's approach is misguided because that "essential" experience is "isolated and described independently of race, class, sexual orientation, and other realities of experience."⁵⁵ I. India Thusi, another feminist critical of radical feminism, explains that radical feminist ideology is based on "the Western, middleclass, white female agenda that only superficially considers other experiences, particularly those of women of color or women in postcolonial societies."⁵⁶ Harris notes that MacKinnon skirts the implications of an essentialist perspective "by pointing to the essentialism of the dominant discourse:" it is based on the commonality among women who are measured by a male standard—a standard that is not theirs.⁵⁷ While this lopsided standard is in fact a commonality among women, it does not tell the whole story. The characterization of "the story of woman as passive victim denies the ability of women to shape their own lives, whether for better or worse."⁵⁸

The concept of essentialism, and the critiques thereof, are especially relevant when radical feminists dispute the central aspects sex work. Radical feminists "rely upon the essentialization of

(2010); see also I. India Thusi, *Radical Feminists Harms on Sex Workers*, 22 LEWIS & CLARK L. REV. 185, 196–197 (2018).

⁵⁰ See generally ANDREA J. NICHOLS, SEX TRAFFICKING IN THE UNITED STATES: THEORY, RESEARCH, POLICY, AND PRACTICE 27 (2016).

⁵¹ See Chuang, *supra* note 49 at 1664–65; Thusi, *supra* note 49, at 197.

⁵² See Dempsey, *supra* note 45, at 1768–69.

⁵³ See Diana Tietjens Meyers, *Feminism and Sex Trafficking: Rethinking Some Aspects of Autonomy and Paternalism*, 17 ETHICAL THEORY & MORAL PRAC. 427, 430 (2014) (describing the position of radical feminist Kathy Miriam as one that 'discounts sex workers' agentic resources and paternalistically dictates an emancipatory agenda to them).

⁵⁴ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STANFORD L. REV. 581, 585 (1990).

⁵⁵ *Id.*

⁵⁶ Thusi, *supra* note 49, at 198.

⁵⁷ Harris, *supra* note 54, at 592.

⁵⁸ *Id.* at 613.

sexuality, womankind, and sex.”⁵⁹ By failing to “address the concerns of sex workers of color and consider that these women *always* face constrained choices and multiple systemic barriers,” radical feminists substitute their judgment as comfortable, well-educated, white women for the judgments of marginalized women in completely different circumstances.⁶⁰

Arguing that radical feminist scholars’ arguments reproduce patriarchy, I. India Thusi writes:

[T]he radical feminist advocate or scholar appears to assert her power over and against the sex worker through a discourse of a singular woman who is a mere victim to sex. Such interpretation of sex work that relies upon the narrative of sex work as solely a site for male dominance “produces the fiction of a universal sisterhood, bonded in its experience of victimization and violence. There is no space in this construction for difference or for the articulation of a subject that is empowered.” The radical feminist debate is overly reliant on this essentialization of sex.⁶¹

Discussing sex workers only as victims without the nuances of various life situations, differences in classes (even within the sex worker community) and with a disregard for context only benefits those pursuing a particular moral agenda based on their version of appropriate female conduct.⁶²

Because sex workers often enter the industry already economically marginalized, anyone evaluating the best option for addressing sex work must recognize that it is not just the sex work itself that is the issue.⁶³ A cofounder of the Disabled Sex Workers Coalition, self-identified Black atheist, feminist, and sex worker Moses Moon⁶⁴ explains that are also crucial issues of age, race, class, sex, gender, and disability that come into play.⁶⁵ Describing the idea of sex work as “*nonwork* or *antivork*,”⁶⁶ they detail their motivation to start sex work:

I needed money. As I aged and got my first “real job,” I discovered something: I hated work. The longest I held a vanilla, or non-sexual, job was a year. Stripping, and various forms of prostitution (street-based, freestyle, hoeing, and sugaring), allowed me the flexibility I desired. Later, when I became a mother, camming, sugar dates, and amateur porn creation provided that same flexibility. Recently I was diagnosed with moderate-to-severe ADHD. After dropping out of college multiple times, quitting jobs, poor impulse control, social/productivity anxiety, and a second pregnancy, postpartum depression drove me to seek medical help. Disability makes

⁵⁹ Thusi, *supra* note 49, at 218.

⁶⁰ *Id.* at 214.

⁶¹ *Id.* at 215 (footnote omitted).

⁶² *Id.* at 218.

⁶³ See Moses Moon, *Symposium Introduction: Sex Workers’ Rights, Advocacy, and Organizing*, 52 COLUMBIA HUMAN RIGHTS L. REV. 1062, 1071–72 (2021). (Moses Moon is formerly known as Femi Babylon, or Suprihmbé. Some databases that publish this article continue to identify the author by previous names.)

⁶⁴ *Id.* at 1076, n. 50.

⁶⁵ *Id.* at 1072.

⁶⁶ *Id.* at 1076 (alteration in original).

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it even more imperative that I not work. I am horrible at meeting deadlines, even self-imposed ones. Content creation (via ManyVids), phone sex, camming, and prostitution are my current modes of nonwork, along with writing, speaking engagements, and other gigs and informal labor.⁶⁷

moon argues that the critical component of any attempt to influence the way we address sex work is the ethical treatment of those who engage in this labor.⁶⁸ Further, they advocate against “the urge to homogenize experiences under the guise of inclusivity.”⁶⁹

The tension between sex trafficking and sex work has been ongoing for more than twenty years, despite the reality that sex workers are also opposed to sex trafficking.⁷⁰ Sex workers and organizations led by sex workers not only attempt to educate others about the differences between sex work and sex trafficking, but actively work against trafficking.⁷¹ Abolitionist feminists and their conservative counterparts have strong, well-established connections to media outlets, and the ability to influence not only politicians, but also the general public.⁷² Both these groups successfully influence the media and the public by conflating sex workers with victims of human trafficking and sensationalizing the message about protecting victims.⁷³

When it comes right down to it, one’s decision about whether sex work should remain illegal likely depends on how one feels about sex in general. In other words, whether one believes that sexual decisions (about when and under what circumstances to engage in sex) are individual choices or whether one believes these decisions that require control by societal rules is likely a good indicator of how one will feel about decriminalizing sex work.⁷⁴ As a result, it is unlikely that the two diametrically opposing

⁶⁷ *Id.*

⁶⁸ *Id.* at 1081 (“[W]e must demand ethical treatment.”).

⁶⁹ *Id.* at 1081 (footnote omitted) (quoting femi babylon, *thotscholar: a working theory of probeaux* (woman)ism [revised 2019], PATREON (Sept. 9, 2019), <https://www.patreon.com/posts/thotscholar-of-1-29836133> [<https://perma.cc/V8VL-Q4Y9>]).

⁷⁰ See GLOB. NETWORK OF SEX WORK PROJECTS, WOMEN SEX WORKER’S HUMAN RIGHTS IN THE CHANGING WORLD OF WORK 6 (2020).

⁷¹ *Id.*

⁷² McClelland, *supra* note 4.

⁷³ See Melissa Gira Grant, *Human Trafficking Prevention Month is a Dangerous Joke*, THE NEW REPUBLIC, (Jan. 15, 2020), <https://newrepublic.com/article/156205/human-trafficking-prevention-month-dangerous-joke> [<https://perma.cc/GHW5-2X8G>] (describing images used by the Department of Homeland Security as part of Human Trafficking Awareness Month). Homeland Security provides numerous publications related to human trafficking, wherein the line between sex workers and victims of sex trafficking is blurred. For example, in one publication, the Department of Homeland Security describes industries where sex trafficking occurs as “[e]scort services, illicit massage services, outdoor sexual solicitation, residential brothels, bars and strip clubs, pornography production, personal sexual servitude, and livestreaming of sexual exploitation.” DEPT. OF HOMELAND SECURITY, DHS ANTI-HUMAN TRAFFICKING EFFORTS INFORMATION SHEET 1 (Apr. 14, 2020). This Homeland Security pamphlet lists such industries that include victims of human trafficking and goes further to stating that causing someone under the age of 18 to engage in commercial sex acts is human trafficking regardless of the use of force. *Id.* Though further close scrutiny of the information sheet allows one to see that the list of potential sex trafficking industries includes some that are legitimate, the sheet can easily be misinterpreted to suggest that the list is part of the definition of sex trafficking. See also GLOB. NETWORK OF SEX WORK PROJECTS, POLICY BRIEF: THE IMPACT OF ANTI-TRAFFICKING LEGISLATION AND INITIATIVES ON SEX WORKERS 3 (2018) [<https://perma.cc/E4MR-SUVB>].

⁷⁴ I believe it is reasonable to hold that some of the most intimate decisions a person can make and the most intimate activities we can engage in would be personal decisions, but not everyone feels this way.

viewpoints will ever coalesce. The 51% in the less certain support categories may be swayed in either direction, and the battle for their support continues.

B. Contrasting sex work and human trafficking

Before analyzing the two forms of legislation that are being considered in several state legislatures and the two positions taken by advocates for each of these forms of legislation, it is important to look closely at the distinctions between two terms that continuously swirl around the debate: human trafficking and sex work.⁷⁵ The English language contains polysemous language—“language with multiple meanings as intended to authors or interpreted by audiences.”⁷⁶ Ambiguity created by polysemous language can be strategically deployed to appeal to different audiences, ultimately making it difficult to differentiate between positions that may be drastically different. The various meanings associated with decriminalization are a vivid example of this, which I argue create ambiguity between human trafficking, sex trafficking and sex work.

When people think of human trafficking, they may picture an image of a young girl being kidnapped and forced to engage in prostitution to avoid the violent wrath of her captor. Images created by anti-trafficking advocates and the media such as the one below use sensational images and polysemous language to encourage people to consider all victims of human trafficking in this way.

⁷⁵ Council on Foreign Rel., *Virtual Roundtable: A Conversation with Catharine A. MacKinnon: The Debate on Sex Trafficking and Prostitution*, YOUTUBE at 2:06-17:52 (Jun. 9, 2020), https://youtu.be/4MxLDi_Wf5k [<https://perma.cc/LY9Z-GA7V>]. Here, Catharine MacKinnon, one of the earliest advocates for eliminating any form of prostitution, describes opposing views of prostitution in relation to human trafficking, saying: (1) Those opposed to decriminalization assert that sex work is a form of human trafficking and sexual exploitation; and (2) those who support decriminalization assert that sex work is distinct from human trafficking and is a form of work entered into freely and therefore should not be caught up in the legitimate efforts to curb human trafficking.

