

## The Paradox of Policing as Protection: A Harm Reduction Approach to Prostitution Using Safe Injection Sites as a Guide

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### I. INTRODUCTION

N.H.I. No humans involved. That was the acronym Los Angeles police officers reportedly used in the files for murders of drug addicts and sex workers<sup>1</sup> in the mid-1980s.<sup>2</sup> The lack of police response to these killings might be the reason why one of L.A.'s most notorious serial killers walked free for almost thirty years.<sup>3</sup> Lonnie Franklin Jr., also known as the Grim Sleeper, allegedly raped and killed women<sup>4</sup> and reportedly took a picture of each one.<sup>5</sup> When he was arrested, police officers seized nearly 1,000 photos of women, some bleeding, unconscious, or presumed dead.<sup>6</sup> On August 10, 2016, *thirty-one* years after he committed his first murder, Lonnie Franklin Jr. was found guilty of ten counts of murder and one count of attempted murder and sentenced to death.<sup>7</sup>

How could such a prolific and deadly serial killer have gone undiscovered by law enforcement for decades? He chose his victims purposefully. He chose victims no one cared about. All of Franklin's victims were prostitutes,<sup>8</sup> and all of them were black.<sup>9</sup> This case illustrates how sex workers, especially non-white sex

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1. Sex workers is the term preferred by those who sell sexual services. Sex work includes more work than just prostituting. For example, sex work can include pornography actors, strippers, or dominatrices. However, in this Note, "sex work" is used to refer to prostitution. This Note will also use "sex work" and "prostitution" interchangeably, as well as "sex worker" and "prostitute" interchangeably.

2. Zachary Wigon, *The L.A.P.D. Didn't Catch an Alleged Serial Killer For 30 Years. Is It Because the Victims Were Black?*, VANITY FAIR, Dec. 18, 2014, <https://www.vanityfair.com/hollywood/2014/12/tales-of-the-grim-sleeper-nick-broomfield>.

3. *Id.*

4. He was formally charged with twelve murders. *Id.*

5. Suzanne Zuppello, *'Grim Sleeper' Serial Killer: Everything You Need to Know*, ROLLING STONE, Aug. 16, 2016, <https://www.rollingstone.com/culture/culture-features/grim-sleeper-serial-killer-everything-you-need-to-know-252246/>.

6. *Id.*

7. See Chandrika Narayan, *'Grim Sleeper' Killer Sentenced to Death*, CNN, Aug. 10, 2016, <https://www.cnn.com/2016/08/10/us/grim-sleeper-death-sentence/index.html>.

8. In the documentary, *Tales of the Grim Sleeper*, members of the community reported being told the assailant was "only killing hookers." *TALES OF THE GRIM SLEEPER* (HBO 2014).

9. Zuppello, *supra* note 5.

workers, are often treated by the police when they experience violence while working. They are treated like they do not matter, like they are not even human.

The policing of prostitution only dehumanizes and targets sex workers. Instead of arresting and prosecuting sex workers, the United States should focus on protecting and helping sex workers. This Note will propose a new solution to addressing prostitution in the United States. It argues that the United States should move to a harm reduction philosophy and institute Safe Sex Sites (SSS) modeled after Canada's Safe Injection Sites to stop the victimization of sex workers.

Section II highlights how policing prostitution no longer achieves the goals of protecting society and the women involved. Section II will start by explaining the current landscape of prostitution in the United States. It gives a brief history of prostitution in the United States, highlighting the racial tensions that are still embedded in current prostitution policing. The policing and prosecution of prostitution has always and continues to disproportionately affect women of color.<sup>10</sup> Women<sup>11</sup> of color represent only forty percent of street sex workers.<sup>12</sup> However, women of color represent fifty-five percent of women arrested for prostitution and eighty-five percent of those sentenced to jail or prison.<sup>13</sup>

Section II goes on to explore the issues with the current methods of policing prostitution in the United States. Women who are involved in sex work are often subjected to targeting and harassment by the police. The practice of targeting street sex workers creates more problems than just police harassment and possible jail time. The criminalization of prostitution and the over-enforcement of related statutes isolates women who work on the street from legal protection. Criminalization essentially eliminates reports of abuse from street sex workers. In order for a sex worker to report abuse that happened while she was working, that woman would have to admit to committing a crime. Therefore, she would have to put herself in harm's way<sup>14</sup> and increase the possibility that she will be charged with a crime.<sup>15</sup> When women who are harmed while engaging in prostitution do

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10. Natalia Benitez et al., *Prostitution and Sex Work*, 19 GEO. J. GENDER & L. 331, 333 (2018).

11. Due to the intersectional complexities involved in prostitution, this Note will focus on cisgender female sex workers. Many of the citations used throughout this Note also address issues faced by trans people and men who engage in sex work. For more information about issues the trans community faces in sex work, see generally THE URBAN JUSTICE CENTER, *REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY* (2003); JOEY MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2001).

12. Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKLEY WOMEN'S L.J. 47, 49 (1995). It should be noted that these statistics are over two decades old. Despite the author's best efforts, newer statistics could not be found. This speaks to the invisibility of these women in society that new statistics seemingly have not been gathered since 1995.

13. *Id.*

14. This problem is exacerbated when the woman is an immigrant. Immigrant sex workers sometimes do not report abuse because they fear deportation. Benitez et al., *supra* note 10.

15. Lucy Platt et al., *Associations between Sex Work Laws and Sex Workers' Health: A Systematic Review and Meta-analysis of Quantitative and Qualitative Studies*, PLOS MED., 1, 36, 42 (Dec. 11, 2018), <https://journals.plos.org/plosmedicine/article/file?id=10.1371/journal.pmed.1002680&type=printable>.

report violence, they are often not taken seriously, especially when they report a rape.<sup>16</sup>

Street prostitution is usually seen as improper and low-class. There is a general worry about public health and violence with prostitution.<sup>17</sup> However, sex workers in countries that criminalize prostitution suffer from more violence and an increased risk of HIV and/or STI transmission.<sup>18</sup> The Section also includes a brief explanation of the current legal landscape of prostitution laws.

Section III explains how Safe Injection Sites (SISs) can be an example of the harm reduction model<sup>19</sup> that the United States can apply to prostitution. SISs are facilities supervised by trained medical staff where drug users can go to inject pre-obtained illicit drugs.<sup>20</sup> These facilities not only provide a safe space to inject drugs, but also provide safe materials, clean water and needles, and an opportunity for drug rehabilitation outreach.<sup>21</sup> SISs allow trained professionals to reach drug users and provide resources to get them off drugs, if that is what the user desires.

Currently, there are no official SISs open in the United States.<sup>22</sup> However, San Francisco, Philadelphia, New York City, and Seattle are researching if SISs can operate in their cities.<sup>23</sup> Those cities are looking to Vancouver, British Columbia, Canada for a template of a functioning SIS.<sup>24</sup> Vancouver is home to Insite, North America's first SIS.<sup>25</sup> Insite has been open since 2003, and the studies about its

16. Benitez et al., *supra* note 10.

17. Platt et al., *supra* note 15.

18. *Id.* at 45.

19. The Harm Reduction Model is a theory of criminal justice reform that aims to meet people where they are. In the drug context, a harm reduction model would acknowledge that people will do drugs, but instead of solely criminalizing it, will give tools to safely do drugs while also providing outreach to help people stop using drugs. *See, e.g.*, HARM REDUCTION MODEL COALITION, PRINCIPLES OF HARM REDUCTION (2019), <https://harmreduction.org/about-us/principles-of-harm-reduction/>.

20. German Lopez, *Why Some US Cities are Opening Safe Spaces for Injecting Heroin*, VOX (Sept. 27, 2018), <https://www.vox.com/science-and-health/2018/1/25/16928144/safe-injection-sites-heroin-opioid-epidemic>.

21. *Id.*

22. For the past few years, there has been an unofficial safe injection site operating in the United States in an undisclosed city. The site is modeled after the SISs in Canada. This site is invitation only. The site has been open for three years and has reported stopping two overdoses. Amanda Holpuch, *Secret Supervised Drug Injection Facility has Been Operating in the US for Year*, THE GUARDIAN, Aug. 8, 2017, <https://www.theguardian.com/society/2017/aug/08/secret-supervised-drug-injection-facility-us-opioids-overdoses>. Additionally, Kensington, Pennsylvania, the city with the largest population in the state, recently had a swell in drug camps. Drug camps are groups of drug users who all use drugs together in an effort to look out for one another and make sure no one overdoses. Aubrey Whelan, *As Kensington Drug Camps Swell, a Plan to Clear Them Draws More Skepticism than Hope*, THE INQUIRER, May 1, 2018, <https://www.philly.com/philly/health/addiction/in-kensington-a-plan-to-clear-encampments-draws-hope-skepticism-20180501.html>

23. *See infra* note 154.

