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# A BUSINESS DOING PLEASURE: COMBATting SEX TRAFFICKING BY DECRIMINALIZING SEX WORK

ANNALISE LEONELLI\*

## INTRODUCTION

On the night police officers pounded on Yang Song's door, she ran to the balcony of her fourth-floor apartment, which overlooks 40th Road in Flushing, Queens.<sup>1</sup> Four years earlier, she had arrived at John F. Kennedy Airport with a dream of opening a restaurant.<sup>2</sup> After a waitressing job failed, as well as a short-lived Chinese fast-food venture, she took a massage therapy course.<sup>3</sup> There, she learned about a "lucrative opportunity" on 40th Road.<sup>4</sup> Flushing's underground sex economy has been notorious for years.<sup>5</sup> In fact, massage parlor arrests across the United States

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<sup>1</sup> See Dan Barry & Jeffrey E. Singer, *The Case of Jane Doe Ponytail*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/interactive/2018/10/11/nyregion/sex-workers-massage-parlor.html> [<https://perma.cc/6G3Y-F9KN>] (furnishing a detailed account of the life and death of Yang Song).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See Nicholas Kulish et al., *Behind Illicit Massage Parlors Lie a Vast Crime Network and Modern Indentured Servitude*, N.Y. TIMES (Mar. 2, 2019), <https://www.nytimes.com/2019/03/02/us/massage-parlors-human-trafficking.html> [<https://perma.cc/4JZ9-UJYY>] ("Law enforcement officials said there were an estimated 9,000 illicit massage parlors across the country, from Orlando to Los Angeles. The epicenter is the bustling Chinatown in Flushing, Queens. Women—typically Chinese, but also Korean, Thai and East European—learn the trade and are sent out to places like Virginia,

consistently lead back to addresses in Flushing.<sup>6</sup> Because massage parlors in Flushing disappear and reappear regularly, and there is confusion about which ones are licensed, the NYPD's attempts to crack down on these businesses have been largely unsuccessful.<sup>7</sup> But that does not stop them from trying.

On the night that police officers pounded on her door, Yang Song had already circled through New York's Human Trafficking Intervention Courts (HTICs) multiple times. The HTICs seek to provide sex workers and trafficking victims with a way out of the sex trade by mandating services such as therapy in lieu of jail time.<sup>8</sup> In fact, Yang Song's fifth court-mandated session with Restore NYC, a nonprofit organization that helps foreign-born victims of sex trafficking, was just four days away.<sup>9</sup> Months earlier, Yang Song disclosed to her lawyer that a police officer had put a gun to her head and forced her to perform oral sex.<sup>10</sup> Whether any of this went through Yang Song's mind on the night the police pounded on her door is unknown.<sup>11</sup> And whether Yang Song jumped, fell, or was pushed from the balcony when her body

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Iowa, Texas and Florida. . . . According to Lori Cohen, director of Sanctuary for Families, an antitrafficking initiative, 'Flushing is the center of this network. . . . [These women] are showing up in different parts of the country, but all of them have addresses in Flushing, Queens.'").

<sup>6</sup> Barry & Singer, *supra* note 1.

<sup>7</sup> *See id.* (noting industry-specific challenges that hinder law enforcement).

<sup>8</sup> *Id.*; see Michelle Chen, *Why Do Sex-Work Diversion Programs Fail?*, THE NATION (Sept. 25, 2015), <https://www.thenation.com/article/archive/why-do-sex-work-diversion-programs-fail/> [https://perma.cc/2U4R-869N] ("Guided by recently passed state legislation aimed at criminalizing sex trafficking and rehabilitating child victims, the courts are designed . . . to route the participants into 'services that will assist in pursuing productive lives, rather than sending victims back into the grip of their abusers' and 'to promote a just and compassionate resolution to the victims of sex trafficking.' Upon completion, participants' criminal records can be scrubbed, if they stay arrest-free for six months."). Some court reformers have criticized the intervention courts. *See* Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1367 (2016) (arguing that the courts "legitimate interventions that are more intrusive than those administered in traditional courts").

<sup>9</sup> Barry & Singer, *supra* note 1. *See also* *About Us*, RESTORE NYC, <https://restorenyc.org/about-us> [https://perma.cc/XB7J-GB9S] ("Restore NYC is a nonprofit organization making freedom real for survivors of trafficking in the United States.").

<sup>10</sup> Barry & Singer, *supra* note 1.

<sup>11</sup> *See id.* ("The balcony was not equipped with surveillance cameras, leaving what happened next to the imagination. It is possible that Song Yang was hoping to escape, perhaps by reaching for a wire that ran vertically past her balcony. It is possible that she was trying to land on the protruding metal sign of the restaurant below. It is also possible that she intended to kill herself.").

plunged four stories down to 40th Road is also unknown.<sup>12</sup> She died the next morning.<sup>13</sup>

Was Yang Song “trafficked” into her massage parlor position, or was she there voluntarily? This is also a question without a clear answer.<sup>14</sup> The concept of sex trafficking captures the imaginations of Americans,<sup>15</sup> but questions of who qualifies as a victim and who does not have many answers—and the answers depend upon a number of circumstances, including whom you ask.

When victim-driven narratives of women and children forced into sexual servitude prevail, they invoke outrage that appears to be apolitical.<sup>16</sup> But pulling back the curtain on the anti-trafficking movement reveals factions with very different ideas about the role of the state in the abolition of trafficking. Films, television shows, and viral social media stories often present the problem as one that only white saviors like Liam Neeson and law enforcement officers can fix.<sup>17</sup> An episode of *Law & Order: Special Victims Unit*, for example, played out a scene eerily similar to the circumstances surrounding Yang Song’s death but with one glaring difference: when the massage parlor raid resulted in a Chinese worker dangling several stories high, she was saved by the detective who pursued her, wrapped in a blanket, and told in Mandarin, “Don’t be afraid.”<sup>18</sup>

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<sup>12</sup> See *id.* (noting that Yang Song may have intended only to evade the police and not to commit suicide).

<sup>13</sup> *Id.*

<sup>14</sup> See *id.* (“Emotionally manipulated by their bosses, ashamed of what they do, afraid to trust, the women rarely confide in the police or even their lawyers about their circumstances. They might be supporting a family in China, or paying back a smuggling debt, or choosing this more profitable endeavor over, say, restaurant work.”).

<sup>15</sup> See *infra* notes 34–36 and accompanying text.

<sup>16</sup> Bridget Anderson & Rutvica Andrijasevic, *Sex, Slaves and Citizens: The Politics of Anti-trafficking*, 40 *SOUNDINGS* 135, 135 (2008) (“[T]o challenge . . . some of the actions taken as a response to [trafficking], is akin to saying that one endorses slavery or is against motherhood and apple pie. Trafficking is a theme that is supposed to bring us all together. But we believe it is necessary to tread the line of challenging motherhood and apple pie while not endorsing slavery, because the moral panic over trafficking is diverting attention from the structural causes of the abuse of migrant workers.”).

<sup>17</sup> See *generally* *TAKEN* (20th Century Fox 2009) (starring Liam Neeson as a former CIA officer who rescues his daughter from human traffickers); *Law & Order Special Victims Unit* (NBC television broadcast Sept. 20, 1999-present).

<sup>18</sup> *Law & Order: Special Victims Unit: Counselor, It’s Chinatown* (NBC television broadcast Nov. 7, 2019); Tiffany Diane Tso, “Law & Order: SVU” Spins NYPD’s Massage Parlor Raids Into A White Savior Fantasy, *HUFFINGTON POST* (Dec. 7, 2019), [https://www.huffingtonpost.ca/entry/law-and-order-svu-yang-song\\_n\\_5de6ef68e4b0d50f32aa9470](https://www.huffingtonpost.ca/entry/law-and-order-svu-yang-song_n_5de6ef68e4b0d50f32aa9470) [<https://perma.cc/F4HD-KJNK>].

The actual drivers of sex trafficking, though, cannot so neatly be defined as a collection of criminal bosses of seedy underbellies or evil kidnappers in unmarked vans. Rather, trafficking of all kinds is driven by poverty.<sup>19</sup> People are generally not snatched off the street and trafficked from one place to another.<sup>20</sup> For example, in the context of immigration, it would make little sense for traffickers to give migrants the service of crossing borders for free when many are willing to pay large sums of money to cross those same borders.<sup>21</sup> Moreover, the mass migrations of the twenty-first century are driven by human-made catastrophes like climate change and war.<sup>22</sup> As such, making migration illegal does not stop people from wanting or needing to migrate; it simply makes it more dangerous and difficult, which leaves people more vulnerable to exploitation.<sup>23</sup> But by characterizing this exploitation as the “work of individual bad actors,” “mainstream trafficking discourse” frames the problem as external and “*independent of state action and political choices.*”<sup>24</sup> In reality, the problem is more

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<sup>19</sup> See MOLLY SMITH & JUNO MAC, REVOLTING PROSTITUTES: THE FIGHT FOR SEX WORKERS’ RIGHTS 62 (2018) (noting that where there are harsh immigration laws, migrants who lack papers have few rights and are thus more likely to be exploited). In the context of trafficking across borders, the practice is driven by harsh immigration policies. *See id.*; see also Elise White et al., *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System’s Response*, Ctr. for Ct. Innovation, at 25 (Dec. 2017) (noting that traffickers frequently threaten Chinese women trafficked in the U.S. with deportation).

<sup>20</sup> See generally Nora V. Demleitner, *The Law at a Crossroads: The Construction of Migrant Women Trafficked into Prostitution*, in GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES 257 (David Kyle & Rey Koslowski eds., 2001) (arguing that the kidnapping of women represents the least likely scenario of human trafficking, as many women willingly leave their homes to join traffickers; it is the subsequent enslavement or coercion that constitutes trafficking); see also Melissa Brown, *Do Traffickers Kidnap Their Victims? The Myths and Realities of Human Trafficking*, FULLER PROJECT (Feb. 25, 2019), <https://fullerproject.org/story/do-traffickers-kidnap-their-victims-the-myths-and-realities-of-human-trafficking/> [<https://perma.cc/PA5M-3PLQ>] (noting that experts regard stories of “young girls snatched from their mothers in broad daylight, stalked in crowded supermarkets and kidnapped across the U.S. border” to be false).

<sup>21</sup> “People smuggling” describes a situation where people pay a smuggler to help them cross a border. The main difference between people smuggling and human trafficking across borders is that “people smuggling” tends to happen to migrants who have money to pay a smuggler up front, whereas human trafficking tends to occur to migrants who have to take on debt to travel and have few or no connections in the destination country. *See* SMITH & MAC, *supra* note 19, at 63 (distinguishing human smuggling and human trafficking).

<sup>22</sup> See HARSHA WALIA, UNDOING BORDER IMPERIALISM 40 (2013) (noting how an ecological crisis is a factor driving migration).

<sup>23</sup> See SMITH & MAC, *supra* note 19, at 64 (arguing that harsh immigration laws fail to stop those who want or need to migrate but make them more likely to be exploited).

<sup>24</sup> *Id.* at 69.

complicated, and anti-prostitution laws, task forces, and vice raids are woefully inadequate solutions.<sup>25</sup>

In response to these inadequacies, New York has made efforts to employ a more holistic, victim-oriented approach to anti-trafficking over the past two decades.<sup>26</sup> These efforts include the establishment of Human Trafficking Intervention Courts, like the one in which Yang Song appeared, and vacatur statutes, whereby a defendant charged with prostitution may have her case dismissed by proving she is a victim of sex trafficking.<sup>27</sup> But current victim-oriented efforts to combat trafficking in New York fall far short of effecting meaningful change.<sup>28</sup> One reason is the failure of the criminal justice system to foster an understanding of the nuances of coercion.<sup>29</sup> This failure gives voluntary sex workers a choice between “consenting to being identified as de facto trafficking victim[s] . . . or assert[ing] agency and be[ing] treated as criminal[s].”<sup>30</sup> Another weakness of New York’s current approach is that intervention courts and vacatur statutes do not change the realities for those in the sex trade at the arrest level.<sup>31</sup> Repeated negative interactions with law enforcement diminish victims’ trust in the system overall.<sup>32</sup> So while these efforts aim

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<sup>25</sup> See Gruber et al., *supra* note 8, at 1361 (describing efforts by law enforcement to crack down on prostitution in New York City).

<sup>26</sup> See Chief Judge Jonathan Lippman, *Announcement of New York’s Human Trafficking Intervention Initiative*, CTR. FOR CT. INNOVATION (Oct. 4, 2013), <https://www.courtinnovation.org/articles/announcement-new-yorks-human-trafficking-intervention-initiative> [<https://perma.cc/8JVM-CAZE>] (announcing the establishment of human trafficking courts in New York); see also Gruber et al., *supra* note 8, at 1367 (describing the strengths and weaknesses of the courts in greater detail).