⁷⁶ Robin E. Jensen, *Sexual Polysemy: The Discursive Ground of Talk about Sex and Education in U.S. History*, 1 COMMUNICATION, CULTURE & CRITIQUE, 396-415, 397 (2008) (examining how educators and policy makers speak about sexual health).



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Note the message included in the image: “Naïve and vulnerable girls lured by slick-talking pimps are drugged, beaten, and held hostage for sex.”⁷⁸ Such sensational language incites outrage and concern. Those responses should be based on more accurate depictions and descriptions of human trafficking victims.

The definition of human trafficking in the United States is located in the federal Trafficking Victims Protection Act (TVPA).⁷⁹ This act addresses both sex trafficking and labor trafficking. The TVPA defines “severe forms of trafficking in persons” as:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.⁸⁰

⁷⁷ timmeko, *Human Trafficking*, FLICKR (Aug. 4, 2009), Creative Commons license CC-BY-NC-SA 2.0, <https://www.flickr.com/photos/timmeko/3788354829> [<https://perma.cc/PH4X-P2JN>] (describing a stock image as an “Interactive package about human trafficking in central Ohio.”)

⁷⁸ *Id.*

⁷⁹ Trafficking Victims Protection Act, 22 U.S.C. § 7101.

⁸⁰ 22 U.S.C. § 7102(11).

The enforcement provisions of the TVPA apply to these severe forms of trafficking.⁸¹ As the definition clearly states, except for minors used for commercial sex, all forms of human trafficking require the use of force, fraud, or coercion.⁸² This requirement is not ambiguous nor subject to interpretation by the agencies charged with enforcing the statute; the Department of State explains that “[h]uman trafficking is a crime involving the exploitation of children for commercial sex, of adults for commercial sex through the use of force, fraud, or coercion, and of any individual for compelled labor.”⁸³ Given this clear force requirement, let us explore just how prevalent human trafficking is in the United States.

1. The data about sex work and trafficking victims does not help advocates

According to the National Institute of Justice, a branch of the Department of Justice that maintains a “robust trafficking research portfolio,” obtaining accurate statistics about victims of human trafficking is challenging because victims are often hidden from public view.⁸⁴ Additionally, in order to have accurate data, we must disentangle human trafficking victims from those who are engaged in activities that do not meet this definition—activities like sex work. When crimes are classified for statistical tracking, this important distinction is often missing.⁸⁵ Even though human trafficking was added to the Uniform Crime Reporting program operated by the FBI, it remains difficult to reliably measure the existence of human trafficking victims in the United States,⁸⁶ especially because labor trafficking, as opposed to sex trafficking, is rarely identified and reported as a trafficking offense.⁸⁷ While the actual number of human trafficking victims remains unclear, the available data contradicts the rhetoric used by anti-trafficking advocates. The U.S. Department of Health and Human Services (HHS) issues Certification Letters to foreign nationals who are adult victims of human trafficking.⁸⁸ These Certification Letters allow persons who have either been granted Continued Presence status,⁸⁹ been granted a T-visa⁹⁰ by the Department of Homeland Security or whose application for a T-visa has

⁸¹ See Chuang, *supra* note 49 at 1679. For examples of enforcement provisions and the use of the term “severe forms of trafficking in persons” rather than simply “trafficking” or “sex trafficking,” see 22 U.S.C. § 7103(d)(7), 7103a, 7104(c), 7104e(a), 7106, 7107, and 7108.

⁸² See 22 U.S.C. § 7102(11).

⁸³ U.S. DEP’T OF STATE, KNOW YOUR RIGHTS 10 (2018).

⁸⁴ NAT’L INST. OF JUST., *The Fight Against Human Trafficking* (June 9, 2019), <https://nij.ojp.gov/topics/articles/fight-against-human-trafficking> [<https://perma.cc/Z7RN-ACGL>] (internal citations omitted); see also AMY FARRELL, MEREDITH DANK, MATTHEW KAFAFIAN, SARAH LOCKWOOD, REBECCA PFEFFER, ANDREA HUGHES & KYLE VINCENT, OFF. OF JUST. PROGRAMS, CAPTURING HUMAN TRAFFICKING VICTIMIZATION THROUGH CRIME REPORTING 1 (2019).

⁸⁵ See FARRELL ET AL., *supra* note 84, at 1. (“One major issue in the field is the lack of accurate data around the number of victims of human trafficking.”)

⁸⁶ *Id.* at 4.

⁸⁷ *Id.* at 1, 23.

⁸⁸ DEP’T OF HEALTH & HUMAN SERVICES, DOC. NO. OTIP-FS-18-02, CERTIFICATION FOR ADULT VICTIMS OF HUMAN TRAFFICKING, FY 2001 – 2017 DATA FACT SHEET 1 (2018).

⁸⁹ Continued Presence status “is a temporary immigration designation provided to individuals identified by law enforcement as victims of a ‘severe form of trafficking in persons’ who may be potential witnesses.” CENTER FOR COUNTERING HUMAN TRAFFICKING, U.S. IMMIGR. AND CUSTOMS ENFT, CONTINUED PRESENCE RESOURCE GUIDE 2 (2021).

⁹⁰ *Id.* at 1 (referring to a T-visa, which confers an immigration status “which allows eligible trafficking victims to remain

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been submitted and not yet been denied, to be eligible for federal and state refugee benefits.⁹¹ Over the seventeen years covered by the most recent HHS data about the number of Certification Letters issued, 65% of these were provided to individuals who had experienced labor trafficking.⁹² Sex trafficking accounted for only 17% of the letters and a combination of labor and sex trafficking made up 7% of the letters issued.⁹³ The remaining 11% represent situations where the form of trafficking was unknown.⁹⁴ Though the data collected by HHS shows an increase in the number of foreign victims who obtained Certification Letters, it suggests that the majority of individuals recognized as trafficking victims were victims of labor trafficking rather than sex trafficking.⁹⁵

Law enforcement agencies contribute to the misconceptions about victims of human trafficking because even when they are not specifically engaged in investigations related to human trafficking, their rhetoric can draw unsupported connections between crimes related to prostitution and the crime of human trafficking. For example, when a county sheriff's office in Oregon conducted a sting by posting an online ad from a fictitious woman purporting to sell sex, the officers reeled in eight men who were arrested for the misdemeanor offense of soliciting commercial sex.⁹⁶ The press release issued by the sheriff's office asserted that the arrest of eight men in response to a fake ad suggested "how prevalent prostitution is in Benton County and Oregon," describing prostitution as "a dangerous criminal enterprise, closely related to human trafficking, narcotics, violence, and sexual assault" and "fuell[ing] the growth of modern-day slavery by providing a façade behind which traffickers for sexual exploitation operate."⁹⁷ While these assertions may enflame public sentiment about the potential problems with prostitution and its possible connection to human trafficking, no prostitutes were involved in the sting, nor were any arrested. Instead, the only arrests made were of men who were willing to pay for sex when they mistakenly believed it was being offered to them.⁹⁸

Advocates against sex work decriminalization conflate sex work with sex trafficking by providing anecdotes and images of young girls being sold as sex slaves.⁹⁹ When combined with unsupported numbers of victims of human trafficking, undifferentiated by whether they are involved in sex trafficking or labor trafficking, these advocacy efforts become even more compelling, despite the lack of evidence and questionable accuracy.

in the U.S. for up to four years and can lead to lawful permanent residence."); *see also* 8 U.S.C. § 1101(a)(15)(I).

⁹¹ DEPT OF HEALTH & HUMAN SERVICES, *supra* note 88, at 1.

⁹² *Id.* at 2.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ Mid-Valley Media, *Sheriff's Deputies Nab 8 Men in Prostitution Sting at Corvallis Hotel*, CORVALLIS GAZETTE TIMES, (Dec. 30, 2021), https://www.gazettetimes.com/news/local/crime-and-courts/sheriffs-deputies-nab-8-men-in-prostitution-sting-at-covallis-hotel/article_5a6c8c72-c5d2-5d96-92b8-a13fe84bac84.html [<https://perma.cc/QH5A-CNXF>].

⁹⁷ *Id.*

⁹⁸ *Id.* (noting that those arrested were men who responded to the ad and arrived at the hotel where they expected to pay for sex)

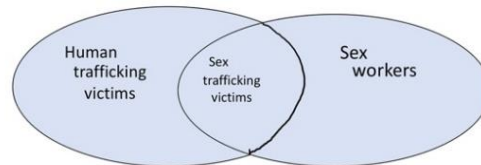
⁹⁹ *See supra* text and image accompanying notes 89-90; *see also* Kaitlyn Tiffany, *The Great (Fake) Child-Sex-Trafficking Epidemic*, THE ATLANTIC (Dec. 9, 2021) <https://www.theatlantic.com/magazine/archive/2022/01/children-sex-trafficking-conspiracy-epidemic/620845/> [<https://perma.cc/P7Q5-RRTL>] (pointing out the "cascade of false information about child trafficking on Instagram and Facebook" perpetuated by organizations connected to QAnon conspiracy propaganda).

2. Distinguishing consensual adult sex work from human and sex trafficking matters

Not all sex workers are victims of human trafficking, and not all victims of human trafficking are involved in sex work.¹⁰⁰ As depicted by the diagram below, human trafficking victims and sex workers are distinct from each other, and those that fall into both categories I have labelled “sex trafficking victims.” Human trafficking includes the exploitation of individuals under 18 years old for commercial sex or the use of fraud, force, or coercion to induce an adult to engage in commercial sex.¹⁰¹ Based on this broad definition, there is no denying that some experiences of sex workers will also fall under the legal definition of human trafficking.

The key point is that not everyone in the commercial sex industry is or has been trafficked.¹⁰² Additionally, some sex workers may have entered the industry as victims of human trafficking either because of age or coercion, and then—once over 18 years old or no longer subject to coercion—chose to remain in the industry. Whether these sex workers should continue to be treated as human trafficking victims is unclear.¹⁰³ As I have discussed, many sex workers choose to engage in this type of work for economic reasons.¹⁰⁴ When working independently or in loosely connected peer networks, there is no individual forcing them to do this work and taking their earnings.¹⁰⁵ In other words: those who work independently cannot be victims of human trafficking, because you cannot traffic yourself.