24. Lopez, *supra* note 20.

25. *Supervised Consumption Sites*, VANCOUVER COASTAL HEALTH, <http://www.vch.ca/public-health/harm-reduction/supervised-consumption-sites> (last visited Nov. 28, 2018).

effectiveness have shown only positive results.<sup>26</sup> The success of Insite and other Canadian SISs make them ideal guides for implementing harm reduction models in the United States. Section III will aim to explain the framework of SISs and their positive impact, setting up how an analogous harm reduction model could be used to better protect sex workers in the United States.

Section IV explains the harm reduction proposal for which this Note advocates. This Section will show how using SISs and other models of prostitution regulation internationally can help the United States reform its approach to prostitution. For example, in Zurich, Switzerland, the government has sanctioned “sex boxes.”<sup>27</sup> These sex boxes give sex workers a safe space to work while also requiring women to register with the government and get tested regularly.<sup>28</sup> This Note argues that by combining the structures of the Zurich sex boxes and Canada’s SISs, the United States could create a functional harm reduction model to help sex workers.

This proposal would establish sites similar to SISs called Safe Sex Sites (SSSs). Unlike the sex boxes in Zurich, these sites would not be owned and operated by the government. Rather, these SSSs would be owned and operated by nonprofit organizations. These sites would be staffed with people who are able to help women during their work if there is a problem. Like SISs, SSSs would provide items necessary for safe sex, like condoms. The sites would also provide a place for outreach. There, staffers could reach women who want help getting out of sex work. Unlike the Nevada model,<sup>29</sup> sex workers would not be obligated to pay for the use of the spaces nor would they be required to give up fifty percent of their earnings to a brothel owner. An important draw of the SSSs will be the community it could create. SSSs would allow the community of sex workers to help protect each other.

Section IV will also address some practical difficulties to operating SSSs in the United States. First, the moral backdrop of the United States has always been hostile to selling sex. Next, unlike in Zurich, prostitution is illegal in the United States. As Section III will explain, SISs in Canada operate under a constitutional exception as a medical facility. It would be hard to imagine any similar exception being allowed in the United States. If SSSs are not given legal exemption from prosecution, the sites could just serve as a bug zapper for sex workers. This Note argues that SSSs are necessary for the protection of sex workers, mainly because of the abuse and targeting that sex workers face at the hands of the police. The current state of policing of prostitution is very dangerous for sex workers. The United States should change its prostitution policy and institute a harm reduction model.

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26. See *Canada v. PHS Community Serv. Soc’y*, 2011 S.C.C. 344 (Can.) (“Insite has saved lives and improved health without increasing the incidence of drug use and crime in the surrounding area.”).

27. George Mills, *Zurich’s ‘Sex Boxes’ for Prostitutes Given Official Thumbs Up*, THE LOCAL, Aug. 22, 2018, <https://www.thelocal.ch/20180822/zurichs-sex-boxes-for-prostitutes-given-official-thumbs-up>.

28. *Id.*

29. Section II.B.1.a, *infra*.

## II. PROSTITUTION IN THE UNITED STATES

Prostitution is often called the world's oldest profession.<sup>30</sup> It has been present in the United States since its Founding.<sup>31</sup> Criminalization of prostitution in the United States was instituted to protect the morality of society, as well as the prostitutes themselves.<sup>32</sup> However, the criminalization of prostitution does not serve those goals. Rather, the continued criminalization of prostitution has resulted in more danger for sex workers. This Section explains how the United States began policing prostitution. Next, this Section will provide a breakdown of the current laws influencing prostitution prosecutions in the United States. Lastly, this Section will show how the current policing of prostitution in the United States has led to the mistreatment of sex workers rather than their protection.

## A. History of Prostitution in the United States

Prostitution was not a crime during the Founding Era. The act of selling sex was merely considered a public nuisance.<sup>33</sup> While prostitution always existed in the American society, its popularity grew with industrialization.<sup>34</sup> Not only did people begin to move into cities in droves, but immigration also increased.<sup>35</sup> In the late nineteenth and early twentieth century, many brothels were run by immigrants and were consolidated in the poor, immigrant sections of cities.<sup>36</sup>

As the twentieth century went on, the division between middle-class families and working-class and immigrant families grew.<sup>37</sup> Working-class and immigrant persons were seen as dangerous and deviant – especially sexually deviant.<sup>38</sup> The concentration of brothels in poor and immigrant areas contributed to that stereotype.<sup>39</sup> At the time, there was also a general thought that black women were inherently linked to “criminality and deviant sexuality.”<sup>40</sup> “Women of color, and

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30. Benitez et al., *supra* note 10.

31. 2 WHARTON'S CRIMINAL LAW BACKGROUND § 263 (15th ed. 2018).

32. Nancy Erbe, *Prostitutes: Victims of Men's Exploitation and Abuse*, 2 LAW & INEQ. 609, 623 (1984).

33. WHARTON'S, *supra* note 31.

34. Susan Thompson, *Prostitution: A Choice Ignored*, 21 WOMEN'S RTS. L. REP. 217, 222 (2000). Interestingly, at one point prostitution was justified as a benefit to society. *Dig: A History Podcast: Selling Sex – 19th Century New York City Prostitution and Brothels* (Sept. 3, 2017), <https://digpodcast.org/2017/09/03/19th-century-new-york-city-brothels/>. In the late nineteenth and early twentieth centuries, it was commonplace for husbands to be unfaithful. *Id.* Prostitution was seen as a benefit because men could have extramarital relations with “willing women.” *Id.* In this argument, prostitution was seen as a way to mitigate rape. *Id.*

35. Thompson, *supra* note 34.

36. RONALD WEITZER, LEGALIZING PROSTITUTION: FROM ILLICIT VICE TO LAWFUL BUSINESS 22 (2011); Lucas, *supra* note 12, at 59.

37. Lucas, *supra* note 12, at 57.

38. *Id.*

39. *Id.* at 56; As prostitution began to spread throughout the country in the late nineteenth century, it spread first to lower income areas such as Five Points in New York. *Dig: A History Podcast, supra* note 34. Five Points was known as one of the most immoral areas but was also the most interracial area at the time. *Id.*

40. In 1895, as a way to discredit anti-lynching campaigns, a Missouri journalist stated, that all black women “[were] prostitutes and all natural liars and thieves.” SARAH HALEY, NO MERCY HERE:

immigrant women in particular, were assumed to be promiscuous, indiscriminate in choice of sexual partner, and likely to be prostitutes.<sup>41</sup> During the mid-twentieth century, immigrant women and women of color were overrepresented in prostitution arrests.<sup>42</sup> Then, as is the case now, white female sex workers were seen as victims who had fallen prey to an overpowering depraved man, whereas non-white women were as seen as responsible for their own choices and immorality.<sup>43</sup>

A dichotomy of prostitution emerged: indoor sex work and street sex work. That dichotomy, which continues today, tends to track a racial divide (white vs. non-white) and a socioeconomic divide. Indoor prostitutes tend to come from a more advantaged socioeconomic background, and tend to be white.<sup>44</sup> Indoor prostitution happens inside, in brothels, massage parlors, dance halls, or on private premises. It tends to be safer than street sex work, mainly because the practice is not as visible. Additionally, most indoor prostitutes have an opportunity to pre-screen their clients.<sup>45</sup> It is estimated that eighty-five percent of sex work in the United States today is indoor sex work.<sup>46</sup>

Indoor prostitution can look very different from woman to woman. For some women working for a top escorting agency, sex can supplement lavish trips to exotic destinations, expensive dinner dates, or exclusive outings to plays or concerts.<sup>47</sup> For women working in a Nevada brothel, sex work means a twelve hour shift, every day for five to fourteen days in a row.<sup>48</sup> For each day they stay at the brothel, the women must pay forty-six dollars to rent their bedroom<sup>49</sup> and half of their earnings.<sup>50</sup>

Although street prostitutes represent a minority of sex workers, street prostitution is generally the more visible form.<sup>51</sup> It is overrepresented in media and tends to be what people think of when they consider prostitution and prostitution reform. The socioeconomic status of the women who engage in street prostitution is usually very different than women who work as indoor prostitutes.<sup>52</sup> Street prostitutes are more likely to experience homelessness, poverty, and substance abuse issues.<sup>53</sup> They are also more likely to have run away

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GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY 120 (2016).

41. Lucas, *supra* note 12, at 56.

42. *Id.* at 58.

43. *Id.* at 57.

44. WEITZER, *supra* note 36.

45. *Id.*

46. *Id.*

47. Claire Hodgson, *My Life as an Escort: Cosmo Meets the Woman Who Was Earning Up to £7,000 A Week*, COSMOPOLITAN, July 2, 2014, <https://www.cosmopolitan.com/uk/reports/longform/a27748/escort-real-life-woman-interview/>.