<sup>27</sup> See N.Y. CRIM. PROC. LAW § 440.10(i) (codifying that a defendant can move to vacate a conviction if their “participation in the offense was a result of having been a victim of sex trafficking”); see also *Announcement of New York’s Human Trafficking Intervention Initiative*, *supra* note 26.

<sup>28</sup> See Gruber et al., *supra* note 8, at 1402 (“Ultimately, the HTICs maintain the illusion that criminal management of individuals, including prostitution defendants, is the answer to social dysfunction. As such, the HTICs, like criminal court interventions generally, insufficiently advance the social restructuring necessary to address the root causes of prostitution crimes.”).

<sup>29</sup> See Gruber et al., *supra* note 8, at 1353 (noting how New York officials assigned to report on an anti-trafficking law “envision[ed] sex trafficking as involving . . . direct coercion through force, threats, confiscating passports, or debt bondage”).

<sup>30</sup> Elise White et al., *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System’s Response*, CTR. FOR CT. INNOVATION 37 (2017).

<sup>31</sup> See *id.* at 39 (explaining the re-traumatizing effect of arrests on trafficked sex workers).

<sup>32</sup> *Id.* at 40 (“Interactions between adults in the sex trade and the police presented

to provide exits for people who were coerced into the sex trade, they do so by *first* treating all sex workers as criminals and *then* giving them a chance to prove innocence.

This Note argues that the main issue with feminists' and lawmakers' approaches to anti-trafficking is their collective failure to genuinely consider the voices of those who are in the sex trade. Workers in the sex industry, whether voluntary sex workers or victims of sex trafficking, are workers. As such, they should be leading the anti-trafficking movement, rather than being relegated to the role of a victim. In that spirit, this Note attempts to amplify the voices of sex workers and victims of trafficking.<sup>33</sup>

Part I aims to provide insight into the current anti-trafficking movement, the rifts that exist within, and the history that precedes it. The Note then looks globally and identifies the differences among models of anti-prostitution and sex trafficking laws: full criminalization, "end demand," legalization, and decriminalization. Part II examines anti-trafficking efforts in the context of New York, which is considered a "trafficking hub" and has attempted to implement more victim-oriented approaches to anti-trafficking.

Part III argues that where current efforts to modify the criminal justice system fail to diminish sex trafficking in any meaningful way, decriminalizing sex work and then arming workers in the sex industry with labor and employment rights has the most potential to succeed. This Note envisions how a burgeoning sex workers' rights movement can lead a rights-driven coalition to (1) provide immediate resources and improved safety to those in the sex trade by extending their access to labor and employment rights, and (2) provide exits for those who wish to leave the sex trade in ways that our criminal justice system currently cannot.

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numerous challenges to court practitioners. First . . . they result in a portion of defendants whose involvement in the sex trade are dubious and gesture toward policing practices that may be legitimately perceived as discriminatory. Second, negative perceptions tied to the initial interactions with law enforcement create an immediate distrust for the remainder of the criminal justice process.").

<sup>33</sup> This Note owes a great debt to the outstanding research and writing of Molly Smith and Juno Mac, former sex workers and authors of *Revolting Prostitutes: The Fight for Sex Workers' Rights*. See SMITH & MAC, *supra* note 19. According to the publisher's website, "Verso Books is the largest independent, radical publishing house in the English-speaking world, publishing one hundred books a year." *About Verso*, VERSO, <https://www.versobooks.com/pg/about-verso> [<https://perma.cc/KZC7-DRND>] (last visited Sept. 12, 2022).

## I. A HISTORY OF TRAFFICKING HYSTERIA AND ITS RESPONSES

“Women are tied up, they’re bound, duct tape put around their faces, around their mouths, in many cases they can’t even breathe. . . . They’re put in the backs of cars or vans or trucks.”<sup>34</sup> In January 2019, former-president Donald Trump used this unsubstantiated image about migrant women for at least the eighth time while publicly arguing for his proposed southern border wall.<sup>35</sup> Although experts said these claims were “divorced from reality,” the narrative reflects one that continues to capture the hearts and imaginations of Americans, resulting in viral social media posts and contributing to misinformation and conspiracy theories that do more to harm actual victims of trafficking than help them.<sup>36</sup>

Trafficking—and the hysteria it inspires—is not a new phenomenon, nor is its influence on legislation and public policy. In the aftermath of the Civil War, a nation founded on chattel slavery and indentured servitude began using the term “white slavery” and “trafficking” to refer to the voluntary and involuntary prostitution of white women.<sup>37</sup> The late nineteenth-century panic over “white slavery” was fueled by a national concern that Black

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<sup>34</sup> Katie Mettler, *Trump Again Mentioned Taped-up Women at the Border. Experts Don't Know What He is Talking About*, WASH. POST (Jan. 25, 2019, 3:20 PM), <https://www.washingtonpost.com/politics/2019/01/17/trumps-stories-taped-up-women-smuggled-into-us-are-divorced-reality-experts-say> [<https://perma.cc/5LPE-E8FA>] (quoting then-president Donald Trump).

<sup>35</sup> *Id.*

<sup>36</sup> See Laura Powers, *Why a Mom's Facebook Warning About Human Traffickers Hurts Sex-trafficked Kids*, LA TIMES (Apr. 3, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-powers-ikea-mom-sex-trafficking-20170331-story.html> [<https://perma.cc/NNA7-LMDE>]; see also MSP: *Human Trafficking Usually On The Web, Not In Parking Lots*, CBS DETROIT (Oct. 16, 2017, 6:13 PM), <https://detroit.cbslocal.com/2017/10/16/msp-dispel-human-trafficking-parking-lot-myth-after-facebook-video-goes-viral/> [<https://perma.cc/KB92-2WXF>]; see also Sarah Jorgensen & Polo Sandoval, *Experts: Trump's Tape-bound Women Trafficking Claim is Misleading*, CNN, <https://www.cnn.com/2019/01/27/us/human-trafficking-fact-check/index.html> [<https://perma.cc/3HC3-EWTQ>] (last updated Jan. 28, 2019, 10:59 AM) (“Trump’s vivid descriptions of women being bound with duct tape and smuggled across the border are not reflective of the vast majority of human trafficking cases in the US.”).

<sup>37</sup> Melissa Ditmore, *The Use of Raids to Fight Trafficking in Persons*, THE SEX WORKERS PROJECT AT THE URBAN JUSTICE CENTER 1, 18 (2009), <https://sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf> [<https://perma.cc/D46F-XWB9>].



and/or foreign men were luring white women into prostitution.<sup>38</sup> Besides its clear and deep ties to white nationalism, this panic was driven by fears about women's economic independence as women increasingly migrated to cities to work outside the home.<sup>39</sup>

According to historians, reporting on white slavery "provided virtually pornographic entertainment to the reading audience," and it was amid this racist, sexualized hysteria that the United States passed its first anti-trafficking law, the 1905 Mann Act.<sup>40</sup> The law was ostensibly against forced prostitution; in reality, it became infamous for mainly criminalizing Black men in romantic relationships with white women.<sup>41</sup>

The late nineteenth century also signaled a shift in how women who were not in the sex industry viewed women who were. Beginning after the Civil War and into the twentieth century, American women became preoccupied with "saving" prostitutes.<sup>42</sup> This movement marked an early iteration of what anthropologist Laura Maria Agustín has termed the "rescue industry": "By the end of the nineteenth century, the image of the 'prostitute' as vile and disgusting had been replaced by the figure of the victim, an ordinary working class woman who needed rescuing."<sup>43</sup> Social reformers visited and talked with prostitutes, women who had

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<sup>38</sup> See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3016 (2006) ("The term 'white slavery' is not accidental. Much of the zeal for the Mann Act arose out of growing concern with prostitution among white women; this was accompanied by the sense that white women, as opposed to women of color, would never willingly engage in acts of prostitution, and therefore must be 'enslaved' innocent victims. The innocence of the posited 'white' female victim was also contrasted against the evil nature of her trafficker. In both Europe and the United States, 'foreigners,' especially immigrants, were targeted as responsible for the traffic. Given the important role that racial rhetoric played in the drafting and passage of the Mann Act, it is not at all surprising that it was also frequently used by police as an excuse not only to arrest immigrant prostitutes, but also to persecute black men traveling or associating with white women."); see also SMITH & MAC, *supra* note 19, at 74–75.

<sup>39</sup> SMITH & MAC, *supra* note 19, at 74–75.

<sup>40</sup> 18 U.S.C. § 2421 (amending 18 U.S.C. § 397); see Maria Luddy, *Prostitution and Irish Society* 163 (2007).

<sup>41</sup> Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 *SIGNS* 45, 50 (2010) (noting that the white slavery narrative was "without factual base" and that the Mann Act "later became notorious for its use in prosecuting instances of interracial sex").

<sup>42</sup> SMITH & MAC, *supra* note 19, at 9.

<sup>43</sup> LAURA MARIA AGUSTÍN, *SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY* 128 (1988).

previously been stigmatized as whores; these early feminists conducted public discussions and founded homes to which the prostitutes could “escape.”<sup>44</sup> In the 1860s and 1870s, feminists successfully campaigned against the proposed government regulation of prostitution.<sup>45</sup> They feared that the legalization of prostitution and subsequent regulation would submit prostitutes to vaginal examinations and licensing.<sup>46</sup> They asserted that all women—even prostitutes—had a right to integrity over their own bodies.<sup>47</sup>

But after successfully halting its legalization, feminists began trying to abolish prostitution altogether.<sup>48</sup> They sponsored legislation that would increase criminal penalties for men who bought sex, but still show sympathy for “victimized” women.<sup>49</sup> Seeing prostitutes as “white slaves” allowed feminists to see themselves as rescuers.<sup>50</sup> The caveat was that the prostitutes had to agree that they were victims; if they denied that their actions were immoral, they were considered no longer deserving of aid or sympathy:<sup>51</sup> “The big sisters of the world [want the] chance to protect the little and weaker sisters, by surrounding them with the right laws for them to obey for their own good.”<sup>52</sup>

As authors and former sex workers Juno Mac and Molly Smith have observed in their analysis of the period, “[t]he rescue industry enabled middle-class women to claim a space as citizens and political agents in the public sphere—at the expense of their working class sisters, whose lives were increasingly policed.”<sup>53</sup> And while the contemporary debate about prostitution and trafficking has, in some ways, evolved beyond the concerns of the late nineteenth and early twentieth-century moral reformers,

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<sup>44</sup> See Linda Gordon & Ellen Dubois, *Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth-Century Feminist Sexual Thought*, 9 FEMINIST STUDIES 1, 7, 14 (1983).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 14–15.

<sup>52</sup> *Id.* at 15 (quoting *The Women’s Political World*, an early 20th-century feminist periodical).

<sup>53</sup> SMITH & MAC, *supra* note 19, at 9.

these themes remain familiar. To illustrate, the rest of Part I explores current approaches to anti-trafficking and prostitution laws: criminalization, end demand, legalization, and decriminalization.<sup>54</sup>

### A. Criminalization

These raids are ugly and horrible. They . . . bang on the door, they break the door, they come in with the guns out! In the beginning, it's frightening and upsetting. [Law enforcement] could do anything, you don't know what they are going to do. . . . It's really horrible, sometimes if they are very angry, they don't let you get dressed. They take you in your work clothes. . . . One never lets go of the fear. Being afraid never goes away. They provoke that.<sup>55</sup>

With the exception of a few counties in Nevada and some jurisdictions that have experimented with other approaches, most of the United States fully criminalizes sex work in most of its forms.<sup>56</sup> Under this model, the sex worker, the client, and third parties such as managers, drivers, and even landlords are all criminalized.<sup>57</sup>

In the early 2000s, trafficking reemerged as a national concern, and anti-trafficking laws at the federal and state levels sought to address what was seen as a serious problem separate from

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<sup>54</sup> Although this Note recognizes that voluntary sex work and sex trafficking are not the same, as this Note will explain, the conflation of the two from the perspective of policy advocates and lawmakers necessitates exploring these approaches with the two considered in tandem.

<sup>55</sup> See Ditmore, *supra* note 37, at 7 (quoting Celia, arrested seven times by local police without being screened for trafficking).

<sup>56</sup> Certain counties in Nevada, have legalized sex work in registered brothels, whereas other jurisdictions throughout the country have experimented with end demand at local levels. See Michelle Rindels, *Indy Explains: How Legal Prostitution Works in Nevada*, NEV. IND. (May 27, 2019, 2:10 AM), <https://thenevadaindependent.com/article/the-indy-explains-how-legal-prostitution-works-in-nevada> [<https://perma.cc/LUH5-SMQC>] (noting that 10 counties in Nevada allow sex work in licensed brothels). See also *infra* note 79 and accompanying text.

