THE STATE WHERE SEX IS EVERYWHERE, YET IS STILL A SIN ON THE BOOKS: WHY PROSTITUTION SHOULD BE DECRIMINALIZED IN NEVADA

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I. INTRODUCTION

Sex workers are everywhere. We are your neighbors. We brush past you on the street. Our kids go to the same schools as yours. We’re behind you at the self-service checkout, with baby food and a bottle of Pinot Grigio. People who sell sex are in your staff cafeteria, your political party, your after-school club committee, your doctor’s waiting room, your place of worship. Sex workers are incarcerated inside immigration detention centres, and sex workers are protesting outside them . . . Many people want to stop us from selling sex, or fix the world so we don’t need to, or just to ensure they don’t have to look at us. But we are notoriously hard to get rid of, at least through criminal law.

—Molly Smith & Juno Mac, Sex Workers

In Las Vegas, Nevada, the “City of Sin,” prostitution is certainly not a sin, although it remains a sin on the books. Las Vegas is one of the world’s

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1 Juno Mac is a sex worker and activist with the Sex Worker Open University (SWOU), a sex worker-led collective with branches in London, Leeds, and Glasgow. Molly Smith is a sex worker and activist with the Sex Worker Advocacy and Resistance Movement (SWARM). MOLLY SMITH & JUNO MAC, REVOLTING PROSTITUTES: THE FIGHT FOR SEX WORKER’S RIGHTS 1–2 (2018).

2 For the purposes of this Note, prostitution refers to activities commonly attributed to “sex work.” Sex workers are “people who sell or trade their own sexual labour in exchange for a resource, which is often money . . .” Id. at 1.
premier meccas for both gambling and commercial sex work and serves as a historical case study for the successful development of an anomaly economy bolstered by two of American society’s most cardinal sins. Gambling plays such a vital role in Nevada’s economy that the state legislature passed a statute expressly stating its reliance upon the industry in order to support the “general welfare of [its] inhabitants.” Gambling and prostitution were demonized in America prior to the turn of the century, as each encouraged individuals to indulge in “illicit pleasures” counter-culture to the time’s Victorian, religious moral sensibilities. However, Nevada embraced the “[s]atan and speculation” surrounding gambling and prostitution, and developed a thriving, tourism, leisure economy centered around the indulgence of each vice by legalizing both 3  April Corbin, Truth in Advertising: Is the Hard Sell on ‘Sin’ Working, Vegas?, L.V. SUN: VEGAS INC. (Aug. 29, 2011, 3:00 AM), https://vegasinc.lasvegassun.com/business/real-estate/2011/aug/29/advertising-vegas/ (“The ‘Sin City’ nickname refers to more than sex. Las Vegas has always been synonymous with gambling.”); see also Becky Little, How Las Vegas Became a Gambling Mecca (May 13, 2022), https://www.history.com/news/las-vegas-history-mobsters-gambling; JENNIFER HEINEMAN ET AL., SEX INDUSTRY AND SEX WORKERS IN NEVADA 1 (Dmitri N. Shalin ed., 2012).

4  Marie Katherine Rowley, “So Much for Fond Five-Dollar Memories”: Prostitution in Las Vegas, 1905-1955, UNIV. NEV., L.V., 2 (May 1, 2012) (“Las Vegas’ history can serve as both a model for other sunbelt cities and a unique case study for how a city can develop with an economy built around activities that are considered taboo elsewhere in the country.”) (quoting BARBRA G. BRENTS ET AL., THE STATE OF SEX: TOURISM, SEX, AND SIN IN THE NEW AMERICAN HEARTLAND, 47 Dec. 15, 2009) (“Since its earliest days, prostitution was one form of ‘deviance’ that Las Vegas embraced for its own profit . . .” “As a city [Las Vegas] market[s] sin . . . That’s our niche market and it has propelled us into iconic status.”); BARBRA G. BRENTS ET AL., THE STATE OF SEX: TOURISM, SEX, AND SIN IN THE NEW AMERICAN HEARTLAND, 1 (Valerie Jenness & Jodi O’Brien eds., 2010).

5  NEV. REV. STAT. § 463.0129 (1)(a) (“The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.”).

6  Mike Panasiti & Natasha Schull, Re-articulating the Moral Economy of Gambling, 77 KROEBER ANTHROPOLOGICAL SOC’Y PAPERS 65, 66 (1994) (“[C]onspicious consumption, leisure, and games of chance were vestiges of an outdated and predatory Victorian aristocracy whose pecuniary standards were incompatible with the demands of industrial capitalism.”).


8  Panasiti & Schull, supra note 6, at 65.

9  Id.

10  Nevada has fully legalized gambling but has partially legalized prostitution. Maine recently “decriminalized” prostitution. Both of these topics will be discussed infra. See Section II.
“sins.” Yet, only one of these sins remains subject to satanic speculation—prostitution.

The allure of indulging in “sin” makes Las Vegas a top tourist destination for visitors to partake in legalized gambling.\(^{11}\) Furthermore, in a country where prostitution is criminal everywhere else, Nevada remains the only state to legalize prostitution because of its historical reliance upon the commercial sex industry.\(^{12}\) This makes Nevada a one-stop-shop for thrills for visitors across the globe; a “Sodom and Gomorrah” of the modern-day United States.\(^ {13}\)

Prostitution is falsely attributed to feeding the criminal enterprise of sex trafficking, which is pervasive in Nevada.\(^{14}\) Adding fuel to the fire, although Sin City and its casinos are havens for those seeking to indulge in the thrills of such vices, casinos also function as “havens” for sex traffickers.\(^{15}\) In 2022, the American Gaming Association (AGA) noted that the travel and tourism industries—notably, casino gaming—are used as “supply chains” for human traffickers.\(^{16}\) Sex work and sex trafficking are both transient and discreet in nature and thus are difficult for law enforcement and casino workers to distinguish between the two.\(^{17}\) Though Nevada remains the only state in the

\(^{11}\) BARBRA G. BRENTS ET AL., supra note 4.


\(^{14}\) Id.

\(^{15}\) Linda Smith & Samantha Healy Vardaman, A Legislative Framework for Combating Domestic Minor Sex Trafficking, 23 REGENT UNIV. L. REV. 265, 277–78 (2011) (“As long as some jurisdictions have human trafficking laws that are narrower or less harsh than other state or federal laws, traffickers will simply move to those more lenient jurisdictions. Such havens for traffickers can include both lenient states and tribal lands, many of which are close to cities and already contain facilities such as casinos that may attract potential buyers.”).

\(^{16}\) Preventing and Combating Human Trafficking in the Gaming Industry, AM. GAMING ASS’N (June 28, 2022), https://www.americangaming.org/wp-content/uploads/2022/06/AGA-Preventing-and-Combating-Human-Trafficking-in-the-Gaming-Industry.pdf (“Traffickers take advantage of legitimate industries and supply chains to find, exploit and traffic victims. This is especially true for the travel and tourism industry—including casino gaming—when properties are unwittingly used to facilitate criminal activity.”).

