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LEGALIZING PROSTITUTION: PROVIDING PROTECTION FROM THE LAW

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I. INTRODUCTION

In recent years, representatives from several different states have proposed legislation and policies at the national, state, and local levels of government that aim to afford increased protection to individuals who sell sex.¹ This increase in proposed legislation suggests that politicians have begun taking seriously the harms that individuals who sell sexual services face every day, though their means to protect such individuals vary widely.² For instance, in 2019 Rep. Ayanna Pressley proposed a bill to the U.S. House of Representatives that would eliminate both “civil and criminal penalties related to consensual sex work” for both the seller and the buyer.³ Kay Khan, a state representative from Massachusetts, however, proposed a resolution to decriminalize the selling of sexual services, but to maintain the criminal penalties in place

¹ The People’s Justice Guarantee Act, H.R. 702, 116th Cong. (2019) (proposing to “remov[e] criminal and civil penalties related to consensual sex work” nationwide); H.R. Res. 568, 2019-2020 Gen. Assemb., Reg. Sess. (Vt. 2020) (proposing to “provide limited immunity from criminal prosecution” to sex workers when reporting that they are the victim of a crime or a witness to a crime that arose from their involvement in sex work in Vermont); S. Res. 233, 2019–2020 Reg. Sess. (Cal. 2019) (amending state law to provide immunity to sex workers who report to law enforcement that they have been a victim of a crime or witnessed a crime and amending state evidence rules to disallow one’s having condoms on their person from being used as evidence that the person was intending to sell sex); H.R. Res. 1480, 191st Gen. Ct., Reg. Sess. (Mass. 2019) (proposing to decriminalize the act of selling sexual services but leave criminal penalties in place for purchasers of sex); H.P. 251, 129th Leg., 1st Reg. Sess. (Me. 2019) (proposing to repeal criminal penalties for engaging in prostitution and allows someone convicted of engaging in prostitution to petition the court for expungement of such record).

² See H.R. 702; but see Mass. H.R. Res. 1480.

³ Janice G. Raymond, *Racial Justice and Decriminalization of Prostitution: No Protection for Women of Color*, 5 DIGNITY: J. ON SEXUAL EXPLOITATION & VIOLENCE 1, 1 (2020) (quoting H.R. 702).

against the buyers.⁴ The Manhattan District Attorney, Cy Vance, Jr., has taken an entirely different approach that avoids the lengthy process of passing legislation altogether; instead, his office has instituted a “decline-to-prosecute” policy regarding prostitution related arrests.⁵

While states’ approaches to sex work legislation vary widely, they do track four main models of sex work legislation: complete criminalization, partial decriminalization, complete decriminalization, and legalization.⁶ This note will explore these four approaches, discuss the schools of thought that justify each approach, and offer illustrative legislation from existing U.S. state statutes, recently proposed state and federal legislation, and legislation from other countries that highlight each approach.

Voluntary, consensual sex work ought not be confused with sex trafficking, which is sex work that is forced by violence or other coercive threats.⁷ On the contrary, voluntary sex workers can be presumed to have weighed their employment options, along with the potential consequences—legal, social, and otherwise—and decided

⁴ Jesse McKinley, *Could Prostitution be Next to be Decriminalized?*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/nyregion/presidential-candidates-prostitution.html>.

⁵ Press Release, Cy Vance, Jr., Dist. Att’y, Manhattan Off. of the Dist. Att’y, Ends Prosecution of Prostitution and Unlicensed Massage, A First in New York State (Apr. 21, 2021), <https://www.manhattanda.org/d-a-vance-ends-prosecution-of-prostitution-and-unlicensed-massage/>.

⁶ Hila Shamir, *Feminist Approaches to the Regulation of Sex Work: Patterns in Transnational Governance Feminist Law Making*, 52 CORNELL INT’L L. J. 177, 178–79 (2019); Janet Halley et. al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 338–39 (2006).

⁷ Louise Cahill, *Conflating Sex Work and Trafficking is Harmful. We Need to Stop*, EACH OTHER (Jul. 30, 2019), <https://eachother.org.uk/sex-work-and-sex-trafficking-different/>.

upon their chosen profession.⁸ In 1990, COYOTE, a prominent sex workers' rights organization, estimated that only roughly 15% of sex workers are coerced into the profession.⁹ Though an up-to-date statistic is virtually impossible to determine due to underground nature of criminalized activities, the conflation is dangerous no matter the number.¹⁰ It should not be presumed that those who sell sex are victims solely because of the work in which they engage, nor that they were forced into their line of work.¹¹

That this note emphasizes that voluntary transactional sex and sex trafficking should not be conflated, does not mean that sellers of sexual services are never victims; sex workers far too regularly experience harassment, wage theft, assault, and sexual assault—often perpetuated by the state.¹² Despite the many ways in which sex industry workers are regularly physically, emotionally, and sexually assaulted, the resources for reporting these crimes made against them are extremely limited.¹³ Reporting such incidents exposes them to a different kind of violence: state violence.¹⁴

⁸ Valerie Jenness, *From Sex as Sin to Sex as Work: COYOTE and the Reorganization of Prostitution as a Social Problem*, 37 SOC. PROBS. 403, 406 (Aug. 1990).

⁹ *Id.*

¹⁰ See Maggie McNeill, *Lies, Damned Lies, and Sex Work Statistics*, WASH. POST (Mar. 27, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/03/27/lies-damned-lies-and-sex-work-statistics/>; see also Cahill, *supra* note 7.

¹¹ See generally Cahill, *supra* note 7.

¹² Fabian Luis Fernandez, *Hands Up: A Systemized Review of Policing Sex Workers in the U.S.*, (Jan. 2016) (MPH thesis, Yale University) (EliScholar).

¹³ Coty R. Miller & Nuria Haltiwanger, *Prostitution and the Legalization/Decriminalization Debate*, 5 GEO. J. GENDER & L. 207, 232 (2004).

¹⁴ World Health Org. et al., *Addressing Violence Against Sex Workers, Implementing Comprehensive HIV/STI Programmes with Sex Workers: Approaches from Collaborative Interventions*, 19, 24 (2013); Ine

As long as sex work is illegal, sex industry workers have minimal recourse to prevent or respond to violence and other crimes committed against them.¹⁵ Reporting crimes against them to police exposes sex workers to both arrest and prosecution for engaging in such work, and violence and harassment perpetrated by the police.¹⁶ At the same time, the goals of criminalizing sex work have failed to be met: laws penalizing prostitution have done little to deter, reduce harm, or dampen the demand for prostitution.¹⁷

This note aims to show how and why criminalization has become the leading legal response to sex work, to detail the various forms of violence to which sex workers are exposed, and to offer alternative responses to sex industry work such as employment and health laws. Section I will provide necessary background information to provide context to the issue of sex work legislation in the United States, as well as providing information on the various sources and types of violence to which sex workers are exposed. Section II will examine the different approaches that various legislatures have taken regarding the regulation—or the lack thereof—of sex work. Section II will also discuss the views that accompany such frameworks and question whether the goals justifying the various approaches are being met. Lastly, Section III will conclude by reiterating the many failures of

Vanwesenbeeck, *Sex Work Criminalization is Barking Up the Wrong Tree*, 46 Archives Sexual Behav. 1631, 1633 (2017).

¹⁵ WORLD HEALTH ORGANIZATION ET AL., *supra* note 13, at 24–25; *see also* Global Network of Sex Work Projects, *Policy Brief: The Impact of Criminalisation on Sex Workers' Vulnerability to HIV and Violence* (2017), https://www.nswp.org/sites/nswp.org/files/impact_of_criminalisation_pb_prf_01.pdf.

¹⁶ Fernandez, *supra* note 12.

¹⁷ Statement of Councilmember David Grosso, *The Criminalization of Sex Work has Caused More Harm than Good. D.C. Needs a New Approach* (Oct. 17, 2019), <http://www.davidgrosso.org/grosso-analysis/2019/10/17/the-criminalization-of-sex-work-has-caused-more-harm-than-good-dc-needs-a-new-approach>.

criminalization and compare a few key differences in proposed legislation.

II. BACKGROUND

A. Statistics

Because sex work encompasses so many different avenues of the sex industry, it is difficult to provide a complete assessment of its statistical significance on a large scale.¹⁸ Still, some data are available to give us an incomplete snapshot of the sex industry in the United States.¹⁹ For instance, sociologist Ronald Weitzer estimates that Americans spend over \$13 billion annually on the legal forms of sex work that include magazine and video pornography and strip clubs, and that roughly one in ten adult Americans go to a strip club at least once a year.²⁰ Though a more accurate number is most likely higher, fifteen to eighteen percent of American men have admitted to paying for sex at least once, and between two to four percent reporting that they had paid for sex within the past year.²¹

Havocscope, a website that provides accurate data on black market activities and has been relied upon for such various respected international organizations such as the World Economic Forum and the Council on Foreign Relations, estimates that prostitution in the United States generates roughly \$14 billion in annual revenue.²² Havocscope lists prostitution as the second largest source to the worldwide black market, contributing around \$186 billion annually.²³ Although

¹⁸ Leon Anderson, *DEVIANCE: Social Constructions and Blurred Boundaries* 315 (2017).

¹⁹ *Id.*

²⁰ *Id.* (citing Ronald Weitzer, *Sex For Sale: Prostitution, Pornography, and the Sex Industry* (2d ed. 2010); Ronald Weitzer, *Sociology of Sex Work*, 35 *Ann. Rev. Socio.* 213–34 (2009)).