<sup>57</sup> Carolyn Sally Henham, *The Reduction of Visible Spaces of Sex Work in Europe*, 18 SEXUALITY RSCH. AND SOC. POL'Y 901, 910 (2021) (describing five "typologies" of sex work law).

voluntary sex work.<sup>58</sup> Consequently, sex workers are still often framed by the criminal legal system as either “deviant criminals who must be punished,” or as “victims in need of rescue.”<sup>59</sup> As a result of those narratives, government funding initiatives have often failed to distinguish between trafficking and prostitution in a meaningful way.<sup>60</sup> The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005 established funding to help state and local law enforcement fight trafficking.<sup>61</sup> In practice, funding for “anti-trafficking task forces,” which are supposed to consist of local and federal law enforcement officers working alongside social and legal service providers, oftentimes focus exclusively on prostitution.<sup>62</sup> As a result, it is often impossible to differentiate between efforts to combat trafficking and efforts to combat sex work.<sup>63</sup>

Moreover, when law enforcement makes no distinction between sex work and sex trafficking, it fails to pursue labor trafficking cases in other sectors.<sup>64</sup> Research suggests that vice squad raids actually undermine efforts to locate and identify individuals trafficked into not only the sex trade, but also the domestic, agricultural, and service sectors.<sup>65</sup> Traffickers often use a

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<sup>58</sup> See Ditmore, *supra* note 37, at 6 (“In 2000, the US passed legislation recognizing ‘serious forms of trafficking’ as ‘recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion’ in all forms of labor, including, but not limited to, sex work, bringing domestic legislation in line with international standards governing trafficking in persons. . . . [P]rior to 2000, anti-trafficking legislation focused exclusively on prostitution, based on the presumption that no woman would ever exchange sex for material gain without extreme coercion.”).

<sup>59</sup> *Id.* at 19.

<sup>60</sup> *Id.*

<sup>61</sup> See generally *Human Trafficking Legislation*, AM. BAR. ASS’N (last visited Sept. 13, 2022), [https://www.americanbar.org/groups/human\\_rights/human-trafficking/trafficking-legislation/](https://www.americanbar.org/groups/human_rights/human-trafficking/trafficking-legislation/) [<https://perma.cc/4CLK-8BR2>] (providing an overview of federal legislation intended to combat human trafficking, including the Trafficking Victims Protection Reauthorization Act of 2005); see also Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 204(a)(1), 119 Stat. 3558 (2006) (authorizing grant funding to help local law enforcement fight trafficking).

<sup>62</sup> See Ditmore, *supra* note 37, at 19 (noting that anti-trafficking task forces often function as de facto vice squads).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (identifying the domestic, agricultural, and service sectors as ones that may go ignored as a result of law enforcement failing to distinguish between sex work and sex trafficking).

<sup>65</sup> *Id.* at 39 (“[R]aids have ripple effects on immigrant communities and sex workers beyond those directly affected by law enforcement activity, increasing fear and driving sex work and undocumented people further underground and farther beyond reach of

trafficked individual's fear of deportation to maintain control of them, and vice raids actually help traffickers by convincing trafficked individuals that law enforcement is less interested in helping them than in arresting and deporting them.<sup>66</sup>

Because of the false perception that all immigrant sex workers have been trafficked and the notion that non-trafficked sex workers deserve punishment, antitrafficking resources have been disproportionately allocated to vice raids against places of prostitution.<sup>67</sup> Moreover, because those who are trafficked into sex work fear being arrested for prostitution and/or deported for being in the country illegally—a fear on which traffickers capitalize—victims are less likely to come forward and identify themselves as trafficked.<sup>68</sup> Criminalization both infringes on the rights of sex workers and blocks anti-trafficking efforts; it is not only an ineffective means to combat trafficking but also harmful to both voluntary sex workers and victims of trafficking alike.

### *B. End Demand*

Before we did not go far with the customer: we would go to a car park nearby. But now the customer wants to go somewhere isolated because they are afraid. . . . I don't like it. There is more risk that something bad happens.<sup>69</sup>

The victim narrative both fuels and is fueled by a conflation of voluntary prostitution and sex trafficking. Following in the footsteps of their nineteenth-century social reformer counterparts, neo-abolitionists<sup>70</sup> in the anti-trafficking movement believe that

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assistance, and making sex workers and immigrants less likely to turn to law enforcement when they experience violence or coercion.”). *See also id.* at 16 (describing the domestic, agricultural, and service sectors as ones where human trafficking takes place).

<sup>66</sup> *Id.* at 60.

<sup>67</sup> *Id.* at 59.

<sup>68</sup> *See id.* at 37–38 (noting that many trafficked individuals “have been reluctant to come forward to law enforcement as a result of fear and trauma induced by the raid itself, or due to fear of retaliation by the trafficker”).

<sup>69</sup> SMITH & MAC, *supra* note 19, at 145 (quoting Silvia, a migrant woman who works on the street in Norway).

<sup>70</sup> Emily Mullin, *How Different Legislative Approaches Impact Sex-Workers*, ORG. FOR WORLD PEACE (Jan. 20, 2020), <https://theowp.org/reports/how-different-legislative->

commercial sex is coercive in all its forms because of its inherent objectification and oppressive treatment of women.<sup>71</sup> This perspective unites activists across a wide political spectrum, from the radical feminist group the Coalition Against Trafficking in Women to well-established Christian right organizations like Focus on the Family.<sup>72</sup> Neo-abolitionists aim to eliminate the sex industry entirely by prioritizing criminal enforcement against buyers and promoters rather than sellers.<sup>73</sup>

This goal is reflected in the strategy known as “End Demand.”<sup>74</sup> End Demand seeks to bury the sex industry by going after clients and market facilitators with heightened criminalization and penalties while “decriminalizing” the sellers of sex.<sup>75</sup> The paradigmatic example of End Demand is Sweden’s 1999 Sex Purchase Act,<sup>76</sup> which criminalized buying sex but decriminalized selling sex.<sup>77</sup> Versions of this model are mimicked globally, and a growing number of American jurisdictions, including Queens,

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approaches-impact-sex-workers/ [https://perma.cc/7UKM-KN92] (“The logic behind neo-abolitionism is to decrease the demand for prostitution by targeting the client. This model has been adopted in places such as Martinique, Belize, Canada, Iceland, Northern Ireland and Ireland and supposes that reducing the demand for sex work will limit the supply of sex services.”).

<sup>71</sup> This view is held by those in the antitrafficking movement known as new abolitionists or neo-abolitionists. See Gruber et al., *supra* note 8, at 1336 (“The neo-abolitionist position holds that commercial sex is inherently coercive, and thus anyone engaged in selling sex is a victim of human trafficking.”); see also Ronal Weitzer, *The Movement to Criminalize Sex Work in the United States*, 37 J. OF L. AND SOC’Y 61, 64 (Mar. 2010), <https://www.jstor.org/stable/25622008> [https://perma.cc/QJ7Z-BUHX] (“The term ‘abolitionist feminist’ refers to those who argue that the sex industry should be eliminated because of its objectification and oppressive treatment of women, considered to be inherent in sex for sale.”).

<sup>72</sup> Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS: J. OF WOMEN IN CULTURE AND SOC’Y 45, 46–47 (2010).

<sup>73</sup> Gruber et al., *supra* note 8, at 1335.

<sup>74</sup> See SMITH & MAC, *supra* note 19, at 140 (noting that this strategy is also known as the “Nordic” or “Swedish” model).

<sup>75</sup> See *id.*; see also Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings*, 10 VIOLENCE AGAINST WOMEN 1187, 1187 (2004) (“When the buyers risk punishment, the number of men who buy prostituted persons decreases, and the local prostitution markets become less lucrative.”).

<sup>76</sup> Chris Bruckert & Stacey Hannem, *Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work*, 28 CANADIAN J. OF L. AND SOC’Y 57, 58 (2013) (noting that the Act is “ideologically cohesive and symbolically powerful” because it criminalizes the (likely) male buyers, but not the (likely) female sellers).

<sup>77</sup> See Ekberg, *supra* note 75, at 1187 (noting that the law is the first attempt by a country to address the demand for prostitution).

have fashioned similar anti-trafficking strategies after the model.<sup>78</sup>

Some have heralded Sweden's law as groundbreaking.<sup>79</sup> Those who applaud Sweden's law see it as "the first attempt by a country to address the root cause of prostitution and trafficking in beings: the demand, the men who assume the right to purchase persons for prostitution purposes."<sup>80</sup> However, quantifying the actual results of End Demand is not easy, in part because prostitution presents particular challenges to accurately assessing figures over time.<sup>81</sup> Studies of whether the End Demand model effectively curbs trafficking are at best inconclusive and at worst show a dismal failure.<sup>82</sup> Although street prostitution has declined overall in Sweden, this decline coincided with an internet-driven global trend that moved many sex workers indoors.<sup>83</sup> Moreover, according to police, the estimated number of brothels in Stockholm

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<sup>78</sup> Politics NY, *DA Katz Announces Human Trafficking Bureau*, POLITICS NY (May 18, 2020), <https://politicsny.com/2020/05/18/da-katz-announces-human-trafficking-bureau/> [<https://perma.cc/89FR-5R5Z>] (explaining that Queens, NY, District Attorney Melinda Katz announced in May of 2020 that her newly created Human Trafficking Bureau would "combat sex and labor trafficking by aggressively prosecuting traffickers and buyers of sex and [would] also connect survivors of trafficking with meaningful services to empower them to escape their traffickers"); THE SWEDISH INSTITUTE, *PROSTITUTION POLICY IN SWEDEN – TARGETING DEMAND 5* (Rikard Lagerberg ed., 2019) (noting that there have been "positive effects of the law" in Sweden, France, Ireland, and Canada).

<sup>79</sup> Ekberg, *supra* note 75, at 1187 (noting that the "groundbreaking law" allows women to live free of male violence); see Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 271, 276 (2011) ("In a growing list of jurisdictions, the Swedish model is one initiative that, having shown promise, is increasingly favored by abolitionists at the principled and practical forefront of this movement."); see also Bruckert & Hannem, *supra* note 76, at 58 (noting that the law is "ideologically cohesive and symbolically powerful").

<sup>80</sup> Ekberg, *supra* note 75 at 1187.

<sup>81</sup> THE SWEDISH INSTITUTE, *supra* note 78, at 6 (acknowledging in the Institute's annual report that prostitution is "particularly problematic" to assess in numbers).

<sup>82</sup> See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1719–20 (2010) (reporting studies that indicate Swedish law has made sex trafficking prosecutions more difficult because clients are less inclined to cooperate given their own criminality); see Stephanie M. Berger, *No End in Sight: Why the "End Demand" Movement Is the Wrong Focus for Efforts to Eliminate Human Trafficking*, 35 HARV. J. L. & GENDER 523, 550 (2012) (noting some prostitutes have to rely more on pimps to find clients because the threat of prosecution has made clients fewer in number and harder to find as a result of the new law criminalizing purchasers).

<sup>83</sup> See SMITH & MAC, *supra* note 19, at 167; see Moira Heiges, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 459 (2009) (citing statistics indicating the number of prostitutes in Sweden decreased by 50% in two years, while the number of men purchasing sex dropped by 75%); see also THE SWEDISH INSTITUTE, *supra* note 78, at 8 (citing the 50% decrease of street prostitution in Sweden since 1995).

has increased: between 2009 and 2012 the estimated number of Thai exotic massage parlors rose from 90 to 250.<sup>84</sup>

In addition to its inconclusive results regarding prostitution and trafficking, critics of End Demand point out that, although End Demand aims to criminalize only the demand for sex work and not the supply, states with laws based on this model still criminalize sex workers in many ways.<sup>85</sup> Municipal laws against soliciting, targeted evictions of sex workers, use of prostitution laws and immigration laws to deport sex workers, and even the continued criminalization of sex workers who share a flat, all contribute to End Demand's empty promises.<sup>86</sup> In Oslo, for example, Amnesty International found that "police 'used sex workers' reports of violence to facilitate their eviction and/or their deportation."<sup>87</sup> Not surprisingly, End Demand also results in the over-policing of the most marginalized groups: police in Oslo are known to target migrant and Nigerian sex workers in particular.<sup>88</sup>

End Demand also decreases the safety of those in the sex trade.<sup>89</sup> Researchers and Swedish sex workers point to "increased violence and greater social and civic exclusion."<sup>90</sup> Because clients will not risk approaching sex workers where there are witnesses, street-based sex workers in Sweden are forced to work in dark and isolated areas.<sup>91</sup> An eroded client base forces sex workers who cannot afford the luxury of properly assessing potential clients and

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<sup>84</sup> Swedish National Police Board, TRAFFICKING IN HUMAN BEINGS FOR SEXUAL AND OTHER PURPOSES, 13 (2012), <https://www.justice.gov.il/Units/Trafficking/MainDocs/swedishnationalpolice2012trafficking%20report.pdf>.

<sup>85</sup> See SMITH & MAC, *supra* note 19, at 156 (noting that "in practice," lots of criminalization of sex workers remains).