\(^{17}\) See id.
United States to partially legalize “prostitution,” such work is only legal in Nevada’s “cow-counties,” (rural counties) and is limited to work in brothels.

In the city where “what happens here, stays here” is the mainstay, tourists—intoxicated by the bright lights and advertisements for sex garishly plastered along the Las Vegas strip—believe that prostitution is not only legal in the city, but a “logical” check off of the list of the Vegas experience. The resulting misconception that prostitution is legal in Las Vegas is of no detriment to the state of Nevada. The state’s market for “illegal” prostitution is estimated to gross more than $5 billion per year, while the state’s “legal” prostitution market—brothels—grosses more than $75 million per year in revenue. Although there have been stringent efforts to combat sex trafficking in Nevada, many—if not all—of the laws “targeted” at preventing sex trafficking are anti-prostitution laws, not anti-sex trafficking laws. This distinction is critical, as anti-prostitution laws punish sex workers—including exploited trafficking victims—instead of punishing sex-traffickers themselves. However, legislative efforts to criminalize sex trafficking by enacting punitive, criminal sanctions

18 Is Sex Work Decriminalization the Answer? What the Research Tells Us, ACLU (Oct. 16, 2020), https://www.aclu.org/report/sex-work-decriminalization-answer-what-research-tells-us ("[T]he buying and selling of sexual acts remains illegal and penalized in all states across the United States besides Nevada, where prostitution is legal only in a regulated, 'licensed house of prostitution'.").
20 Corbin, supra note 3 (”Though Las Vegas is in a county where prostitution is illegal, in the public’s eye the two are still incontrovertibly linked.”).
21 Corey Levitan, Vegas Myths Re-Busted: Prostitution Is Legal in Las Vegas, CASINO.ORG, https://web.archive.org/web/20231204095216/https://www.casin.org/news/vegas-myths-busted-prostitution-is-legal-in-las-vegas/ (Oct. 28, 2023, 7:55 AM) (quoting Michael Green, Associate Professor of History at the University of Nevada, Las Vegas) (”A number of people believe Las Vegas allows prostitution because it seems to be happening openly . . . It’s also something that people tend to think would be logical in Las Vegas. Anything goes here. So why not prostitution?").
22 Jason Guinasso, If Nevadans Are Serious About Ending Sex Trafficking, They Must Abolish Legal Prostitution, NEV. INDEP. (Sept. 16, 2022, 2:00 AM), https://thenevadaindependent.com/article/if-nevadans-are-serious-about-ending-sex-trafficking-they-must-abolish-legal-prostitution.
23 Id.
24 For a detailed record of Nevada laws aiming to combat sex trafficking by enacting anti-prostitution legislation, see DECRIMINALIZE SEX WORK, supra note 12.
25 See id.
26 See NEV. REV. STAT. §§ 201.300–305.
27 An individual who has been trafficked cannot engage in prostitution or sex work, as such acts are voluntary, and a trafficked individual is being forced to use their body for another’s profit.
against prostitution are, “in fact, anything but new.”

Further, such laws actively work to the detriment of ending sex trafficking in the state by criminalizing and stigmatizing consensual sex workers.

In a state where the prospect of sex amplifies and fuels the large profit margins that both the state and its casinos rake in annually for selling and capitalizing upon the thrill of the indulgence in sex itself, one would presume that embracing prostitution—rich in the state’s founding history of its economy—it is not a radical idea. Recognition—both legal and social—is far past due for the many women who have worked to bolster and create such a unique, taboo economy in Nevada. In Sin City, prostitution is everywhere, has been everywhere, and is “notoriously hard to get rid of, at least through criminal law.” A prominent Nevada brothel owner addressed the realities of the Las Vegas economy himself:

Let’s talk about gaming. 24-hour availability of liquor, quickie divorces, all the things we do here in Nevada. We had been very successful at this because we recognize one overriding issue, and that is that one man’s morality is another man’s pleasure . . . Now because of my background in tourism, I’ve been asked many times over the years, by hotel owners, business people, even elected officials, ‘What can we do here in Ely [Nevada] to bring more tourism in?’ And that question has only really one answer. It doesn’t matter who’s asking, it, or where they’re from. And that is you have to offer people something that they can’t get at home.

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28 See Seo-Young Cho et al., Does Legalized Prostitution Increase Human Trafficking?, 41 WORLD DEV. 67, 67 (2012) (“The idea that combating human trafficking requires combating prostitution is, in fact, anything but new.”).

29 This Note uses the term “women” referring mostly to cisgender women and girls. Data shows, however, that transgender women, non-binary individuals, and cisgender men—both homosexual and heterosexual—also participate in sex work that is harmed by criminalization. Particularly, trans women of color are the most at risk when laws criminalize prostitution in any capacity. ACLU, supra note 18, at 11. See generally Lucy Platt et al., Associations Between Sex Work Laws and Sex Workers’ Health: A Systematic Review and Meta-Analysis of Quantitative and Qualitative Studies, 15.2 PUB. LIB. OF SCI.: MED., Dec. 2018, at 2, 37; SMITH & MAC, supra note 1; see GLOBAL NETWORK OF SEX WORK PROJECTS, POLICY BRIEF: SEX WORK AND GENDER EQUALITY 9 (2017).


31 SMITH & MAC, supra note 1, at 1.

32 BRENTS ET AL., supra note 4, at 1.
If sex is so integral to the state’s economy, yet is not recognized by the state as a deposit of its own silver vein, what rights do sex workers, miners of the Nevada economy, have in Nevada?

Part I of this Note briefly examines the history of Las Vegas, Nevada’s commercial sex industry, and its rise alongside gambling. This section discusses how Nevada has profited off of the legalization of gambling, and also profited off of sex itself at the hands of the women who are not afforded a legal paycheck. Part II of this Note defines prostitution, addresses the misconceptions of sex trafficking and sex work, and explores four prominent approaches to combat sex trafficking by varying means of regulating prostitution. Further, this section examines the gaming industry’s approach to combatting sex trafficking while also acknowledging prostitution as its counterpart in the path toward legalization. Part III will briefly explore the relationship between property rights, corporal autonomy, sex work, and address feminist critiques of prostitution. Lastly, Part IV of this Note analyzes Nevada and federal laws that criminalize prostitution and ineffectively target sex trafficking.