Continuing to conflate consensual adult sex work with human trafficking harms sex workers due in part to law enforcement efforts to combat human trafficking. In order to bring a charge of human trafficking, police must corroborate information about the use of force, fraud, or coercion, which requires multiple interactions with the suspected victims.¹⁰⁶ This extended police interaction exposes consensual adult sex workers to all of the risks of police interaction, even if the goal of the police is to identify and assist victims of human trafficking.¹⁰⁷ The fight against human trafficking often



¹⁰⁰ See *infra*.

¹⁰¹ See 22 U.S.C. § 7102(1).

¹⁰² See Luo, *supra* note 41, at 4.

¹⁰³ See UNIV. S. CAL. GOULD INT’L HUMAN RIGHTS CLINIC, OVER-POLICING SEX TRAFFICKING: HOW U.S. LAW ENFORCEMENT SHOULD REFORM OPERATIONS 13 (2021), <https://humanrightsclinic.usc.edu/2021/11/15/over-policing-sex-trafficking-how-u-s-law-enforcement-should-reform-operations/> [<https://perma.cc/GMA6-5NZN>] [hereinafter INT’L HUMAN RIGHTS CLINIC, OVER-POLICING SEX TRAFFICKING].

¹⁰⁴ See *id.*; see also *supra* notes 63-67 and accompanying text.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 13-14.

¹⁰⁷ See *id.*

involves protracted and intense investigations that usually result in the arrest of multiple sex workers, with few, if any charges of human trafficking, which is similarly problematic.¹⁰⁸

The criminal nature of sex work alone causes sex workers to face violence at the hands of the police and some of their clients. In addition, though sex workers are at a higher risk of sexually transmitted diseases and sexual assault, studies show that sex workers face barriers to basic health care.¹⁰⁹ The stigma and fear of discrimination or being reported to the police prevents many sex workers from disclosing their involvement in sex work to health care providers, and in some cases from seeking health care altogether.¹¹⁰ Also, if arrested, sex workers may face extended periods of time without access to important medications.¹¹¹ Frequent arrests as part of human trafficking stings or sweeps exacerbate all of these issues. It will surprise no one that being arrested or convicted for prostitution can lead to collateral issues for sex workers. Anyone arrested or convicted of a crime faces ongoing negative consequences. In fact, the phenomenon of over-criminalization and over-incarceration has become a topic of national discussion.¹¹² Recently, many so-called victimless crimes have been decriminalized.¹¹³ But, sex work is still criminalized.

i. Harms of criminalization for commercial sex workers

Though most people on either side of the criminalization debate recognize that the current system of criminalization of sex work causes harm to those who do this work, anti-trafficking and anti-prostitution advocates conveniently ignore the effects on consensual, adult sex workers. Whether a sex worker wants to exit the industry or not, the criminal nature of sex work makes it difficult to do so. End demand models may provide some relief to victims of human trafficking or exploitation, but not all sex workers are trafficked or exploited.

Having a criminal record limits a sex worker's options for alternative employment.¹¹⁴ Many employers are resistant to hiring someone with a criminal record.¹¹⁵ Some professional licenses are unavailable to those with criminal records.¹¹⁶ A criminal record may make one ineligible for certain

¹⁰⁸ See FARRELL ET AL., *supra* note 84, at 14.

¹⁰⁹ See Luo, *supra* note 41, at 11.

¹¹⁰ See *id.*

¹¹¹ See NSW P, THE IMPACT OF CRIMINALISATION ON SEX WORKERS' VULNERABILITY TO HIV AND VIOLENCE (POLICY BRIEF), 9 (2017).

¹¹² See, e.g., James R. Copland & Rafael A. Mangual, MANHATTAN INSTITUTE, OVERCRIMINALIZING AMERICA: AN OVERVIEW AND MODEL LEGISLATION FOR STATES (2018). <https://www.manhattan-institute.org/html/overcriminalizing-america-overview-and-model-legislation-states-11399.html> [<https://perma.cc/3SX4-T7EQ>].

¹¹³ In addition to decriminalization of certain drug offenses, activities such as sodomy, adultery, and fornication have been decriminalized in most jurisdictions.

¹¹⁴ See Amanda Agan & Sonja B. Starr, *The Effect of Criminal Records on Access to Employment*, 107 AM. ECON. REV.: PAPERS & PROC., May 2017, at 560–64 (discussing the issues that low level felons encountered while trying to obtain employment post-conviction); see also NING FU, ET AL., THE EFFECTS OF A CRIMINAL RECORD ON EMPLOYMENT, WELFARE PARTICIPATION, AND HEALTH (Annual Health and Econometrics Workshop 2017).

¹¹⁵ Lesley E. Schneider et. al., *Before and After Ban the Box: Who Complies with Anti-Discrimination Law?*, 47 LAW & SOC. INQUIRY 749, 751 (2022).

¹¹⁶ 49 U.S.C. §§ 5103a(a), (d) (license to transport hazardous materials); CONN. GEN. STAT. § 29-161h(c) (security guard); GA. CODE ANN. § 40-5-39(b)(3) (license to operate motor vehicle for hire); 216–40 R.I. CODE R. § 5.31.1-10(3).15.1 A.3

forms of financial assistance.¹¹⁷ It may lead to fewer housing options by eliminating the opportunity to obtain housing benefits.¹¹⁸ For non-citizens, even those present in the United States legally, arrests alone put their ability to remain in the country in jeopardy.¹¹⁹ An arrest or criminal record involving commercial sex work can lead to the loss of custody of one's children.¹²⁰

In addition to the effects of arrest and conviction faced by anyone who finds themselves on the wrong side of the criminal law, sex workers are often more vulnerable because their entire income can be at risk when they are arrested. While many people who get arrested can return to their regular work while their case works through the criminal justice system, sex workers released after an arrest face the potential of enhanced penalties or loss of freedom pending trial if they return to their usual means of generating income. For example, a sex worker who is arrested in New York City will be processed through the Human Trafficking Intervention Courts, “a statewide system of courts, designed to intervene in the lives of trafficked human beings and to help them to break the cycle of exploitation and arrest.”¹²¹ Though described as a system to address the needs of victims of trafficking in general, the courts were established to handle prostitution-related offenses.¹²² From its inception, the HTIC system has considered all forms of sex work exploitative, violent, or both.¹²³

Those who are arrested and routed through the Human Trafficking Intervention Courts continue to be exposed to abuses by police officers. Although courts often suspend the charges and then dismiss them after a waiting period (that is conditioned on no re-arrests), the waiting period is fraught with harm.¹²⁴ Once known to police officers, sex workers are more likely to be re-arrested, thereby forfeiting the opportunity to have their original charges dismissed.¹²⁵ Because they cannot engage in sex work without risking arrest, those in the waiting period must find other ways to generate income—a task made more challenging by having an open criminal case still pending.¹²⁶ Moreover, subjecting commercial sex workers to criminal fines and the associated legal fees can leave them vulnerable to becoming victims of trafficking, because generating the funds to pay fines or their legal fees would require sex workers engage in more illegal activity.¹²⁷ Being rescued financially by someone

(LexisNexis 2021) (dental hygienist).

¹¹⁷ FU, ET.AL., *supra* note 114, at 10.

¹¹⁸ *Id.* See 24 C.F.R. 966.4 (l)(5)(iv) (2021).

¹¹⁹ 8 U.S.C. § 1227 (a)(2) (2021).

¹²⁰ See Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737, 764 (2000).

¹²¹ Center for Court Innovation, *Announcement of New York's Human Trafficking Intervention Initiative*, Oct. 4, 2013, <https://www.courtinnovation.org/articles/announcement-new-yorks-human-trafficking-intervention-initiative> [<https://perma.cc/AD4B-WLEL>].

¹²² See YALE GLOB. HEALTH JUSTICE P'SHIP, UN-MEETABLE PROMISES: RHETORIC AND REALITY IN NEW YORK CITY'S HUMAN TRAFFICKING INTERVENTION COURTS 25 (2018) [hereinafter GLOB. HEALTH JUSTICE P'SHIP, UN-MEETABLE PROMISES].

¹²³ *Id.* at 22, 27.

¹²⁴ See *id.* at 68. (explaining that this waiting period harms defendants who are over-policed and discriminatorily profiled; are noncitizens or undocumented; encounter access barriers such as housing and employment; or are legally vulnerable due to open cases).

¹²⁵ See *id.* at 8-9.

¹²⁶ See *id.* at 8-9, 50.

¹²⁷ Research Brief, ACLU, *Why Decriminalize Sex Work?* 10 (Oct. 21, 2020) (available at <https://www>).

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who then exacts a “price” for covering the legal costs means providers who had previously been independent, consensual sex workers find themselves victims of sex trafficking.¹²⁸

Many sex workers support themselves and their families using the income they generate selling sex. Faced with the prospect of being arrested again or being unable to feed or shelter their family, most sex workers choose to go back to work.¹²⁹ One sex worker, an undocumented woman from Haiti, describes her situation this way:

After the earthquake in Haiti, my grandmother and my little sister and my little brother came to live with me. I was supporting all of them on sex work. . . .

Child protective services showed up at my door with two police officers. I was in shock. I'm an undocumented woman, I'm Black, I'm a sex worker, and I need to take care of my newborn daughter. I was terrified.

It was my first lesson in not trusting the system because they're not here to help you. They said if I don't find a therapist they'd take my daughter away. So I paid for state mandated therapy out of my own pocket, from money I made doing sex work, and the therapist's main focus was on me leaving sex work.¹³⁰

As this anecdote shows, interrupting that source of income jeopardizes sex workers' ability to provide for themselves and their families.

ii. Harm from police surveillance and interactions

Sex workers who identify as a part of the LGBTIQI community, those who are non-citizens and those who are people of color face a significant risk when interacting with police compared to white sex workers.¹³¹ These extra-vulnerable sex workers are more frequently targeted by police than their white counterparts.¹³² This phenomenon is important and deserves further scrutiny, but this article will mainly focus on the harms perpetuated by police against sex workers irrespective of the intersectional impact of those harms.

Obviously, sex workers are subject to police attention because they are engaging in an illegal activity. But beyond that, sex workers report that they face a significant threat of physical harm from police officers themselves.¹³³ Sex workers report that when they are stopped by police officers, sometimes those officers offer to refrain from arresting them if they provide the officers with sexual

[aclu.org/report/sex-work-decriminalization-answer-what-research-tells-us](https://www.aclu.org/report/sex-work-decriminalization-answer-what-research-tells-us) [https://perma.cc/DJ39-VD73]).

¹²⁸ See Luo *supra* note 41, at 15-16.