<sup>86</sup> *Id.*

<sup>87</sup> Melissa Gira Grant, *Amnesty International Calls for an End to the 'Nordic Model' of Criminalizing Sex Workers*, THE NATION (May 26, 2016), <https://www.thenation.com/article/archive/amnesty-international-calls-for-an-end-to-the-nordic-model-of-criminalizing-sex-workers/> [<https://perma.cc/QY3N-96AU>].

<sup>88</sup> See *id.* (noting how a Nigerian sex worker was "essentially punished" by police for reporting rape and violent robbery).

<sup>89</sup> Bruckert & Hannem, *supra* note 76, at 58; Erin Albright & Kate D'Adamo, *Decreasing Human Trafficking through Sex Work Decriminalization*, 19 AMA J. OF ETHICS 122, 122 (Jan. 2017) (noting that it is criminalization that created a more violent environment for sex workers).

<sup>90</sup> Bruckert & Hannem, *supra* note 76, at 58 (noting how street sex workers are "working in dark and isolated areas" because clients do not want others to see them); see Albright & D'Adamo, *supra* note 89, at 122.

<sup>91</sup> Bruckert & Hannem, *supra* note 76, at 58.



weeding out violent or risky ones to take clients they otherwise would not.<sup>92</sup> Sex workers in Sweden also risk losing housing, since landlords are vulnerable to sanctions.<sup>93</sup> Finally, the Swedish police view condoms as evidence of sex work, which, in light of the ways in which police continue to criminalize sellers of sex, creates a significant disincentive for workers to use condoms.<sup>94</sup>

At the heart of arguments in favor of End Demand is a dismissal of the possibility that “prostitution is a business transaction between two equal parties.”<sup>95</sup> In fact, proponents do not deny that their position strips agency from those in the sex trade:

[P]rostitution can never be regarded as a profession; prostitution is always exploitation. In this sense the extent of the consent to provide prostitution is deemed secondary to the understanding that the transaction involves exploitation at some level.<sup>96</sup>

But this results in what researchers Chris Bruckert and Stacey Hannem term a “stigma feedback loop:” proponents of End Demand ascribe victimhood to all sex workers regardless of a worker’s subjective position.<sup>97</sup> This allows for the delegitimization of workers’ experiences, which then “rationalize[s] talking over, and for, sex workers, denying their voice and negating their agency.”<sup>98</sup>

The failures of End Demand illustrate how ignoring the voices of sex workers results in the increased vulnerability of sex workers to trafficking and other forms of exploitation.<sup>99</sup> Neo-abolitionists are not primarily concerned with reducing trafficking; because

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<sup>92</sup> *Id.*; see Albright & D’Adamo, *supra* note 89, at 122.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*; see Melissa Gira Grant, *supra* note 87 (“Migrant and African sex workers [in Norway] described how police profile them, whether they are working or not. Wendy, a young woman of African origin, told researchers that plainclothes police had stopped her and her friends when she wasn’t working. They asked to see her papers, and then asked if they were carrying condoms. ‘They told us to go away and that they better not see us on the street—we better not come back for 24 hours or they would take us to the station.’”).

<sup>95</sup> Bruckert & Hannem, *supra* note 76, at 58.

<sup>96</sup> THE SWEDISH INSTITUTE, *supra* note 78, at 15.

<sup>97</sup> Bruckert & Hannem, *supra* note 76, at 58.

<sup>98</sup> *Id.*

<sup>99</sup> See Albright & D’Adamo, *supra* note 89, at 122–24 (noting that fines and costs associated with an arrest combined with lack of a platform leads to an increased vulnerability and lack of recognition).

they see all forms of prostitution as violence and exploitation, regardless of a sex worker's personal subjectivity, proponents of End Demand view the overall reduction of prostitution as "the purpose of the law."<sup>100</sup> End Demand supporters celebrate those who "have extricated themselves from prostitution" while denying the social and civic rights of those who wish to remain in the sex trade.<sup>101</sup> In imagining a utopia where prostitution is a thing of the past, and the power imbalance between buyers and sellers of sex no longer exists, proponents of End Demand either fail or choose not to recognize that the model increases this power imbalance for those who are currently in the sex trade.<sup>102</sup>

### C. Legalization

My boyfriend is handling the bureaucracy for me. I try to understand what he does, so that I won't be too dependent on him, but I haven't succeeded yet. Due to the increased complexity of having to register. . . . I will understand things even less, and those of my colleagues who work with pimps will become even more dependent on them.<sup>103</sup>

Legalization, also known as regulation, legalizes "some sex work, in some contexts," "while continuing to criminalize workers who can't or won't comply with various bureaucratic requirements."<sup>104</sup> These requirements include "mandatory health testing, employment in certain [limited] venues, or registering

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<sup>100</sup> SWEDISH INSTITUTE, SELECTED EXTRACTS OF THE SWEDISH GOVERNMENT REPORT SOU 2010:49: "THE BAN AGAINST THE PURCHASE OF SEXUAL SERVICES. AN EVALUATION 1999-2008" 34 (Mirielle L. Key & Jennifer Evans trans., 2010) [hereinafter *Swedish Government Report*], <https://www.government.se/contentassets/8f0c2ccaa84e455f8bd2b7e9c557ff3e/english-translation-of-chapter-4-and-5-in-sou-2010-49.pdf> [<https://perma.cc/T4QK-NQGT>].

<sup>101</sup> Bruckert & Hannem, *supra* note 76 at 59 (quoting Swedish Government Report at 10).

<sup>102</sup> See Albright & D'Adamo, *supra* note 89, at 123 (noting that for those still in sex work, there is a climate of fear, a systemic erosion of trust in health care because of fear of judgment, and also an increased vulnerability due to potential long-term consequences if caught by the police).

<sup>103</sup> SMITH & MAC, *supra* note 19, at 181 (quoting a street-working migrant in Germany, where although sex work is legalized, those who have to work illegally within the regime are still subject to many of the same harms as under full criminalization).

<sup>104</sup> *Id.* at 176.

publicly as a [sex worker].”<sup>105</sup> Legalization today looks very similar to the government regulation against which the feminists of the 1860s and 1870s fought.<sup>106</sup> In addition to Germany and the Netherlands, this model regulates sex work in certain counties in Nevada.<sup>107</sup>

The aim of a legalized or regulatory approach is to minimize harms associated with a social practice that seems unfortunate yet inevitable.<sup>108</sup> So, when states heavily regulate legal sex work, it is generally not out of concern for the welfare of the sex workers themselves.<sup>109</sup> Rather, advocates for sex work legalization tend to see prostitution as a “necessary evil,” and prostitutes as “vectors of disease or symbols of disorder who must be controlled.”<sup>110</sup> For example, in Nevada, where lawmakers are motivated by containment, only counties with fewer than 700,000 people can license brothels, and there are tight controls on zoning and locations of establishments.<sup>111</sup> Other laws are clearly motivated by public health, such as the mandate that brothels regularly test their workers for HIV and other STIs.<sup>112</sup>

Legalization, despite its name, still results in the criminalization of workers who either do not meet the criteria for licenses or do not want to be licensed because they wish to work independently or avoid the permanent stigma of being a licensed sex worker.<sup>113</sup> Not surprisingly, these consequences most often affect the most vulnerable and marginalized communities: migrants, those with criminal records, and those who cannot afford licenses.<sup>114</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> *See supra* note 45 and accompanying text.

<sup>107</sup> SMITH & MAC, *supra* note 19, at 177, 179.

<sup>108</sup> *See* Bruckert & Hannem, *supra* note 76, at 55.

<sup>109</sup> SMITH & MAC, *supra* note 19, at 176.

<sup>110</sup> *Id.*

<sup>111</sup> Nev. Rev. Stat. Ann. § 201.354(1), 244.345(8) (West, Westlaw through 79th Reg. Sess. 2017); Bruckert & Hannem, *supra* note 76, at 56.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 57.

<sup>114</sup> *See* SMITH & MAC, *supra* note 19, at 181; Bruckert & Hannem, *supra* note 76, at 57 (“Workers who cannot work within the confines of the legalized regime (i.e., they do not meet the criteria for licenses, have a criminal record, are irregular migrants) or do not want to do so (i.e., they wish to work independently or do not want the permanent stigma of having registered as a sex worker) are criminalized and subject to the same repression imposed by any criminalized system.”).

As with criminalization and End Demand, supporting legalization requires failing to see the role of the state in trafficking. In reality, those who do not fit the state's determination of an "acceptable" sex worker are perfect targets for exploitation at the hands of third parties.<sup>115</sup> Consequently, when the state has the power to regulate sex work under a legalized model, it can still punish sex workers whom it deems "unacceptable" while reaping the benefits of a legal sex industry, such as taxes on licensed brothels and income from tourism.<sup>116</sup> In fact, these benefits place an incentive on turning a blind eye to trafficking while still criminalizing more visible voluntary sex work.<sup>117</sup> Like criminalization and End Demand, legalization fails to fight sex trafficking because it creates an atmosphere in which exploitation can thrive.

#### *D. Decriminalization*

Just regular workplace standards that the government currently handles, if they would take our complaints seriously, we would be in a much better position than we are now. Just simply taking our complaints seriously would help. The same folks are saying how degrading the work is but they aren't doing anything to improve those conditions. They're blinded by their own moralism.<sup>118</sup>

Legalized sex work and decriminalization of sex work are often erroneously grouped together, be it by accident or on purpose.<sup>119</sup>

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<sup>115</sup> See *id.* at 179–81 (describing how a German law requiring sex workers to register to authorities inadvertently created a "parasite industry" where predators "offer[ed] services to struggling sex workers; for example, providing dummy addresses and post forwarding, or helping with German-language application forms. This, of course, allows predators to easily identify sex workers who might be targeted for exploitation: the ones who are uncertain of their rights or close to the breadline").

<sup>116</sup> *Id.*

<sup>117</sup> See *id.* (noting that where prostitution is legal, police and the criminal justice system still draw the same paycheques from prostitution they do elsewhere in the world, through fines and confiscating cash).

<sup>118</sup> Emily van der Meulen, *When Sex is Work: Organizing for Labour Rights and Protections*, 69 *Labour/Le Travail* 147, 153-5467 (2012) (quoting Alyssa, a sex worker).

<sup>119</sup> Although sometimes these terms are conflated mistakenly, advocates for End

But the key difference between legalization and decriminalization is that under a decriminalization framework, sex work is legal as the default position; legalization, by contrast, legalizes only some sex work in some contexts.<sup>120</sup> Decriminalization aims to reduce immediate harm and improve the material well-being of those who trade in sex.<sup>121</sup> Unlike legalization, which positions prostitutes as disease-ridden and in need of control, decriminalization positions sex workers as primary rights holders.<sup>122</sup> Under this framework, sex workers' knowledge, safety, and rights are prioritized because the people shaping the sex industry are the sex workers themselves.<sup>123</sup>

“Decriminalization is a process of overturning criminal laws and administrative or civil orders that punitively target” the trade of consensual sex between adults.<sup>124</sup> Thus far, New Zealand is the only jurisdiction to meaningfully decriminalize through its 2003 Prostitution Reform Act (PRA).<sup>125</sup> This Act made it legal for any

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Demand will occasionally point to the failures of legalization in order to advocate against full decriminalization. See, e.g., Claire Mooney, *Overrepresented Yet Overlooked: LGBTQ Survivors of Trafficking and the Imperative for the Nordic Approach to Sex Trafficking Laws in the United States*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 261, 267–68 (2020) (conflating decriminalization with legalization in arguing for the Nordic Model); see also Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J. L. & FEMINISM 109, 110 (2006) (erroneously explaining that decriminalization “is a radical removal of any and all laws regarding prostitution (including laws against pimping, pandering, purchasing, and procuring) so that the buying and selling of people in prostitution is considered the legal equivalent of buying candy”); SMITH & MAC, *supra* note 19, at 178 (“To the exasperation of sex working feminists . . . when we make clear that we’re asking for decriminalisation of sex work, we are persistently misunderstood to mean legalisation and are maligned as liberals, capitalists, or men’s-rights activists interested in securing the unimpeded primacy of male sexuality.”).

<sup>120</sup> SMITH & MAC, *supra* note 19, at 176.

<sup>121</sup> Gruber et al., *supra* note 8, at 1334.

<sup>122</sup> SMITH & MAC, *supra* note 19, at 179, 193.

<sup>123</sup> See, e.g., Aotearoa New Zealand Sex Workers’ Collective (“NZPC”), *The New Zealand Model*, <https://www.nzpc.org.nz/The-New-Zealand-Model> [<https://perma.cc/9MLR-UQV2>] (last visited Apr. 27, 2021) [hereinafter *Aotearoa New Zealand Sex Workers’ Collective*] (explaining that the Aotearoa New Zealand Sex Workers’ Collective, is an organization run by sex workers for sex workers, and was at the forefront of reforming the law in New Zealand and helped to draft the PRA. In addition to focusing on workers’ rights, health, and safety, the organization recognizes not only that sex work is work, but that sex workers are experts in their own lives. Their belief is that it is crucial for sex workers to have control over all aspects of their own work and lives). *Id.*

<sup>124</sup> SMITH & MAC, *supra* note 19, at 193.