48. Dylan Love, *I Walked into A Nevada Brothel and My Expectations were Shattered*, BUS. INSIDER, Nov. 4, 2013, <https://www.businessinsider.com/inside-a-nevada-brothel-2013-10>.

49. *Id.*

50. *Id.*

51. Lucas, *supra* note 12, at 48.

52. *Id.* at 47.

53. *Id.*

from home at a young age.<sup>54</sup> In line with its history, street prostitution is still associated with lower class, non-white women, and the moral stigma of poverty.

## B. Current Laws Criminalizing Prostitution in the United States

Prostitution laws were designed to “provide an ascertainable standard of conduct directed at” policing the “defined evil,” of “the commercial exploitation of sexual gratification.”<sup>55</sup> Prostitution has long been thought to threaten both public and private morality and create hostility towards marriage.<sup>56</sup> The laws were designed not only because society needed to be kept away from this “evil,” but also because women “needed to be saved” from entering such a horrible life.<sup>57</sup>

Although prostitution is often called a victimless crime, some have argued that prostitution can have two victims: the sex workers themselves and the communities in which they work. Advocates who believe that women are the real victims argue that prostitutes harm themselves mentally and physically while engaging in sex work.<sup>58</sup> In addition to the psychological harm, advocates worry that sex workers are at a higher risk of abusing drugs while in the profession.<sup>59</sup> Critics have also argued that allowing or condoning prostitution encourages bad behavior in men.<sup>60</sup>

The second argument is that the communities where prostitution is prevalent are the victims. There is also a concern that prostitution in an area will increase other criminal activity.<sup>61</sup> These neighborhoods have to grapple with the presence of “scantly clad women,” overt sexual activity, as well as debris on the street, such as drug paraphernalia or used condoms.<sup>62</sup> Society tends to associate street prostitution with images of crime, drugs, and poverty. The “clean up the streets” mentality has led not only to the criminalization of prostitution, but also the aggressive policing of street prostitutes that indoor sex workers might not otherwise experience.

Public health concerns have served as another justification for criminalizing prostitution. There is an ever-present concern that the commercialization of sex will lead to high rates of sexually transmitted infections (STI). However, there is evidence that women who engage in commercial sex work are more likely to use

54. THE URBAN JUSTICE CENTER, *REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY* 22 (2003) [hereinafter *REVOLVING DOOR*].

55. *Com. v. DeStefanis*, 658 A.2d 416, 419 (Pa. Sup. Ct. 1995).

56. See *United States v. Bitty*, 208 U.S. 393, 398 (1908) (implying that the lives of prostitutes are in direct contrast with the ideas of family and morality).

57. There is a lot of literature about the validity of sex work as work. The general consensus is that consensual sex work should be left alone and treated like any other job a person could choose to do. This Note does not take the opportunity to discuss sex work as employment, though treats the choice as valid. Rather, this Note focuses on the challenges women in the field face. However, this Note is only focused on consensual sex work and not women trafficked into sexual exploitation.

58. Nancy Erbe, *Prostitutes: Victims of Men's Exploitation and Abuse*, 2 *LAW & INEQ.* 609, 623 (1984).

59. *Id.*

60. *Id.* at 626.

61. MOGUL ET AL., *supra* note 11, at 60; Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 *FLA. L. REV.* 1333, 1341 (2016).

62. *Id.*

a condom.<sup>63</sup> There may be more incentives for women who engage in commercial sex to use condoms because getting an STI would negatively affect their livelihood.

Even if there is an increased possibility of STI transmission by sex workers, the current laws and policing tactics do nothing to protect the women, their clients, or the public from STI transmission. For example, when searching a woman to determine if she is a prostitute, police check to see the number of condoms she is carrying.<sup>64</sup> The more condoms she is carrying, the higher the chance that the police will assume she is engaged in prostitution and arrest her.<sup>65</sup> This may discourage sex workers from carrying condoms, which could increase STI transmission. To understand the policing of prostitution and the problems it causes for sex workers, it is first important to understand the laws the police are enforcing.

### 1. State Laws

Regulating prostitution is a state right, and states may decide whether or not they want to criminalize prostitution and to what extent they want to criminalize it.<sup>66</sup> While some federal laws may implicate prostitution,<sup>67</sup> federal laws can only apply when there is interstate commercial activity.<sup>68</sup> Prostitution is currently illegal everywhere in the United States except ten counties in Nevada.<sup>69</sup>

Generally, prostitution requires three elements: sexual activity, compensation, and intent.<sup>70</sup> But since each state can regulate prostitution however it chooses, the legal standard of what constitutes prostitution varies between jurisdictions. The variance comes from how each state defines those three elements.

For example, would it be criminal if a prostitute approaches a man on the street and offers to perform assisted masturbation in exchange for food? At face value, this looks like an exchange of something of value for performance of a sexual act, which is what most people think of as prostitution. However, it is possible for this hypothetical conduct to not be criminalized in all fifty states. Louisiana, for instance, defines prostitution as the “practice by a person of indiscriminate sexual intercourse with others for compensation” and defines sexual intercourse as anal, oral, or vaginal intercourse.<sup>71</sup> Under Louisiana’s statute, assisted masturbation for food would not qualify as sexual activity. The

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63. Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 550 (2000).

64. See MOGUL ET AL., *supra* note 11, at 62.

65. *Id.*

66. See *Hoke v. United States*, 227 U.S. 308, 321 (1913) (stating “[t]here is unquestionably a control in the States over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime”).

67. Two examples, Stop Enabling Sex Traffickers Act and Fight Online Sex Trafficking Act, are discussed in the next section.

68. *Hoke*, 227 U.S. at 322.

69. U.S. *Federal and State Prostitution Laws and Related Punishments*, PROCON (May 4, 2018), <https://prostitution.procon.org/view.resource.php?resourceID=000119>. Until 2009, Rhode Island did not criminalize indoor prostitution. Benitez et al., *supra* note 10, at 335.

70. 63C AM. JUR. 2d *Prostitution* § 1 (Aug. 2018); Prostitution can also be criminalized under general loitering statutes.

71. LA. CRIM. CODE ANN. § 14:82 (2017).



same would be true in Maine because Maine requires an exchange of pecuniary benefit,<sup>72</sup> although the outcome could be different if the food was treated as a pecuniary benefit.<sup>73</sup>

a. Nevada

The biggest outlier in American prostitution laws is Nevada. Nevada state law makes it “unlawful for any person to engage in prostitution or solicitation of prostitution therefore, except in a licensed house of prostitution.”<sup>74</sup> Licensed brothels can only be in counties that have a population of 700,000 persons or less.<sup>75</sup> There are currently sixteen operational brothels in Nevada.<sup>76</sup> In order to be employed at a licensed brothel, a person has to submit to health testing at the state public health laboratory.<sup>77</sup> The testing checks potential sex workers for all known STIs and HIV/AIDS.<sup>78</sup> In addition to the testing required to start working, sex workers must also be tested for STIs weekly and tested for HIV monthly while they are working.<sup>79</sup> Furthermore, state law requires all sex workers to use a condom during any sexual contact.<sup>80</sup>

Once the sex worker is hired by a brothel, there are additional requirements and regulations. Women who work in legal brothels describe themselves as independent contractors.<sup>81</sup> Each woman sets her own prices and boundaries for client interactions.<sup>82</sup> While each brothel has different procedures on how women can approach clients, a few things are consistent. First, the initial interactions happen in a common area, usually the parlor of the house.<sup>83</sup> Second, prices cannot

72. ME. STAT. tit. 17-A § 851 (1977).

73. A search through Maine case law did not result in any cases defining benefit within the prostitution statute. This interpretation of the statute is based on the definition of the word pecuniary: “consisting of or measured in money; of or relating to money . . .” *Pecuniary*, MERRIAM-WEBSTER (2018), <https://www.merriam-webster.com/dictionary/pecuniary>.

74. NEV. REV. STAT. § 201.354 (2017).

75. NEV. REV. STAT. § 244.345 (2017). Brothels are not legal in Clark County, which contains Las Vegas, or in Washoe County, which contains Reno. Michelle Rindels, *The Indy Explains: How Legal Prostitution Works in Nevada*, THE NEV. INDEP., May 27, 2018, <https://thenevadaindependent.com/article/the-indy-explains-how-legal-prostitution-works-in-nevada>. Additionally, Carson City, Nevada’s capital, outlaws prostitution through municipal ordinance. *Id.*

76. Since brothels are regulated by individual counties like any other business, there is no official list of brothels currently operating in Nevada. The number sixteen is an estimate based on how many brothels had functioning websites or advertisements in 2018.