¹²⁹ See *id.* at 8, 13 (describing sex workers stories of multiple arrests yet continued work as sex workers).

¹³⁰ *Id.* at 12.

¹³¹ See Rosentel, et. al., *supra* note 33 (“Like other forms of quality-of-life policing, this approach to enforcing commercial sex laws mainly targeted groups who were poor, Black, Latino, queer, and/or transgender.” *Id.* at 3).

¹³² Research Brief, ACLU, *Is Sex Work Decriminalization the Answer* 12-13 (2021) (available at <https://www.aclu.org/report/sex-work-decriminalization-answer-what-research-tells-us> [https://perma.cc/GLT4-JRTJ]).

¹³³ DANIELLE BLUNT & ARIEL WOLF, *ERASED: THE IMPACT OF FOSTA SESTA 23* (2020).

services.¹³⁴ Other interactions involve threats of violence, sexual harassment, and even rape.¹³⁵

Sex workers' individual accounts of sexual abuse by police officers have been corroborated by the Department of Justice.¹³⁶ In Baltimore, Maryland, where 78% of the sex workers surveyed reported "at least one abusive encounter with the police," the Department of Justice investigated the Baltimore Police Department and found that Baltimore police officers repeatedly engaged in sex acts with sex workers in exchange for not arresting them.¹³⁷ According to the Department of Justice, even when these actions were reported, the police department either failed to investigate or investigated so slowly that those being investigated continued the offending behavior.¹³⁸

Additionally, seemingly innocent actions can lead to police confrontations and increased likelihood of arrest, harassment, abuse, or a combination of these harms. At times, the conduct for which a sex worker can be arrested are often combinations of independently legal behaviors. Researchers reviewed arrest data from Chicago, a city where end-demand policies have been adopted, between 1998 and 2017.¹³⁹ Part of this study involved identifying the evidence that initiated the police encounter. While 59% of people arrested for prostitution or prostitution-related offenses were stopped because they were flagging down vehicles, almost 40% were arrested simply because they were in an area known for prostitution.¹⁴⁰ Other reasons for the initial police contact were the individual's gender presentation or attire.¹⁴¹ These results suggest that the police were "concerned with identifying and managing deviant bodies in their enforcement of commercial sex."¹⁴²

Because police officers—and sometimes an entire police division or department—receive financial incentives for making prostitution arrests, police officers have been known to set up stings in an effort to catch those suspected of selling sex.¹⁴³ For example, in New York City, police officers working in the vice division count on a significant amount of overtime to supplement their salaries.¹⁴⁴ They earn overtime when they make many arrests that require paperwork and processing.¹⁴⁵ Many officers "rely on padded paychecks to support lifestyles they otherwise could not afford,"¹⁴⁶ and "squeeze all they can out of overtime because it factors into pension payouts, often based on the years

¹³⁴ U.S. DEP'T OF JUST., CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 149-150 (2016).

¹³⁵ BLUNT & WOLF, *supra* note 133, at 23-24.

¹³⁶ U.S. DEP'T OF JUST., *supra* note 134, at 149-150.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See* Rosentel, et al., *supra* note 33, at 1977.

¹⁴⁰ *See id.* at 1982, Table 5.

¹⁴¹ *See id.* at 1984.

¹⁴² *See id.* at 1983.

¹⁴³ *See*, e.g., Joshua Kaplan & Joaquin Sapien, *NYPD Cops Cash In on Sex Trade Arrests With Little Evidence, While Black and Brown New Yorkers Pay the Price*, PROPUBLICA (Dec. 7, 2020), https://www.propublica.org/article/nypd-cops-cash-in-on-sex-trade-arrests-with-little-evidence-while-black-and-brown-new-yorkers-pay-the-price?utm_source=twitt%E2%80%A6 [<https://perma.cc/8RJE-J66Y>].

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

in which they took home the most money.¹⁴⁷ This overtime accrues quickly when the officers begin to round up sex workers.¹⁴⁸

iii. Harm from clients

When sex work is criminalized, commercial sex workers can be displaced to settings where the activity will not draw police attention.¹⁴⁹ Prior to the enactment of SESTA/FOSTA, many sex workers relied on internet platforms to conduct screenings of potential clients, to access information about potentially dangerous individuals, and to engage in a community that could watch out for each other and notice if it appeared someone was in trouble.¹⁵⁰ Shutting these platforms forced sex workers to adjust their practices, which increased their exposure to danger:¹⁵¹ with the safety net of internet negotiations no longer available, sex workers were forced to negotiate in person and also motivated to do this as surreptitiously as possible.¹⁵² The urgency to make a deal before drawing unwanted attention leads to riskier decisions,¹⁵³ and the need to complete a negotiation quickly may cause a sex worker to agree to things that would have been off limits when protected by the asynchronous aspects of internet interactions.¹⁵⁴ For instance, sex workers report that client pressure can cause them to agree to services such as sex without protection or to particular sex acts that increase their health risks.¹⁵⁵

We all face the risk of being harmed at work, whether as a result of the work we are engaged in or by the criminal or tortious actions of someone not associated with work. The risk of harm that sex workers face goes beyond these typical risks: the harm of criminalization both creates new harms and exacerbates the harms already incident to vulnerability. No workplace is safe all the time, but the simple fact is that the services sex workers provide are only criminalized because money changes hands.

Consider what happens to a person who sets up a date through an online dating service or meets someone at a bar and is later assaulted by their date. If the assaulted person chooses to report the incident to the police, that person is considered a victim and the perpetrator is pursued as a criminal. Though the process of reporting a sexual assault is often uncomfortable, the victim is not at risk of arrest for making the report. Contrast that with a sex worker who sets up a date online or meets a client in a bar and is then assaulted by the client: if the sex worker reports the assault, he or she is likely to be arrested for prostitution. An even more outrageous example is a provocatively dressed woman walking

¹⁴⁷ *Id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See* Michelle R. Decker et al., *Human Rights Violations Against Sex Workers: Burden and Effect on HIV*, 385 THE LANCET 186, 191–92 (2015); *see also* discussion *infra* Section II.B.

¹⁵⁰ *See supra* Section II.A.2; *see also* BLUNT & WOLF, *supra* note 133, at 4, 20–22, 25.

¹⁵¹ BLUNT & WOLF, *supra* note 133, at 18–19.

¹⁵² *See* Decker, *supra* note 149, at 191–93 (detailing rushed negotiations and risky decisions sex workers may make when attempting to evade police detection).

¹⁵³ *See id.* at 3 (discussing the risks of miscommunication and violence that street-based sex workers face due to rushed negotiations with clients resulting from fear of law enforcement)

¹⁵⁴ *See* LeMoon, *Prostitution and the City Part 1*, *supra* note 23 (reporting that the closing of online platforms left sex workers desperate enough to engage in “higher-risk sexual behaviors, like anal sex or condomless sex”).

¹⁵⁵ *See* Research Brief, ACLU, *supra* note 127 at 8–9 (discussing higher rates of unprotected sex and STI transmission in criminalized and partially criminalized contexts); *see also* LeMoon, *Prostitution and the City Part 1*, *supra* note 23 (explaining that economically desperate sex workers may engage in higher-risk sexual behaviors, including anal sex).

in a college neighborhood. She is likely to be ignored by law enforcement. Yet in a different part of town, that same provocatively dressed individual could be arrested as a prostitute.¹⁵⁶

II. RECENT LEGISLATION AFFECTING SEX WORKERS

A. Enacted legislation affecting sex workers: SESTA/FOSTA

Let's return to Grace and Brian and Stella and Peter for a moment. Prior to 2018, both couples could easily find men to help them indulge in their extramarital sexual activities. A discreet ad placed on Craigslist, Backpage, or any number of alternative lifestyle websites generated enough interest to satisfy both couples' needs. But after April 2018, Stella and Peter had no access to websites on which they could find men willing to pay for sex with Stella. Conversely, while Grace and Brian may have had a few online resources shut down, their primary source of meeting men for Grace—through alternative lifestyle websites—continued with few changes. What was it that caused the change in April 2018? It was SESTA/FOSTA.

On April 18, 2018, Congress enacted a statute intended to fight online sex trafficking: the Allow States and Victims to Fight Online Sex Trafficking Act of 2017—better known as SESTA/FOSTA.¹⁵⁷ Touted as a mechanism to protect human trafficking victims, SESTA/FOSTA imposed criminal and civil liability on websites and other internet platforms for hosting material that advertised victims of human sex trafficking.¹⁵⁸ With the passage of SESTA/FOSTA, the conflation of human trafficking and consensual sex work eliminated an important safety net for many people who do not fall within the definition of victims of human trafficking—adult providers of consensual commercial sex.¹⁵⁹

1. Expectations of SESTA/FOSTA and consensual commercial sex work

In the weeks before SESTA/FOSTA became law, the public debate about its goals and potential consequences became heated, and it included some of the sensational language that conflates sex work and trafficking. Supporters and sponsors of the bill provided heart-wrenching anecdotes from survivors of sex trafficking and their families.¹⁶⁰ In one such description, Representative Shelia Jackson Lee of Texas, stated:

¹⁵⁶ Melissa Gira Grant, *The NYPD Arrests Women for Who They Are and Where They Go—Now They're Fighting Back*, THE VILLAGE VOICE (Nov. 22, 2016), <https://www.villagevoice.com/2016/11/22/the-nypd-arrests-women-for-who-they-are-and-where-they-go-now-theyre-fighting-back/> [https://perma.cc/2BZE-N8HY] (describing neighborhoods in New York where police cite “women’s clothing as evidence of their ‘purpose’ to engage in prostitution” in discussing loitering arrests).

¹⁵⁷ Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (SESTA/FOSTA), 18 U.S.C. § 2421A.

¹⁵⁸ *See id.*

¹⁵⁹ *See* BLUNT & WOLF *supra* note 133 at 5 (“FOSTA-SESTA’s passage was followed with an immediate chilling effect, as platforms shuttered in anticipation of bankrupting lawsuits and possible criminal charges. Platforms used by mainstream audiences—like Reddit and Craigslist—deleted content before the law had even been signed. As a result, the already-marginalized communities who use the web to find work and build community around sex work were suddenly locked out.” (footnotes omitted)).

¹⁶⁰ *See, e.g.*, 164 CONG. REC. H1291 (daily ed. Feb 27, 2018) (comments by Representative Jackson Lee).