<sup>125</sup> See Prostitution Reform Act 2003, pt 1 s 3 (N.Z.), (decriminalizing prostitution and creating a framework that (a) safeguards human rights, (b) promotes welfare, (c) protects public health, and (d) limits prostitution to those over 18).

citizen over 18 years old to sell sexual services.<sup>126</sup> Specifically, the stated purpose of the Act was to decriminalize prostitution and to create a framework that “(a) safeguards the human rights of sex workers and protects them from exploitation; (b) promotes the welfare and occupational health and safety of sex workers; (c) is conducive to public health; and (d) prohibits prostitution of persons under 18 years of age.”<sup>127</sup> Street-based sex work is legal, as is running a brothel.<sup>128</sup> But no one, including brothel operators and clients, can force a sex worker to have sex, even after a client has paid.<sup>129</sup>

In New Zealand, trafficking is still illegal, but sex workers’ rights are guaranteed mainly through employment and human rights legislation.<sup>130</sup> The role of the police is to recognize sex workers as community members and provide them safety and access to justice as they would to anyone else.<sup>131</sup> The laws pertaining to sex work mirror those for other workplaces; some of the regulatory bodies that have worked with the police in the regulation of sex work are the Ministry of Health, the Ministry of Business, and Occupational Safety and Health (OSH).<sup>132</sup> But unlike those in jurisdictions where sex work is legalized, sex workers in New Zealand can determine many of their own working conditions such as where to meet clients; whether to work for themselves, with friends, or in brothels; and whether or not to work at home.<sup>133</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Aotearoa New Zealand Sex Workers’ Collective, *supra* note 123.

<sup>129</sup> *Id.*

<sup>130</sup> Crimes Act 1961, s 98(D) (N.Z.); Fraser Crichton, *Decriminalising Sex Work in New Zealand: Its History and Impact*, OPENDEMOCRACY (Aug. 21, 2015), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/decriminalising-sex-work-in-new-zealand-its-history-and-impact/> [https://perma.cc/ZN99-63NX].

<sup>131</sup> Aotearoa New Zealand Sex Workers’ Collective, *supra* note 123.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* In May 2016, Amnesty International released a similar model policy that calls upon countries to decriminalize the sex trade in order to better protect the health and human rights of sex workers while maintaining and reaffirming its strong condemnation of human trafficking. This model has support not only from sex workers’ rights activists, but also from Amnesty International, the World Health Organization, UNAIDS, the Global Alliance Against Trafficking in Women (GAATW), Human Rights Watch, Lambda Legal, and the American Civil Liberties Union. Albright & D’Adamo, *supra* note 89, at 122; see Amnesty International, *Amnesty International Policy on State Obligations To Respect, Protect And Fulfil The Human Rights Of Sex Workers* (May 26, 2016).

Decriminalization has received its share of criticism from neo-abolitionists, who fear that decriminalizing sex work will make it more difficult to tackle exploitation and punish abusers, or that allowing the sex industry to exist without prohibition will encourage it to proliferate.<sup>134</sup> However, research suggests that decriminalization has had little impact on the number of people entering the sex industry in New Zealand.<sup>135</sup> The data does, however, suggest a move of sex workers from the managed sector, comprising brothel workers and those who work for escort services, to the private sector, working for themselves.<sup>136</sup> The implication here is that more sex workers feel empowered to work on their own without relying on managers; those surveyed reported moving to private work because it provided a safer working environment where “they could earn more and attract better clients.”<sup>137</sup> Sex workers also reported being more likely to go to the police if they were to experience “a bad incident,” such as verbal or physical harassment or if a client failed to pay.<sup>138</sup>

How sex work decriminalization has contributed to sex workers’ rights in New Zealand is perhaps no better illustrated than by the case of *DML v. Montgomery*.<sup>139</sup> In that case, the plaintiff was a sex worker providing commercial sex services at a brothel managed by the defendant.<sup>140</sup> Although she was categorized as an “independent contractor,” she lodged a complaint with the Human Rights Commission under the Human Rights Act of 1993 after the defendant made sexual comments to her that made her uncomfortable.<sup>141</sup> The Court ruled in favor of the plaintiff, finding that “context is everything. Even in a brothel language with a sexual dimension can be used inappropriately in suggestive, oppressive, or abusive circumstances. . . . [The defendant] had no

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<sup>134</sup> SMITH & MAC, *supra* note 19, at 204.

<sup>135</sup> Abel, Fitzgerald & Brunton, *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers*, UNIVERSITY OF OTAGO, 171 (Nov. 2007) <https://www.otago.ac.nz/christchurch/otago018607.pdf> [https://perma.cc/CQ2G-Y76E] (identical procedures were used in this study as those adopted when estimating the size of the sex work industry in 1999).

<sup>136</sup> *See id.* at 6.

<sup>137</sup> *Id.* at 11.

<sup>138</sup> *See id.* at 15, 164.

<sup>139</sup> *DML v. Montgomery* (2014), 11 NZELR 673.

<sup>140</sup> *Id.* para. 1.

<sup>141</sup> *Id.* paras. 2–3.

'business' purpose for asking the questions or making the particular comment to her."<sup>142</sup> There are two important takeaways from this case. First, the decriminalized status of sex work empowered the plaintiff to fight workplace injustice.<sup>143</sup> Second, because New Zealand bases its labor and employment rights on human rights law, the plaintiff had an avenue by which to seek recourse, despite not being categorized as an employee.<sup>144</sup>

Criticism of New Zealand's version of decriminalization points out that the law does little to address the rights of migrants in the sex industry.<sup>145</sup> In the "eleventh hour" of the PRA's passage, panic about trafficking enabled the introduction of a clause that prohibited migrants from the Act.<sup>146</sup> Moreover, those who hold temporary visas or whose permanent residency statuses carry special conditions may be deported if they are caught working in the sex industry.<sup>147</sup> As such, work visas cannot be issued to sex workers or brothel operators.<sup>148</sup> The Global Alliance Against

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<sup>142</sup> *Id.* para. 106.

<sup>143</sup> *But see id.* para. 64 (noting that although sex work in New Zealand has been decriminalized, it is still difficult for sex workers to make sexual harassment complaints against their employers, as sex workers fear the consequences of upsetting brothel owners or having their names made public).

<sup>144</sup> *Id.* para. 146 ("Sex workers have the same human rights as other workers. The special vulnerability of sex workers to exploitation and abuse was specifically recognised by the Prostitution Reform Act 2003 which not only decriminalised prostitution but also had the purpose of creating a framework to safeguard the human rights of sex workers and to promote their welfare and occupational health and safety.").

<sup>145</sup> See Lynzi Armstrong, *Sex Workers Organising for Change: Global Alliance Against Traffic in Women Annual Report on New Zealand* (2018), <https://gaatw.org/publications/SWorganising/NewZealand-web.pdf> [<https://perma.cc/YD3Z-26JR>]. "[While] this legal framework is considered best practice from a rights-based perspective, it is not a perfect law and one of its limitations is that temporary migrants are prohibited from engaging in sex work and can face deportation if they violate this rule." *Id.*

<sup>146</sup> Although discourse about sex work in New Zealand is not dominated by antitrafficking concerns the way it is in other countries, research participants cited the influence of anti-immigration sentiment and international policy, particularly the US Department of State Trafficking in Persons Report. While the influence of this report on global antitrafficking initiatives is beyond the scope of this Note, it is worth pointing out that the report's annual release has global impacts, even leading to brothel raids in New Zealand. Says one organizer: "My experience working at grassroots level is when that American document, the Trafficking in Person report, usually comes out in June yearly and so there's like this pressure I think from I don't know who . . . the government departments, particularly like New Zealand Customs, Immigration New Zealand, New Zealand Police, Department of Internal Affairs have this, have a group or some people in those departments that will shift and things will start rolling around before that report comes out. And in my experience in Auckland . . . we've had brothel raids." *Id.*

<sup>147</sup> Prostitution Reform Act 2003, Part 2 (N.Z.).

<sup>148</sup> *Id.*



Traffic in Women, in its 2017 annual report, explains why this element of the law is contradictory:

On the one hand, the decriminalisation of sex work is a protective factor against the exploitation of sex workers, since they have the right to challenge exploitation. However, the policy which prohibits migrant sex work means that not all sex workers fully benefit from decriminalisation. Migrant sex workers are rendered more vulnerable to exploitation which creates conditions in which trafficking could conceivably occur.<sup>149</sup>

At the time that the report was released, no cases of trafficking into sex work had been identified.<sup>150</sup> However, migrants were more likely to be harassed or taken advantage of at work.<sup>151</sup> Lack of immigration status provides an opportunity for abusive clients to make unreasonable demands and then threaten to call the police if their demands are not met.<sup>152</sup> As was seen with the other models, the fear of deportation provides a strong disincentive for migrant sex workers to report these exploitative and abusive experiences to the police.<sup>153</sup> The New Zealand model, then, represents a good first attempt at decriminalization, but its exclusion of migrants leaves this vulnerable community with many of the same problems it faces under criminalization, end demand, and legalization.

## II. NEW YORK'S OPPORTUNITY

As of this Note's publication, New York still criminalizes prostitution; however, the state has taken steps to modify its anti-trafficking efforts to become more victim-oriented. This section explores the history of New York's approach to anti-trafficking, which will lay the groundwork for the argument that New York

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<sup>149</sup> See Armstrong, *supra* note 145.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

should decriminalize sex work as a means to extend labor and employment rights to people in the sex trade.

*A. A Brief History of New York's Approach to Anti-Trafficking*

After two decades of “broken windows” policing under Mayor Rudolph Giuliani in New York City, under which prostitutes were the frequent target of vice arrests, New York endeavored to become a “trail blazer” in modifying its anti-trafficking strategies to be more victim-oriented.<sup>154</sup> This shift, and the reasoning behind it, was not unlike that led by the moral reformer feminists of the nineteenth century.<sup>155</sup> In 2007, following publicity that New York was a major hub for trafficked women and children from abroad, the New York State legislature passed the state’s first anti-trafficking statute.<sup>156</sup>

Under the law, a victim is considered to have been trafficked when another person “advances or profits from” the victim’s prostitution by means of various coercive behavior including providing drugs, debt bondage, physical harm and coercion, “false statements” or “any other act . . . which is calculated to harm the person.”<sup>157</sup> While this text reflects many sex workers’ situations, early interpretations of the law did not conceive of the ordinary street prostitute as a trafficking victim.<sup>158</sup> For example, New York’s interagency task force charged with reporting on the law continued to envision sex trafficking as strictly involving

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<sup>154</sup> Lippman, *supra* note 26 (“Within the new framework that we are creating, New York will be a trail blazer, the first state in the nation to create 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.”).

<sup>155</sup> See *supra* text accompanying notes 42–51.

<sup>156</sup> N.Y. PENAL LAW § 230.34 (McKinney 2016) (effective Nov. 1, 2007); Gruber et al., *supra* note 8, at 1353.

<sup>157</sup> N.Y. PENAL LAW § 230.34.

<sup>158</sup> See NEW YORK STATE INTERAGENCY TASK FORCE ON HUMAN TRAFFICKING, 2, 4 (2008), [https://stage.criminaljustice.ny.gov/pio/humantrafficking/human\\_trafficking\\_rpt\\_aug08.pdf](https://stage.criminaljustice.ny.gov/pio/humantrafficking/human_trafficking_rpt_aug08.pdf) [<https://perma.cc/LL57-HW6P>].

transnational transport and direct coercion through force, threats, confiscated passports, or debt bondage.<sup>159</sup>

But reformers concerned with minors engaged in prostitution pushed for changes to mitigate the harsh effects of criminalization for minors; their efforts led to the 2008 Safe Harbor for Exploited Children Act, which creates a presumption that juveniles charged with prostitution offenses are “person[s] in need of supervision” as opposed to “delinquents.”<sup>160</sup> In 2009, New York went a step further by passing a vacatur statute, whereby a defendant of *any* age charged with prostitution may make a motion to the court that she is a victim of sex trafficking under New York or federal law.<sup>161</sup> Then, in 2015, New York passed the Trafficking Victims Prevention & Justice Act; this law enhanced penalties for those convicted of trafficking and created new trafficking-related crimes.<sup>162</sup> And in 2017, New York’s police commissioner James O’Neill announced that his vice division would be redirected to address sex trafficking and that the division would undergo training in an attempt to change what he described as the “law-enforcement mind-set.”<sup>163</sup>

<sup>159</sup> Gruber et al., *supra* note 8 at 1353; see Denise E. O’Donnell & David A. Hansel, New York State Interagency Task Force on Human Trafficking, New York State Interagency Task Force on Human Trafficking, 2018 Annual Report, 12–13, [https://www.criminaljustice.ny.gov/pio/humantrafficking/FINAL\\_Human\\_Trafficking\\_ITF\\_2018.Annual.Report\\_4.13.20.pdf](https://www.criminaljustice.ny.gov/pio/humantrafficking/FINAL_Human_Trafficking_ITF_2018.Annual.Report_4.13.20.pdf) (last visited Sept. 2, 2022) (“Victims are trafficked into the United States from all over the world, within U.S. borders, and within other countries. They are frequently found enslaved in prostitution . . .”).