²¹ ANDERSON, *supra* note 18.

²² *Prostitution Statistics*, HAVOCScope, <https://havocscope.com/prostitution-statistics/> (last visited Nov. 1, 2020).

²³ HAVOCScope, <https://havocscope.com/> (last visited Sept. 15, 2021).

prostitution is illegal in most countries around the world, the sex industry, and more specifically prostitution, is nonetheless booming.

B. Social and Legal History

Prostitution has not always been criminalized in the United States: it was legal in most places until the 19th Century.²⁴ In fact, before the 19th Century, the number of men in America substantially exceeded the number of women and created high demand for female companionship.²⁵ America's acceptance of prostitution was driven by a need to protect married women from the sexual appetites of men.²⁶

At the turn of the 20th Century, however, tolerance of prostitution began to dwindle as conservative and religious groups mounted a moral crusade against sex as a profession.²⁷ Led by religious groups and women's societies, the crusade took aim at criminalizing prostitution for its lack of morality.²⁸ Sociologist Ronald Weitzer identifies three main characteristics of a moral crusade: 1) an exaggeration of the problem, 2) presentation of anecdotal stories in which the most horrific examples of the problem are detailed, and 3) unshakeable conviction.²⁹ The dramatization of a supposed "evil" is then used to frighten the public and justify harsh punishments.³⁰

With the support of an outraged public, the crusaders can effectively lobby politicians to intensify punishment for established

²⁴ Alysa Castro, Note, *Better in Theory: The Road to Prostitution Reform in Pennsylvania*, 9 RUTGERS J. L. & PUB. POL'Y 37, 42 (2012).

²⁵ Gregg Aronson, Note, *Seeking a Consolidated Feminist Voice for Prostitution in the U.S.*, 3 RUTGERS J. L. & URB. POL'Y 357, 360 (2006).

²⁶ *Id.* at 361.

²⁷ *Prostitution and Sex Work*, 14 GEO. J. GENDER & L. (SPECIAL ISSUES) 553, 554 (2014).

²⁸ *Id.* at 553.

²⁹ Ronald Weitzer, *The Movement to Criminalize Sex Work in the United States*, J. L. & SOC'Y 61, 63 (2010).

³⁰ *Id.*

crimes or outlaw conduct that was previously legal.³¹ Once the crusade against transactional sex took hold in the U.S., states began passing statutes that made selling and buying sexual services illegal.³² By 1910, the federal government passed its own legislation aimed at punishing sex workers, the Mann Act.³³

The Mann Act, also referred to as the White Slave Traffic Act because of its supposed purpose to thwart sex trafficking of white women, sought to control both prostitution and immigration.³⁴ The legislation made it illegal for a man to transport a woman across state lines “for immoral purposes,” with no consideration of whether the woman went with the defendant voluntarily.³⁵ The Act punished both the transporter and the transportee for violations, so while the narrative around the Act was one of protecting white women, the policy was policing women, immigrant women in particular.³⁶ When violations of the Mann Act involved immigrant sex workers, they were deported to their original countries.³⁷ Notably, the Mann Act came about in the

³¹ Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 *POL. & SOC’Y* 447, 448 (2007).

³² Castro, *supra* note 24, at 44.

³³ Aronson, *supra* note 25, at 362.

³⁴ Anders Walker, *Strange Traffic: Sex, Slavery, and the Freedom Principle*, 46 *CONN. L. REV.* 561, 598 (2013); Jessica R. Pliley, *Sexual Surveillance and Moral Quarantines: A History of Anti-Trafficking*, *OPENDEMOCRACY* (Apr. 27, 2015), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/sexual-surveillance-and-moral-quarantines-history-of-antitrafficking/> (stating that the Act aimed to “halt sex trafficking within the U.S., and to protect what one congressman called the ‘blue eyed girl’ in America”).

³⁵ Walker, *supra* note 34, at 584 (quoting Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 *YALE L.J.* 756, 793 (2006)).

³⁶ *State v. Harper*, 138 P. 495, 498 (Mont. 1914); *see also* Pliley, *supra* note 34.

³⁷ Lauren M. Davis, *Prostitution*, 7 *GEO. J. GENDER & L.* 835, 835–36 (2006) (citing Nicole A. Hough, *Sodomy and Prostitution: Laws Protecting the “Fabric of Society”*, 3 *PIERCE L. REV.* 101, 113 (2004)).

midst of Congress fortifying their Immigration Acts between 1903 and 1917, which outlawed the importation of sex workers, among other acts demonstrating moral ineptitude.³⁸ With the passage of the Mann Act, enforcement of such supposed moral ineptitude expanded from solely the jurisdiction of the Immigration Bureau to the Federal Bureau Investigation (FBI), which at the time had only sixty-one agents.³⁹ Within four years of passing the Mann Act, the FBI had expanded to over 300 representatives throughout the country.⁴⁰ Jessica R. Pliley, a Professor of the History of Women, Genders, and Sexualities at Texas State University⁴¹, argues in her book, *Policing Sexuality: The Mann Act and the Making of the FBI*, that “it was the active policing of sex trafficking that led to the national growth of the FBI.”⁴²

Modern governance around sex work is unique in that it unites both right-wing religious conservatives along with secular liberals.⁴³ As neoliberalism⁴⁴ began to take hold as the philosophical guiding light in United States governance, different frameworks around sex work have developed, with one feature being the inclusion of market forces in

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Jessica R. Pliley, TEX. STATE UNIV.,

<https://www.txstate.edu/history/people/faculty/pliley.html> (last visited Aug. 27, 2021).

⁴² *Id.* (quoting Jessica R. Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI* (2014)).

⁴³ Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex Rights and Freedom*, in CONTEMPORARY ANTITRAFFICKING CAMPAIGNS, 36 SIGNS: J. WOMEN IN CULTURE & SOC’Y 45, 46 (2010).

⁴⁴ Leigh Goodmark, *Intimate Partner Violence Is . . . A Criminal Justice Problem?*, in DECRIMINALIZING DOMESTIC VIOLENCE, 124 (2018)

(“Neoliberalism, narrowly defined, is a system of economic ideas and policies that emphasizes small government and market based solutions to social and economic problems.”).

public discourse regarding the legal prostitution debate.⁴⁵ One feature of neoliberalism that began during Ronald Reagan's presidency is that mass incarceration replaces social welfare programs to address structural and systemic issues, thus commercializing the American Criminal Justice System.⁴⁶ Out of this guiding philosophy arose a new form of feminism: carceral feminism, which is the idea that a state-centered, prison-backed system is the best response to feminist issues.⁴⁷

C. Structural Conditions

Sex workers come in many forms—from pornography modeling and acting, to webcam entertainment to selling intimate sexual services. This note focuses on the selling of intimate sexual services, within which workers are divided along “a range of economic classes”: street-level workers, those who work in brothels, and high-end escorts.⁴⁸ As in many career fields in the U.S., racism and classism are ever-present in the sex industry, with the subcategories being delineated along race and class lines, with poor people of color working mostly on the street, and wealthy, mostly white women and men working as highly paid escorts.⁴⁹

Though street-level workers make up only ten to twenty percent of all transactional sex workers,⁵⁰ they account for eighty-five to ninety

⁴⁵ See Barbara G. Brents, *Neoliberalism's Market Morality and Heteroflexibility: Protectionist and Free Market Discourses in Debates for Legal Prostitution*, UNIV. NEV. L.V. SEX RSCH. & SOC. POL'Y 1, 2–4 (2016).

⁴⁶ Daniel J. Stedman, *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics*, 1–20 (Harv. Univ. Press 2012); Goodmark, *supra* note 44, at 15.

⁴⁷ Bernstein, *supra* note 43, at 47.

⁴⁸ Katie Beran, *Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform*, 30 LAW & INEQ. 19, 24-25 (2012) (citing Karen Peterson-Iyer, *A Feminist Ethical Analysis*, 14 J. FEMINIST STUD. RELIGION 19, 20-21 (1998)).

⁴⁹ Beran, *supra* note 48, at 25–26.

⁵⁰ Tesla Carrasquillo, *Understanding Prostitution and the Need for Legal Reform*, 30 TOURO L. REV. 697, 706 (2014).

percent of all arrests.⁵¹ They are typically controlled by a pimp, and they are the most likely to be subjected to violence in the course of their work.⁵² Further, while non-white workers make up 40% of street transactional sex workers, they account for 55% of arrests, exposing them to more harassment, arrests, and violence from law enforcement than their white counterparts.⁵³ Comparatively, white call girls constitute the largest percentage of all transactional sex workers, and yet, at least 85% of all prostitution arrests are of street-level workers.⁵⁴

While some people see law enforcement as an institution designed to keep them safe, many sex industry workers experience law enforcement officers as perpetrators of violence and harassment.⁵⁵ In fact, one of the most prolific sex workers' rights organizations, COYOTE (Call Off Your Old Tired Ethics) adopted the slogan "Hookers Unite, You Have Nothing to Lose But Cop Harassment."⁵⁶ Social stigma, criminalization, and law enforcement perpetuate an unending cycle of police violence.⁵⁷ Criminalization legitimizes the social stigma of transactional sex and provides the foundation for law

⁵¹ *Id.* at 708 (writing that "90% of prostitutes arrested are streetwalkers"); *but see* Miller & Haltiwanger, *supra* note 13, at 225–26 (citing Michelle S. Jacobs, *Prostitutes, Drug Users, and Thieves: The Invisible Women in the Campaign to End Violence Against Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 459, 468 (1999) (writing that "[street-level workers] represent 85% of the women incarcerated for prostitution"); Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 529 (2000)).