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I sat down with victims who had been trafficked or who had been victimized through online sex trafficking or other aspects of sex trafficking. It was overwhelming to hear parents speak of a young girl, their daughter, who had been misled and driven away from their home or from her area and had been taken and abused for a long period of time until he [sic] had to rescue her himself, spending \$50,000, and then \$60,000, to be able to rehabilitate herself, which is now an ongoing process. Though, as every family and every parent, he is grateful that she is alive.¹⁶¹

In the same floor speech, Representative Jackson Lee told a more vivid story:

I would like to share the story of a young woman named Kathy, who moved to Houston in 1994 with her family. Kathy was raised to be strong and independent; she was very involved in her church, community, and ROTC. She graduated from high school, with hopes of pursuing a career in journalism. Yet, Kathy became a victim of sex trafficking. . . . She met a charming young man who treated her like she had never been treated before. After a fairytale year, her Prince Charming proposed something Kathy felt she could not refuse—a promising job with his company, an administrative position that would triple her income and provide financial security for her future. The job was in Dallas and, despite her initial hesitation, she saw the offer as an opportunity to provide for her family. But, shortly after she arrived in Dallas, Kathy found herself in the dark world of sex trafficking and prostitution. . . . Graphic images were taken of her and placed on the Internet against her will. She was forced to perform sexual favors multiple times, every day. . . . Escape was not easy. She was cut off from her family. Her boyfriend, turned pimp, limited her phone calls to johns, and did not allow her to have money. But somehow, she found an opportunity to get away and she never looked back.¹⁶²

Legislators spoke of their “responsibility to provide justice for [sex trafficking] victims and to do everything [they] can to protect the most vulnerable members of society from trafficking.”¹⁶³

On the very same day the Judiciary Committee was reporting out to the full House of Representatives, the Department of Justice noted in a letter to the chair of the committee that the original language was too broad, extending “to situations where there is minimal federal interest, such as instances in which an individual person uses a cell phone to manage local commercial sex transactions involving consenting adults.”¹⁶⁴ The Department of Justice offered language that would clarify Congress’s “intent to target traffickers using or operating interactive computer services,”¹⁶⁵ but despite the suggestion that the bill should not apply to an individual managing consensual commercial sex transactions, legislators made no distinction between prostitution and sex trafficking.¹⁶⁶

¹⁶¹ *Id.*

¹⁶² *Id.* at H1292.

¹⁶³ *Id.* at H1290-91 (comments by Representative Roby).

¹⁶⁴ Opinion Letter on H.R. 1865 to Judiciary Committee, U.S. Dep’t of Justice (February 27, 2018), at 2. <https://www.eff.org/files/2018/03/19/doj-sesta.pdf> [<https://perma.cc/LP8T-FFG9>].

¹⁶⁵ *Id.*

¹⁶⁶ 22 U.S.C. § 7102 (11).

Although the TVPA specifies that sex trafficking must involve force, fraud, or coercion, the bill itself notes that:

It is the sense of Congress that—

(1) section 230 of the Communications Act of 1934 . . . was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and contribute to sex trafficking;

(2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims . . .¹⁶⁷

The fact that SESTA/FOSTA would encompass consensual adult sex work in addition to sex trafficking was evident in comments about the bill as it was reported out of the Judiciary Committee. Representative Jackson Lee pointed out that the bill “creates the new offense of intentional promotion or facilitation of prostitution while using or operating a facility or means of interstate or foreign commerce, such as the internet.”¹⁶⁸ The DOJ later pointed out that provisions of the bill allowing states to bring criminal actions against traffickers and those using the internet to promote prostitution would “alter the landscape of the industry involved in advertising prostitution.”¹⁶⁹

Further evidence of the reach beyond human trafficking and into consensual commercial sex is the fact that Section 3 of SESTA/FOSTA adds criminal penalties to the Mann Act.¹⁷⁰ This new provision criminalizes promotion or facilitation of prostitution or recklessly disregarding the fact that promoting prostitution contributes to trafficking.¹⁷¹ When describing the need for the legislation, the Judiciary Committee report acknowledged that prosecuting sex trafficking cases is complicated by uncooperative or unsympathetic victims.¹⁷² Immediately following this acknowledgement the report asserts that because the “new statute instead targets promotion and facilitation of prostitution [it] is far more useful to prosecutors [because] [p]rostitution and sex trafficking are inextricably linked. . . .”¹⁷³

Though sex work and sex trafficking may overlap at times, they should remain distinct from each other because this conflation of prostitution and sex trafficking harms consensual adult sex workers occurs. The legislature acted without consulting with sex workers about how this legislation would affect them, and therefore, created a situation where the consequences of the legislation caused more harm than benefit—harm to sex workers and harm to victims of sex trafficking.

¹⁶⁷ See H.R. REP. NO. 115-572, at 2 (2018) (describing the language of Section 2 of the amended bill).

¹⁶⁸ 164 CONG. REC. H1290 (daily ed. Feb 27, 2018) (comments by Representative Jackson Lee).

¹⁶⁹ *Id.*

¹⁷⁰ See 18 U.S.C. § 2421A.

¹⁷¹ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 3, 132 Stat. 1253, 1253-54 (2018).

¹⁷² See H.R. REP. NO. 115-572, at 5 (2018).

¹⁷³ *Id.*

2. Reality of SESTA/FOSTA for sex workers

As a result of SESTA/FOSTA, many online platforms where sex workers interacted with each other and with potential clients were shut down.¹⁷⁴ The shuttering of these platforms forced sex workers to adjust their practices, which increased their exposure to danger.¹⁷⁵ Once SESTA/FOSTA was enacted, the ability of sex workers to use online resources as tools to protect themselves from potential harm was significantly curtailed.¹⁷⁶

Prior to this legislation, sex workers used public online resources despite the risk of criminal exposure because the risks these online resources prevented were even more significant.¹⁷⁷ In other words, using the internet provided an additional layer of safety to sex workers. Whereas “[s]treet based workers must identify clients and discuss logistics quickly to avoid the appearance of soliciting . . . [a] meeting made online can provide more time to negotiate terms” and evaluate risks.¹⁷⁸ Online interactions also allowed sex workers to discuss what services they would or would not provide and to be clear about the price, all prior to meeting the client.¹⁷⁹ Thus, the ability to use internet websites provided sex workers the opportunity to engage in harm reduction strategies. For example, many used internet platforms to “review[] clients in an effort to flag those that [sic] with a history of violence, non-payment, or potential connections to law enforcement.”¹⁸⁰ They could “educate each other by sharing experiences with violent clients, exploitative management, and labor exploitation.”¹⁸¹ They also used websites and internet platforms to verify important data collected when screening clients.¹⁸²

Rather than protecting any of those who engaged in commercial sex, whether victims of trafficking or not, SESTA/FOSTA forced many sex workers underground and back out on the streets, making them more vulnerable to victimization, not less.¹⁸³ When internet platforms became unavailable to sex workers who had relied on the internet to conduct business more safely and without the need for the protection and assistance of a pimp, those workers became more susceptible to exploitation. Exploitation, in this case, makes them more likely to be victims of human trafficking.¹⁸⁴

SESTA/FOSTA eliminated consensual sex workers’ ability to screen potential clients, to build communities of sex workers that provided assistance unavailable to them in more traditional ways, and to manage their financial transactions.¹⁸⁵ According to a survey of sex workers conducted eighteen months after SESTA/FOSTA was enacted, 72.5% of the online survey participants reported increased

¹⁷⁴ See generally BLUNT & WOLF *supra* note 133.

¹⁷⁵ See *id.* at 21.

¹⁷⁶ See *id.* (“By censoring the way that sex workers communicate with each other online, this law is also responsible for the dissolution of harm reduction tactics that allow workers to educate each other by sharing experiences with violent clients, exploitative management, and labor exploitation.”).

¹⁷⁷ See generally, *id.* (discussing the impact of online resources on the safety of sex work).

¹⁷⁸ *Id.* at 22.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 21.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See BLUNT & WOLF, *supra* note 133, at 18-19.

¹⁸⁴ *Id.* at 18.

¹⁸⁵ *Id.*

economic instability, and 33.8% reported an increase in client violence.¹⁸⁶ According to the report describing this survey, “[o]f the online respondents surveyed 78.5% said that sex work made of [sic] the majority of their income, while 47% said it was their *only* form of income. Of this group 72.5% reported that they are facing increased financial insecurity” since internet-based platforms became unavailable to them.¹⁸⁷

When sex workers moved their business online, female homicides decreased.¹⁸⁸ A 2017 study that examined how online platforms affected female safety found that from 2002 to 2010, when Craigslist’s erotic-services site was active and solicitation moved indoors, the female homicide rate fell by “as much as 10-17 percent.”¹⁸⁹ In the first month after SESTA/FOSTA was passed, the sex worker community reported that “13 workers [had] gone missing and two [had] been confirmed dead. Two workers [had] been assaulted at gunpoint, and [there were] other stories of rape and assault . . . from people returning to or just learning the streets for the first time.”¹⁹⁰ In the year following the law’s passage, “[a]t least 50 sex workers [were] killed or found dead in the United States.”¹⁹¹

B. Proposed legislation affecting sex workers: The End Demand Model

In a new effort to eradicate commercial sex altogether, advocates for a variety of anti-trafficking efforts have supported potential legislative changes that would shift criminal liability for consensual adult sex work from the provider to the purchaser.¹⁹² Known as “partial decriminalization” or the end demand model, this approach is similar to the Nordic Model, which allow providers to avoid harsh penalties for selling sex but subject those who patronize the providers to significant fines and the potential for jail time.¹⁹³ Pioneered in Sweden, the end demand model makes those who purchase sex and those who sell the sexual services of someone else—the pimps and traffickers—subject to criminal prosecution.¹⁹⁴

Anti-trafficking advocates who support the end demand model want to abolish prostitution, and they suggest that doing so this way would help victims of human trafficking avoid harm because it

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 22.

¹⁸⁸ See Gregory DeAngelo, Scott Cunningham & John Tripp, *Craigslist’s Effect on Violence Against Women*, (2019) (unpublished working paper) (available at <https://assets.documentcloud.org/documents/5720120/craigslistFOSTA.pdf>) [<https://perma.cc/D3MH-WZJH>].

¹⁸⁹ *Id.*

¹⁹⁰ V. Blue, *Suicide, violence, and going underground: FOSTA’s body count*, ENGADGET (2021) <https://www.engadget.com/2018-04-27-suicide-violence-and-going-underground-fosta-sesta.html> [<https://perma.cc/3BV8-XFG5>].