II. THE SILVER STATE AND SEX WORK

_Vice flourished luxuriantly during the heyday of our ‘flush times.’ The saloons were over-burdened with custom; so were the police courts, the gambling dens, the brothels, and the jails—unfailing signs of high prosperity in a mining region._

—Mark Twain

Nevada’s history as a mining state is integral to the creation of its status as an international hub for sex work and its consumption. Alongside mining economies, leisure economies thrived. Men sought to engage in leisure activities after a hard day’s work, and the women without work “saw [an] opportunit[y] to provide services.” In its earliest years as a state, “saloons and sexual services were anchoring service businesses in Nevada’s . . . mining towns.” The state’s desert climate made it difficult for transients to settle down, and its population became dependent upon the next silver or gold vein to be struck. Boom towns began to rapidly spring up across the state, consisting of transient, single men seeking employment at the mines when the veins flared up. At the same time, women and other non-mining men seeking to capitalize upon the creation of a leisure economy. In Virginia City, Nevada—Nevada’s capital at the time—several brothels were opened, varying in degrees of

33 _Id._ at 47.
34 _Id._ at 45.
35 _Id._
36 _Id._ at 47.
37 BRENTS ET AL., _supra_ note 4, at 45.
38 _See id._ at 46.
39 _Id._
“luxury.” The most luxurious brothels “were occupied mostly by white women.”\footnote{Id. at 49.} Black, Chinese, and Native American women also ran their own separate brothels.\footnote{Id.} But, whether a miner ended his day in a “mostly white” brothel, or one ran mostly by women of color, the common denominator of either experience was drugs and alcohol.  

Today, prostitution, gambling, and drinking remain as mainstays in Nevada’s economy. In Las Vegas, these “vice[s]” have “established a culture of escape [and become] a symbol of prosperity, framing the service [industry].”\footnote{Id. at 47–48.} Despite this culture, prostitution is partially criminalized, but not in the Las Vegas casino industry, where much of the state’s commercial sex market is flourishing.\footnote{American Bar Association, \textit{infra} note 60, at 50:29 (“[N]inety-percent of prostitution happens in Las Vegas.”).} Much of Nevada’s laws aimed at thwarting sex trafficking are anti-prostitution laws.\footnote{See generally \textit{DECRIMINALIZE SEX WORK}, supra note 12.} These laws fail to target traffickers themselves and place sex workers and sex trafficking victims at risk of arrest, incarceration, and needless violence by police officers.\footnote{See generally Skye Wheeler, \textit{South African Leadership Makes Moves to Decriminalize Sex Work: Decades of Activism by Sex Workers Has Highlighted Dangers of Criminalization}, HUM. RTS. WATCH (Dec. 14, 2022, 9:58 AM), https://www.hrw.org/news/2022/12/14/south-african-leadership-makes-moves-decriminalize-sex-work?eType=EmailBlastContent&eid=187f79d2-06c8-48e6-9138-8304a3e7680a.} One of the greatest harms of criminalizing sex work is the stigma that it creates and fuels. Criminalizing sex work “fram[es] commercial sex as immoral, illicit, and unlawful, by declining sex workers’ (human and worker) rights by powering negative opinions.”\footnote{Vanwesenbeeck, \textit{infra} note 135, at 1632 (“Stigmatized people imputed a ‘spoiled identity’ [prostitutes] run a higher risk of being undervalued, socially excluded, and discriminated against.”) (internal citations omitted).}  

### III. WHAT IS PROSTITUTION?

Prostitution exists, and it always will. There is a reason it is called the ‘world’s oldest profession.’ It is either legal and regulated, or it is illegal and a criminal issue. A third choice—no prostitution—doesn’t exist.

—Robert J. Fisher, Journalist\footnote{Fisher, \textit{supra} note 30.}  

There is a fourth choice for the “world’s oldest profession”—decriminalization. The criminalization and regulation of prostitution in both the United States and across the globe demonstrates that the injection of the law and
law enforcement into the spaces of voluntary, consensual sex work “overwhelmingly” increases both the risk of violence against voluntary sex workers as well as threats to their safety.\textsuperscript{48} Police and client violence increases when the law is injected into sex workers’ spaces.\textsuperscript{49} Much of the foundational ideology for the criminalization of sex work is justified by lawmakers who fear that the decriminalization of sex work will encourage, if not increase, sex trafficking and make the practice more difficult to eradicate.\textsuperscript{50} The facts, however, say otherwise.\textsuperscript{51} This conflated rationale is a common misconception among lawmakers which, in turn, makes sex work more dangerous for sex workers acting upon their own volition.\textsuperscript{52}

Blanketly criminalizing sex work conflates the exploitation of victims who are sex trafficked with the agency of consensual sex workers. Criminalizing sex work does not end the demand for sex within the commercial sex market.\textsuperscript{53} Criminalizing sex work makes the practice more dangerous for consensual sex workers by eliminating the screening tools used to vet out potentially violent or dangerous clients.\textsuperscript{54}

Victims of sex trafficking do not have agency over themselves, nor do they have agency over who they are forced to sell and exploit their bodies to.\textsuperscript{55} By treating consensual sex work the same as the exploited labor of sex trafficking victims under the guise of the law, lawmakers functionally force consensual sex workers to work under the same conditions as an exploited sex trafficking victim.\textsuperscript{56}

\textsuperscript{48} See ACLU, supra note 18, at 14 (“The research overwhelmingly suggests that criminalization of sex work, including criminalization of buying, but not of selling, sex known as the “end-demand” or “Nordic” model, increases the risk of violence and threatens the safety of sex workers.”); see also Juno Mac, The Laws that Sex Workers Really Want, TED X (Jan. 2016), https://www.ted.com/talks/juno_mac_the_laws_that_sex_workers_really_want?language=en (“Decriminalizing sex work maximizes sex workers’ legal protection and their ability to exercise other key rights, including to justice and health care. Legal recognition of sex workers and their occupation maximizes their protection, dignity, and equality.”); Human Rights Watch, Why Sex Work Should be Decriminalized (Aug. 17, 2019, 3:19 AM), https://decriminalizesex.work/why-decriminalization/briefing-papers/human-trafficking-and-sex-work/ (“Arrests of adults engaged in consensual sex work grossly inflate the perceived rate of sex trafficking, denying resources to the vast majority of victims who are trafficked into other industries.”).

\textsuperscript{49} See generally ACLU, supra note 18.

\textsuperscript{50} Mac, supra note 48, at 6:43.

\textsuperscript{51} See ACLU, supra note 18, at 6. See generally Vialpando, infra note 68.

\textsuperscript{52} See generally Vialpando, infra note 68.

\textsuperscript{53} SMITH & MAC, supra note 1, at 118.

\textsuperscript{54} Sex workers use websites and social media to screen out their potential clients, but this can be difficult or risky if the act of selling sex itself is illegal. Id. at 113.

\textsuperscript{55} Id. at 119.
victims.56 Currently, the United Nations Convention Against Transnational Organized Crime defines sex trafficking as:

[t]he recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.57

The key difference between a victim of sex trafficking and a voluntary sex worker is the element of consent. The United Nations posits that victims of sex trafficking cannot consent under the conditions of the nature of sex trafficking itself, mainly because of the coercive and exploitative nature of the act of sex trafficking.58 The United Nations Office on Drugs and Crime defines exploitation as “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery.”59 Again, it is important to note that sex trafficking victims are exploited to perform sexual labor and services for individuals whom they do not—and cannot—consent to providing such services to.