⁵² Law, *supra* note 51, at 529 (2000) (citing Tracy M. Clements, *Prostitution and the American Health Care System: Denying Access to a Group of Women in Need*, 11 BERKELEY WOMEN'S L. J. 49, 52–53 (1996)).

⁵³ Beran, *supra* note 48, at 25-26.

⁵⁴ *Id.*

⁵⁵ Fernandez, *supra* note 12, at 2–3.

⁵⁶ *Id.* (citing Valerie Jenness, *From Sex as Sin to Sex as Work: COYOTE and the Reorganization of Prostitution as a Social Problem*, 37 SOC. PROBS. 403, 403–20 (1990)).

⁵⁷ *Id.* at 7.

enforcement; the stigma then fuels law enforcement's harassment and abuse of sex workers—particularly for those who work on the street.⁵⁸

III. LEGAL FRAMEWORKS

Today, there are four main approaches to the regulation of sex work.⁵⁹ The first is a total legal ban on engaging in prostitution, or complete criminalization.⁶⁰ The second is partial decriminalization which seeks to abolish the demand for prostitution by only criminalizing the solicitation and pimping of sex workers.⁶¹ The third is complete decriminalization which repeals all criminal penalties for engaging in or purchasing the sale of sexual services.⁶² Finally, the last approach is legalization which, like complete decriminalization, repeals criminal penalties for the sale or purchase of sexual services, but also sets up positive law to regulate the trade, including licensing requirements, medical checkups, zoning requirements, and other protective measures.⁶³

A. Complete Criminalization

1. View

Complete criminalization is the model followed by the United States and carceral feminists today.⁶⁴ Carceral feminism is a form of feminism that embraces a state-centric, law-and-order approach to

⁵⁸ *Id.* 7–8.

⁵⁹ Janet Halley et al., From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Feminism, 29 HARV. J. L. & GENDER 335, 338–39 (2006).

⁶⁰ *Id.* at 338.

⁶¹ *Id.* at 338–39.

⁶² *Id.* at 339.

⁶³ *Id.*

⁶⁴ Krishna De La Cruz, Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer, 19 SCHOLAR 79, 82 (2016).

achieving justice for women.⁶⁵ Carceral feminism is an outgrowth of the Battered Women's Movement of the 70's and 80's.⁶⁶ The Movement began as grass roots social activism that sought to provide shelter and support to survivors of intimate partner violence and then to reform the legal system's response to violence against women.⁶⁷ At the time, the police's general response to intimate partner violence was to tell the perpetrator "to take a walk around the block to cool down."⁶⁸ Officers were to only make warrantless arrests if they witnessed the assault.⁶⁹ Following a number of high profile cases in the late 70's to mid 80's,⁷⁰ "feminist attorneys around the country brought successful class-action lawsuits against police departments for failure to respond appropriately to calls from battered women."⁷¹ Feminist lawyers then began arguing that the state must intervene to correct power imbalances between men and women, which were rampant in domestic violence cases.⁷²

⁶⁵ *Id.* at 80–81.

⁶⁶ See De La Cruz, *supra* note 64, at 95–96; see generally Leigh Goodmark, The Unintended Consequences of Domestic Violence Criminalization: Reassessing a Governance Feminist Success Story, in GOVERNANCE FEMINISM: NOTES FROM THE FIELD, 124 (Janet Halley et al. eds., 2019) (quoting Elizabeth Bernstein, Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedoms in Contemporary Antitrafficking Campaigns, 36 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 45, 45–71 (2010)).

⁶⁷ Goodmark, *supra* note 66, at 125.

⁶⁸ *Id.* at 127.

⁶⁹ Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 288 (1997).

⁷⁰ *Id.* at 288 n.36. For accounts of the high profile cases, see *Thurman v. Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), *Nearing v. Weaver*, 670 P.2d 137 (Or. 1983), *Sorichetti v. City of New York*, 482 N.E.2d 70 (N.Y. 1985), and *Bruno v. Codd*, 393 N.E.2d 976 (N.Y. 1979).

⁷¹ *Id.* at 287–88.

⁷² Goodmark, *supra* note 66, at 128.

Despite the Movement's professional and governance feminists' appreciation for the fact that a state-centric approach to domestic violence could have collateral consequences—particularly for people of color—carceral feminism took hold and by the mid 90's, Congress passed the Violence Against Women Act (VAWA), which provided significant funding to police, courts, and prosecutors to arrest and prosecute abusers.⁷³ Though VAWA and related legislation has helped and protected many women (particularly white middle to upper class women), the carceral feminist approach has failed to adequately protect many minority, indigent, immigrant, non-cis gendered, and non-heterosexual women and people.⁷⁴

In fact, VAWA has had the unintended consequence of exposing vulnerable populations to harassment, embarrassment, usurpation of women's agency, arrest and incarceration, deportation, and loss of income, housing, and childcare all at the hands of the state.⁷⁵ Carceral feminists have largely ignored these collateral consequences and applied the same approach to another feminist concern: prostitution.⁷⁶ These carceral feminists, also termed Prohibitionists because of their belief that prostitution-related activities should be prohibited, “[b]elieve that sex work in and of itself, is inherently violent and exploitative, and

⁷³ De La Cruz, *supra* note 64, at 81; 34 U.S.C. § 12291 (2017).

⁷⁴ See Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women of Color Feminism and Alternatives to Incarceration*, J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK, 219, 223–25 (2018).

⁷⁵ Goodmark, *supra* note 43, at 132; see also Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFFALO CRIM. L. REV. 801 (2001) (citing ANNE SPARKS, *Feminists Negotiate the Executive Branch: The Policing of Male Violence, in FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE* 35, 35–36 (Cynthia R. Daniels et al. eds., 1997)).

⁷⁶ See generally Robyn Maynard, *Carceral Feminism: The Failure of Sex Work Prohibition*, FUSE MAG., <https://robynmaynard.com/writing/carceral-feminism-the-failure-of-sex-work-prohibition/> (last visited Sep. 27, 2021).

propose instead that a carceral, prohibitionist approach must be taken to eliminate sex work itself.”⁷⁷

Criminalization makes all aspects of transactional sex and prostitution-related activities illegal.⁷⁸ Criminalization of transactional sex today is justified by the belief that society must be protected from prostitution for public health, safety, and moral reasons, and as a kind of Broken Windows⁷⁹ police strategy, in which police crackdown on smaller crimes in order to prevent more major crimes.⁸⁰ Every state in the U.S., with the exception of Nevada, have legislation that criminalizes all aspects of prostitution, including the sex worker, the pimp, and the customer, or John, as customers are otherwise known.⁸¹

2. Goals

Criminalization has its roots in Progressive Era reform, when politicians viewed prostitution as a threat to the leading American values.⁸² The goals during that era were to force poor and immigrant women to conform to the social norms of chastity, modesty, and marriage.⁸³ To do so, policies criminalized prostitution as a means to deter and punish women for soliciting sex outside of the private sphere of their home or marriage.⁸⁴

⁷⁷ *Id.*

⁷⁸ Miller & Haltiwanger, *supra* note 13, at 229.

⁷⁹ Shankar Vedantam et al., *How a Theory of Crime and Policing Was Born and What Went Wrong*, NPR (Nov. 1, 2016), <https://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong>.

⁸⁰ Miller & Haltiwanger, *supra* note 13, at 229;

⁸¹ Cecilia Benoit et al., *The Prostitution Problem: Claims, Evidence, and Policy Outcomes*, 48 ARCHIVE SEX BEHAV. 1905, 1909 (2019).

⁸² De La Cruz, *supra* note 64, at 83 (citing Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN’S L. J. 47, 50 (1995)).

⁸³ *Id.* at 83–84.

⁸⁴ *Id.*

Today, the goals of criminalization are a bit different. Instead of focusing on chastity or marriage, laws against prostitution presumably have the same justifications as the punishments for other criminalized activities: specific and general deterrence, rehabilitation, incapacitation, retribution.⁸⁵ Specifically, states claim their ultimate goal is eradication.⁸⁶ Prohibitionists argue that eradication would further other goals within the state such as slowing the spread of STI's, reducing other crimes associated with sex work, and ending the sexual exploitation of women.⁸⁷ Most of these goals, however, remain largely unmet, as illustrated by the high recidivism rate, the lack of a decrease in sexually transmitted infection (STI) rates, the further trauma and harm caused by arrest, loss of income, and the loss of agency experienced by those sex industry workers who have encountered the criminal justice system.⁸⁸

⁸⁵ See generally Mark R. Fondacaro & Megan J. O'Toole, *American Punitiveness and Mass Incarceration: Psychological Perspectives on Retributive and Consequentialist Responses to Crime*, 18 NEW CRIM. L. REV. 477 (2015).

⁸⁶ Tesla Carrasquillo, *Understanding Prostitution and the Need for Legal Reform*, 30 TOURO L. REV. 697, 704 (2014).

⁸⁷ *Id.*

⁸⁸ See Benoit et al., *Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers* 55 J. SEX RSCH. 457, 462 (2018) ("In many countries, the rights of persons who sell sex are violated by police through verbal harassment, public humiliation, excessive force, invasive searches, and unwarranted arrests."); Carrasquillo, *supra* note 86, at 708 ("Arrests and fines do not effectively act as deterrents. . . . Criminalization is also an attack on a woman's sexual autonomy and does nothing to prevent the spread of STDs. . . . A conviction can negatively affect a woman's opportunity to obtain housing, education, and most importantly, the ability to get a job.").