77. NEV. ADMIN. CODE § 441A.800 (2018).

78. *Id.*

79. *Id.*

80. NEV. ADMIN. CODE § 441A.805 (2018).

81. Cheryl Wischhover, *What It’s Like to Work in a Legal Nevada Brothel*, COSMOPOLITAN, Oct. 15, 2015, <https://www.cosmopolitan.com/sex-love/news/a47763/what-its-like-to-work-in-a-legal-nevada-brothel/>.

82. *Id.*

83. Michael Martinez, *What to Know About Nevada’s Legal Brothels*, CNN, Oct. 19, 2018, <https://www.cnn.com/2015/10/14/us/lamar-odom-nevada-brothels/index.html>.

be negotiated in the public spaces of the house; they must be discussed in the privacy of the woman's bedroom.<sup>84</sup>

The Nevada model is not always beneficial for sex workers. Financial operations of the brothels illustrate one downside. Women who work in the brothels are required to pay rent to use the space.<sup>85</sup> On top of that, women are required to give fifty percent of their earnings to the brothel.<sup>86</sup> Additionally, women who work in Nevada have no control over their schedules. The women have to work twelve hour shifts.<sup>87</sup> Usually, women must stay at least one week at a time.<sup>88</sup> While the regulation of Nevada's sex industry is used as a positive example for legalizing prostitution, regulating women's bodies also takes away some of their autonomy.

#### b. State Attempts at Reform

Recent attempts to curb human trafficking have led to the reform of prostitution laws. Although human trafficking and prostitution can be two different enterprises, they often overlap, and thus are sometimes treated as one issue. The pressure to stop human trafficking has led to some states instituting new initiatives that have impacted sex workers as well. Sex trafficking is an issue on the forefront of many minds, and the political debate usually centers on the impact of trafficking on children.<sup>89</sup> However, conflating sex trafficking with sex work leads to a crackdown on consensual commercial sexual activity.<sup>90</sup>

One example can be found in New York state courts. In 2013, New York announced a state-wide initiative called Human Trafficking Initiative Courts (HTICs) in an attempt to change the way sex workers are treated in the judicial system.<sup>91</sup> The motivation behind these courts is well meaning. The courts were started to give women arrested for prostitution access to resources and an alternative to prison.<sup>92</sup> These diversion courts were also seen as an option to break

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84. *Id.*

85. Love, *supra* note 48.

86. *Id.*

87. Wischhover, *supra* note 81.

88. *Id.*

89. Tina Horn, *How a New Senate Bill Will Screw Over Sex Workers*, ROLLING STONE, Mar. 23, 2018, <https://www.rollingstone.com/politics/politics-features/how-a-new-senate-bill-will-screw-over-sex-workers-205311/>. SESTA (a federal bill discussed below in Section III.A.2.) was popularized using celebrity endorsements and advertisements that touted the bill as a way to protect "children and girls from serial rape." *Id.*

90. To be very clear, this Note does not in any way advocate for doing away with all laws aimed at curbing human trafficking. Nor does this Note see any value or good in human or sex trafficking. It is the opinion of this author that human and sex trafficking are horrible crimes and need to be addressed. Rather, this Note argues that the broad scope of these new laws aimed at curbing human trafficking does a lot of harm to consensual sex work. Any laws aimed at human trafficking should be narrow enough to allow for consensual sex work.

91. Jonathan Lippman, *Announcement of New York's Human Trafficking Intervention Initiative*, CTR. FOR CT. INTERVENTION, Sept. 25, 2013, <https://www.courtinnovation.org/articles/announcement-new-yorks-human-trafficking-intervention-initiative>.

92. *Id.*

the cycle for women who repeatedly find themselves arrested for prostitution.<sup>93</sup> Women are assumed to be victims, rather than criminals.<sup>94</sup> The most common outcome for a first offense is to complete five counseling sessions at a counseling center chosen by the court.<sup>95</sup> After completing the counseling program to the judge's satisfaction, the charges are dropped. While these courts seem like good reform options, these courts focus more on the impact on the community than the impact on the women involved.<sup>96</sup>

HTICs do not address some of the biggest harms sex workers face. HTICs are diversion courts where sex workers are still prosecuted for prostitution.<sup>97</sup> In order to receive diversion, sex workers must still experience the trauma of being arrested. These women are still at risk of harm from the police during the arrests. While the court vows to treat these women as victims, there is no guarantee the police will do the same.<sup>98</sup> Once in the program, the threat of incarceration hangs over the sex workers at every turn. Treatment is mandated and administered on the court's terms.<sup>99</sup> Attending five counseling sessions could be cost prohibitive for some women. And, being convicted of the underlying charge and consequently incarcerated is still a real possibility for many women in the HTICs.<sup>100</sup>

The establishment of HTICs also does not eliminate racial profiling by the police who enforce anti-prostitution laws. Most of the defendants that come through those courts are poor women of color.<sup>101</sup> In the HTIC in Queens, New York, most of the women are from Latin America or Asia.<sup>102</sup> In 2014, forty percent of the defendants in that court room were Asian and most of them were undocumented.<sup>103</sup> As a result, HTICs have become riddled with immigration officers, such as Immigration and Customs Enforcement (ICE) officers, waiting to make an arrest of an undocumented defendant who has been brought to this

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93. Liz Robbins, *In a Queens' Court, Women in Prostitution Cases are Seen as Victims*, N.Y. TIMES, Nov. 21, 2014, <https://www.nytimes.com/2014/11/23/nyregion/in-a-queens-court-women-arrested-for-prostitution-are-seen-as-victims.html>.

94. *Id.*

95. *Id.*

96. For example, Philadelphia has a similar diversionary program called Project DAWN. Tara Murtha, *A New Dawn: Philly Court Uses Compassion to Fight Prostitution*, PHILA. WKLY., Aug. 3, 2010, [http://www.philadelphiaweekly.com/news/a-new-dawn-philly-court-uses-compassion-to-fight-prostitution/article\\_2b6f1f3c-7475-5deb-b553-c919ad644734.html](http://www.philadelphiaweekly.com/news/a-new-dawn-philly-court-uses-compassion-to-fight-prostitution/article_2b6f1f3c-7475-5deb-b553-c919ad644734.html). One goal of Project DAWN is to connect sex workers who have been arrested repeatedly with resources. *Id.* However, the other two goals of the project are to: reduce recidivism of prostitution, therefore making the community safer, and reduce the burden on tax payers who have to pay for the jailing of these offenders. *Id.*

97. Gruber et al., *supra* note 61.

98. "Despite efforts by the New York Police Department's vice enforcement squad, advocates say the message has not always filtered to the precinct level to treat women as victims when arresting them." Robbins, *supra* note 93.

99. Gruber et al., *supra* note 61.

100. *Id.*

101. *Id.*

102. Robbins, *supra* note 93.

103. *Id.*

special court to receive help.<sup>104</sup> The officers will wait outside of Queens HTIC courtroom in plain clothes with a list of undocumented defendants who are due to appear before the judge on that day.<sup>105</sup> The presence of ICE agents disrupts the positive impact HTICs were established to have. State legislators' attempts at reform, although good intentioned, so far have fallen short.

## 2. Federal Laws

Although states have the discretion to regulate prostitution, two new federal laws have created additional dire consequences for many sex workers. Federal law usually only regulates prostitution when it relates to interstate human trafficking.<sup>106</sup> However, these new federal regulations extend to cover intrastate sex work. In spring of 2018, the House and the Senate passed bills simultaneously aimed at combatting backpage, a website often used to advertise sexual services.<sup>107</sup> In April 2018, both bills were signed into law by the President.<sup>108</sup> The Senate bill, Stop Enabling Sex Traffickers Act (SESTA) amended § 230 of the Communications Decency Act to make website publishers liable if third parties post ads for prostitution, even consensual prostitution, on their sites.<sup>109</sup> The House bill, Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), made "posting or hosting online prostitution ads a federal crime."<sup>110</sup> Almost immediately after the bills were passed, websites began to take down sections commonly used by sex workers to get business.<sup>111</sup>

Both bills were aimed at combatting sex trafficking, with many proponents of the bill centering the rhetoric around helping minors who were being sex trafficked.<sup>112</sup> Unfortunately for sex workers, the vision of these laws conflates sex work and sex trafficking. The laws do nothing to protect women engaging in consensual sex work from actual harms they face. While these bills might help thwart the sex-trafficking of minors, the immediate effect of the bills has put a lot of women in danger.<sup>113</sup> Women who used websites like Backpage and Craigslist

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104. Melissa Gira Grant, *ICE is Using Prostitution Diversion Courts to Stalk Immigrants*, THE VILLAGE VOICE, July 18, 2017, <https://www.villagevoice.com/2017/07/18/ice-is-using-prostitution-diversion-courts-to-stalk-immigrants/>.