Recognizing the differences between sex work and sex trafficking is crucial when casinos are creating and considering policies to combat sex trafficking. Although casinos are well regulated, sex trafficking is a “ghost crime” and is a largely unregulated and unmonitored criminal enterprise,60 making it difficult for policy makers and employees of casinos to differentiate between what is consensual sex work and what is sex trafficking. Furthermore, although opponents of decriminalization argue that such a practice will increase sex trafficking, “research shows the opposite to be true—that it is criminalization that creates conditions of impunity and enhances sex workers’ vulnerabilities to violence and exploitation, including trafficking.”61 The casino industry is global, as is the sex trade, making sex trafficking a lucrative industry for traffickers and

56  Wheeler, supra note 45 (“Under criminalization, sex workers are forced to work in darker or otherwise dangerous places to avoid arrest, making it more likely they will become victims of rape and other violence.”).
58  Id. at 43.
59  Id. at 42.
for casinos who profit from the forced labor of individuals exploited to sell their bodies and forced “consent.”

Although the focus of this Note is sex work and sex trafficking occurring within the casino and gaming industry, it is also important to note that several wage workers within the casino and gaming industry have also been trafficked and are forced to sell their labor alongside their sex trafficked counterparts. Migration is a large aspect of both sex and human trafficking, and “human trafficking is a Nevada problem;” ninety percent of the prostitution activity that occurs within Nevada happens in the city of Las Vegas. Moreover, in Nevada, there is a “steady stream of women who have not routinely sold sex” that come to work in brothels from low-wage service industry jobs “who are willing to try sex for pay in a legal setting.” Furthermore, “within casino gaming establishments, the sex trafficking aspect of human trafficking is the most common form of this crime,” largely because of the transient nature of sex trafficking itself and because of casino crowds and co-located lodging facilities.

Sex trafficking is the third largest criminal enterprise in the world and the “fastest growing business of organized crime.” Therefore, it is vital for both casino owners and lawmakers to implement procedures, policies, and laws that actually address the trafficking problem while not simultaneously exacerbating conditions for consensual sex workers. Currently, there are four legislative approaches for regulating sex work: Full Criminalization, Partial Criminalization, or Legalization; criminalizing the purchasing of sex (The Nordic Model), and Decriminalization.

A. Challenging the Status Quo: Critiquing the Full Criminalization Model of Prostitution

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62 As aforementioned, Nevada’s illegal prostitution market brings in nearly $5 billion per year. Guinasso, supra note 22.
63 AM. BAR ASS’N, supra note 60, at 06:07.
64 See generally SMITH & MAC, supra note 1.
65 AM. BAR ASS’N, supra note 60, at 50:29.
66 Id.
67 BRENTS ET AL., supra note 11, at 153.
69 Id.
70 AM. GAMING ASSOC., supra note 16, at 11.
Illegal prostitution is practiced in casinos in order to keep men happy, especially those with deep pockets.

—Louis Hartwell, Journalist

Under the Full Criminalization model, all actors in the exchange of sex work are criminally punished. Actors include sex workers, buyers of sex (clients), and third parties such as managers or drivers. The United States, excluding Nevada and Maine—South Africa, Russia, Iran, Pakistan, and China utilize this model. The thrust of this approach is that the threat alone of being arrested will quell the sale of sex in and of itself.

There are several issues to parse out here: first, and most relevant, although consensual sex work happens in casinos, the AGA recognizes this, yet characterizes it as a “myth”; confusing and conflating sex trafficking and sex work. This conflation is so great that people engaging in consensual sex work as “escort workers” within casinos are often erroneously labeled as “sex trafficking victims,” even though this may be far from the truth. Furthermore, it is undisputed that sex trafficking patterns are difficult to track because of the transient nature of the criminal enterprise.

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72 SMITH & MAC, supra note 1, at 115.

73 Id. at 115–16.

74 Id. at 145.

75 See id. at 116.

76 See id.

77 See Libertarian Sex Worker Rights Talking Points, OLD PROS, https://oldprosonline.org/libertarian-sex-worker-rights/ (last visited Jan. 12, 2024) (“The majority of individuals involved in the sex trade are consenting adults. Nearly 90% of the federal government’s $24 million ‘trafficking prevention’ budget was used to arrest consensual adult sex workers rather than to detect traffickers or assist victims. In 2020, prostitution related offenses outnumbered those related to trafficking in the sex trade 38 to 1.5.”).

78 Sex trafficking is often interchanged with “human trafficking.” This is a global criminal enterprise that predominately affects women and female children. The American Gaming Association defines sex-trafficking as “[w]hen a minor is induced to engage in a commercial sex act, or when a person of any age is induced to engage in a commercial sex act using force, fraud, or coercion.” AM. GAMING ASSOC., supra note 16, at 3 (noting that “[s]ex trafficking victims may appear similar to voluntary sex workers”).

The Full Criminalization model is especially harmful when casinos capitalize on the “age-old notion that wherever there is gambling, there will be prostitutes,” by using it as a marketing strategy. For example, in 2015, the China Central Television network broadcasted that casinos on Jeju Island were “offering prostitutes as benefits to entice Chinese gamblers.” A more pertinent—and glaring—example is a 2022 advertisement ran by Hotels.com, featuring glitzy nightlife scenes in a Las Vegas casino. In the advertisement, the narrator acts as if she is a hotel who “isn’t looking for anything long term . . . just [for] a few nights of fun.”

In such a system, the law assumes that the demand of sex will decrease with the looming threat of law enforcement’s stick. When push comes to shove, and decisions based upon whether an individual can feed oneself—or their family at the cost of the threat of jail time—the gamble may be worth the risk. Also, in a city where certain “sins” like gambling have been codified, why should such individuals not take the gamble of being arrested? If the demand for sex is always there, and the payoff may be a cushy place to stay for the night, why not take the risk? Las Vegas is the place to risk it all, is it not? The heart of such questions lie within what sex workers themselves are risking when taking such gambles. Moreover, the answers to these questions lie at the center of the Full Criminalization model. This approach does more harm than good and punishes a workforce that bolsters Nevada’s economy.

B. The Nevada Way: The Partial Criminalization/Legalization Model

The law won’t protect sex workers. It’s just about control.

—Sex Worker in Germany

Smith and Mac note that “sex work is work and is every bit as necessary as any other work.” This is especially true for Nevada’s economy, because the state follows the Partial Criminalization model. The Partial Criminalization, or,
Legalization model legalizes the purchase of sex under certain circumstances, in certain locations, if stringent regulatory measures are met by sex workers or persons. The term legalization is a misnomer, as the act of selling sex is only legal under specific circumstances prescribed by state law. Therefore, the act of selling sex itself, absent state prescribed conditions, is not legal—it’s criminal.