3. Legislation: New Jersey

The criminalization model is the legal policy currently employed everywhere in the United States, aside from ten counties in Nevada.⁸⁹ In New Jersey, and most of the United States, it is unlawful to: 1) engage in prostitution as a patron; 2) to promote prostitution; 3) to knowingly promote the prostitution of a child under 18 “whether or not the actor mistakenly believed that the child” was at least 18, even if the belief was reasonable; 4) to promote prostitution of one’s own child, ward or anyone else in one’s care; 5) to compel another person to engage in or promote prostitution; 6) to promote prostitution of one’s spouse, 7) engage in or solicit prostitution with a person under 18; or 8) to engage in prostitution by offering sexual services in exchange for money or something else of economic value.⁹⁰

The New Jersey statute defines prostitution as “sexual activity with another person in exchange for something of economic value, or the offer or acceptance of an offer to engage in sexual activity in exchange for something of economic value.”⁹¹ “Promoting prostitution” is defined not only as working to procure clients for prostitutes, but also includes “knowingly leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or promotion of prostitution, or failure to make a reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means,” and an actor is guilty of promoting prostitution if they are “supported in whole or substantial part by the proceeds of prostitution,” unless the supported person is a “prostitute’s child or other legal dependent.”⁹² This means that if a couple cohabitates and one partner provides for the couple through prostitution, the other is guilty of

⁸⁹ *U.S. Federal and State Prostitution Laws and Related Punishments*, PROCON (May 4, 2018), <https://prostitution.procon.org/us-federal-and-state-prostitution-laws-and-related-punishments/>.

⁹⁰ N.J. STAT. ANN. § 2C:34-1b(1)(8) (West 2021).

⁹¹ *Id.* § 2C:34-1a(1).

⁹² *Id.* § 2C:34-1a(4)(d), (g).

promoting prostitution, regardless of where the prostitution takes place or if the other partner was not involved in any way.

For a first time offender, the penalty for “personally offering” sexual services for money is a misdemeanor disorderly persons offense which is accompanied by a fine.⁹³ On the second or subsequent conviction, however, the offense results in a crime of the fourth degree which “carries a potential penalty of up to 18 months.”⁹⁴ The penalties for promoting prostitution constitute crimes between the first and the third degree depending on the severity of the crime alleged, but also imposes a penalty of at least \$10,000 and at most \$50,000, unless “the offense involves the promotion of the prostitution of a child under 18,” for which the penalty is at least \$25,000 in addition to the fines authorized by N.J. Statute § 2C:43-3.⁹⁵

Per § 2C:43-3, crimes of the first degree, which in the case of prostitution-related offenses are promoting prostitution of a child 18 or promoting the prostitution of one’s own “child, ward, or any other person for whose care the actor is responsible,” a penalty can be imposed of up to \$200,000.⁹⁶ Crimes of the second degree, which in this case would be knowingly engaging in prostitution with someone under 18, entering or remaining “in a house of prostitution for the purpose of engaging in sexual activity with a child under the age of 18,” or soliciting a child under 18 “to engage in sexual activity”, carry a fine of up to \$150,000. Those convicted of third degree crimes, which here are promoting prostitution,⁹⁷ compelling someone “to engage in or

⁹³ *Id.* § 2C:34-1c(6), b(8).

⁹⁴ *Id.* § 2C:34-1c(6); New Jersey Courts, *The Criminal Justice Process*, <https://njcourts.gov/courts/criminal/criminalprocess.html?lang=eng> (last visited Jan. 20, 2021).

⁹⁵ N.J. STAT. ANN. 2C:34-1c(1)–(6), f(2) (West 2021).

⁹⁶ *Id.* §§ 2C:34-1c(1), b(3)–(4), 2C:43-3(a)(1) (West 2021).

⁹⁷ Promoting prostitution is a crime of the third degree unless the violation was for “(d) [s]oliciting a person to patronize a prostitute [or] (e) [p]rocur[ing] a prostitute for a patron,” in which case, the offense is graded as a crime of

promote prostitution” or promoting prostitution of one’s spouse, may be sentenced to pay a fine up to \$15,000.⁹⁸ Prostitution-related crimes of the fourth degree, which include soliciting someone “to patronize a prostitute” or “procuring a prostitute for a patron,” carry fines of up to \$10,000.⁹⁹

Engaging in prostitution as a patron is considered a disorderly persons offense with a fine up to \$1,000, except that one’s second and third convictions constitute crimes of the fourth degree, and the fourth and subsequent convictions constitute crimes of the third degree, raising the fine to up to \$10,000 and \$15,000 respectively.¹⁰⁰ Convictions for engaging in prostitution in exchange for money or “something of economic value” (i.e., as the seller) are accompanied by fines of up to \$1,000 and constitute disorderly persons offenses, except that second and all subsequent convictions are considered crimes of the fourth degree and carry a fine of up to \$10,000.¹⁰¹

B. Partial Decriminalization

1. View

Partial decriminalization embraces the ideology of radical feminism¹⁰², a view that because of the dominance of the patriarchy, women’s sexuality is controlled by men’s sexuality, which leads to male sexual dominance and women’s sexual submission.¹⁰³ Essentially, because women are subject to the sexual dominance of the patriarchy,

the fourth degree. N.J. STAT. ANN. § 2C:34-1a(4)(e) and (f), c(4) (West 2021).

⁹⁸ N.J. STAT. ANN. §§ 2C:34-1c(4), a(4)(a)–(c), (f)–(g), 2C:43-3b(1).

⁹⁹ N.J. STAT. ANN. §§ 2C:34-1b(8), c(4), 2C:43-3c, b(2).

¹⁰⁰ N.J. STAT. ANN. §§ 2C:34-1b(1), c(5), 2C:43-3b, c.

¹⁰¹ N.J. STAT. ANN. §§ 2C:34-1b(8), c(6), 2C:43-3c, b(2).

¹⁰² India Thusi, *Radical Feminist Harms on Sex Workers*, 22 LEWIS & CLARK L. REV. 185,194 (2016)

¹⁰³ Hila Shamir, *Feminist Approaches to the Regulation of Sex Work: Patterns in Transnational Governance Feminist Law Making*, 52 CORNELL INT’L L. J. 177, 189, 201 (2019).

radical feminists believe that women can never consent to sex, much less engage in voluntary sex work.¹⁰⁴

Transactional sex work, according to radical feminists, could never be chosen freely by a woman, because even if she did choose the occupation, she had to have internalized the exploitation of the sexual dominance of the patriarchy.¹⁰⁵ Transactional sex, then, is not a form of labor, but rather a form of exploitation.¹⁰⁶ Essentially, radical feminists, also termed neo-abolitionists because of their view that the demand side of sex work must be strictly abolished, treat all sex workers as victims of sex trafficking who were coerced in the occupation.¹⁰⁷ Because neo-abolitionists believe that sex industry workers are victims of sexual exploitation, they do not support penalizing the workers themselves, but instead advocate for criminalizing the involvement of others in the industry, including their pimps and Johns.¹⁰⁸ Because neo-abolitionists wish to end prostitution, they have no interest in creating positive law to regulate the exchange of sexual services for money.¹⁰⁹ Instead, the goal is to arrest the John or the pimp, but not penalize the worker, or to offer her housing and rehabilitation.¹¹⁰ In that way, the

¹⁰⁴ *Id.* at 190–91.

¹⁰⁵ *Id.* at 190.

¹⁰⁶ Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J. L. & FEMINISM 69, 82 (1998).

¹⁰⁷ Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 347 (2006).

¹⁰⁸ *Id.* at 338–39.

¹⁰⁹ See Adrienne D. Davis, *Regulating Sex Work: Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195, 1209 (2015).

¹¹⁰ Dee Veandra Nelson & Ralph Leonard, *Recidivism Among Women Charged with Prostitution Who Participated in at Least Six Months of Residential Rehabilitation Compared to Community Controls*, 11 INTERNET J. OF HEALTH (2009).

selling of sexual services is decriminalized, but the purchase of sexual services is illegal.¹¹¹

2. Goals

In keeping with this view, neo-abolitionists approach sex work with an aim to criminalize only the exploiters of the transactional sex workers, i.e., the Johns and pimps.¹¹² The goal of neo-abolitionism is, as the name suggests, to abolish prostitution altogether.¹¹³ Through harsh penalties for the Johns and pimps, neo-abolitionists and radical feminists hope to squash the demand for prostitution without subjecting sex workers to further harm associated with criminalization.¹¹⁴

Some cities now use an altered version of this approach by sending arrested sex workers to programs aimed to get them out of the sex trade by enrolling them in GED programs and providing them shelter and safety for a length of time.¹¹⁵ Still, a Massachusetts study revealed that of the arrests for prostitution and prostitution-related activities, arrests of women who sell sex far outweigh the number of

¹¹¹ Tesla Carrasquillo, *Understanding Prostitution and the Need for Reform*, 30 *TOURO L. REV.* 697, 712 (2014).

¹¹² Shamir, *supra* note 103, at 191 (using the term “abolitionist” as we use “neo-abolitionist” here).