<sup>160</sup> N.Y. FAM. CT. ACT § 311.4; see Katherine Mullen & Rachel Lloyd, The Passage of the Safe Harbor Act and the Voices of Sexually Exploited Youth, in *Lawyer’s Manual on Human Trafficking: Pursuing Justice for Victims* 129, 130 (Jill Laurie Goodman & Dorchen Leidholdt eds., 2011) (“In the fall of 2004, the Juvenile Justice Coalition of the Correctional Association of New York (Juvenile Justice Coalition), the Juvenile Rights Practice of The Legal Aid Society, and the Girls Educational Mentoring Services (GEMS) formed a working group to redress this inequity. Together these three organizations made a commitment to drafting and working to pass legislation that would establish that commercially sexually exploited youth are victims of crimes who should be provided with services, not prosecuted for committing criminal acts.”).

<sup>161</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(i).

<sup>162</sup> Andrew J. Lanza, *Lanza & Paulin Announce Passage of Historic Human Trafficking Bill in Both Houses of Legislature*, The New York State Senate (March 17, 2015), <https://www.nysenate.gov/newsroom/press-releases/andrew-j-lanza/lanza-paulin-announce-passage-historic-human-trafficking-bill> [<https://perma.cc/TW9R-GUA7>]. Among other things, the TVPJA enhanced penalties for trafficking offenses, created additional crimes related to prostitution, and removed the word “prostitute” from the Penal Law, replacing it with the phrase “person for prostitution.” A.506, S.7, 2015-2016 Gen. Sess. (N.Y. 2015).

<sup>163</sup> Dan Barry and Jeffrey E. Singer, *The Case of Jane Doe Ponytail*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/interactive/2018/10/11/nyregion/sex-workers-massage-parlor.html> [<https://perma.cc/HE92-9HL6>].

### A. New York's Current Approach

Despite efforts to soften its approach to prostitution and anti-trafficking, the State of New York has struggled to adapt its laws to an extent that garners the intended results: prosecution of traffickers, protection of victims, and prevention of trafficking.<sup>164</sup> From 2008 to 2018, there were a total of 637 arrests where Penal Law § 230.34 was the top charge, yet only 109 of those arrests resulted in a trafficking-relating conviction.<sup>165</sup> And although arrests for sex trafficking mostly rose steadily over that decade—there were 16 in 2008 and 110 in 2018—convictions were scattered; in 2018, there were only three.<sup>166</sup>

Clues as to why New York's "victim-oriented" approaches to sex trafficking largely have failed are perhaps no better illustrated than by New York's Human Trafficking Intervention Courts (HTICs). Borrowing from lessons learned in domestic violence problem-solving courts, New York developed HTICs in 2013.<sup>167</sup> In announcing the "revolutionary" statewide initiative, Chief Judge Jonathan Lippman proclaimed that New York was implementing HTICs to "eradicate the epidemic of human trafficking."<sup>168</sup> The aim was ultimately to "identify trafficking victims, refer them to services, and restore them to law-abiding lives."<sup>169</sup>

While the stated goal of the HTICs is to "break the cycle of exploitation and arrest" for victims of sex trafficking, they attempt to do so by arresting and prosecuting prostitution defendants—mostly poor women of color—and offering them mandated services in lieu of jail time.<sup>170</sup> Thus, HTICs present a contradiction in that

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<sup>164</sup> According to the U.S. State Department Office to Monitor and Combat Trafficking in Persons, this is known as the "3 Ps paradigm." *3Ps: Prosecution, Protection, and Prevention*, U.S. Department of State, <https://www.state.gov/3ps-prosecution-protection-and-prevention/> (last visited Sept. 2, 2022).

<sup>165</sup> O'Donnell & Hansel, *supra* note 159, at 4.

<sup>166</sup> *Id.*

<sup>167</sup> Gruber et al., *supra* note 8, at 1336, 1349 ("Over the next several years, under the DV paradigm of coercive control-which Judge Camacho applied to prostitution offenses-all Queens' prostitution cases, teenage and adult alike, became eligible for prostitution diversion court. This idea, that coercive control is a defense to prostitution charges, even if informally, would become a core justification for the HTICs.").

<sup>168</sup> Lippman, *supra* note 26.

<sup>169</sup> *Id.*

<sup>170</sup> See Gruber et al., *supra* note 8, at 1336.

they view criminal defendants as victims but then seek to help those victims through the institutions of criminal prosecution.<sup>171</sup> So, even when the system deems someone a victim of trafficking, that person is still basically treated as a criminal defendant: they must complete their mandates, and they are held accountable if they do not.<sup>172</sup> But because open cases have a direct effect on immigration applications, job applications, housing applications, and other collateral consequences, HTICs in many ways accomplish the opposite of that for which they were intended: providing an exit for people in the sex trade.<sup>173</sup>

HTICs are also ineffective at targeting and prosecuting sex traffickers. In many cases, victims are disinterested in prosecuting their traffickers, which can be anyone from a massage parlor owner to a domestic partner.<sup>174</sup> Also, because both federal law and state trafficking statutes require proof of force, fraud, or coercion, investigations into trafficking require victims to provide graphic details about their exploitation and commercial sex acts, which can retraumatize.<sup>175</sup> Those in the sex trade are, understandably, reluctant to work with police because their experiences with law enforcement are frequently negative,<sup>176</sup> ranging from verbal abuse and harassment to propositioning sex in exchange for not being arrested.<sup>177</sup>

The dominant victim-narrative, which plagues both HTICs and the anti-trafficking movement at large, imagines all individuals who trade in sex as people in need of rescue, and this framing robs

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<sup>171</sup> *Id.* at 1359.

<sup>172</sup> *Id.* at 1336.

<sup>173</sup> White et al., *supra* note 30, at 37.

<sup>174</sup> See Amy Farrell et al., *Failing Victims? Challenges to the Police Response to Human Trafficking*, *CRIMINOLOGY & PUB. POL'Y* 649, 662 (2019) (“Although law enforcement knows that many of the women owe debts to smugglers or other individuals who facilitated their movement from Korea or China to the United States, ‘they’re very loyal and are not going to admit they’re being trafficked.’”).

<sup>175</sup> *Id.*

<sup>176</sup> Meredith Dank et al., *Consequences of Policing Prostitution: An Analysis of Individuals Arrested and Prosecuted for Commercial Sex in New York City*, *URB. INST.* 28 (April 2017).

<sup>177</sup> It is important to note that these abuses of power appear to be directed at trans women of color in a significant percentage of cases. Of 54 trans women surveyed in one New York study, 63% reported being harassed by a police officer because of their gender presentation, and almost 31.5% reported that a police officer did not arrest them in exchange for sex. Despite the unique experiences conveyed by trans women, women of both cis and trans experience, and gender non-conforming men, reported police violence as well. Often, this violence involved sexual contact. White et al., *supra* note 30, at 27.

all of them of agency. But respect for a person's self-determination requires respect for her choices about sex and survival.<sup>178</sup> And this respect requires the recognition that "some prostitution and trafficking—typically adult, voluntary sex work and migration—is a free choice made by an autonomous individual often resulting from economic necessity."<sup>179</sup>

### III. NEXT STEPS

I felt I had no escape, I had no choice, this was it. I had been arrested so many times. So no one's ever going to hire me. At that time, I didn't have a diploma. I had nowhere to live. If I didn't do [prostitution], I would have no way to get money for me to have somewhere to live.<sup>180</sup>

Economic vulnerability drives trafficking. Indeed, even if one assumes that all people in the sex trade are victims, be it of trafficking, the patriarchy, or exploitative working conditions, there is one antidote to all three of those concerns: economic freedom. Too often, there is a tendency for lawmakers and policy advocates to analyze prostitution through a lens of gendered power relations as opposed to economic ones.<sup>181</sup> This is not to say that gendered power relations do not exist, but understanding sex work as a legitimate business and as an economic occurrence is critically missing from current approaches to anti-trafficking. In the meantime, searching for boogeymen and rounding up prostitutes in the process detracts from the immediate and long-term needs of people in the sex trade, regardless of how they got there.

States should decriminalize sex work in order to effectively address the issue of trafficking. Specifically, New York should pass Senate Bill S3075, which was reintroduced in January 2021.<sup>182</sup>

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<sup>178</sup> JANE E. LARSON, *Prostitution, Labor, and Human Rights*, 37 U.C. DAVIS L. REV. 673, 681 (2004).

<sup>179</sup> *Id.*

<sup>180</sup> Dank et al., *supra* note 176, at 34 (quoting a 32-year-old multiracial female in the sex trade).

<sup>181</sup> LARSON, *supra* note 178, at 681.

<sup>182</sup> See S. B. 3075, 2021-22 Leg. Sess. (N.Y. 2021), <https://www.nysenate.gov/legislation/bills/2021/S3075> [<https://perma.cc/7E6M-SP8P>].

Doing so would automatically extend labor and employment rights to current sex workers, who could then pursue justice when those rights are violated.<sup>183</sup> Moreover, where decriminalizing sex work falls short of extending workplace protections to migrants who lack immigration status, a Sex Workers' Bill of Rights, modeled after current bills of rights that seek to protect domestic workers and nail technicians, can extend labor and employment rights, as well as freedom from harassment, to the communities unprotected by decriminalization alone.<sup>184</sup>

Although decriminalizing sex work at the federal level is an ultimate goal worth pursuing, this section focuses specifically on New York for three reasons. First, in addition to the fact that New York is considered a trafficking hub, the bill to decriminalize sex work in New York is already in committee.<sup>185</sup> Second, New York has been at the forefront of bill-of-rights campaigns that protect workers omitted from traditional labor and employment laws; it has a chance to continue this trend and set a standard that other states could then implement.<sup>186</sup> Third, New York has been a center of sex workers' rights grassroots organizing.<sup>187</sup> Consequently, a burgeoning coalition supporting sex workers' rights is already in place to support sex workers as they keep themselves safe where the criminal justice system has failed them.

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<sup>183</sup> *Id.*

<sup>184</sup> See LaLa B. Holston-Zannell, *Sex Work is Real Work, and it's Time to Treat it That Way*, ACLU (June 10, 2020), <https://www.aclu.org/news/lgbtq-rights/sex-work-is-real-work-and-its-time-to-treat-it-that-way> [<https://perma.cc/VDF4-C4EV>].

<sup>185</sup> See S. B. 6419, 2019-20 Leg. Sess. (N.Y. 2019), <https://www.nysenate.gov/legislation/bills/2019/s6419> [<https://perma.cc/YQG9-N39K>].

<sup>186</sup> See, e.g., Jamie Feldman, *New Salon Bill of Rights Helps Ensure Safety of Salon Workers*, HUFFPOST (Jun. 6, 2017), [https://www.huffpost.com/entry/nail-salon-bill-of-rights\\_n\\_7487464](https://www.huffpost.com/entry/nail-salon-bill-of-rights_n_7487464) [<https://perma.cc/2V3S-R66L>]; see also N.Y. Dep't of Lab., *Labor Rights and Protections for Domestic Workers in New York* (2010), <https://www.labor.ny.gov/formsdocs/factsheets/pdfs/P712.pdf> [<https://perma.cc/UK9N-LRRK>]; N.Y. Dep't Lab., *Forms and Publications*, <https://dol.ny.gov/domestic-workers-bill-rights> (last visited Apr. 29, 2021) (listing the languages in which the fact sheet may be printed).

<sup>187</sup> See *infra* note 207–09.

*A. New York Can Craft the New Decriminalization Model*

New York has an opportunity to craft a new model of decriminalization and expand on the model New Zealand has established. Senate Bill S3075 would “repeal statutes that criminalize sex work between consenting adults, but keep laws relating to minors or trafficking, and . . . provide . . . criminal record relief for people convicted of crimes repealed under [the] bill.”<sup>188</sup> The passage of this bill has the potential to not only improve the lives of voluntary sex workers but also empower trafficking victims who wish to exit the trade.