This model is only ideal for those who can afford to jump through the mandatory regulatory hoops. Small businessmen dominate ownership in Nevada’s brothel industry because they are the only players that can afford statutory regulatory costs. State legislators who create laws “legalizing” sex work, are often not sex workers, nor have they worked in the commercial sex industry. Lawmakers are thus often far removed from the burdens their regulations impose upon sex workers. Such regulatory schemes act as a wolf in sheep’s clothing. Although these laws parade as being pro-sex work by “legalizing” the practice, in reality, they increase police and client violence upon women, making the work more unsafe. Smith and Mac refer to this effect as the “charmed circle.” Sex workers able to meet regulatory requirements are inside the charmed circle, while the majority of sex workers engaging in street work remain at risk of violent interactions with law enforcement and the carceral system—outside of the circle. In sum, legislators have drawn a circle around sex workers whose regulations are effectively “meaningless.”

Legalization is meaningless to sex workers as the wages they receive are far below the regulatory costs required to become licensed workers, or to become a brothel owner who also balances the costs of statutorily imposed fees. It is especially meaningless to women who are migrants and trafficking victims. How can a migrant, sex trafficking victim meet regulatory standards when her status in this country itself is deemed to be illegal? Put differently, how can she “work” within such legalized spaces for sex when doing so may result in arrest for her unrelated citizenship status? The problem is, “those who have to work illegally under a ‘legali[zed]’ regime remain subject to the many harms of clear-cut

88 Hartwell, supra note 71.
89 See BRENTS ET AL., supra note 11, at 94 (“Where brothels used to be owned by individuals who had come through the sex industry ranks, the brothels have gradually shifted hands into small businessmen coming from outside the sex industry, and even to corporate partnerships.”).
90 Wheeler, supra note 45 (“[C]riminalization of sex work not only undermines core rights to privacy and bodily autonomy, but makes the work more dangerous.”).
91 ACLU, supra note 18, at 10
92 SMITH & MAC, supra note 1, at 180.
93 Street work is sex work performed outside of a brothel. For example, street work includes providing services to clients in hotel rooms, cars, or on the street itself. Id.
94 Id.
95 Id. (quoting a sex worker from Austria, “I am powerless here. I don’t get a wage slip. I can’t take out any credit or loans. I can’t lease a car. I pay the tax office, I pay social security, but I won’t get a pension. I don’t get anything. I also don’t get unemployment benefits . . . I can’t do anything in my name”).
criminalization.\textsuperscript{96} This problem also includes undocumented women performing sex work consensually. Many women, trafficked or not, sell sex in Nevada’s casinos instead of brothels because the profit margins are larger and unburdened by regulatory overhead costs.

In only legalizing the selling and purchasing of sex within the walls of a brothel where brothel owners receive a portion of the sex worker’s wages, the state fails to provide sex workers with safety in casinos where the market is teeming with customers and a bigger pay day. As aforementioned, there are twenty-one brothels in the state of Nevada, but, ninety percent of prostitution—illegal prostitution—activity occurs in Las Vegas, where prostitution is blanketly outlawed.\textsuperscript{97} Furthermore, physical aesthetics and looks are a significant part of brothel work,\textsuperscript{98} which may act as a bar for women who do not meet clientele or brothel owner’s standards, or who need to pay for beauty procedures to maintain a certain image. For these women, casino work may be the only option to keep food on the table. The American Civil Liberties Union (ACLU) has found that prohibitive laws on the purchase and sale of sex correlates to “lower and less stable income for sex workers,” such that the Partial Criminalization of sex work creates a higher financial burden and “inability [for sex workers] to support themselves and their dependents.”\textsuperscript{99}

Another study conducted by sociology professors at the University of Nevada, Las Vegas (UNLV) found that of the several women surveyed and interviewed for the project, many had never worked in the sex industry prior to their entrance into brothel work.\textsuperscript{100} Many of the women came from “straight” (legal) service industry jobs and partially or fully turned to illegal sex work because the “pay was so much better.”\textsuperscript{101} The study found that many of the women coming to work at brothels from the illegal sex industry in Nevada did so to escape the “stress of working illegally.”\textsuperscript{102}

The UNLV study also reported that “for many women, fear of arrest is a big motivator for going to the brothels.”\textsuperscript{103} Fear should not be a state tool to force women into less lucrative work when they have children or others depending on their income. This reality is another reason why the Partial Criminalization model is harmful to sex workers. The state is defining who, where, and how these women are able to earn an income. More importantly, the state is placing additional financial burdens on such women to do their work legally. Nevada’s unique situation as the only state in the United States to

\textsuperscript{96} Id. at 181.
\textsuperscript{97} AM. BAR ASS’N, supra note 60, at 50:29.
\textsuperscript{98} See BRENTS ET AL. supra, note 11, at 185.
\textsuperscript{99} ACLU, supra note 18, at 10.
\textsuperscript{100} BRENTS ET AL., supra note 11, at 162.
\textsuperscript{101} Straight service industry jobs are jobs available in casinos, such as restaurant or cocktail service. Id. at 162–63.
\textsuperscript{102} Id. at 163.
\textsuperscript{103} Id.
legalize prostitution in tandem with its global gaming and tourist economy provides many women and sex workers with a unique opportunity.

The criminalization of the purchase and sale of sex within Nevada’s casinos places these women at grave risk of arrest and making unnecessary contacts with the criminal justice system. This is especially true for women and other sex workers attempting to leave the sex industry and find legal, hourly work.\(^{104}\) The Partial Criminalization model functions the same as the Full Criminalization model with a carve out for women to work in highly regulated spaces.

The Partial Criminalization and Full Criminalization models put women working in illegal spaces at risk of police violence and abuse.\(^{105}\) For example, an investigation by the United States Department of Justice found that officers in the Baltimore Police Department forced sex workers to perform sexual acts to avoid arrest.\(^{106}\) Because sex is illegal across the United States, “police having sex with prostitutes is formally endorsed by the state,” in prostitution stings where the sex worker is “conveniently” arrested “only after the officer has ejaculated.”\(^{107}\) Such abusive practices have been subject to push back and attempts to reform. However, resistance to ending such practices is criticized as “making it harder to prove prostitution is happening.”\(^{108}\) For such practices, Smith and Mac poignantly ask, “would any sex worker consent to sex if they knew it was a prelude to being arrested?”\(^{109}\)

Alongside the potentiality of rape, the Partial Criminalization model subjects sex workers to police surveillance, real threat of incarceration, and violent interactions with police officers.\(^{110}\) Furthermore, the threat of arrest causes sex workers to report violence against themselves and violent crime to police at low rates.\(^{111}\) Police officers themselves have expressed the view that “violence [is] an inevitable consequence of sex work and not worth addressing in a serious manner.”\(^{112}\) Such officers do not view the victimization of sex workers as “legitimate.”\(^{113}\) This view is especially problematic when sex workers experience violence from clients because of the “actual and perceived lack of

\(^{104}\) See AM. BAR ASS’N, supra note 60, at 58:12.