¹⁹¹ Ella Ceron, *Sex Workers Warned Everyone About FOSTA-SESTA—Now Lawmakers are Beginning to Listen*, MTV NEWS, DEC. 17, 2019 <http://www.mtv.com/news/3149442/safe-sex-work-study-act-fosta-sesta-ro-khanna/> [<https://perma.cc/A3RQ-R268>].

¹⁹² See Luo, *supra* note 41, at 18 (“[The End Demand/Nordic Model] seeks to end the sex industry by ending demand for it.”).

¹⁹³ See HUMAN RIGHTS WATCH, *supra* note 34 (discussing the “Nordic model,” a policy model first introduced in Sweden that makes buying sex illegal).

¹⁹⁴ Council on Foreign Rel., *supra* note 75 at 9:05-10:25. For an example of the harm of end demand models in countries where this model exists, see Thusi, *supra* note 49 at 211–212 (2018).

eliminates the threat of criminal prosecution for those engaging in prostitution.¹⁹⁵ Under the ideal end demand model, providers of consensual commercial sex, just like victims of human trafficking, are provided with services intended to help them leave the sex industry.¹⁹⁶ The underlying assumptions of the end demand proposals is that rather than being arrested for engaging in prostitution, sex workers will be accept these services that will allow them to leave the sex trade industry.¹⁹⁷ But this model provides neither incentives nor protections for those who are not ready to leave the industry.¹⁹⁸ Rather, end demand efforts attempt to eliminate commercial sex work altogether while failing to address the underlying causes of exploitation—resulting in a scheme whose harmful effects are hardly different from the current criminalization scheme.¹⁹⁹

In Sweden where the end demand model was first introduced, proponents have been very clear that the goal of the law is to combat prostitution and that increased stigma and discrimination against sex workers is encouraged.²⁰⁰ Similar sentiment has been expressed in Israel, another country where the end demand model was instituted to eliminate sex work.²⁰¹ Advocates in the United States avoid being so transparent. Instead, U.S. advocates attempt to co-opt the term “decriminalization”—the term used by sex workers and their advocates for eliminating all criminal penalties related to sex work.²⁰²

American advocates of the end demand model continue to conflate consensual adult sex work with sex trafficking, despite the fact that consensual sex workers do not meet the definition of victims of sex trafficking.²⁰³ According to the TVPA, sex trafficking requires that the exchange of sex for money be induced by fraud, force, or coercion, or involve someone under 18 years old.²⁰⁴ End demand advocates refuse to accept that someone could make a choice to engage in commercial sex work, so the advocates substitute their own beliefs and their concept of the correct choice instead of accepting

¹⁹⁵ See COALITION AGAINST TRAFFICKING IN WOMEN, *The Trafficking and Sexual Exploitation of Women and Girls*, (last visited Nov. 20, 2022) <https://catwinternational.org/the-challenge/the-sex-trade/> [https://perma.cc/NVF7-HGEY] (“Without a vibrant sex trade, where the bodies of women and girls are consumed for the entertainment of men and the profit of exploiters, there would be no sex trafficking”).

¹⁹⁶ Sebastian Kohn, *The False Promise of “End Demand” Laws*, OPEN SOCIETY FOUNDATIONS (June 2, 2017) <https://www.opensocietyfoundations.org/voices/false-promise-end-demand-laws> [https://perma.cc/MHY2-E4VJ] (“The end-demand model is also supposed to include social services to help people leave the sex trade. But in practice, the emphasis is always on law enforcement; the promised services are an afterthought.”).

¹⁹⁷ Council on Foreign Rel., *supra* note 75, at 9:05-10:25.

¹⁹⁸ See LeMoon, *Prostitution and the City Part 1*, *supra* note 23 (discussing the “End Demand” system of prostitution criminalization in Seattle).

¹⁹⁹ See A. Krüsi, et. Al., *Criminalization of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study*, 4 *BMJ OPEN* 1, 1 (2014) (“In its original incarnation, the model of marginalised clients in Sweden was not designed to increase the safety of women in sex work; rather its goal was to eradicate prostitution and increase the safety of women who exit sex work. Indeed, in Sweden, the government explicitly condoned the increased risks that marginalised sex workers were exposed to by arguing that any adverse effects on women who remain in sex work were outweighed by the message of the law that prostitution is not tolerated.”)

²⁰⁰ Luo, *supra* note 41 at 18.

²⁰¹ See NSW *supra* note 111 at 2 (citing ANNA SKARHED ET AL. *SOU* 2010:49: FÖRBUD MOT KÖP AV SEXUELL TJÄNST EN UTVÄRDERING 1999–2008 34 (2010)).

²⁰² See discussion *supra* Section I.B.

²⁰³ See discussion *supra* Section I.B.2.

²⁰⁴ 22 U.S.C. § 7102(11).

providers' personal life decisions and individual choices.²⁰⁵ By refusing to recognize those who engage in sex work without a pimp or trafficker, end demand advocates see all providers of commercial sex as victims of sex trafficking.²⁰⁶

The end demand model is an effort to shift criminal liability from providers of commercial sex to purchasers of commercial sex to protect providers from harm associated with being arrested. This sounds like a laudable goal since there are obvious negative consequences from being arrested.²⁰⁷ But in addition to the harms associated with arrests, providers suffer harm when they are forced to operate without drawing attention from the police.²⁰⁸ Partial decriminalization creates criminal liability for providers' clients, so transactions must continue to be shielded from police detection.²⁰⁹ By continuing to criminalize the transactions for commercial sex, the end demand model cannot effectively protect sex workers.²¹⁰

1. An End Demand Example: New York's Equality Act

The legislation proposed in New York, described as the "sex trade survivors justice and equality act," is a form of end demand legislation.²¹¹ The proposed legislation repeals the existing prohibitions against prostitution²¹² and prostitution in a school zone,²¹³ as well as the defense available to individuals charged with patronizing a prostitute in school zone who were unaware of the age of the prostitute.²¹⁴ The legislation also eliminates the criminal consequences of engaging in prostitution for those who do so with the involvement of a pimp or trafficker, by providing an affirmative defense to prostitution charges if the person charged was a victim of the crimes of compelling prostitution, sex trafficking, or sex trafficking of minors.²¹⁵ However, it also removes that affirmative defense for those charged with prostitution under the more general prohibitions²¹⁶ that do not require the facilitation of anyone else.²¹⁷ The net effect of these changes is that consensual adult sex workers arrested for engaging

²⁰⁵ See Council on Foreign Rel., *supra* note 75. Some abolitionists assert that people are coerced into prostitution because they have no other options. As Catharine MacKinnon says of prostitution, "it's the last resort of people with the fewest choices, or none at all." *Id.* at 7:15.

²⁰⁶ See COALITION AGAINST TRAFFICKING IN WOMEN, *supra* note 195. The Coalition Against Trafficking in Women states explicitly its goal to end commercial sex work altogether: "Sex trafficking is intricately linked to the sex trade. It is the process through which exploiters deliver women and girls into this multi-billion dollar enterprise, where they experience unspeakable violence. To combat sex trafficking and sexual exploitation, we must work toward ending the sex trade." *Id.*

²⁰⁷ See discussion *infra* Section III (describing the imposition of arrest records, fines, and incarceration as consequences of being arrested as a sex worker).

²⁰⁸ See discussion *infra* Section III (explaining increased surveillance, financial incentives for arrests, and sexual abuse at the hands of police officers).

²⁰⁹ See Grant, *supra* note 73.

²¹⁰ *Id.*

²¹¹ See Sex Trade Survivors Justice and Equality Act, S. 6040, 2021-2022 Reg. Sess. (N.Y. 2021).

²¹² N.Y. PENAL CODE § 230.00.

²¹³ *Id.* at § 230.03.

²¹⁴ *Id.* at § 230.07; S. 6040, §§ 9-11 (repealing §§ 230.00, 230.03, and 230.07).

²¹⁵ *Id.* at § 2; N.Y. Penal Code §§ 230.01, 230.33, 230.34, 230.34-a.

²¹⁶ S. 6040, § 2; N.Y. Penal Code §§ 230.00, 230.03.

²¹⁷ S. 6040, § 2 (amending Section 230.01 of the N.Y. PENAL CODE).

in commercial sex transactions must self-identify as victims of trafficking or lose any benefit of the new protections and face criminal charges. Studies show that individuals arrested in connection with selling sex rarely self-identify as victims, even if they are being coerced.²¹⁸

The crime of compelling prostitution makes it illegal for an adult to “knowingly advance[] prostitution by compelling a person less than eighteen years old, by force or intimidation, to engage in prostitution.”²¹⁹ Victims of sex trafficking, as defined by New York law,²²⁰ also have an affirmative defense to prostitution charges.²²¹ In New York, a person can be charged with sex trafficking under state law for engaging in a variety of activities. If they “intentionally advance[] or profit[] from prostitution” by providing specific judgment-impairing drugs to someone to induce them to engage in prostitution, they violate the New York sex trafficking law.²²² Sex trafficking also includes inducing prostitution by making false statements,²²³ withholding a person’s documentation to restrict their freedom of movement in order to threaten the person into engaging in prostitution,²²⁴ requiring a person to engage in prostitution to pay off a debt,²²⁵ threatening harm to the person or the person’s property, or threatening to accuse the person of a crime, expose personal information, testify against the person, or use their official capacity in an adverse manner, to induce the person to engage in prostitution.²²⁶

The Act provides individuals charged with prostitution with an affirmative defense under the New York Equality Act if they were induced to engage in prostitution with someone over the age of 21 when the individual was under 18 (which is considered sex trafficking of a minor).²²⁷ Additionally, those who qualify as victims of human trafficking under federal law have an affirmative defense to prostitution charges.²²⁸ Studies show that individuals arrested in connection with selling sex rarely self-identify as victims, even if they are being coerced.²²⁹ For many, the interactions with police and prosecutors throughout this process are just as coercive as the behavior of those who compel them to sell sex in the first place.²³⁰

²¹⁸ INT’L HUMAN RIGHTS CLINIC, *supra* note 103, at 24.

²¹⁹ N.Y. PENAL CODE § 230.33 (2020).

²²⁰ *See id.* at § 230.34.

²²¹ *Id.* at § 230.01.

²²² *Id.* at § 230.34(1).

²²³ *Id.* at § 230.34(2).

²²⁴ *Id.* at § 230.34(3).

²²⁵ *Id.* at § 230.34(4).