¹¹³ Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 47 *WM. & MARY J. WOMEN & L.* 47, 58 (2016) (citing ELAINE MOSSMAN, *INTERNATIONAL APPROACHES TO DECRIMINALISING OR LEGALISING PROSTITUTION*, MINISTRY OF JUSTICE 36 (2007)).

¹¹⁴ *Id.*

¹¹⁵ Nelson & Leonard, *supra* note 110.

arrests of Johns and pimps.¹¹⁶ Per the study, the workers are easier for police officers to locate, arrest, and prosecute.¹¹⁷

3. Legislation: Massachusetts & California

i. Massachusetts

A bill proposed in 2017 by Massachusetts Representative Kay Khan illustrates the neo-abolitionist partial decriminalization model.¹¹⁸ Speaking of her bill, Khan claimed that the goal of partial decriminalization is to protect women caught up in the sex trade and provide them help in starting a new life without the burden of a prostitution conviction on their record.¹¹⁹ Khan's bill also proposed to add "commercial sexual exploitation victim" to the definitions list in the Massachusetts Annotated Statutes, along with including "commercial sexual exploitation victims" in the Victim of Human Trafficking Trust Fund—a Massachusetts trust fund set up for victims of human trafficking.¹²⁰ Including "sexual exploitation victims" in the Victim of Human Trafficking Trust Fund tracks with Khan's purposes and radical feminism: this proposed legislation would treat all sex workers as victims of human trafficking and would provide supposed "victims" with financial help to start their lives outside of the sex trade.¹²¹ The

¹¹⁶ See Jennifer McKim & Michael Bottari, *Massachusetts State Police data: Far more women than men arrested for prostitution-related offenses*, MASSLIVE (Mar. 24, 2019, 10:43 AM), https://www.masslive.com/news/2014/10/massachusetts_state_police_data_prostitution_arrests.html.

¹¹⁷ *Id.*

¹¹⁸ H. 1480, 191st Gen. Ct., Reg. Sess. (Mass. 2017).

¹¹⁹ Andy Metzger, *Prostitution Bill Would Legalize Sex Work, Sponsor Says*, THE SALEM NEWS (Nov. 28, 2017), https://www.salemnews.com/news/state_news/prostitution-bill-would-legalize-sex-work-sponsor-says/article_07773578-d498-11e7-91dc-274bea5b3802.html.

¹²⁰ H. 1480, § 1; MASS. ANN. LAWS, ch. 10, § 66A (LexisNexis 2021).

¹²¹ H. 1480, § 2; MASS. ANN. LAWS, ch. 10, § 66A (LexisNexis 2021); Metzger, *supra* note 119.

bill also sought to repeal a statute that criminalized “streetwalking” by children.¹²² Most importantly, the bill proposed to amend the following current statute against conduct involving the sale of sexual services:

Current Law:

Ch. 272 § 53A: Engaging in sexual conduct for a fee, engaging in sexual conduct with child under age 18 for a fee; penalties.

(a) Whoever engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee, shall be punished by imprisonment in the house of correction for not more than 1 year or by a fine of not more than \$500, or by both such imprisonment and fine, whether such sexual conduct occurs or not.

(b) Whoever pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another person, shall be punished by imprisonment in the house of correction for not more than 2 and one-half years or by a fine of not less than \$1,000 and not more than \$5,000 or by both such imprisonment and fine, whether such sexual conduct occurs or not.

(c) Whoever pays, agrees to pay or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 18, or whoever is paid, agrees to pay, or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18, shall be punished by imprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-half years and by a fine of not less than \$3,000 and not more than \$10,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not; provided, however, that a prosecution commenced under this section shall not be continued without a finding or placed on file.¹²³

¹²² H. 1480, § 4; MASS. ANN. LAWS, ch. 119, § 39L (LexisNexis 2021).

¹²³ MASS. ANN. LAWS ch. 272, § 53A (LexisNexis 2021) (emphasis added).

Khan's proposed bill would have completely repealed subsection (a), but simply converted subsections (b) and (c) to subsection (a) and (b) and in its place.¹²⁴ This proposal is illustrative of partial decriminalization: it repeals the subsection that imposes criminal punishment for those who engage in sexual services but leaves in place the criminal penalties for those who pay, agree to pay, or offer to pay another person to engage in sexual conduct, i.e., the customers.¹²⁵

ii. California

An interesting proposal of partial decriminalization that came into effect in 2020 can be seen in California. In early 2020, a new law took effect in California that immunized sex industry workers who were reporting to law enforcement that they were the victim of a crime or a witness to a crime while engaged in illegal sex work.¹²⁶ To this end, one section of California's Evidence Code was replaced, one amended, and another was added to grant this immunity.¹²⁷ Section 1162 previously stated:

Evidence that a victim of, or witness to, *extortion* as defined in Section 519 of the Penal Code, *stalking* as defined in Section 646.9 of the Penal Code, or a *violent felony* as defined in Section 667.5 of the Penal Code, has engaged in an act of prostitution at or around the time he or she was the victim of or witness to the crime is inadmissible in a separate prosecution of that victim or witness to prove his or her criminal liability for the act of prostitution.¹²⁸

¹²⁴ H. 1480.

¹²⁵ *Id.*

¹²⁶ S. B. 233, 2019-2020 Reg. Sess. (Cal. 2019).

¹²⁷ *Id.* §§ 3, 4.

¹²⁸ CAL. EVID. CODE § 1162 (Deering 2019) (amended 2019) (emphasis added).

As amended, the statute now reads:

Evidence that a victim of, or a witness to, a *serious felony* as defined in subdivision (c) of Section 1192.7 of, *an assault* in violation of subdivision (a) of Section 245 of, *domestic violence* in violation of Section 273.5 of, *extortion* in violation of Section 518 of, *human trafficking* in violation of Section 236.1 of, *sexual battery* in violation of subdivision (a) of Section 243.4 of, or *stalking* in violation of 646.9 of, the Penal Code, has engaged in an act of prostitution at or around the time they were the victim of or witness to the crime is inadmissible in a separate prosecution of the victim or witness to prove criminal liability for the act of prostitution.¹²⁹

As amended, the statute now grants immunity from prosecution for the act of prostitution when reporting a wider range of acts either committed against the sex worker or those acts that the sex worker witnessed.¹³⁰ While the statute previously granted immunity from prosecution for the act of prostitution if the sex worker was reporting one of the crimes of extortion, stalking, or a violent felony, the amended statute in effect today now also includes the acts of a serious felony, assault, domestic violence, human trafficking, and sexual battery.¹³¹

The California bill also added the following section to their Penal Code:

647.3. Reporting related crime; Misdemeanor violation of California Uniform Controlled Substances Act or prostitution; Prostitution

(a) A person who reports being a victim of, or a witness to, a serious felony as defined in subdivision (c) of Section 1192.7, an assault in violation of subdivision (a) of Section 245, domestic violence in violation of Section 273.5, extortion in violation of Section 518, human

¹²⁹ CAL. EVID. CODE § 1162 (Deering 2021) (amending CAL. EVID. CODE § 1162 (Deering 2019) (emphasis added)).

¹³⁰ *Id.*

¹³¹ *Id.*

trafficking in violation of Section 236, sexual battery in violation of subdivision (a) of Section 243.4, or stalking in violation of Section 646.9 shall not be arrested for any of the following offenses if that offense is related to the crime that the person is reporting or if the person was engaged in that offense at or around the time that the person was the victim of or witness to the crime they are reporting:

- (1) A misdemeanor violation of the California Uniform Substances Act...
 - (2) Any violation of Section 372, subdivision (a) or (b) of Section 647 or Section 653.22, if the offense is related to an act of prostitution
- (b) Possession of condoms in any amount shall not provide a basis for probable cause for arrest for a violation of Section 372, subdivision (a) or (b) of Section 647 or Section 653.22 if the offense is related to an act of prostitution.¹³²

Complementing subsection (b) of Section 647.3 of the Penal Code, the bill also repealed the following statute that allowed the possession of condoms to be admitted as evidence of intent to engage in prostitution:

782.1. In any prosecution under Sections 647 and 653.22 of the Penal Code , if the possession of one or more condoms is to be introduced as evidence in support of the commission of the crime, the following procedure shall be followed:

- (a) A written motion shall be made by the prosecutor to the court and to the defendant stating that the prosecution has an offer of proof of the relevancy of the possession by the defendant of one or more condoms.
- (b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to subdivision (c). After that

¹³² CAL. PENAL CODE § 647.3 (Deering 2021); S.B. 233, § 4.

determination, the affidavit shall be resealed by the court.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow questioning regarding the offer of proof made by the prosecution.

(d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the prosecutor regarding the possession of condoms is relevant pursuant to Section 210, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the prosecutor. The prosecutor may then offer evidence pursuant to the order of the court.

(e) An affidavit resealed by the court pursuant to subdivision (b) shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed document. If the defendant raises that issue on appeal, the court shall allow the Attorney General and appellate counsel for the defendant access to the sealed affidavit. If the issue is raised on collateral review, the court shall allow the district attorney and defendant's counsel access to the sealed affidavit. The use of the information contained in the affidavit shall be limited solely to the pending proceeding.¹³³

The purpose of this statute was to create a procedure by which prosecutors could introduce condoms as evidence of a defendant engaging in the act of prostitution at trial.¹³⁴ The procedure generally went as follows: 1) The prosecutor would file a written motion stating that they could prove the relevancy of the condoms in defendant's possession, along with a sealed affidavit containing such "proof" of relevancy, which was only to be unsealed by the judge in determining whether such proof was sufficient to hold a hearing on its relevance, 2)

¹³³ CAL. EVID. CODE § 782.1 (West 2015) (repealed 2020); S. B. 233, *supra* note 126, § 1.