105. *Id.*

106. See *Hoke v. United States*, 227 U.S. 308, 321 (1913) (upholding the Mann Act); 18 U.S.C. § 2421, the current version of the Mann Act, prohibits knowingly transporting any individual with the intent that such individual will engage in prostitution, or any criminalized sexual activity. At its inception, the Mann Act, also known at the time as the White Slave Trade Act, made it illegal to knowingly transport any *woman or girl* to engage in prostitution, debauchery, or any other immoral act. See 227 U.S. at 317.

107. Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (Apr. 18, 2018) <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> (last visited Mar. 5, 2019) (explaining that while the bill was motivated by concerns about Backpage, it affects all websites).

108. *Id.*

109. Horn, *supra* note 89.

110. *Id.*

111. Romano, *supra* note 107.

112. See *id.*; see *supra* note 89.

113. See *supra* note 90.

to advertise their services were able to get off the streets and vet their clients before meeting them. Not only have the bills taken away sex workers' opportunities to get off the street, but they have also led to most sex worker "blacklists" being deleted off the internet. Blacklists, or "bad client lists," were lists created by the sex working community to warn other women about violent, or abusive clients. For sex workers, these lists were key to staying safe.<sup>114</sup>

In the immediate aftermath of the bill, many sex workers have been placed back into dangerous situations. In a Huffington Post article, nine sex workers were interviewed about the impact of the bills on their work. The women reported that the new laws have negatively affected their lives.<sup>115</sup> Former abusive pimps and clients have been using the new laws to their advantage, trying to reel women back into exploitative situations.<sup>116</sup> One woman interviewed noted the dangerous impact these laws are having on LGBT and minority women: "they are facing homelessness, they are going without food, they have to lower their rates, they are having to take unsafe risks when meeting clients."<sup>117</sup>

These laws have forced women into dangerous situations in two ways: women have to go back to the streets to find their clients, and they are no longer able to pre-screen their clients.<sup>118</sup> This bill also takes away the ability to create a safe place to do sex work.<sup>119</sup> Advertising on the internet allowed women to control their own clientele, income intake, and safety.<sup>120</sup> They also allowed women to get off the street and away from dangerous situations.<sup>121</sup> Now, after approaching clients on the street, most women risk their safety by engaging in sexual acts in the clients' cars. Taking away the Internet as a tool for sex work also takes away safety measures for sex workers.<sup>122</sup>

The passage of these laws has also impacted local communities. In San Jose, California, there was a rise in street sex work in known prostitution areas.<sup>123</sup> Not only were there more women working as prostitutes on the street, but there were also more men attempting to buy sexual services.<sup>124</sup> The conflation of consensual and nonconsensual sex work by SESTA and FOSTA have created more danger for prostitutes by forcing many back on to the streets where there is violence. Unfortunately for those women consensually engaging in sex work, neither law considered or protected them.

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114. Emily McCombs, *'This Bill Is Killing Us': 9 Sex Workers On Their Lives in the Wake of FOSTA*, HUFFINGTON POST, May 11, 2018, [https://www.huffingtonpost.com/entry/sex-workers-sesta-fosta\\_us\\_5ad0d7d0e4b0edca2cb964d9](https://www.huffingtonpost.com/entry/sex-workers-sesta-fosta_us_5ad0d7d0e4b0edca2cb964d9).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*; Romano, *supra* note 107.

119. McCombs, *supra* note 114; Romano, *supra* note 107.

120. McCombs, *supra* note 114.

121. *Id.*

122. *Id.*

123. Timothy Williams, *Backpage's Sex Ads Are Gone. Child Trafficking? Hardly.*, N. Y. TIMES, Mar. 11, 2017, <https://www.nytimes.com/2017/03/11/us/backpage-ads-sex-trafficking.html>.

124. *Id.*

### C. Policing of Prostitution

The pressure to crack down on human trafficking has led to a resurgence in policing and prosecuting prostitution. As explained above, sometimes the issues of prostitution and sex trafficking can overlap. However, attempting to curb human trafficking by criminalizing consensual prostitution can inadvertently harm consensual sex workers.<sup>125</sup> In addition to the intensified scrutiny of prostitution engendered by renewed anti-trafficking efforts, street sex work is often targeted in campaigns to “clean up our streets.”<sup>126</sup> The harm done to these women needs to be redressed by switching the focus from policing prostitution to protecting prostitutes. There are three main issues with the current state of policing prostitution: (1) police targeting of sex workers, (2) police abuse of sex workers, and (3) the lack of protection and access to resources for sex workers. Because of these issues, the policing and criminalization of prostitution is no longer consistent with the initial motivations for criminalizing prostitution.

Police do not consistently enforce prostitution laws and tend to exclusively target the most visible sex workers: street prostitutes.<sup>127</sup> The negative connotation of street sex work as dirty and depraved tends to lead to harsher policing in lower-income areas. Criminalization of sex work operates similarly to the criminalization of drug use in America.<sup>128</sup> Criminalization of drug use and prostitution are often associated with public health rationales, societal wellbeing, and “cleaning up the streets.” Sex workers constantly feel targeted by police officers; “[t]hey want [them] out of sight, underground, dead, or easy to arrest.”<sup>129</sup> This constant feeling of being targeted increases distrust of the police among sex workers. In the current scheme of policing, even if police officers had resources to give to sex workers, it is unlikely that sex workers would trust the police enough to receive the help.

There is also a racial disparity in how prostitution is policed. Street prostitutes, who tend to be poorer and non-white, are more likely to be arrested and targeted by the police than indoor prostitutes.<sup>130</sup> Although street prostitution is the least utilized form of sex work, accounting for less than twenty percent of prostitutes, street prostitutes account for ninety percent of prostitutes arrested.<sup>131</sup> Fifty-five percent of prostitutes arrested and eighty-five percent of prostitutes incarcerated are women of color.<sup>132</sup>

Police targeting is unsafe generally, but it is especially unsafe for the women involved in sex work and their clients. One way police officers instigate interactions with prostitutes is by searching their person or bag for more than one

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125. See *supra* note 90.

126. MOGUL ET AL., *supra* note 11.

127. Benitez et al., *supra* note 10, at 333.

128. Jasmine Sankofa, *From Margin to Center: Sex Work Decriminalization is a Racial Justice Issue*, AMNESTY INT'L, <https://www.amnestyusa.org/from-margin-to-center-sex-work-decriminalization-is-a-racial-justice-issue/> (last visited Feb. 19, 2019).

129. McCombs, *supra* note 114.

130. Lucas, *supra* note 12, at 48.

131. *Id.* at 49.

132. *Id.*

condom.<sup>133</sup> This practice can lead to sex workers not carrying condoms for fear of a police interaction.<sup>134</sup> If a police officer does find condoms on an alleged sex worker, they will often confiscate them.<sup>135</sup> These practices, along with the practice of confiscating needles, are positively correlated with an increased risk of HIV or STI transmission.<sup>136</sup>

Second, sex workers often suffer abuse at the hands of the police. This abuse can take many forms, including: “arbitrary arrest and detention, verbal harassment, intimidation, humiliating and derogatory treatment, extortion, forcible displacement, physical violence, gang rape, and other forms of sexual violence during raids and in police custody.”<sup>137</sup> In a 2002 study of sex workers in Chicago, twenty-four percent of street workers who reported being raped stated that the perpetrator was a police officer.<sup>138</sup> The same study found that approximately twenty percent of sexual violence against sex workers was attributed to police officers.<sup>139</sup> In another study done in New York City, thirty percent of sex workers interviewed reported that a police officer had threatened them with violence.<sup>140</sup>

Reports of police violence against sex workers are not limited to large metropolitan cities. In 2003, two police officers were arrested for multiple counts of rape and harassment in Eugene, Oregon.<sup>141</sup> Officer Roger Magana assaulted thirteen women, and Officer Juan Lara assaulted seven women.<sup>142</sup> In 2004, Officer Magana was sentenced to ninety-four years in prison.<sup>143</sup> Officer Magana committed his assaults for almost eight years before he was finally caught and prosecuted.<sup>144</sup> Despite multiple complaints against him, Officer Magana was able to get away with his abuse so long because the complaints were reportedly dismissed as “grumblings of junkies and prostitutes.”<sup>145</sup>

Lastly, the current state of policing prostitution does not lead to police addressing the issues sex workers face. As evidenced by the introduction story about the L.A.P.D.’s N.H.I. policy, sex workers are often stripped of their humanity. Street sex workers are more likely to experience violence while working than indoor prostitutes, at the hand of clients, pimps, and the police.<sup>146</sup> In

133. See MOGUL ET AL., *supra* note 11, at 62.

134. Platt et al., *supra* note 15, at 2.

135. See MOGUL ET AL., *supra* note 11, at 62.

136. *Id.* at 9.

137. *Id.* at 36.