\(^{105}\) ACLU, supra note 18, at 6 (“[I]n heavily policed, criminalized contexts, including end-demand models, sex workers are often physically or sexually coerced by police through threat of detention, violence (including rape), or extortion.”).


\(^{107}\) SMITH & MAC, supra note 1, at 125.

\(^{108}\) Id. at 126.

\(^{109}\) Id.

\(^{110}\) See ACLU, supra note 18, at 7.

\(^{111}\) Id.

\(^{112}\) Id.

\(^{113}\) Id.
police protection.\textsuperscript{114} The threat of being arrested renders clients more weary of sex workers; “[r]esearch suggests a strong association between rushing negotiation[s]\textsuperscript{115} with sex workers about their safety concerns (e.g., providing services where they feel safe) when clients perceive a threat of arrest. Thus, sex workers are often unable to timely and effectively screen and negotiate with clients about the boundaries of the interaction.\textsuperscript{116}

In sum, although the Partial Criminalization model provides sex workers with some protections, these protections are few and far between and are only meaningful in specific circumstances. Such circumstances may not be preferable to or attainable for many sex workers, forcing them to work in unregulated spaces—like that of a casino floor—for both a higher pay off and a higher threat of incarceration and arrest. Because of such circumstances, the Partial Criminalization model offers little to no protections for sex workers who are unable to comply with statutorily prescribed mandates, either because the pay day is not large enough or because the regulations are difficult and unfavorable to comply with. Creating a legal market for sex work excludes persons who cannot work legally because of their citizenship status. Thus, such persons are forced to work in illegal markets subjecting them to criminal liability for both prostitution and immigration offenses. Decriminalizing the purchasing and selling of consensual sex in all forms mitigates the harms and threats imposed by client and police interactions.\textsuperscript{117}

C. Enforcing the Unenforceable: The Challenges of Implementing the End Demand Model

The Swedish street prostitutes experience a tougher time. They are more frequently exposed to dangerous clients, while the [legitimate] clients are afraid of being arrested . . .They have less time to assess the client as the deal takes place very hurriedly due to fear on the part of the client.

—Norwegian Ministry of Justice and Public Security\textsuperscript{118}

The “Nordic,” or End Demand model, is a legal model in which the purchase of sex is criminalized while the selling of sex is decriminalized.\textsuperscript{119} The punishment for purchasing sex also includes punishing third parties facilitating the transaction (managers, drivers, and landlords).\textsuperscript{120} Also known as the “sex

\begin{itemize}
  \item \textsuperscript{114} Id. at 5.
  \item \textsuperscript{115} ACLU, supra note 18, at 5.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} See Wheeler, supra note 45.
  \item \textsuperscript{118} WORKING GROUP, NORWEGIAN MINISTRY OF JUST. AND POLICE, PURCHASING SEXUAL SERVICES IN SWEDEN AND THE NETHERLANDS: LEGAL REGULATION AND EXPERIENCES, 19 (Ministry of Justice and the Police, 2004).
  \item \textsuperscript{119} SMITH & MAC, supra note 1, at 140.
  \item \textsuperscript{120} Id.
\end{itemize}
purchase ban,” this asymmetrical model of criminalization was celebrated by feminists as a “feminist prostitution law,” restoring agency to sex workers and properly ascribing criminal punishment “where the power really lies in the transaction.”\textsuperscript{121} The aim is to “go after the man who pays for sex,”\textsuperscript{122} or rather, to end the demand for commercial sex itself, so that women will no longer have to “subject” themselves to the “harm” that is prostitution. In theory, this model is “ideal” because it does not punish the sex worker, however, only ten percent of prostitution-related arrests under this model are of clients.\textsuperscript{123}

The problem with this model is that sex workers remain subject to criminal laws. Furthermore, if the purchase of sex is criminalized, the market for safer clients becomes smaller for sex workers. The clients who are disproportionately deterred are the “nicer clients” who “have something to lose” if arrested, charged, and criminally punished for the purchase of sex.\textsuperscript{124} Meanwhile, clients and men who may not be concerned with a charge for the purchasing of sex are the clients often left for sex workers to choose from.\textsuperscript{125} In either case, the dynamic of the transaction becomes dangerous under this model as the sex worker may have to risk her safety\textsuperscript{126} to comply with the client’s needs to ensure that the client is free from police visibility.\textsuperscript{127} This dynamic often forces sex workers to work alone as opposed to working in a group. There is safety in numbers given the potential for a violent interaction with either a client or police. Working in a group also makes sex workers more visible to police.\textsuperscript{128}

Furthermore, in regions like Northern Ireland, this model has proven to be detrimental to sex workers, as criminalizing the purchase of sex led to an increase in harassment and abusive behavior by clients, “resulting in an increase of fear and stigma reported by sex workers.”\textsuperscript{129} Maine recently passed End Demand legislation decriminalizing prostitution.\textsuperscript{130} The law was criticized by sex workers and advocates as it still punishes the purchasing of sex.\textsuperscript{131} Moreover, the

\textsuperscript{121} Id.
\textsuperscript{122} Id. at 142.
\textsuperscript{123} Id. at 142–43.
\textsuperscript{124} SMITH & MAC, supra note 1, at 144.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 145 (“The sex worker is poorer, so she feels more pressure to accept a client she might otherwise reject; she works later and alone; the nicer clients have stayed away while the more impulsive or more unpredictable clients remain; and she has less time to assess him.”).
\textsuperscript{127} Id. at 144 (“To get the client’s money, you often have to cater to his need for safety from arrest.”).
\textsuperscript{128} Id.
\textsuperscript{129} ACLU, supra note 18, at 5 (“[S]ex workers expressed that the end-demand law was negatively impacting them more than it was the clients.”).
\textsuperscript{131} Emma Kilbride, Governor Signs Bill Partially Decriminalizing Sex Work, PORTLAND PRESS HERALD: POL., https://www.pressherald.com/2023/06/26/govern
ACLU reported that the End Demand model does not decrease violence against sex workers by police or clients, even though the target of end-demand laws is the clients themselves. Although this model is facially more beneficial for sex workers than the Partial and Full Criminalization models because the sale of sex is no longer criminal, the lingering effects of criminalizing the purchase of sex are harmful to the safety and financial stability of sex workers.

Research shows that “sex workers may be safer under less restrictions,” as they are less likely to make contact with police. Further, criminalizing sex work in any capacity—whether it be the purchase or sale of sex—is “barking up the wrong tree because it is fighting sex instead of crime and it is not offering any solution for the structural conditions that sex work (its ugly sides included) is rooted in.”

D. A Call for Change: The Decriminalization Model

The sex workers’ rights movement, too, often appears to clutch at magical solutions. The movement is at pains to express in the simplest of terms that what sex workers want—and urgently need—is decriminalisation.