²²⁶ *Id.* at § 230.34(5).

²²⁷ N.Y. PENAL CODE § 230.34-A (2020).

²²⁸ *Id.* at § 230.01.

²²⁹ INT’L HUMAN RIGHTS CLINIC, *supra* note 103, at 24. (providing insight into the way sex trafficking arrests are just as coercive as the trafficking situation).

²³⁰ *See* GLOB. HEALTH JUSTICE P’SHIP, UN-MEETABLE PROMISES *supra* note 122 at 45 (“[D]efendants in HTICs throughout the state reported experiencing high levels of violence at the hands of police. They discussed patterns of abuse and harassment, and complained about what they saw as the unfairness of the undercover tactics used to entrap them. . . . Defendants also reported experiencing verbal harassment, manhandling, and physical assault.”) (“[One] defendant described a litany of police abuses: ‘They really are disrespectful. I’ve had a police officer stick his finger in my pussy. I’ve had them lifting up my dress. I’ve had them [say] ‘oh you’re just a bird bitch, you ain’t nothing.’ ‘You’re the scum of the earth, why would you sell your body?’”). According to the study of the HTIC’s, “defendants’ first contact with the system via police is more often than not itself a point

2. Penalties for those who procure and provide commercial sex

The legislation proposed in New York also imposes mandatory fines on those who patronize a prostitute.²³¹ These fines, which are established based on the defendant's income, are directed to the victims of sexual exploitation fund.²³² Additionally, the legislation makes patrons subject to charges of advancing prostitution or profiting from prostitution—charges that patrons were previously excepted from.²³³

The fines collected in connection with criminal charges related to prostitution are designated for distribution to assist those recognized as victims of trafficking or sexual exploitation with costs associated with personal injuries loss of property; medical and counseling services; lost wages, savings, or support; transportation; occupational and vocational rehabilitation; use of shelters; housing; moving expenses; and other costs.²³⁴ While the services outlined in the proposed legislation are important, they are only available to those who are being trafficked or induced into prostitution by someone else. It is problematic that these services are not available to those who engage in consensual adult sex work without coercion or exploitation, even if those sex workers would prefer to find alternative work.²³⁵ This is where the distinction between victims of human trafficking or sexual exploitation and consensual adult sex work become critical.

Similar legislation may have been successful in other countries because in addition to eliminating criminal penalties for those who engage in prostitution, those countries provide critical services and assistance to eliminate the vulnerability that could be exploited.²³⁶

Rather than addressing the underlying causes of exploitation, this end demand proposal provides no additional protection or services for those who engage in sex work, unless that person has been induced by someone else. Further, it neither works to protect vulnerable sex workers, nor provide assistance for those who want to exit the industry. Instead, this legislation shifts the focus away from the underlying inequities at play when marginalized individuals choose sex work. Although this legislation stems from an attempt to eliminate commercial sex work altogether, it is no different than the current criminalization of sex work in terms of creating and maintaining sex workers' vulnerability to harm.

of further traumatization and victimization." *Supra* at 46.

²³¹ See S.B. S6040A, § 8, Reg. Sess. (N.Y. 2021) (adding § 80.20 to the N.Y. PENAL CODE to create mandatory fines for patronizing a prostitute).

²³² *Id.* (directing the disposition of fines in paragraph 5 of the proposed § 80.20).

²³³ *Id.* at § 4 (amending N.Y. PENAL CODE § 230.15 to remove exception for patrons of prostitution).

²³⁴ *Id.* at § 8 (directing the disposition of fines in paragraph 5 of the proposed § 80.20).

²³⁵ N.Y. PENAL CODE § 230.01 (2022) (establishing an affirmative defense to criminal charges for various prostitution criminal charges if the person arrested was a victim of sex trafficking or otherwise compelled); N.Y. CRIM. PROC. LAW § 440.10 (2022) (including compelled prostitution charges among those eligible to be vacated); S.B. S6040A, § 8 paragraph 5, Reg. Sess. (N.Y. 2021) (adding § 80.20 to the N.Y. PENAL CODE requiring fines collected from prostitution offenses be distributed to assist victims of sexual exploitation). Consensual sex workers are not compelled and would therefore not receive the benefits of the proposed legislation.

²³⁶ See generally Council on Foreign Rel., *supra* note 75.

3. Indirect Criminality: expectations of end demand legislation obscure its harmful effects

The legislative proposal in New York that would establish an end demand model is being touted as a bill that decriminalizes sex work.²³⁷ One of the organizations supporting this proposed legislation includes the tag line “Let’s end the criminalization of people in the sex trade” at the top of their website.²³⁸ That website, entitled “Sanctuary for Families,” describes the proposed legislation as an act that will “decriminalize people in prostitution” and “repeal the crime of selling sex.”²³⁹ On another website, created by New Yorkers for the Equality Model, the first heading after the name of the legislation on the section of the website providing an overview of the legislation is “Ends the Arrest and Incarceration of People in Prostitution.”²⁴⁰ Despite the use of the term “decriminalization,” even one of the bill’s sponsors, New York Senator Liz Kreuger, acknowledges that the proposal directly contradicts the idea of full decriminalization that most sex workers are fighting to achieve, and which has been introduced as a competing bill and considered over several legislative sessions.²⁴¹

Under the proposed Sex Trades Survivors Justice and Equality Act, sex workers are still subject to arrest for crimes related to prostitution; it is inconsequential if they choose to engage in commercial sex work because it is a better alternative than other jobs available to them. Though the specific criminal prohibition against prostitution will be repealed if the New York end demand proposal is enacted, consensual adult sex workers who do business independently will still be vulnerable to other charges, and they will not be eligible for the affirmative defenses or the services provided to victims of trafficking or exploitation.²⁴²

In order to arrest the patrons of prostitutes, police must surveil those who sell sex. To determine whether a sex worker can assert an affirmative defense, that sex worker must first be detained, possibly arrested, and be willing to identify as a victim.²⁴³ A sex worker who is not currently engaged in selling sex might still be helping other sex workers by providing information about potentially dangerous clients, acting as a lookout for police activity, holding personal property while the working sex workers engages with a client, providing transportation, or simply living with another sex worker to share expenses. Any of these activities, common among independent consensual sex workers, could be considered advancing prostitution²⁴⁴ and therefore would constitute the illegal act of promoting prostitution.²⁴⁵ Because many sex workers support each other by sharing information and

²³⁷ Brandon Whiting, *Legislation Would Reduce Punishment for Prostitutes, Encouraging Services and Support*, THE LEGISLATIVE GAZETTE (Feb. 2, 2021), <https://legislativegazette.com/legislation-would-reduce-punishment-for-prostitutes-encouraging-services-and-support/> [https://perma.cc/N4FG-ZZ52].

²³⁸ *It’s Time for New York State to Enact the Sex Trade Survivors Justice & Equality Act*, SANCTUARY FOR FAMILIES, <https://sanctuaryforfamilies.org/our-approach/advocacy/sts-justice-equality-act/> (last visited December 13, 2021) [https://perma.cc/B5YB-7MFZ].

²³⁹ *Id.*

²⁴⁰ *Sex Trade Survivors Justice & Equality Act*, NEW YORKERS FOR THE EQUALITY MODEL, <https://www.equalitymodelny.org/bill-overview> (last visited Dec. 13, 2021) [https://perma.cc/9SLZ-T7J6].

²⁴¹ *See* N.Y.S.B. 6040A, 2021–2022 Leg. Sess. (N.Y. 2021).

²⁴² *See* N.Y. PENAL CODE § 230.01 (2020).

²⁴³ *See supra* Section I.B.1; INT’L HUMAN RIGHTS CLINIC, OVER-POLICING SEX TRAFFICKING *supra* note 103.

²⁴⁴ *See id.* at § 230.15(1).

²⁴⁵ *Id.* at §§ 230.19 – 230.32.

even living or working spaces, they are vulnerable of being charged with promoting prostitution.²⁴⁶

Furthermore, profiting from prostitution is also a form of promoting prostitution,²⁴⁷ so sex workers whose income helps support their families may find family members vulnerable to arrest. A live-in partner or spouse of a sex worker who knows their partner or spouse engages in sex work and contributes that income to the household expenses, likely has “an agreement or understanding . . . whereby he or she participates or is to participate in the proceeds of prostitution activity.”²⁴⁸ Under New York law, this is a crime.²⁴⁹

Recall Stella and Peter, one of the fictional married couples described earlier. Though they may have chosen to earn money by having Stella engage in sexual activity with men willing to pay, under the New York Equality Act (and most similar end demand proposals) they face criminal penalties regardless of how they respond if Stella is arrested or detained for selling sex. Stella can claim she is a victim of coercion by naming her husband, Peter, as the person who forced her to sell sex. In that situation, Stella will be forced to stop earning money that the family needs and will likely have to remove herself from Peter. Peter will face enhanced criminal charges for compelling or advancing prostitution. Alternatively, Stella can choose not to identify as a victim and be charged with prostitution without the benefit of any affirmative defense. In that scenario, Peter is vulnerable to charges for profiting from prostitution because he is aware that Stella engages in commercial sex, and he benefits from her financial contribution to their household expenses.

III. INDICTING THE END DEMAND MODEL

The only way to protect vulnerable sex workers from harm is to remove the prohibition against all aspects of consensual adult commercial sex. Until commercial sex work is fully decriminalized, adult sex workers engaging in consensual sex will continue to suffer harm from people with whom they interact—including police officers and those in the legal system—and from the very groups who advocate for protection by enacting an end demand model of criminalization.

A. *End demand is not decriminalization*

As noted earlier, the end demand model of criminalization of commercial sex makes the purchase of sex illegal but does not criminally punish those who provide commercial sex for that specific act. End demand purportedly eliminates the stigma of criminal records, but this is a false flag. Although providers would not face criminal consequences for selling sex, anyone else associated with the commercial sale of sex would be subject to criminal consequences,²⁵⁰ and the activities associated with the transaction of sex work, such as advertising for clients, associating with other sex workers, or simply living with sex workers, would still lead to criminal penalties.²⁵¹ Though providers may not end up with an arrest or conviction for prostitution, they are still likely to be arrested and charged with the

²⁴⁶ See N.Y. PENAL CODE § 230.15 (2020).

²⁴⁷ *Id.* at § 230.15(2).

²⁴⁸ *Id.* at § 230.15(2).

²⁴⁹ *Id.* at §§ 230.19–230.32.

²⁵⁰ Dempsey, *supra* note 45, at 1749-50.