138. JODY RAPHAEL & DEBORAH SHAPIRA, SISTERS SPEAK OUT: THE LIVES AND NEEDS OF PROSTITUTED WOMEN IN CHICAGO 20 (Aug. 2002), <http://media.virbcdn.com/files/79/FileItem-149903-sisterspeakout.pdf>.

139. *Id.*

140. REVOLVING DOOR, *supra* note 54, at 7.

141. Nancy Phillips, *Two Officers Left an Oregon City Reeling*, INQUIRER, Mar. 29, 2007, [http://www.philly.com/philly/news/special\\_packages/inquirer/Two\\_officers\\_left\\_an\\_Oregon\\_city\\_reeling.html](http://www.philly.com/philly/news/special_packages/inquirer/Two_officers_left_an_Oregon_city_reeling.html).

142. *Id.*

143. *Id.*

144. *Id.*

145. MOGUL ET AL., *supra* note 11, at 65.

146. Benitez et al., *supra* note 10, at 333.

order to report the violence committed against them, they would have to confess to a crime by admitting they were prostituting at the time of the attack. The fear of arrest can keep many women from reporting any violence.<sup>147</sup> When a sex worker is a woman of color or a drug user, the chance that she reports violence declines even more.<sup>148</sup>

Even when women do report violence suffered during prostitution, they are often not believed.<sup>149</sup> Some sex workers even report being told that they should accept the violence they suffer as “what they get” for doing the work they do.<sup>150</sup> Women have also stated that when they try to report sexual violence, police officers express doubt that a sex worker could even be raped.<sup>151</sup> Furthermore, some women trying to stop engaging in sex work are denied help from various institutions because of their involvement in sex work.<sup>152</sup>

The criminalization and stigmatization of prostitution leads to a class of women being unprotected by officers hired to “police and protect.” In order to stop the victimization of street prostitutes, the United States must change the way it handles prostitution. Instead of using state resources to arrest prostitutes, those resources should be redirected to protect and help street sex workers. The criminalization of prostitution cannot continue without perpetuating abuse of sex workers. The United States must move to a harm reduction model in order to end the victimization of sex workers.

### III. SAFE INJECTION SITES

The United States should look to the harm reduction model used to deal with the opioid crisis in Canada. A harm reduction model assumes that while it would be better if nobody used illicit drugs, if people are going to use drugs, they should have a safe space to do so.<sup>153</sup> Vancouver is attempting to tackle its opioid crisis by supporting, instead of arresting, drug users. Tactics designed to solve drug problems can inform solutions for prostitution. As explained above, drug diversion courts have been used as a model to start diversionary courts for sex workers and victims of sex trafficking.

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147. Platt et al., *supra* note 15, at 36.

148. *Id.* at 37.

149. REVOLVING DOOR, *supra* note 54, at 8.

150. *Id.*

151. Platt et al., *supra* note 15, at 36.

152. See YOUNG WOMEN’S EMPOWERMENT, GIRLS DO WHAT THEY HAVE TO DO TO SURVIVE: ILLUMINATING METHODS USED BY GIRLS IN THE SEX TRADE AND STREET ECONOMY TO FIGHT BACK AND HEAL (2009), <https://www.nswp.org/sites/nswp.org/files/Girls%20do%20what%20they%20have%20to%20do%20to%20survive%20A%20study%20of%20resilience%20and%20resistance.pdf> (stating that some sex workers reported being denied help from police officers, social workers, and hospitals when trying to get treatment for violence or drug treatment); see also Platt et al., *supra* note 15, at 42 (quoting a woman who explains all insurance forms ask if you have ever been a prostitute, she further explains that she cannot even lie because once the insurance company pulls her medical records and sees how often she gets STI checks, it will be obvious that she is a sex worker).

153. HARM REDUCTION MODEL COALITION, PRINCIPLES OF HARM REDUCTION (2019), <https://harmreduction.org/about-us/principles-of-harm-reduction/>.



Safe Injection Sites (SISs) have been a successful tool in fighting the opioid crisis in Canada and are a possible solution to the growing opioid crisis in the United States. In 2016, there were 63,600 deaths due to drug overdose in the United States.<sup>154</sup> The CDC estimated that in 2017, there were 72,000 drug overdose deaths.<sup>155</sup> This growing epidemic has led to a search for new solutions. SISs have become an emerging, albeit extremely controversial, solution to the growing drug overdose epidemic. Vancouver's harm reduction model is familiar to U.S. policy makers. Multiple U.S. cities are considering opening their own SISs.<sup>156</sup> A look at Vancouver's SISs can provide insight into the harm reduction model generally and into a possible solution to help protect sex workers in the United States.

A SIS is a place where drug users can go to safely inject pre-obtained illicit drugs under the supervision of trained staff.<sup>157</sup> SISs also provide sterile equipment used to inject drugs, like needles or syringes, and safely dispose of that equipment.<sup>158</sup> The main appeal of SISs is the supervision by trained staff who are ready to respond to overdoses, and have already saved hundreds of lives.<sup>159</sup> Additionally, staff provide resources to members of the community who are trying to overcome their drug addiction. There are not currently any sanctioned SISs operating in the United States, however, there are several unofficial SISs.<sup>160</sup>

Several U.S. cities are preparing to open their own official SISs, including New York City, Philadelphia, San Francisco, and Seattle.<sup>161</sup> In August 2018, the California State Senate passed Assembly Bill 186 which would authorize San

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154. CDC, OPIOID OVERDOSE DATA (2017), <https://www.cdc.gov/drugoverdose/data/statedeaths.html>.

155. *Id.*

156. Lopez, *supra* note 20.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*; Azeen Ghorayshi, *There are Now Two Cities in the US That Will Allow 'Safe Injection Sites' For Heroin Users*, BUZZFEED NEWS, Jan. 23, 2018, <https://www.buzzfeednews.com/article/azeenghorayshi/philadelphia-safe-injection-site>. States looking into Safe Injection Sites are already facing federal backlash. In August 2018, then-Deputy Attorney General Rod Rosenstein published an Op-Ed in the New York Times admonishing the cities who are trying to open SISs. Rod Rosenstein, *Fight Drug Abuse, Don't Subsidize It*, N.Y. TIMES, AUG. 27, 2018, <https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html>. Rosenstein called SISs a threat to public safety, dangerous and "illegal." *Id.* He also discredited evidence that the SISs can help get drug users clean or at the very least keep them safe. *Id.* In response to the Op-Ed, former Pennsylvania Governor Ed Rendell, told NPR: "I have a message for Mr. Rosenstein: I'm the incorporator of the safe injection site nonprofit and they can come and arrest me first." Bobby Allyn, *'Come Arrest and Me': Former Pa. Governor Defies Justice Department on Safe Injection*, NPR, Oct. 10, 2018, <https://www.npr.org/sections/health-shots/2018/10/10/656268815/come-and-arrest-me-former-pa-governor-defies-justice-department-on-safe-injectio>. The Trump administration responded by filing a civil lawsuit against Safehouse to stop the organization from opening an SIS. German Lopez, *The Trump Administration is Taking Legal Action Against Philadelphia's Safe Injection Site*, VOX (Feb. 6, 2019), <https://www.vox.com/policy-and-politics/2019/2/6/18214021/philadelphia-safe-injection-site-trump-justice-department>. The basis for the lawsuit is the federal crack house statute which prohibits operating a dwelling where drugs are used. *Id.* Despite the new lawsuit, the advocates for SISs in Philadelphia are not backing down. *Id.*

San Francisco to open the first sanctioned SISs.<sup>162</sup> San Francisco's site was modeled after SISs in other countries. The bill was proposed to authorize sites that would "provide medical supervision to consumers of pre-obtained drugs, in order to save lives, connect individuals with vital services like detoxification and housing, and reduce public nuisance and potentially hazardous litter."<sup>163</sup> The state senate's committee on public safety cited statistics showing the success of Canadian safe injection sites.<sup>164</sup> However, on October 1, California Governor Jerry Brown vetoed the bill, putting the opening of San Francisco's SISs on hold indefinitely.<sup>165</sup>

Insite, North America's first supervised consumption site, another term for SISs, opened in 2003.<sup>166</sup> Although drugs are illegal in Canada, Insite operates under a constitutional exemption that allows the center to function without interference from federal drug laws.<sup>167</sup> Insite is located in the Eastside neighborhood of Vancouver, one of the most notorious drug neighborhoods in Canada, as well as its "poorest postal code."<sup>168</sup> Insite is overseen by the leading health agency in Vancouver and is almost fully funded by the public.<sup>169</sup> Insite has succeeded for two reasons: anonymity and training.