To review, the main purpose of decriminalization is to displace the criminal law, and specifically the police, as the “de facto regulators of sex work.”<sup>189</sup> In a decriminalized system, the sale, purchase, and facilitation of commercial sex would be shifted instead into the framework of contract and labor law.<sup>190</sup> The purchase and facilitation of sexual services would remain subject to the same reasonable penal laws on coercion, exploitation, bullying, assault, and rape that apply in other contract and labor contexts, but would otherwise not be criminalized.<sup>191</sup> Because the work itself is not criminalized, sex workers who encounter problems on the job—coercion, exploitation, harassment, or safety concerns—would be more inclined to seek recourse for those problems.<sup>192</sup>

But while decriminalization would help lift barriers that prevent those in the sex trade from seeking recourse for their complaints, protecting people in the sex trade requires an important second step: the application of labor and employment law principles. Applying these principles to sex work is not easy. Because sex work is so varied in terms of the nature of the work and the workers themselves, any approach to extending labor and employment protections to those in the sex trade must be flexible

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<sup>188</sup> See S. B. 3075, 2021-22 Leg. Sess. (N.Y. 2021), <https://www.nysenate.gov/legislation/bills/2021/S3075> [<https://perma.cc/AEW4-9NHB>].

<sup>189</sup> Molly Smith & Juno Mac, *Revolted Prostitutes: The Fight For Sex Workers' Rights*, Verso 197 (2018).

<sup>190</sup> *Id.* at 193.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*



and, most importantly, led by sex workers.<sup>193</sup> This necessity suggests a combination of organizing strategies with support from the state and wider networks.

Union organizing, for example, might work best in the context of strip clubs, massage parlors, and brothels. Collective bargaining generally requires two or more employees aggregated for the assertion for collective bargaining or organizational rights, and these workplaces imply a workforce of more than one sex worker.<sup>194</sup> In fact, exotic dancers, whose work is already decriminalized, have demonstrated how labor and employment law principles can apply to the sex sector.<sup>195</sup>

Consider for example the Lusty Lady in San Francisco. From its inception in 1982, the Lusty Lady was considered among dancers to be a good place to work, not only because the club was known to be “sex positive” in that the dancers were feminists who considered their work empowering, but also because the club hired dancers as employees as opposed to independent contractors.<sup>196</sup> This classification allowed the dancers to access job security and benefits.<sup>197</sup> But the dancers at the Lusty Lady were not without complaints.<sup>198</sup> In the early 1990s, a dancer petitioned management to increase wages paid to women who worked in private booths as opposed to the larger stage.<sup>199</sup> Dancers of color subsequently created their own petition to end the racist

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<sup>193</sup> The term “sex work” applies to various commercial services in different cultural, economic, geographic, and social contexts. Services may include street solicitation, escorting, exotic dance, sugar babying, bondage and domination, sexual healing and massage therapy, attentive company, “camgirling,” and acting in pornographic videos. *See, e.g.*, van der Meulen, *supra* note 118, at 149; *see also* AGUSTÍN, *supra* note 43, at 60.

<sup>194</sup> *See* ABA SECTION LAB. AND EMP. L., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* ch. 11.1 (John E. Higgins, Jr. et al. eds., 7th ed. 2020) (explaining the requirements to qualify as a bargaining unit).

<sup>195</sup> *See generally* Nikki Karalekas, *Is Law Opposed to Politics for Feminists? The Case of the Lusty Lady*, 26 *FEMINIST FORMATIONS* 27, 27 (2014) (providing a case study on the unionization of exotic dancers in San Francisco); *see also* Andrew Wright, *Union-Represented Strippers Have Been on Strike for Nearly 10 Weeks in North Hollywood, ‘Seeking Action Against Increased’ Safety Threats*, *PEOPLE’S WORLD* (Jun. 7, 2022), <https://www.peoplesworld.org/article/strippers-on-strike-in-north-hollywood-after-mounting-safety-threats/> [<https://perma.cc/X65F-UN7F>] (explaining that “formally employed” exotic dancers in California, by organizing for their protection, became a cause for celebration among labor unions).

<sup>196</sup> *See* Karalekas, *supra* note 193, at 39.

<sup>197</sup> *See id.*

<sup>198</sup> *See id.*

<sup>199</sup> *See id.*

scheduling practices, as only white dancers were scheduled in the more lucrative private booths to begin with.<sup>200</sup> One of the few Black dancers at the club, Sihban Brooks, filed a racial discrimination complaint with the Department of Fair and Equal Housing to protest the racist scheduling practices.<sup>201</sup> Dancers had other grievances as well, including lack of sick pay and the installation of one-way mirrors, which allowed customers to covertly videotape performances.<sup>202</sup>

This list of grievances led the dancers to attempt to form a union.<sup>203</sup> Although the dancers at the Lusty Lady were considered employees as opposed to independent contractors, larger parent unions generally refused to represent them because they were in the adult entertainment industry.<sup>204</sup> Eventually, with the help of a nonprofit called the Exotic Dancer's Alliance, the dancers convinced the Service Employees International Union (SEIU) to represent them.<sup>205</sup> During the summer of 1996, the dancers held a National Labor Relations Board (NLRB) election, against which management campaigned rigorously.<sup>206</sup> But, as one dancer recalls, "Despite the lies, deceptive leaflets, threats, harassment of union activists and scripted, tear-filled pleas to give the company a 'second chance' we stuck it out and won the election 57 to 15. We named our SEIU chapter the Exotic Dancers Union."<sup>207</sup> Eventually, the dancers bought the club and established a co-op.<sup>208</sup>

Although workplace organization of dancers is still rare, exotic dancers, as occupiers of a decriminalized sector of the sex trade,

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<sup>200</sup> *See id.* at 39–40.

<sup>201</sup> *See id.* at 40.

<sup>202</sup> *See id.*

<sup>203</sup> *See id.*

<sup>204</sup> *See id.*

<sup>205</sup> *See id.*

<sup>206</sup> *See id.* at 40–41.

<sup>207</sup> *Id.* The dancers entered contract negotiations with management, but their reluctance required them to deploy their bargaining rights. Their creative strategies to get management to take them more seriously included a work slowdown in the form of a "No Pink Day," where dancers agreed to work with their legs crossed. They wrote slogans on their hands and bodies asking patrons not to spend their money there, and that the club was unfair to labor. They also staged a two-day picket line outside the club and chanted, "2, 4, 6, 8, Don't go in to masturbate!" Soon, the dancers were able to negotiate a contract that safeguarded them from arbitrary punishment and dismissal, protected older workers, provided workers with an automatic raise and paid sick day, and allowed dancers to swap shifts freely without consequence. *See id.* at 41–42.

<sup>208</sup> *See id.* at 42.

have established a precedent by which sex workers might demand labor and employment rights. In the wake of the Lusty Lady came a number of exotic dancers throughout the country who successfully took their employers to court in order to be deemed employees instead of independent contractors.<sup>209</sup> In *Harrell v. Diamond A. Entertainment, Inc.*, for example, the court considered whether exotic dancers could be considered employees under the Fair Labor Standards Act (FLSA).<sup>210</sup> In applying the FLSA's "economic realities" test, they found that the dancers were employees rather than independent contractors.<sup>211</sup>

But beyond the context of employee status and collective bargaining, obtaining labor and employment rights for this industry presents a number of other unique challenges, in part because sex work is extremely diverse: escorts and street workers are going to have different needs and concerns than brothel and massage parlor employees. Also, sex work is oftentimes transient. According to one sex worker, "women go in and out of the sex trade, or they go in and out and between sectors, or they move around geographically, so it can be really difficult to get that sort of critical mass [in a labor organizing context]."<sup>212</sup> These concerns, combined with the fact that the National Labor Relations Act's application to workers who lack immigration status is limited, suggest a look toward alt-labor strategies.<sup>213</sup>

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<sup>209</sup> See generally Margot Rutman, *Exotic Dancers' Employment Law Regulations*, 8 TEMP. POL. & CIV. RTS. L. REV. 515, 525, 529, 537-38 (1999) (collecting cases); see also Holly J. Wilmet, *Naked Feminism: The Unionization of the Adult Entertainment Industry*, 7 AM. U. J. GENDER, SOC. POL'Y & L. 465, 474 (1999) (applying the economic realities test to determine whether dancers generally are considered employees or independent contractors under the Fair Labor Standards Act).

<sup>210</sup> See *Harrell v. Diamond A Ent., Inc.*, 992 F. Supp. 1343, 1345 (M.D. Fla. 1997).

<sup>211</sup> See *id.* at 1354; see also 29 C.F.R. § 795.105 (2022) (determining employee and independent contractor classification under the FLSA).

<sup>212</sup> See van der Meulen, *supra* note 118, at 166 (quoting Kara, a sex worker).

<sup>213</sup> See generally National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169 (1994); see also *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 151 (2002) (holding that Federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA), foreclosed the NLRB from awarding backpay to an undocumented alien who had never been legally authorized to work in the United States, even though an alien had been unlawfully terminated in violation of the NLRA).

*B. New York Should Implement a Sex Workers' Bill of Rights*

I feel that this point, the best we can do is within our own communities, sex work communities and broader communities, is continue to use the language of sex work and to present ourselves and conceptualize issues in a labour context. So when we are talking about safer sex, it's an occupational health and safety issue. When we're talking about violence against sex workers, it's an occupational health and safety issue. Not just use the language, but really build that construct and that understanding around our work and around our activities so it's then construed and understood as work. Then you start to build a bit of a snowball movement.<sup>214</sup>

As an alternative labor strategy, a Sex Workers' Bill of Rights should come on the heels of decriminalization in New York. Modeled after New York's Domestic Workers' Bill of Rights and the Bill of Rights for Nail Salon Workers, a Sex Workers' Bill of Rights' aim would be to fill the gaps left by current labor and employment protections in addressing the needs of communities most vulnerable to exploitation, namely migrants.

Sector-specific bills of rights act as catchalls to protect vulnerable workers who might slip through the cracks of traditional labor and employment protections, either because those protections explicitly exclude workers or because workers are not aware of the protections.<sup>215</sup> For example, domestic workers have long faced enormous hurdles in their attempts to organize.<sup>216</sup> In what some call an "echo of slavery," the Fair Labor

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<sup>214</sup> See van der Meulen, *supra* note 118, at 154 (quoting Kara, a sex worker).

<sup>215</sup> See Office of Labor Policy & Standards, *Workers' Bill of Rights*, N.Y.C. DEPT CONSUMER AND WORKER PROT., <https://www1.nyc.gov/site/dca/workers/workersrights/know-your-worker-rights.page> [<https://perma.cc/NJ76-4WKN>] (last visited Aug. 27, 2022) (explaining the industry and worker specific protections available to vulnerable worker populations, specific protections for domestic workers).

<sup>216</sup> See Linda Burnham & Andrea Cristina Mercado, *Expanding Domestic Worker Rights in the 21st Century: Statewide Campaigns for Domestic Worker Bill of Rights*, NO

Standards Act and the National Labor Relations Act notoriously excluded domestic workers and farm workers from the federal codification of the rights of workers to organize and have decent working conditions.<sup>217</sup> As such, domestic workers have no federally recognized right to form unions, choose representatives, or bargain collectively.<sup>218</sup>

To address this problem, the New York Domestic Workers Justice Coalition, a group of other migrant and worker-focused organizations, launched a citywide campaign to improve working conditions in 2001.<sup>219</sup> After two years of coalition building, worker mobilization, and winning over key members in the city council, Local Law 33 was passed.<sup>220</sup> Local Law 33 mandated employment agencies that place domestic workers to provide employees with information in writing about wages, hours, services, and agency fees of each potential position, and the law included record-keeping and enforcement provisions.<sup>221</sup> This win was followed by a statewide Domestic Worker Bill of Rights, which was signed in 2010.<sup>222</sup>

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ONE SIZE FITS ALL 295, 295 (Janice Fine et al. ed, 2018) (discussing how the implementation of the National Labor Relations Act created criteria “against which . . . organizing must push”).

<sup>217</sup> See 29 U.S.C. § 151 (discussing the purpose of the National Labor Relations Act (NLRA) to allow for collective bargaining practices and ultimately improve working conditions); see also § 152(3) (stating that in regard to the NLRA, “[t]he term ‘employee’ . . . shall not include any . . . agricultural laborer . . .”); § 203(e) (explaining that for purposes of the Fair Labor Standards Act, the term employee “does not include any individual employed by an employer engaged in agriculture if such individual is [a member of the employer’s immediate family.]”); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L. J. 95, 96–97 (2011) (referring to the exclusion as an “Echo[] of Slavery” in the title of the article).

<sup>218</sup> See Burnham & Mercado, *supra* note 216, at 295.