²⁵¹ See Luo, *supra* note 41, at 6 (detailing various charges in relation with sex work and who or what is criminalized for each charge).

associated crimes. To make matters worse, the intent of the end demand model is to increase the penalties for associated activities, so a provider who is safe from a prostitution charge is still at risk of enhanced penalties for everything related to the sale of sex.

B. *Harms of conflating sex workers and trafficking victims*

1. Individual choice

The end demand model substitutes legislative decision-making for individual choice.²⁵² Designed to eradicate all sex work, its advocates continue to conflate sex workers with victims of trafficking, viewing those employed as sex workers as unable to make independent, informed choices.²⁵³ Underlying this is the belief that all sex work is a form of violence that vitiates any form of consent.²⁵⁴ In countries where the end demand model is used, which serve as the models for proposals in the United States, sex workers are treated the same way victims of human trafficking are treated, because they are considered one and the same.²⁵⁵

New York's court system provides an example of what happens when sex workers in the United States are considered victims.²⁵⁶ The New York Human Trafficking Intervention Courts were established to address prostitution concerns.²⁵⁷ Sex workers involved in this system, whether victims of trafficking or not, are allowed to avoid criminal charges only if they successfully navigate a waiting period between arrest and the final dismissal of the criminal charges.²⁵⁸ During this time, they must meet conditions of release—including avoiding additional arrests.²⁵⁹ Yet, because they were arrested in the first place, they are now subject to more intense police surveillance, and any effort to return to their chosen profession, or even to return to their living situation without the intent to return to selling sex, means they are likely to be arrested again, which causes them to forfeit the ability to have their case dismissed.²⁶⁰

End demand criminalization leaves no room for individuals to choose consensual sex work. Though it decriminalizes the specific act of exchanging sex for money, it criminalizes all the things necessary for that to occur, including the purchaser.²⁶¹ By exposing sex workers to related criminal charges, it assures that they will be caught up in the criminal justice system. Once involved in that system, the choice to return to consensual sex work will only lead to further criminal exposure and the harms that result from that exposure.

²⁵² See *Debunking the Entrapment Model, A.K.A. The End Demand Model*, DECRIMINALIZE SEX WORK, <https://decriminalizesex.work/why-decriminalization/briefing-papers/debunking-the-entrapment-model/> [https://perma.cc/3QNR-CVYF] (last visited Sept. 21, 2022).

²⁵³ See *id.*

²⁵⁴ See *id.*

²⁵⁵ See NSWP, *supra* note 111, at 8.

²⁵⁶ See discussion *supra* Section II.B.

²⁵⁷ GLOB. HEALTH JUSTICE P'SHIP, UN-MEETABLE PROMISES, *supra* note 122 at 23.

²⁵⁸ *Id.* at 50.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ See discussion *supra* Part II; see also *supra* notes 135-138, 118-124.

Regardless of the way end demand has been characterized, if the goal is to eradicate commercial sex, it removes the ability of individuals to choose that form of work or to continue that work based on choices they have already made.

2. Decreasing potential clients makes consensual sex workers more vulnerable, not less vulnerable

The purpose of end demand legislation is to permanently disrupt sex workers' ability to generate the income necessary to sustain themselves and those who depend on them for survival.²⁶² Imagine being told that, for your own protection, your ability to generate income would be eliminated. Many people across this country faced this exact scenario beginning in March 2020 as temporary restrictions were imposed to address concerns about the COVID pandemic. Concerns about vulnerable individuals' ability to provide food and housing for themselves and their families were part of pandemic-response conversations every day. The difference between those facing temporary pandemic-related job losses and sex workers facing the prospect of end demand legislation is that sex workers' livelihoods will be permanently disrupted if the end demand system is successful.²⁶³

Under the end demand system, just like under the current system, sex workers are forced to take on riskier clients.²⁶⁴ One of the most concerning risks sex workers will face is the increased likelihood of managing clients that insist on engaging in sex without a condom.²⁶⁵ The choice between forgoing work or agreeing to unprotected sex leads many vulnerable sex workers to risk their health rather than risk the potential lost income (or the potential of a client using force to get what they have requested).²⁶⁶ Just as the current criminalization system makes sex workers more vulnerable, the end demand system will do the same, despite its advocates suggesting that it is designed to protect sex workers.

3. End demand means continued police surveillance with all its attendant risks

End demand criminalization does nothing to minimize or eliminate the risks sex workers face from interactions with the police.²⁶⁷ Removing one potential criminal charge while continuing to criminalize everything else about commercial sex means sex workers will continue to be monitored by the police.²⁶⁸ They will continue to be subjected to requests for sexual services in return for not being arrested.²⁶⁹ They will continue to be stopped by police for engaging in behaviors that are legal for someone not suspected of being a sex worker.²⁷⁰ Every risk from the police that currently exists under

²⁶² See *id.*

²⁶³ See NSWP, *supra* note 111, at 4–6 (discussing the harmful effects that end demand legislation will have on sex workers).

²⁶⁴ See Research Brief, ACLU, *supra* note 132, at 6.

²⁶⁵ See *id.* at 8.

²⁶⁶ Decker, *supra* note 149, at 192.

²⁶⁷ Luo, *supra* note 41, at 18.

²⁶⁸ Rosentel, et. Al., *supra* note 33, at 1977.

²⁶⁹ See CHALLENGING THE NORDIC MODEL, *supra* note 19 at 8 (noting that targeting those who purchase sex allows police to target sex workers' places of work and leads to continued police abuse). For discussion of harm caused by police officers, see *supra* Section I.B.2.i.

²⁷⁰ See *id.*

the criminalization scheme in place today will continue to exist under all forms of end demand criminalization.²⁷¹ Police will surveil sex workers.²⁷² They will target them to arrest those who are purchasing sex.²⁷³ They will arrest sex workers for all the crimes associated with sex work, even if not for the actual sale.²⁷⁴

In a symposium presentation and article defending the end demand model in place in Sweden, Max Waltman, a PhD candidate at Stockholm University, described an interview (before the end demand system was adopted) of a woman who had been a sex worker for twenty-five years wanted to escape:

The problem is that I cannot enter schools, courses, or workplaces. I have no papers and I cannot account for what I have done during all these years. I get anxious for the future. It is too late for me now to change my life. Nonetheless, I am afraid to get stuck in prostitution. I cannot imagine going around here until age 50-60. For me, it is now burdensome and difficult to walk the streets. It is onerous to stand here.²⁷⁵

Though this description was conducted under a stricter criminalization scheme, there is nothing about an end demand system that will change these concerns.²⁷⁶ The need to protect themselves from arrest, and to protect their potential clients from arrest—an increased risk under end demand—forces sex workers to take the same sort of steps they take under the current criminalization system.²⁷⁷ Negotiations with clients will continue to be rushed and will usually be conducted in isolated areas where any violence perpetrated by clients goes unnoticed.²⁷⁸ Rather than helping trafficking victims and consensual sex workers who may wish to leave the industry, end demand perpetrates more violence and stigma, making it even more difficult to choose other forms of work.²⁷⁹

IV. PROTECTING SEX WORKERS FROM HARM REQUIRES ELIMINATION OF CRIMINAL PENALTIES FOR CONSENSUAL COMMERCIAL SEX

The world's oldest profession will continue to exist regardless of efforts to eradicate it. Criminalization of sex work, whether completely or through an end demand system, neither eliminates sex work nor prevents people from becoming sex workers.²⁸⁰ Contrary to assertions made by advocates

²⁷¹ Luo, *supra* note 41, at 18.

²⁷² *Id.*

²⁷³ *Id.* See also CHALLENGING THE NORDIC MODEL, *supra* note 19 at 8.

²⁷⁴ Luo, *supra* note 41, at 18.

²⁷⁵ Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 MICH. J. INT'L L. 133, 145 (2011).

²⁷⁶ Luo, *supra* note 41 (noting the objective of the Nordic Model is to “make the sex industry so dangerous and violent that it ends”).

²⁷⁷ *Id.* See also CHALLENGING THE NORDIC MODEL, *supra* note 19 at 7-12.

²⁷⁸ Decker, *supra* note 149, at 191-192.

²⁷⁹ See *infra* text accompanying note 188-194.

²⁸⁰ See Waltman, *supra* note 275, at 146 (noting that after the Nordic model was enacted, the sex trade disappeared

for continued criminalization of any sort, decriminalizing sex work does not appear to affect the volume of sex workers.²⁸¹ Research in New Zealand, where sex work is fully decriminalized, demonstrates that the number of sex workers remains essentially unchanged.²⁸²

Though the social stigma associated with sex work may not change quickly, fully decriminalizing sex work will combat discrimination in key areas such as housing and financial assistance.²⁸³ Sex workers will no longer be prohibited from accessing housing options, financial assistance, or alternative employment.²⁸⁴ The stain of a criminal conviction will be eliminated, and the potential criminal liability for those who allow sex workers to operate on their property or using their websites will be eliminated. Additionally, when sex work is fully decriminalized, sex workers will be able to avail themselves of remedies when they face these sorts of discrimination. Importantly, they will also be able to request police assistance if they find themselves victims of violence or other crimes. They will no longer face the potential for arrest just by reporting a crime.

Eliminating the criminal penalties for engaging in sex work will also assist sex workers efforts to maintain their online presence. Though decriminalization may not remove the fear of liability imposed by SESTA/FOSTA, it may lessen the effect of that potential liability. And doing so would allow many sex workers to return to the safer conditions that internet transactions provided. Decriminalization will also remove the ability of financial institutions to prohibit online financial transactions based on their illegality. If the transaction is no longer illegal, there is no justification for blocking sex workers' transactions.

Finally, decriminalization will recognize the right of every individual to determine their own boundaries about their private, consensual sexual conduct. In other words, sex workers will be treated as fully functioning adults—at last.

briefly, but then returned, albeit at a diminished level).

²⁸¹ See PARLIAMENTARY LIBR., PROSTITUTION LAW REFORM IN NEW ZEALAND 5 (2012). *But cf.* Waltman, *supra* note 275, at 157 (concluding that the Nordic Model implemented in Sweden has decreased the number of women engaged in prostitution and trafficking).

²⁸² PARLIAMENTARY LIBR, *supra* note 281.

²⁸³ *Cf.* Luo, *supra* note 41, at 16, 18 (noting the consequences of an arrest record where sex work is criminalized and the positive effects in New Zealand, where it is decriminalized).

²⁸⁴ *Id.*

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