Anonymity makes patrons feel more comfortable.<sup>170</sup> When Insite's visitors check-in, they have to give a name, but fake names are often given and not questioned.<sup>171</sup> Insite does not provide drugs; people must bring their own. However, Insite does offer drug testing so users can ensure their drugs are not laced with fentanyl or other dangerous lacing agents before they inject.<sup>172</sup> Insite has thirteen individual booths for injection, each with a spotlight over them for supervision purposes.<sup>173</sup> There are also clean needles and clean water for injections.<sup>174</sup> Within the building, there is also a lounge with food where patrons

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162. Nuala Sawyer, *California Senate Passes Landmark Safe Consumption Site Bill*, SF WKLY., Aug. 21, 2018, <http://www.sfweekly.com/news/california-senate-passes-landmark-safe-consumption-site-bill/>.

163. S. AB 186, Committee on Pub. Safety (2018).

164. *Id.*

165. Adam Brinklow, *Gov. Brown Vetoes San Francisco's Safe Injection Bill*, SF CURBED, Oct. 1, 2018, <https://sf.curbed.com/2018/8/22/17768842/sf-senate-safe-injection-ab-186>.

166. *Supervised Consumption Sites*, *supra* note 25.

167. PHS Community Services Society, 2011 S.C.C. 44. Canadian law grants the Minister of Health the discretion to grant exemptions from prosecution under a law for circumstances due to medical necessity or necessity for public safety. *Id.* The Canadian Supreme Court held that depriving Insite the federal law exemption could place the facility's clients in life threatening situations by taking away their access to the resources Insite provides. *Id.* The Court stated that the possession of drugs within the facility is vital to the facilities operation, therefore it was constitutionally necessary for Insite to be exempted from the federal laws prohibiting drug use and possession. *Id.*

168. Elana Gordon, *Lessons from Vancouver: U.S. Cities Consider Supervised Injection Facilities*, THE PULSE, July 5, 2018, <https://why.org/segments/lessons-from-vancouver-u-s-cities-consider-supervised-injection-facilities/>.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

can go after injecting drugs, counselors to speak with, and Onsite, an inpatient treatment facility.<sup>175</sup>

The other vital component of the safe injection site is supervision. Trained supervisors are able to treat overdoses immediately.<sup>176</sup> When supervisors see someone becoming unresponsive, they first try to stimulate them by talking to them.<sup>177</sup> The staff is careful to not touch someone without consent because if the individual responds, they may have past traumas that make them sensitive to touch.<sup>178</sup> If a patron does not respond, they are tipped on their back and breathing techniques are administered to bring them back to consciousness.<sup>179</sup> Then, staff administers an oxygen tank and naloxone<sup>180</sup> if necessary.<sup>181</sup>

SISs are also able to make injections safer. The individual booths are equipped with mirrors to help injections, and the trained staff can help users find a safe way to inject if they are having trouble.<sup>182</sup> But this is a feature, not a bug, of the harm reduction model. It is likely that these users would be unsafely injecting if there was no SIS. And, at least in supervised sites, they are taught how to inject more safely and can be monitored in case anything goes wrong.<sup>183</sup> It is imperative to note that the staff members do not actually stick the users and do not physically inject drugs into anyone.<sup>184</sup>

One of the less controversial function of the staff at SISs is their outreach component. At Insite, the lounge allows staff members, some of whom are former or current drug users, to speak to the drug users. The Vancouver Area Network of Drug Users (VANDU),<sup>185</sup> another SIS supported by public health funding, provides literature about treatment throughout the site.<sup>186</sup> During these conversations, staff members can offer help with housing, mental health, or any

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. Naloxone is more commonly known as Narcan. It is used to “counter the effect of opioid overdose.” *Understanding Naloxone*, HARM REDUCTION COALITION, <https://harmreduction.org/issues/overdose-prevention/overview/overdose-basics/understanding-naloxone/> (last visited Dec. 3, 2018).

181. Gordon, *supra* note 168.

182. There are some very unsafe ways to inject intravenous drugs such as in the neck or jugular. Gabriel Spitzer, *Watchful Eyes: At Peer-Run Injection Sites, Drug Users Help Each Other Stay Safe*, NPR, July 13, 2018, <https://www.npr.org/sections/health-shots/2018/07/13/619546120/watchful-eyes-at-peer-run-injection-sites-drug-users-help-each-other-stay-safe>. Staff can help find another place on the body for users to inject or show them how to safely inject in the neck if that is the only possible way. *Id.*

183. At Vancouver Area Network of Drug Users (VANDU), and other SISs, there are posters on the wall showing the safest and riskiest places on the body to inject. *Id.*

184. Gordon, *supra* note 168.

185. VANDU is one of many peer run safe injection facilities in Vancouver. Spitzer, *supra* note 180. VANDU and MOPS, another peer run site, have essentially the same set-up. *Id.* Peers, either current or former drug users, or advocates are trained to recognize the signs of overdose and treat it. *Id.* There are fewer rules at the peer run sites (mainly just no dealers and no fights) and some drug users report feeling more comfortable and less judged at the facilities run by their peers rather than the facilities run by health officials. *Id.* There have been no reported fatal overdoses at the peer run facilities. *Id.*

186. Spitzer, *supra* note 182.

other issues that arise.<sup>187</sup> SISs can provide an easy gateway for outreach because the people in need come to the people who can help.

Overall, Canadian SISs are seen as successful experiments.<sup>188</sup> Of course, there is little empirical evidence about the effect SISs have on society because the few SISs open are relatively new.<sup>189</sup> However, there have been a few studies focusing on the effects VANDU and Insite have had in Vancouver, as well as an exploratory study on the possible effects SISs could have in Philadelphia.<sup>190</sup>

These studies revealed that in the 500 meters surrounding the Insite facility in Vancouver, there was a thirty-five percent reduction in deaths, while deaths were reduced by only nine percent in other areas of the city.<sup>191</sup> Furthermore, in the first four years Insite was open, there were 1,004 non-fatal overdoses, and no reported deaths.<sup>192</sup> In 2017, Insite reported 2,151 overdose interventions.<sup>193</sup> A study conducted from 2003 to 2006 found a positive association between regular attendance at Insite and interaction with Insite counselors and enrollment in drug treatment programs.<sup>194</sup> Another study found that Insite's opening led to a thirty percent increase in the use of detoxification services.<sup>195</sup>

Drugs are often associated with a dirty or unsafe neighborhood. Because of the negative connotation of drugs, communities may oppose the construction of SISs.<sup>196</sup> One concern is that SISs might increase crime rates in the neighborhood. However, the neighborhood surrounding Insite has not seen an increase or decrease of crime rates since the opening of the facility.<sup>197</sup> Additionally, there was no observed increase of drug sales in the area surrounding Insite.<sup>198</sup> In fact, the area surrounding Insite has seen a decrease in disorder throughout the

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187. Gordon, *supra* note 168.

188. See PHS Community Services Society, 2011 S.C.C. 344 (“Insite has saved lives and improved health without increasing the incidence of drug use and crime in the surrounding area.”).

189. The only North American SISs are in Vancouver. Therefore, there is very little evidence about how SISs will function in other environments. Furthermore, most of the reporting of research about Insite and its effects of the community come from Insite itself.

190. SHARON LARSON ET AL., MAIN LINE HEALTH SYSTEM, SUPERVISED CONSUMPTION FACILITIES – REVIEW OF THE EVIDENCE (2017), [https://dbhids.org/wp-content/uploads/2018/01/OTF\\_LarsonS\\_PHL\\_ReportOnSCF\\_Dec2017.pdf](https://dbhids.org/wp-content/uploads/2018/01/OTF_LarsonS_PHL_ReportOnSCF_Dec2017.pdf).

191. Marshall et al., *Reduction in Overdose Mortality After the Opening of North America's First Medically Supervised Safer Injecting Facility*, 377 THE LANCET 1429, 1434 (Apr. 2011).

192. LARSON ET AL., *supra* note 190.

193. *Supervised Consumption Sites*, *supra* note 25.

194. Kora DeBeck et al., *Injection Drug Use Cessation and the Use of North America's First Medically Supervised Safer Injecting Facility*, 113 DRUG AND ALCOHOL DEPENDENCE 172–76 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5590717/pdf/nihms900571.pdf>.

195. Evan Wood et al., *Rate of Detoxification Service Use and Its Impact Among a Cohort of Supervised Injecting Facility Users*, 102 ADDICTION 916–19 (2007), <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1360-0443.2007.01818.x>.

196. See David Carson, Opinion, ‘Safe Injection Sites’ are Not the Answer to Our Heroin Problem, REDMOND REP. (June 29, 2017), <http://www.redmond-reporter.com/opinion/safe-injection-sites-are-not-the-answer-to-our-heroin-problem-guest-editorial/>.