—Molly Smith & Juno Mac

Currently, New Zealand and New South Wales, Australia, are the two prominent examples of the Decriminalization model. While this framework is the ultimate goal of many feminists and sex work advocates, is not perfect and does not entirely erase the stain and stigma that criminalizing sex work in any capacity leaves on sex workers. The model decriminalizes the purchase and sale of sex for the worker, the client, and third parties that are involved. The Decriminalization model regulates the sex industry through labor laws, not criminal punishment. Decriminalization lowers the potential for violent police contacts and aids in destigmatizing consensual sex workers by recognizing them as valid laborers in the workforce. Decriminalization includes decriminalizing

or-signs-law-partially-decriminalizing-sex-work/ (June 27, 2023) (“[M]embers of the sex work industry have criticized the bill for failing to fully decriminalize their work, arguing that as long as the purchase of sex remains illegal, sex workers will continue to face threats to their safety and wellbeing.”).

See ACLU, supra note 18, at 6.
See id.
Id.
Ine Vanwesenbeeck, Sex Work Criminalization Is Barking Up the Wrong Tree, 46(6) ARCHIVES OF SEXUAL BEHAV. 1631, 1636 (2017).
SMITH & MAC, supra note 1, at 190.
Id. at 191.
See id.
See id. at 190.
Id.
See generally ACLU, supra note 18.
street work142 and the advertising of sex work services, yet still subjects such practices to “reasonable laws, coercion, exploitation, bullying, assault, and rape that apply in other contexts.”143

This model allows sex workers to work in the daylight and in groups as opposed to other criminalized models, where working during the day and in groups can tip off law enforcement officers that illegal sex work is occurring.144 In the casino space, the Decriminalization model could allow sex workers to work freely on the casino floor. This would also enable casino employees to view what consensual sex work looks like and prevent the mistaken reporting of illegal prostitution activity to law enforcement. Decriminalization also furthers the victim-centered approach to sex trafficking laws which seek to punish traffickers themselves and provide reprieve and social services to sex trafficking victims. Human trafficking is a global issue; however, Las Vegas’s gambling, tourism, and sports entertainment industries situate Sin City at risk for sex traffickers flocking to the city to exploit such industries.145 Decriminalizing sex work allows lawmakers and law enforcement agencies to shift their focus and funding spent on policing prostitution to implementing anti-sex trafficking legislation and practices. Sex workers should not have to take the gamble of working in the shadows in dangerous confines to avoid arrest, especially if it means skirting screening mechanisms and meeting unknown buyers on a casino floor through unnecessarily rushed transactions.

If the AGA and Nevada casinos recognize that sex trafficking is an industry-wide issue within the gaming industry, policy makers and employers must work to prevent sex trafficking from happening within gaming spaces. Simultaneously, these players must not enact policies that place sex workers at risk of arrest and harmful contacts with police. Decriminalization of sex work and the regulation of such work by labor laws will allow sex workers to work safely. It is also an avenue for the gaming industry and law makers to use to

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142 Street work refers to sex work performed outside of a brothel. For example, street work includes providing services to clients in hotel rooms, in cars, or on the street.
143 Smith & Mac, supra note 1, at 193.
144 Id.
145 See Vialpando, supra note 68 (“Human traffickers often seek to set-up shop in casino hotels to facilitate prostitution activity. Normal casino hotel activity—with hundreds of patrons arriving and leaving the facility on a 24/7 basis and transiting from the adjacent hotel to the casino floor and back again—conceals the trafficker’s activity, and the environment provides a potential customer base for the illegal business.”). See generally Carly Sauvageau, Ten Years After Nevada Criminalized Sex Trafficking, Legislators Want to Crack Down Further, THE NEV. INDEP.: LEGISLATURE: SEX INDUS. (Feb. 8, 2023, 2:00 AM), https://thenevadaindependent.com/article/ten-years-after-nevada-criminalized-sex-trafficking-legislators-want-to-crack-down-further?utm_source=The+Nevada+Independent&utm_campaign=881531de6c-EMAIL_CAMPAIGN_2023_02_06_05_05_COPY_01&utm_medium=email&utm_term=0_d503d5d003-%5BLIST_EMAIL_ID%5D.
meaningfully address sex trafficking within casino spaces. The criminalization of sex work—whether it be Full, Partial, or an End-Demand model—is harmful for sex workers regardless of the intentions of lawmakers. Criminalization punishes sex trafficking victims for a “choice” that they are forced to make while simultaneously expanding the carceral state by arresting voluntary sex workers for merely exercising autonomy over their bodies and their labor.

IV. PROSTITUTION & CORPOREAL AUTHORITY

That prostitution exists is a given fact, even for the government. That requires a realistic approach, without moralism.

—Dutch Minister of Justice, Benk Korthals

Corporeal autonomy is a salient precept in America’s common law and is integral to the doctrine of natural property rights and labor. Corporeal autonomy in sex work is vital, as an individual is selling their labor, or rather, their body. This is an intimate choice—if consensual. One using their body as labor enjoys and is entitled to the property rights to such labor. John Locke stressed this principle, especially that property rights are natural rights, “because ownership is the only way to sustain oneself.” This is especially true when one’s survival depends upon selling their body.

Contention exists amongst feminist scholars about whether prostitution can be consensual, or rather, that prostitution is a “choiceless choice.”

147 See The Founder’s Constitution, UNIV. OF CHI., https://press-pubs.uchicago.edu/founders/documents/v1ch16s3.html (“Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his,” as stated by John Locke.); Deanna Forbush, When It Comes to Prostitution, Let Freedom Be the Last Word, THE NEV. INDEP. (Feb. 3, 2023, 2:00 AM) https://thenevadaindependent.com/article/when-it-comes-to-prostitution-let-freedom-be-the-last-word (“With respect to one's own body, common law, which has long been the primary basis for property rights, has provided a set of protections that have the effect of granting certain property rights in one's own body, though the law never speaks of these rights as property. Tort law protects us from nonconsensual physical contact and physical invasions of our bodies.”).
148 Id.
149 JANICE G. RAYMOND, NOT A CHOICE, NOT A JOB: EXPOSING THE MYTHS ABOUT PROSTITUTION AND THE GLOBAL SEX TRADE, 19–20 (2013) (“Choice has come to replace what is actually a strategy of survival for most prostituted women. It is a ‘choiceless choice.’ Paying someone to have sex with you when your motivation is to get enough money to survive, or to buy the next bag of groceries or drugs, is not
individuals are selling their labor—as well as being subjected to carceral punishment—regardless of whether one views this work as a choice, or as inherently coerced and thus morally repugnant and counter to the feminist cause. Notably, such arguments paint prostitution and sex trafficking as being indistinguishable—positioning that the physical forces of a pimp are tantamount to the patriarchal structures ultimately “forcing” women into this line of work. Thus, prostitution can never be consensual, and reform methods like Decriminalization only benefit traffickers, pimps, and the patriarchy—a Hobson’s choice. Even if prostitution is a Hobson’s choice, individuals selling their labor and body—their property—have a right to do so autonomously. Moralistic ideology should not trump the stark reality that sex workers face. Economist Murray Rothbard once wrote, “if labor and persons in general are to be free, then so should there be freedom for prostitution. Prostitution is a voluntary sale of a labor service.”