<sup>219</sup> The New York Domestic Workers Coalition included Adhikaar for Human Rights, Unity Housecleaners, Damayan Migrant Workers Association, Haitian Women for Haitian Refugees, and Andolan Organizing South Asian Workers. See Ai-jen Poo & E. Tammy Kim, *Organizing to Transform Ourselves and Our Laws: The New York Domestic Workers Bill of Rights Campaign*, 44 CLEARINGHOUSE REV. J. POVERTY L. AND POL’Y 577, 578 (2011); see also *Domestic Work is an Engine of New York City’s Economy*, NATIONAL DOMESTIC WORKERS ALLIANCE, <https://www.domesticworkers.org/membership/chapters/we-dream-in-black-new-york-chapter/nyc-care-campaign/new-york-city-domestic-work-factsheet/> [<https://perma.cc/883D-G5CW>] (last visited Sept. 4, 2022) (discussing some of the issues that the Alliance is addressing); Burnham & Mercado, *supra* note 216, at 296 (explaining that the Coalition began in 2001).

<sup>220</sup> See Burnham & Mercado, *supra* note 216, at 296.

<sup>221</sup> *Id.*

<sup>222</sup> See N.Y. Dep’t of Lab., *supra* note 186 (“Domestic workers and their employers have rights and responsibilities under the Labor Law, including the Domestic Workers’ Bill of Rights, which took effect on November 29, 2010.”).

New York's Domestic Worker Bill of Rights includes wage and hour provisions, such as the right to overtime pay, rest days, and paid rest days, and creates a cause of action for domestic workers who suffer sexual or racial harassment.<sup>223</sup> Importantly, the Department of Labor fact sheet explaining domestic employees' rights, which comes in sixteen languages, clearly states that "the Domestic Workers' Bill of Rights, appl[ies] to all workers, regardless of their immigration status."<sup>224</sup>

Organizing domestic workers presents many of the same challenges that organizing sex workers would. First, both the workforce and the employers are similarly disaggregated and dispersed, making it difficult to establish a large collective bargaining unit.<sup>225</sup> Second, domestic work often functions in an informal context, and as such, there are few standards or guidelines.<sup>226</sup> It is also a predominantly female workforce, which is largely made up of migrants.<sup>227</sup> These vulnerabilities have rendered the workforce similarly susceptible to labor exploitation and abuse, including subminimum wages, wage theft, forced overtime work, no overtime pay, health and safety hazards, threats, and intimidation.<sup>228</sup> Not surprisingly, domestic workers are also particularly susceptible to trafficking.<sup>229</sup>

The domestic worker movement owes some of its successes to a strategic decision to pursue policy wins at the state level as a way of "both creating the necessary framework to protect and expand the labor rights of domestic workers and, at the same time, to increase the capacity of the movement to mobilize, organize, advocate, and shift the narrative about the rights and dignity of low-wage women workers."<sup>230</sup>

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<sup>223</sup> See *id.*

<sup>224</sup> *Id.*; see *Domestic Workers' Bill of Rights*, N.Y. STATE DEP'T LAB., <https://dol.ny.gov/domestic-workers-bill-rights> [<https://perma.cc/4SNR-GZZY>] (last visited Sept. 4, 2022) (listing the languages in which the fact sheet may be printed).

<sup>225</sup> See Burnham & Mercado, *supra* note 216, at 296.

<sup>226</sup> See Ai-jen Poo & Palak Shah, *Mobilizing High-Road Employers and Private Sector Strategies: National Domestic Workers Alliance*, NO ONE SIZE FITS ALL 359, 359 (Janice Fine et al., eds., 2018).

<sup>227</sup> See Burnham & Mercado, *supra* note 216, at 296.

<sup>228</sup> See *id.*

<sup>229</sup> See *id.*

<sup>230</sup> *Id.* at 313.

Similarly, the Bill of Rights for Nail Workers seeks to enforce ethical working conditions in the nail salon industry.<sup>231</sup> In fourteen languages, a poster which nail salon owners must display in their salons indicate minimum wage requirements, overtime requirements, and restrictions on owners, such as taking tips, denying meal breaks, or failing to provide safety equipment such as respirator masks, gloves, and eye protection.<sup>232</sup> At the top of the fact sheet it clearly states “THESE ARE YOUR RIGHTS REGARDLESS OF IMMIGRATION STATUS.”<sup>233</sup>

It is not difficult to imagine how sex workers, especially those who work for managers, might benefit from a similar bill of rights. Where federal and state labor laws fail to provide coverage to those lacking immigration statuses, a bill of rights has the potential to fill in the gaps. Sex workers in all sectors would have avenues by which to address working conditions, regardless of immigration status.<sup>234</sup> This, in turn, would reduce exploitation.

### *C. The Support System and Coalition Building*

Because of the stigma, if you say “sex work” for a lot of these women they don’t think of themselves that way. By and large, they aren’t politicized around sex work and this is really something that they’re doing because they need to make money or because they are students or whatever. Understandably, they don’t take on that identity. . . . They think it’s not a real job because it is so delegitimized in every possible way. They don’t put it back into the realm of labour. . . . That happens with all forms of women’s work but in the sex industry more so. It is totally delegitimated in the eyes of the workers themselves. They don’t see themselves as workers

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<sup>231</sup> See Jamie Feldman, *New Salon Bill of Rights Helps Ensure Safety of Salon Workers*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/nail-salon-bill-of-rights\\_n\\_7487464](https://www.huffpost.com/entry/nail-salon-bill-of-rights_n_7487464) [<https://perma.cc/8ULS-BM5R>].

<sup>232</sup> See N.Y. DEP’T OF LAB., *BILL OF RIGHTS FOR NAIL WORKERS 1* (2021), <https://dol.ny.gov/system/files/documents/2021/12/p718-12-21.pdf> [<https://perma.cc/H67R-Z8KC>].

<sup>233</sup> *Id.*

<sup>234</sup> See, e.g., *id.* (providing a phone number for information or help).

and they don't think about labour rights or anything like that.<sup>235</sup>

One of the most unique issues with organizing the sex industry is the stigma attached to sex work and the fact that many members of the workforce harbor very real fears of discrimination and reprisal from family, friends, and—currently—the law.<sup>236</sup> As such, the third necessary element for a successful overhaul of the sex work industry, following decriminalization and a bill of rights protecting labor and employment rights of all sex workers, is a grassroots coalition led by sex workers to support these efforts and ensure their success.

The importance of this coalition-building is illustrated by the impact that the Aotearoa New Zealand Sex Workers' Collective (NZPC) has had on the industry there.<sup>237</sup> The NZPC is not a union, and sex workers can be involved to any extent they wish.<sup>238</sup> The NZPC serves several functions, including providing health and advocacy services, advising on laws and policies, informing research, and providing a safe space for sex workers to meet, strategize, and share ideas and experiences.<sup>239</sup> But the NZPC has an additional important function, which is that it is uniquely situated to deal with trafficking if it were to arise.<sup>240</sup> While sex workers in New Zealand have reported that they still would not feel comfortable approaching the police if they were to encounter an instance of trafficking, they would feel comfortable approaching NZPC.<sup>241</sup> As one explained,

I think that my first reaction [to encountering someone who has been trafficked] would have been to offer to take them here to the NZPC. I know that

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<sup>235</sup> Van der Meulen, *supra* note 118, at 163 (quoting Julia, a sex worker).

<sup>236</sup> AGUSTÍN, *supra* note 43 at 73 (discussing the stigma attached to sex work).

<sup>237</sup> See *About NZPC*, AOTEAROA NEW ZEALAND SEX WORKERS' COLLECTIVE, <https://www.nzpc.org.nz/About-NZPC> [<https://perma.cc/TW8M-2QCJ>] (last visited Aug. 28, 2022) (“NZPC has long been at the forefront of reforming the law for sex workers.”).

<sup>238</sup> See Lynzi Armstrong, *New Zealand*, in *SEX WORKERS ORGANISING FOR CHANGE: SELF-REPRESENTATION, COMMUNITY MOBILIZATION, AND WORKING CONDITIONS* 73, 83 (Global Alliance Against Traffic in Women 2018), <https://www.gaatw.org/publications/SWorganising/SWorganising-complete-web.pdf> [<https://perma.cc/45ZZ-689R>].

<sup>239</sup> See *id.*

<sup>240</sup> See *id.* at 97–98.

<sup>241</sup> See *id.* at 97.



the NZPC has resources and other languages and has workers who can communicate with people who don't speak English. So I think that would have probably [been] my first move. I think if they felt like they were in real danger I would have let them know that the police won't be horrible to them, but I don't know how likely I would have been to recommend that because of the possible consequences of deportation.<sup>242</sup>

This sentiment demonstrates what is so important about grassroots organizing, as well as what is wrong with other approaches to anti-trafficking. Because those in NZPC are considered "insiders" rather than outsiders, sex workers and others involved in sex work are more likely to share with NZPC information that they would not be willing to share with someone who is not part of the community.<sup>243</sup>

To the extent that sex workers and their allies are currently able to organize, despite criminalization, New York is already home to a burgeoning grassroots movement. DecrimNY is, according to its website, "a new coalition made up of more than 20 current and former sex workers, allies, and organizational partners seeking to decriminalize, decarcerate, and destigmatize the sex trades in New York City and State."<sup>244</sup> The Sex Workers Project at the Urban Justice Center engages in "free legal services, education, research, and policy advocacy" to build a movement to protect the human rights of sex workers, and their aim is to "create a world that is safe for sex workers and where human trafficking does not exist."<sup>245</sup> And Red Canary Song, a transnational grassroots collective of Asian and migrant sex workers, has three tenets: (1) "No more police raids and deportations. Policing is not social work;" (2) "Labor rights in our workplaces, regardless of immigration status: freedom to openly assemble without fear, share resources, and collectively organize for better wages and

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<sup>242</sup> *Id.* at 94.

<sup>243</sup> *Id.* at 97.

<sup>244</sup> *Coalition Members*, DECRIM NY, <https://www.decrimny.org/coalition-members> [<https://perma.cc/P456-TB76>] (last visited Sept. 4, 2022).

<sup>245</sup> *About Us*, URB. JUST. CTR., <https://swp.urbanjustice.org/about> [<https://perma.cc/8V2T-Z8BB>] (last visited Sept. 4, 2022).

working conditions;” and (3) “Nothing about us without us. Respect and dignified livelihood for all sex workers and migrant workers.”<sup>246</sup> This organization came to be in the wake of the death of Yang Song.<sup>247</sup>

## CONCLUSION

Yang Song did not wish to be in the sex industry.<sup>248</sup> But she did not trust her city’s criminal justice system, and understandably so.<sup>249</sup> A union would not have fixed all of Yang Song’s problems, nor would decriminalization of the sex trade. Immigration, borders, poverty, and the inherent exploitation that comes with living in a capitalist society will not be fixed by the decriminalization of sex work—the problem is admittedly much bigger than that. But understanding that the cause of sex trafficking is more of a *what* than a *who* is a first step in the right direction. Economic vulnerability is the target. And short of solving globalization poverty, recognizing this target must inform our approaches to anti-trafficking going forward.

Any policy that does not center the voices, concerns, and experiences of people in the sex trade will fail. This is because advocating for policies that ignore those directly impacted requires seeing everyone who trades in sex as a victim in need of rescue. By pushing sex work deeper underground and out of sight, initiatives based on “saving” sex workers from bad actors accomplish the opposite of what they intend.

Sex workers are known as whores, hookers, prostitutes, and sex workers. Regardless of what we call them, they invoke something in us. For many, it is the “sex” that is wrong with the “work.” Sex

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<sup>246</sup> *About Us*, RED CANARY SONG, <https://www.redcanarysong.net/about-us> [<https://perma.cc/97XV-ZEQ9>] (last visited Sept. 4, 2022).

<sup>247</sup> *See id.* (“We began our organizing in a fight for justice and police accountability, after the death of Flushing massage worker, Yang Song, who was killed during a police raid in November 2017.”).

<sup>248</sup> Dan Barry & Jeffrey E. Singer, *The Case of Jane Doe Ponytail*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/interactive/2018/10/11/nyregion/sex-workers-massage-parlor.html> [<https://perma.cc/R63E-7DW3>].

<sup>249</sup> *See id.* (“[T]he women rarely confide in the police or even their lawyer about their circumstances.”).

work is different, somehow—it is not like being a waitress, nanny, or maid. Sex work is special.

Sex work *is* special, but it is because liberating the sex industry from the chains of exploitation means liberating some of the most marginalized people in society, which can, in turn, provide a model for the liberation of others. As stated by Black Women for Wages for Housework, “When prostitutes win, all women win.”<sup>250</sup> And if there is one thing we know about prostitutes, it is that they are not going anywhere. No quantity of ended demands will eradicate them. But “the way a whore fights the power is of value to everyone.”<sup>251</sup> It would behoove lawmakers, and all of us, to focus on getting out of their way and letting them do that.

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<sup>250</sup> MOLLY SMITH & JUNO MAC, *REVOLTING PROSTITUTES: THE FIGHT FOR SEX WORKERS’ RIGHTS* 1, 220 (2018).

<sup>251</sup> *Id.*