197. LARSON ET AL., *supra* note 190.

198. *Id.*

neighborhood,<sup>199</sup> including a decrease in public drug injections.<sup>200</sup> Insite has also greatly contributed to the clean-up of the surrounding neighborhood through its needle exchange program, where users can quickly and discreetly dispose of used needles and get clean needles without using the injection rooms.<sup>201</sup>

Insite and the positive effects it has had on the community are an illustration of a successful harm reduction model. The harm reduction model advocates meeting people where they are, in all senses, including geographically. By putting SISs in neighborhoods most affected by drug use, the facility can directly help the surrounding community. However, bringing a SIS to an area already plagued by drug use can still worry the community, mainly with the fear that the SISs will attract additional drug users to the area.<sup>202</sup> However, research done by Insite showed no increase in the population of drug users in the immediate area surrounding Insite after the opening of the facility.<sup>203</sup>

SISs and the harm reduction model have had a positive effect in Vancouver. Refocusing the solution to the opioid crisis to assistance rather than punishment can guide the United States in improving the laws surrounding prostitution.

#### IV. SAFE SEX SITES

Instead of criminalizing street sex work, a program similar to SISs would more effectively reduce harm to sex-workers and reduce sex-trafficking. This proposal aims to take pieces from other types of reform and propose the establishment of Safe Sex Sites (SSSs). The goal of these SSSs would be to protect street prostitutes and move towards decriminalization. These SSSs would combine the features of SISs and the logistics and framework of Zurich sex boxes to create an American model. Because of the overlap between drug users and street prostitutes and the similarity between the methods for policing drug users and prostitutes in the United States, the positive effects from the implementation of SISs will transfer to the prostitution realm. However, for this model to work, there needs to be some form of legalization of prostitution, either *de facto* or *de jure*.

In 2012, Zurich approved “sex boxes” by referendum. In Switzerland, there is no law prohibiting prostitution, and it has been *de facto* legalized since 1942.<sup>204</sup> Instead, prostitution is heavily regulated.<sup>205</sup> In Zurich, prostitution is only allowed

199. *Id.*

200. *Id.*

201. *Id.*

202. The concern is sometimes called the honey pot effect. In other words, if you put a honey pot out bees from the immediate area will swarm to the pot. Additionally, bees from surrounding areas will come to the open honey pot, creating an increased dense population of bees.

203. Some downtown Vancouver business owners have even requested informal SISs near their businesses to prevent people from shooting up in their bathrooms or the alleys behind the businesses. Gordon, *supra* note 168.

204. Prostitution has always been tolerated in Switzerland. Corinne Isler, *The Normalization of Prostitution in Switzerland*, 3 DIGNITY 1, 5 (2018), <https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1097&context=dignity>. When the criminal code was enacted in 1942, there was no law written to prohibit prostitution. *Id.* In 1973, the Swiss constitutional right to economic freedom was broadened to include prostitution. *Id.*

205. *Id.*

in certain areas of the city, and sex workers must purchase daily tickets in order to work.<sup>206</sup> Moreover, sex workers must register with the city and get regular health tests in order to work.<sup>207</sup>

Before the referendum to allow sex boxes, street sex workers in Zurich faced daily violence.<sup>208</sup> The sex boxes were set up to help provide a safe space for street sex workers to work.<sup>209</sup> The referendum approved two million dollars in taxpayer funds to build the sex boxes, and additional money was set aside to operate the sites.<sup>210</sup> The sex boxes allow customers with cars to drive their vehicles into structures that look like one-car garages and customers who did not drive to go to rooms above the garages.<sup>211</sup> While there are no cameras, each box is equipped with alarm buttons that immediately summon the on-site guards in case of emergency.<sup>212</sup>

Similar to VANDU,<sup>213</sup> the SSSs proposed here would be run and supervised by other sex workers, funded by a nonprofit organization, and not regulated or funded by the government. Sex workers would set their own prices with customers and would have the protection and support of other people who understand their trade. Each site would have condoms and other necessary sanitary products. Additionally, the sites would be equipped to perform free STI testing, although these tests would not be required to use the facility. Like SISs, the creation of SSSs would help get prostitutes off the street and would keep condoms and other litter from sex off the streets near common prostitution areas. SSSs would also provide the anonymity seen in SISs. Taking pressure off of women by not requiring them to provide identification could help with outreach efforts. Most importantly, the SSSs should be set up in the areas where prostitution is already prevalent. Consistent with the harm reduction model, the SSSs should meet its target population where they are, geographically and mentally.

The SSSs would also have a big outreach component. There would be resources to help women get mainstream employment and get out of the sex work industry if they want. Additionally, there would be resources to help address other issues street sex workers often face. There would be information addressing homelessness. Lastly, there would be drug abuse information since a lot of street sex workers can develop a drug addiction.<sup>214</sup>

The main roadblock to this proposal is the current illegal status of prostitution in the United States. Zurich's Sex Boxes are effective because prostitution was already *de facto* legalized, so there was already a defined set of norms sex workers must adhere to. In the United States, it would be an uphill battle for prostitution

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206. *Id.*

207. *Id.*

208. Mills, *supra* note 27.

209. *Id.*

210. Helena Bachmann, *Sex in the City: Zurich's Prostitution 'Sex Boxes' Deemed Success in Switzerland*, USA TODAY, Aug. 24, 2018, <https://www.usatoday.com/story/news/world/2018/08/24/sex-boxes-make-legal-prostitution-safe-zurich-switzerland-europe/1083444002/>.

211. *Id.*

212. *Id.*

213. *Supra* Section III.

214. Lucas, *supra* note 12, at 47.

to be accepted. However, Nevada shows that it would not be completely foreign for prostitution to be accepted in the United States.

The illegality of prostitution in the United States also poses a problem through the threat of police interventions at SSSs. As long as prostitution is illegal, there is still a risk of negative police interactions for street sex workers. Although the illegality of prostitution is an issue, it is not an impossible barrier to overcome. In Vancouver, drugs were not legalized before SISs began to open. Rather, a medical exception was created for the facilities to operate. Police in Vancouver are still free to punish the buying and selling of drugs, but the SISs are a safe haven for drug injection. The SSSs would have to operate in a similar manner. In order for them to be effective, there needs to be an understanding that police will not raid the sites in order to enforce anti-prostitution laws. For the SSSs to work, decriminalization is necessary.<sup>215</sup>

Another big fight the SSSs would need to win is the public perception of prostitution and sex work in general. The history of prostitution in the United States has led to a negative view of sex work and the women engage in it. Current debates about decriminalization and legalization are often met with criticism because of the seemingly unsavory nature of the profession. However, the reasons touted for criminalizing prostitution (public health, protecting women, and the view of society) would all be addressed by SSSs. Sex workers would be off the street, they would be safer and protected if something unsafe starts to happen, and regulation would help prevent STIs. Additionally, the provision of condoms in the SSSs would help alleviate public health concerns.

In order for SSSs to be implemented properly, the best approach would likely be to focus on one area of the country where the sites could actually function. Insite and VANDU worked so well in Vancouver almost immediately because, consistent with the harm reduction model, the sites were established where the problem was greatest.<sup>216</sup> It is hard to tell where the problem of prostitution is largest. Most studies on the effects of criminalization of prostitution in the United States tend to focus on big cities, specifically Chicago and New York. Another option would be to focus on opening an SSS in a city that is already comfortable with SISs.<sup>217</sup> Accepting the validity of the harm reduction philosophy is an important step to opening an SSS. Operating in a city that has already accepted the harm reduction philosophy as it applies to drugs might be a helpful first step.

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215. There are many possible legal reforms to address prostitution. *De facto* decriminalization would mean the prostitution laws would stay on the books, but they would no longer be enforced. Partial decriminalization would reduce the penalties for violating prostitution laws. Next, full decriminalization would take prostitution laws off of the books. Another possible reform is legalization, which would make the act of prostitution legal but would likely require some action by sex workers to be in conformity with the laws (e.g. registering with the state). WEITZER, *supra* note 36, at 47. While selecting a legal reform is outside the scope of this Note, full decriminalization or *de facto* decriminalization would be most compatible with SSSs.

216. Gordon, *supra* note 168.

217. See Lopez, *supra* note 20.

## V. CONCLUSION

Street sex work in the United States is very dangerous for the women in that line of work. Not only do women face violence from clients and pimps, but they are also subject to targeting and violence from the police. In order to better protect these women, the United States should refocus its approach to prostitution to a harm reduction model. Vancouver's SISs are a helpful template for a harm reduction model. An analogous model, SSSs, could help reduce the amount of violence sex workers face. SSSs could bring sex workers off the street and reduce the amount of targeting and violence sex workers face. SSSs could also provide a way for women to screen their clients and provide protection while they are working. Most importantly, SSSs would give sex workers a better way to access resources. As opposed to the current state of affairs, SSSs could provide women a way out of sex work. The criminalization of sex work does not truly protect women; instead, refocusing on providing resources and safe spaces for sex workers would reduce harm and provide actual protection.