¹³⁴ CAL. EVID. CODE § 782.1 (West 2015) (repealed 2020).

if the judge were to find the proof sufficient, they ordered a hearing away from the jury and allowed questions by the defense regarding such proof, 3) if, by the end of the hearing, the judge determined the possession of condoms by the defendant to be relevant and admissible, the court would make an order detailing what evidence could be introduced by the prosecutor who would then offer such evidence to the court, and 4) the resealed affidavit was to remain sealed unless or until the defendant appealed the court's decision.¹³⁵

As of January 1st, 2020, however, the California courts have done away with this procedure and replaced the statute with the following change:

782.1. Possession of condoms; non-admissibility as evidence for offenses related to prostitution:

The possession of a condom is not admissible as evidence in the prosecution of a violation of Section 372 of, subdivision (a) or (b) of Section 647 of, or Section 653.22 of, the Penal Code, if the offense is related to prostitution.¹³⁶

The new statute complements subdivision (b) of the California Penal Code Section 643.7 by not allowing a defendant's possession of condoms to be admitted as evidence of solicitation as it relates to prostitution.¹³⁷ Together, the statutes forbid law enforcement from using the possession of condoms as probable cause to make an arrest for prostitution, and they forbid prosecutors from admitting the possession of condoms as evidence of one's engagement in prostitution.¹³⁸

These changes to the California Penal and Evidence Codes seem to be part of an effort to afford more protections for sex workers from

¹³⁵ *Id.*

¹³⁶ CAL. EVID. CODE § 782.1 (West 2021).

¹³⁷ S. B. 233 § 2.

¹³⁸ CAL. EVID. CODE § 782.1 (West 2021); CAL. PENAL CODE § 647.3 (Deering 2021).

both law enforcement and the courts.¹³⁹ The changes appear to recognize that one of the biggest risks that sex workers were facing in California was that they had little recourse when they were victims or witnesses of a crime that was committed while they were engaging in prostitution.¹⁴⁰ The updated statutes are a small steps toward protecting sex industry workers and not simply ignoring and accepting the harm and abuse they regularly endure by virtue of the profession they have chosen.

B. Full Decriminalization

1. View

Full decriminalization differs from partial decriminalization in that it repeals criminal penalties for both the buyers and sellers of sexual services.¹⁴¹ It differs from legalization in that decriminalization calls for repealing prostitution laws, while legalization also entails regulating prostitution through laws and codes, such as labor and employment law, licensing requirements, zoning regulations of sex businesses, etc.¹⁴² Full decriminalization recognizes the risks that sex industry workers face not only from customers and pimps but also from the law and seeks to reduce these risks by not criminally penalizing any aspect of transactional sex-related activities.¹⁴³

¹³⁹ See S. B. 233.

¹⁴⁰ See *id.*

¹⁴¹ Janet Halley, et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 339 (2006).

¹⁴² *Id.*

¹⁴³ See Global Network of Sex Work Projects, Policy Brief: *The Impact of Criminalisation on Sex Workers' Vulnerability to HIV and Violence*, 1, 7 (2017).

2. Goals

The goals of full decriminalization are to reduce the harm that criminalization imposes, particularly the risks that are posed by state actors such as police officers and the criminal justice system.¹⁴⁴ Specifically, the goals of decriminalization include reducing “the policing, isolation, and abuse that make sex workers more vulnerable, and reduce vulnerability that results from increased risk-taking behaviour [sic] under criminalization [sic].”¹⁴⁵ Complete decriminalization also aims to minimize discriminatory harm that its supporters allege sex workers could face if their profession were to be heavily regulated.¹⁴⁶

3. Legislation: Proposed U.S. bill authored by Congresswoman Ayanna Pressley

As part of a sweeping resolution titled The People’s Guaranteed Justice Act seeking to halt mass incarceration in the United States and to meet the U.S.’s “foundational promise of guaranteed just for all,” Congresswoman Ayanna Pressley proposes the decriminalization of several highly policed activities and states of being, such as addiction, homelessness, migration, and most relevant to this note, consensual sex work.¹⁴⁷ The proposal reads in relevant part:

That it is the sense of the House of Representatives that the time is now for the Federal Government to begin a large-scale decarceration effort to reshape the American legal system to— ... (2) dramatically reduce the incarcerated populations to—to decriminalize behavior and divert cases that do not require confinement by... (ii)

¹⁴⁴ See Gillian Abel, Lisa Fitzgerald & Cheryl Brunton, Report to the Prostitution Law Review Committee, *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers*, DEP’T OF PUB. HEALTH & GEN. PRACTICE, UNIVERSITY OF OTAGO, 1, 21-23 (2007).

¹⁴⁵ Global Network of Sex Work Projects, *supra* note 143, at 2.

¹⁴⁶ Halley et al., *supra* note 141, at 416.

¹⁴⁷ The People’s Justice Guarantee Act, H.R. Res. 702, 116th Cong. (2019).

decriminalizing sex work by removing criminal and civil penalties related to consensual sex work and addressing structural inequities that impede the safety, dignity, and wellbeing of all individuals, especially those most vulnerable to discrimination on the basis of race, gender, identity or expression, sexual orientation, disability, socioeconomic status, and citizenship status.¹⁴⁸

The resolution is illustrative of decriminalization: It proposes the total decriminalization of engaging in consensual voluntary sex work without also proposing a regulatory scheme to regulate the sexual service industry.¹⁴⁹

C. Legalization

1. View

The final school of thought on regulating sex work makes entirely different presumptions about the industry than the first three do. Legalization's foundation is that of sex radicalism, idea that people ought to be able to choose sex work as a profession just as they can choose any legal line of work.¹⁵⁰ Sex radical feminism "reorients sex from a fixed social or cultural value ... to a choice focused on individuals."¹⁵¹ Further, sex radical feminists hold that discussions and theories around sex and sexuality should be "rooted in the consent of those involved, rather than broad proclamations of their cultural harms."¹⁵² Whereas radical feminists maintain that prostitution is always "an abuse of human rights," be it forced, coerced or voluntary,

¹⁴⁸ *Id.* at 11-13.

¹⁴⁹ *Id.*

¹⁵⁰ Kate Sutherland, *Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade*, 42 OSGOOD HALL L. J., 139, 153 (2004).

¹⁵¹ Kurt Flow, *At Least for Me, It's Empowering: The Changing Experience of Sex Work in the Digital Age*, at 39 (May 2019) (Ph.D. dissertation, Rutgers University), <https://rucore.libraries.rutgers.edu/rutgers-lib/60533/PDF/1/play/>.

¹⁵² *Id.*

sex radicals focus their advocacy toward self-determination and safe working conditions.¹⁵³

The country's foremost sex workers' rights advocates, COYOTE base their support of legalization on three claims: 1) prostitution is work and discourse and regulation around it should be centering it as work instead of as a crime; 2) most women who engage in prostitution do so voluntarily; and 3) prostitution is work that people should be legally permitted to choose and engage in.¹⁵⁴ Based on the belief that people should be able to choose to sell sexual services as a profession, sex radicals contend that prostitution ought to be legal and regulated under the same employment laws as every other profession.¹⁵⁵

2. Goals

The goals of the legalization framework are improving health standards, providing legal recourse for theft, violence, and other violations against the workers, and to provide the workers a better opportunity to leave the profession if they so choose—something that is difficult with a prostitution conviction on one's record.¹⁵⁶ Proponents for legalization believe that employment laws can protect sex workers by allowing them to negotiate their terms such as payment, commission, condom usage, and other such terms.¹⁵⁷ By legalizing the profession,

¹⁵³ Sutherland, *supra* note 150 at 141.

¹⁵⁴ Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 78 (1998).

¹⁵⁵ *Id.* at 77.

¹⁵⁶ Katie Beran, *Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform*, 30 LAW & INEQ. 19, 35-36 (2012).

¹⁵⁷ Kate Shannon, *Structural and Environmental Barriers to Condom Use Negotiation with Clients Among Female Sex Workers: Implications for HIV-Prevention Strategies and Policy*, 99 AM. J. PUB. HEALTH 659, 663 (2009).

workers will have legal recourse against those who violate the terms of their contracts.¹⁵⁸

Further, legalization would mean that workers would be able to turn to the police in instances of harassment, theft, assault, and other crimes committed against them.¹⁵⁹ Legalizing prostitution would also allow sex industry workers to unionize and negotiate for safer and better working conditions.¹⁶⁰ A large union would be an effective means to represent a “collective sex worker voice” and create more “lobbying and political power.”¹⁶¹

In 2003, New Zealand decriminalized all activities associated with sex work, including solicitation, living off the earnings of prostitution, and procuring clients for sex workers by passing the Prostitution Reform Act (PRA).¹⁶² While selling sex was not illegal prior to the PRA’s passage, all of the afore-mentioned activities were, making it logically impossible to sell sexual services.¹⁶³ While New Zealand varies from the United States in myriad ways, including its small population of roughly four million people compared to the United States population of over three hundred million, it is a good reference for states, with the average state population being around 6.5 million.

3. Legislation: New Zealand & Nevada

i. New Zealand

When advocates for legalization began making headway towards legalization they made two major changes in New Zealand’s discourse surrounding the sex work legalization debate: 1) Advocates

¹⁵⁸ See Emily van der Meulen, *When Sex is Work: Organizing for Labour Rights and Protections*, 69 *LABOUR* 147 (2012).

¹⁵⁹ Carrasquillo, *supra* note 111, at 713.

¹⁶⁰ Meulen, *supra* note 158 at 160.

¹⁶¹ *Id.*

¹⁶² Gillian M. Abel, *A Decade of Decriminalization: Sex Work ‘Down Under’ But Not Underground*, 14 *CRIMINOLOGY AND CRIM. JUST.* 580, 580-81 (2014).

¹⁶³ *Id.* at 581.

refrained from engaging in moral arguments concerning sex work, and 2) The voices of actual sex workers were included in the development of the Act.¹⁶⁴ These shifts must be considered by any state that wishes to legalize prostitution if they hope to move beyond moral arguments—particularly those that conflate voluntary sex work with sex trafficking—and to include the voices whom legalization affects the most—the workers.

The purpose of the PRA is set out in section 3, which reads:

The purpose of this Act is to decriminalise (sic) prostitution (while not endorsing or morally sanctioning prostitution or its use) and to create a framework that –

- a) Safeguards the human rights of sex workers and protects them from exploitation;
- b) Promote the welfare and occupational health and safety of sex workers;
- c) Is conducive to public health;
- d) Prohibits the use in prostitution of persons under 18 years of age;
- e) Implements certain other related reforms.¹⁶⁵

These enumerated purposes identify the PRA's main goal: harm reduction.¹⁶⁶ To achieve that end, the PRA went beyond simply repealing the laws that made sex-work activities (such as loitering, procuring, living off earnings, etc.) illegal and took it a leap forward to establish sex work as an industry like any other, requiring regulation.¹⁶⁷ New Zealand's Department of Occupational Safety and Health (OSH) set forth guidelines for all workers, including the self-employed, managers, and business owners.¹⁶⁸ The OSH guidelines laid out what was necessary for sex work health, such as safety from violence,

¹⁶⁴ *Id.*

¹⁶⁵ Prostitution Reform Act 2003, s 3 (N.Z.).

¹⁶⁶ Abel et al., *supra* note 144, at 23.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

workplace amenities, recourse for complaints, and workplace documentation.¹⁶⁹

The PRA has proven successful in many different facets, including allowing sex workers legal recourse when crimes are committed unto them—even when the perpetrator was law enforcement.¹⁷⁰ For instance, some criminal charges against police officers have proven success, as was the case in *Humphreys* when a police officer was convicted in 2012 of bribing a sex worker to engage in free sex in exchange for dropping a driving related charge.¹⁷¹ In another, an officer was sentenced to jail time for abusing his power for the purpose of enticing a sex worker to engage in free sex work with him.¹⁷²

The increase in cases brought by victimized sex workers is indicative of a major change in their ability to obtain legal resources when crimes have been committed against them: Now, they can turn to law enforcement without worrying that reporting a crime committed against them will result in their own punishment.

Another benefit of legalization in New Zealand is that workers have a greater ability to refuse to take certain clients.¹⁷³ In a report regarding the PRA and its effects, researchers found that around two thirds of participating sex workers who were working before the PRA went into effect, reported that it was easier to refuse a client since the law was enacted.¹⁷⁴

ii. Nevada

The regulation of prostitution is not an enumerated power listed in the Constitution as the province of Congress, and thus—aside from Congress’s power to regulate interstate commerce—prostitution laws in

¹⁶⁹ *Id.* at 24.

¹⁷⁰ Abel, *supra* note 162, at 581.

¹⁷¹ *Id.* at 585.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Abel et al., *supra* note 144, at 116.

the United States are controlled by the individual states. Nevada is set apart from the other forty-nine United States in one exceptional way: within a licensed brothel in one of twelve specific counties, the trading of sexual services in exchange for money is legal.¹⁷⁵

Not only is it legal to engage in prostitution in a licensed brothel, the brothel owners and sex workers are subject to several regulations such as background checks for the owners and health checks for the workers before they can begin working.¹⁷⁶ The regulations have proven effective at reducing HIV in sex workers in the state: no sex worker in a Nevada brothel has tested HIV positive since testing began in 1985.¹⁷⁷ An additional benefit of the legal brothels in Nevada is that they provide safety measures for the workers including “alarm buttons, listening devices, and management surveillance.”¹⁷⁸

IV. CONCLUSION

While we cannot know for certain which legal framework would best address the concerns and provide the greatest safety for sex workers in the United States, we do know that criminalization has failed the goals of sex radical feminists, radical feminists, and even abolitionists.¹⁷⁹ Criminalization has never deterred sex workers; workers are arrested and/or fined for solicitation and prostitution, and then they are quickly back to work to pay off the fine or make up for lost income.¹⁸⁰ Criminalization is costly for both taxpayers and sex workers, with the cost of housing an inmate being around \$168,000 per inmate per year and the NYPD alone arresting an average of 2,700 sex workers each

¹⁷⁵ Margaret Davis, *Modern Courts and the Oldest Profession: The Litigious Development of Legalized Brothels in Ontario and Nevada*, 18 PUB. IN. L. REP. 66, 66-67 (2012).

¹⁷⁶ Joelle Freeman, *Legalization of Sex Work in the United States: An HIV Reduction Strategy*, 32 GEO. J. LEGAL ETHICS, 597, 604-05 (2019).

¹⁷⁷ *Id.* at 605.

¹⁷⁸ *Id.*

¹⁷⁹ See Carrasquillo, *supra* note 111, at 708-09.

¹⁸⁰ *Id.* at 708.

year.¹⁸¹ Taxpayers in New York alone spend roughly \$1.24 million on jailing sex workers—who will be back to work as soon as they are released.¹⁸²

Criminalization also fails to protect public health and does nothing to prevent STIs and HIV.¹⁸³ Whereas American society believes, and media perpetuates, that sex industry workers immorally and unilaterally spread disease to “innocent” clients, the truth is that women who engage in transactional sex are at lower risk of carrying HIV than their clients.¹⁸⁴ In fact, the majority of documented cases show that it is the client who wishes to engage in unsafe sex, not the sex worker.¹⁸⁵ Sex workers who are less financially dependent on clients can more easily refuse to engage in unprotected sex.¹⁸⁶ Those who are more economically dependent on customers are in less of a position to turn down clients, and thus, their decision making is influenced more by economics than of clear judgment.¹⁸⁷

Consider the case of Rhode Island. In the early 2000’s, attorney Mike Kiselica discovered a “loophole” in the Rhode Island statute that

¹⁸¹ *Id.* (citing Jeff Storey, *Q&A: Kate Mogulescu*, N.Y.L.J. (July 26, 2013 at 12:00 a.m), <https://www.law.com/newyorklawjournal/almID/1202612471658/Q/?sreturn=20210826133148>; *N.Y.C. ’s Yearly Cost Per Inmate Almost as Expensive as Ivy League Tuition*, FOX NEWS (Nov. 20, 2015), <https://www.foxnews.com/us/nycs-yearly-cost-per-inmate-almost-as-expensive-as-ivy-league-tuition>).

¹⁸² *Id.* (“[T]he NYPD makes an average of 2,700 arrests each year for prostitution and loitering for the purpose of engaging in prostitution citywide.’ . . . It costs . . . \$460 a day, per inmate [to house an inmate] . . .”) (quoting Storey, *supra* note 181).

¹⁸³ *See id.*

¹⁸⁴ Beran, *supra* note 48, at 26-27.

¹⁸⁵ *Id.* at 27.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

criminalizes prostitution.¹⁸⁸ The loophole appeared to be a simple oversight: when the state legislature re-wrote the prostitution statute to reduce the crime from a felony to a misdemeanor, they limited the definition to include only street level prostitution.¹⁸⁹ Before Kiselica's discovery, sex workers who practiced indoors were being arrested, charged, and convicted for prostitution, because the public, the police, and even the judges were unaware of the strict definition of "prostitution."¹⁹⁰

Until 2009, the law in Rhode Island remained the same and the prostitution business boomed, creating an ideal source of data for researchers, including Manisha Shah, a UCLA economist who studies the "worldwide economics of prostitution."¹⁹¹ What Shah discovered was counter-intuitive and counter to many public health arguments for criminalization: as the sex business in Rhode Island boomed, the gonorrhea rates in the state fell by 40% even when controlling for many, various other factors.¹⁹² Shah's theory for this phenomenon reflects that of the argument above: when prostitution is legalized, sex workers have more power to refuse riskier sexual behavior.¹⁹³

Per a policy brief written by the Global Network of Sex Work Projects detailing the failings of criminalizing prostitution, "Criminalisation [sic] creates a culture of impunity which fosters a variety of human rights abuses, most notably physical and sexual violence."¹⁹⁴ Instead, it exposes workers—particularly street-level workers—to greater harms by harassing them in the street and scaring off would be clients, fining them and making them more economically

¹⁸⁸ Elena Gordon, *Prostitution Decriminalized: Rhode Island's Experiment*, WHY (Aug. 3, 2017), <https://why.org/articles/prostitution-decriminalized-rhode-islands-experiment/>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Global Network of Sex Work Projects, *supra* note 143, at 4.

dependent on transactional sex, and arresting and jailing them which results in a loss of income.¹⁹⁵ All of these law enforcement tactics—legitimized through criminalization and social stigma—result not in less prostitution, but in less safe prostitution.¹⁹⁶

The lack of safety perpetuated by criminalization does not stop at public health. Those who engage in transactional sex are forty times more likely to die a premature death than the national average.¹⁹⁷ A study of street level sex workers in San Francisco found that 70% of the participating workers were raped an average of thirty-one times by their clients and 65% reported being beaten by their clients an average of 4.3 times.¹⁹⁸

Among sex workers, women of color and transgender women are disproportionately affected by criminalization and law enforcement efforts.¹⁹⁹ A study in Brooklyn, New York found that the borough's "African American defendants faced . . . 94% of all charges for loitering for purposes of prostitution."²⁰⁰

Despite these egregious statistics, sex workers have fewer avenues of legal recourse for crimes committed against them than the average non-sex worker.²⁰¹ Reporting such crimes means exposing themselves to state sanctioned violence, that is, engaging with the criminal justice system opens them up to punishment by the same system from which they seek protection.²⁰² This reluctance to engage

¹⁹⁵ *Id.* at 7; see also Kate Shannon, *Structural and Environmental Barriers to Condom Use Negotiation with Clients Among Female Sex Workers: Implications for HIV-Prevention Strategies and Policy*, 99 AM. J. PUB. HEALTH 659 (2009).

¹⁹⁶ See Carrasquillo, *supra* note 111, at 708–12.

¹⁹⁷ *Id.* at 709.

¹⁹⁸ *Id.*

¹⁹⁹ Danielle Augustson & Alyssa George, *Prostitution and Sex Work*, 16 GEO. J. GENDER & L. 229, 257 (2015).

²⁰⁰ *Id.*

²⁰¹ Carrasquillo, *supra* note 111, at 709.

²⁰² Augustson et al., *supra* note 199, at 258.

with the criminal justice system is even greater in minority sex industry workers who more regularly face violence by police officers.²⁰³ For immigrant sex workers, engaging with the criminal justice system could mean they are deported back to the country of their origin, countries which could be hostile to their return.²⁰⁴

Of the failures of criminalization, American law professor Herbert L. Packer wrote in 1968:

What does society gain from this kind of law enforcement activity? If the effort is to stamp out prostitution, it is plainly doomed to failure. If it is to eradicate or curb the spread of venereal disease, that too is illusory . . . To put it crudely, but accurately, the law is perverted . . .²⁰⁵

In 1948, the UN adopted the Universal Declaration of Human Rights, which rests on the following fundamental principles: 1) all humans are born with inherent rights, regardless of social status; 2) these rights are recognized in international treaties and customary international law that states must respect, protect, and realize; and 3) the UN system and agencies, regional human rights organizations and civil society organizations must monitor and enforce these rights.²⁰⁶ Sex workers' rights advocates have long sought to apply these internationally recognized human rights to the rights of sex workers.²⁰⁷

The World Charter for Prostitutes' Rights demands that governments guarantee sellers of sexual services all the human rights and civil rights enjoyed by others that include the right to work, to

²⁰³ See Goodmark, *supra* note 44.

²⁰⁴ *Id.*

²⁰⁵ Law, *supra* note 51, at 531 (citing HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 328-31 (1968)).

²⁰⁶ Chi Adanna Mgbako, *The Mainstreaming of Sex Workers' Rights as Human Rights*, 43 HARV. J. L. & GENDER 91, 92 (2020).

²⁰⁷ *Id.*

unemployment insurance, to health insurance and to housing.²⁰⁸ Advocates for the Charter and other sex worker rights advocates also believe that if prostitution was seen as a legal profession, workers would not be as targeted by the police as they are now.²⁰⁹

In recent years, a number of states have proposed bills to change prostitution laws, including in Maine, Massachusetts, Washington D.C., and New York.²¹⁰ The bills that have been introduced vary in their approach to updating their state's prostitution laws: some, such as Massachusetts, embrace decriminalization, and others, such as New York, embrace legalization.²¹¹ Kay Khan, the MA representative who proposed the bill, hoped the bill's passage would mean that police would direct their focus on the demand side of prostitution, those who buy sex, the Johns, and those who exploit sex, the pimps.²¹² Khan's approach embraces the radical feminist view discussed above that those who sell sexual services do so because they are victims human trafficking or because they do not otherwise know how to make money.²¹³ Khan elaborates that once a sex worker has a felony on their record, legitimate ways of making money are then foreclosed to them.²¹⁴

²⁰⁸ Bingham, *supra* note 154, at 80.

²⁰⁹ *Id.* at 79.

²¹⁰ Jesse McKinley, *Could Prostitution Be Next to Be Decriminalized?*, N.Y. TIMES (May 31, 2019),

<https://www.nytimes.com/2019/05/31/nyregion/presidential-candidates-prostitution.html>; Jesse McKinley, *Bills to Decriminalize Prostitution Are Introduced. Is New York Ready?*, N.Y. TIMES (June 11, 2019),

<https://www.nytimes.com/2019/06/11/nyregion/prostitution-legal-ny.html>.

²¹¹ Andy Metzger, *Prostitution Bill Would Legalize Sex Work, Sponsor Says*, THE SALEM NEWS (Nov. 28, 2017),

https://www.salemnews.com/news/state_news/prostitution-bill-would-legalize-sex-work-sponsor-says/article_07773578-d498-11e7-91dc-274bea5b3802.html; McKinley, *Bills to Decriminalize Prostitution Are Introduced. Is New York Ready?*, *supra* note 210.

²¹² Metzger, *supra* note 211.

²¹³ *Id.*

²¹⁴ *Id.*

Around the same time, another Massachusetts representative, Congresswoman Ayanna Pressley proposed legislation to decriminalize sex work at the federal level as part of an expansive resolution for criminal justice reform.²¹⁵ The bill, entitled the People’s Justice Guarantee, would decriminalize the selling of sexual services by “removing criminal and civil penalties related to consensual sex work and addressing structural inequities that impede the safety, dignity, and wellbeing of all individuals.”²¹⁶

Pressley commented on the bill saying, “Two principles of the People’s Justice Guarantee are safety and dignity—both of which are compromised for sex workers. Sex work is work . . . Black and brown women, especially Black and brown trans women, have been historically and unjustly over-policed and over-criminalized, including within the sex work industry.”²¹⁷ Pressley’s comments reflect that of sex radicals like COYOTE who argue that sex work is first and foremost work, and as such, legislation around sex work should be about regulating the industry, not criminalizing the work.²¹⁸

The two Massachusetts representatives present the most common divide among decriminalization advocates: Khan argues that sex workers are victims and thus should not be penalized, but pimps and Johns should, while Pressley contends that sex work is work, and decriminalization is necessary to stop the over-policing of Black and brown women within the industry.²¹⁹

²¹⁵ Alanna Vagianos, *Rep. Ayanna Pressley Calls to Decriminalize Sex Work in Criminal Justice Resolution*, HUFFPOST (Nov. 17, 2019), https://www.huffpost.com/entry/ayanna-pressley-decriminalize-sex-work-peoples-justice-guarantee_n_5dcdb510e4b06a60957d21c8.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Bingham, *supra* note 154.

²¹⁹ *See Metzger, supra* note 211; *see also* Vagianos, *supra* note 215.

Not far from the debate in Massachusetts, lawmakers in New York have also recently introduced bills to decriminalize prostitution.²²⁰ There, the lawmakers contend that centuries of criminalization have done more harm than good, commenting that prostitution has been driven “into the shadows in an underground illegal environment where sex workers face increased violence, abuse and exploitation, and are more vulnerable to trafficking.”²²¹

In early 2020, even New York Governor Andrew Cuomo called for the repeal of criminal penalties for loitering with the intent to engage in prostitution—despite striking down the bill previously mentioned just six months earlier in June of 2019.²²² Perhaps Governor Cuomo’s willingness to lay steppingstones to decriminalization reflects a broad trend of lawmakers considering the needs and safety of sex workers nationwide.

In Vermont, two related proposals have been introduced: one that would decriminalize prostitution and create a panel that would make recommendations on modernizing Vermont’s current prostitution laws, and one that would “give immunity to people who were victims of or witness a crime while engaged in prostitution or sex trafficking so they can report it to law enforcement.”²²³ The bills’ sponsor, Rep. Selene Colburn, commented on the necessity of the bills saying, “Right now sex workers really feel that they cannot access police protection. There are tons of statistics about the violence . . . and sex assault that people who engage in sex work experience.”²²⁴

²²⁰ McKinley, *Bills to Decriminalize Prostitution Are Introduced. Is New York Ready?*, *supra* note 210.

²²¹ *Id.*

²²² Lisa Rathke, *Bill in Vermont Would Decriminalize Prostitution*, AP NEWS (Feb. 6, 2020)

<https://apnews.com/article/2f92fad4f8154f934183eb84b8048d39>; Bernadette Hogan & Nolan Hicks, *Cuomo Nixes Last-Minute Effort to Legalize Prostitution*, N.Y. POST (June 17, 2019).

²²³ Rathke, *supra* note 222.

²²⁴ *Id.*

Though few of the recent proposals have actually passed, they indicate that politicians and leaders have begun to start thinking seriously about the criminalization of a vulnerable population and how criminalization exposes sex industry workers to further harm and violence at the hands of the state. Hopefully, states will soon pass more legislation to protect those in the sex industry, and the various frameworks in different states will offer researchers the chance to compare how different approaches in the United States have helped or harmed sex industry workers. With such information, along with consultations with workers themselves, the United States could construct comprehensive and considerate laws to protect those who choose to work within the sex industry.