V. FEDERAL AND STATE LAWS AND SEX WORK

Once Backpage was seized, I saw workers in my area who’d only recently clawed their way up from street-based work and homelessness into the lowest rung of indoor work . . . get flung back into what they’d just escaped.

—Sex Worker in Amsterdam

In 2018, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), and its companion, the Stop Enabling Sex

voluntary intercourse. It’s a transaction based on her disadvantages and his power of purchase. It’s compliance to the only options available.

Id. at 17 (“Values do matter. The promotion of human rights for women in prostitution is twofold. On the one hand, prostituted women need safety, security, and services. On the other, they need dignity, respect, and equality. Prostitution is particularly objectionable because of its personal degradation of body and spirit, and the gender subordination on which the system is built. If women in prostitution cannot have a future where their lives have value, their prospects are bleak.”).

Id. at 11 (“They make distinctions between trafficking and prostitution but believe me, there are none. I was both trafficked and prostituted,” as stated by a prostitution and sex trafficking survivor.).

See id. at 13 (“The great seduction of legal prostitution regimes is to believe that sexual exploitation can be made better through pragmatic legislation that claims to provide improved “working” conditions for women. The reality is these regimes provide first-class working conditions for pimps and brothel owners whose status is elevated to legitimate businessmen.”).


Smith & Mac, supra note 1, at 124.
Traffickers Act (SESTA). SESTA was incorporated into FOSTA, and the bills were passed in the House of Representatives as the “FOSTA-SESTA package.” Nevada Senator Catherine Cortez Masto was a co-sponsor of SESTA and is a staunch advocate for the array of reforms brought forth by the FOSTA-SESTA package. The main provisions of FOSTA-SESTA sought to target online sex trafficking.

Online sex work’s origins date back to the 1990s when websites such as Craigslist and Backpage were used by sex workers to advertise their services online and to vet clients. The migration of sex work solicitation from in-person to online makes it easier for sex workers to work for themselves, instead of being forced to “work” under pimps. It also allowed sex workers to form online coalitions and communities to work together and to warn others of poor or dangerous client experiences. However, traffickers also took advantage of the migration of sex work solicitation to the internet. Backpage specifically “became notorious for its role of trafficking young women and children—a number of whom were later found to have been raped, abused, and even murdered,” spurring outrage from the general public and a cry for regulation and reform. Thus FOSTA-SESTA was born.

FOSTA-SESTA’s main provision makes it a felony for anyone “to use or operate an online service with the intent to ‘promote or facilitate the prostitution of another person.’” This includes the posting of “any content that helped facilitate sex trafficking or prostitution—even if it was consensual.”

155 These bills were passed to supplement each other and are thus commonly referred to as FOSTA-SESTA.
156 Jacob Solis, Fact Check: What Cortez Masto Did (and Didn’t Do) on Sex Trafficking Policy, THE NEV. INDEP., (Aug. 28, 2022, 2:00 AM) https://thenevadaindependent.com/article/fact-check-what-cortez-masto-did-and-didnt-do-on-sex-trafficking-policy (“For too long, these websites have been immune from criminal prosecution even when evidence against them is incontrovertible . . . This bill will change that by giving survivors the tools they need to bring the websites that intentionally facilitate and profit from this horrendous crime to justice.”).
158 Id.
159 Id.
160 Id.
163 Tung, supra note 158.
The provision conflates sex trafficking with prostitution as well as punishes sex workers and traffickers alike, *even when sex workers are acting upon their own agency*. Furthermore, FOSTA-SESTA is largely criticized for updating the Communications Decency Act, 47 U.S.C. § 230(c)(1), by expressly creating exceptions to Section 230(c)(1)’s safe harbor for online hosting platforms. This safe harbor prevents the prescription of liability to hosts of online platforms for posts made by its users that violate federal or state laws.

FOSTA-SESTA prescribes liability to the statute’s otherwise broad protections for owners of online platforms for violating 18 U.S.C. § 1591, a federal statute creating sanctionable offenses for child sex trafficking. However, Section 230(c)(1)’s safe harbor particularly posits that, “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” This directly conflicts with FOSTA-SESTA’s broad provision that punishes both the internet platform and the speaker for any publishing or posting of any material that “promote[s] or facilitate[s] the prostitution of another person.”

Similar to Nevada’s laws targeting prostitution, this FOSTA-SESTA provision targets the selling of sex itself, which “render[ed] sex workers in the US and beyond more precarious, broke, and desperate over night as their source of income vanished,” as websites began to censor sex worker’s listings and advertisements to avoid fines and potential liability. Furthermore, the bill is also criticized by sex work advocates because it has discouraged platforms that sex workers use to advertise their services “into staying far away from anything that smells like sex work.” This bill strips consensual sex workers of the client screening and vetting tools brought about by the digital age.

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164 Woodhull Freedom Found. v. United States, 72 F.4th 1286, 1293 (D.C. Cir. 2023) (“Congress enacted FOSTA to strengthen protections against online sex trafficking. In doing so, Congress underscored that Section 230 of the Communications Decency Act ‘was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution’ or to ‘websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.’”).


167 SMITH & MAC, *supra* note 1, at 124.


169 Solis, *supra* note 156 (“It’s much harder to communicate bad date lists, which are problematic clients. It's more difficult to share safety tips and contacts with each other, it's more difficult than screening clients…[a]nd this has affected the most marginalized of sex workers, which are those that are most vulnerable to sex trafficking,” as stated by Barbara Brents, a sociology professor at the University of Nevada, Las Vegas.).

170 *Id.*
A month after the bill’s passage, the Justice Department seized Backpage and indicted seven current and former leaders of the company for sex trafficking related offenses, and one of its co-founders, Carl Ferrer, pled guilty to sex trafficking and has cooperated with prosecutors.171 However, after FOSTA-SESTA’s passage, a report from the Government Accountability Office from June 2021 found that the Department of Justice has only prosecuted one case under FOSTA-SESTA since its enactment.172 The stakes for consensual sex workers are clearly at odds with such a bleak statistic, demonstrating that “[anti-prostitution laws don’t work because sex workers still do.”173 Moreover, “[anti-prostitution laws waste valuable resources that could be better used to implement laws that really improve sex workers’ rights, safety, and health.”174 Sex workers are asking for “rights, not rescue.”175 Paternalistic “rescue” laws like FOSTA-SESTA are not actually rescuing anyone and actively harm sex workers that do not need saving in the first place. Laws like FOSTA-SESTA stigmatize sex work, and, “signal to violent people that sex workers are in some sense ‘legitimate targets’ at the periphery of society.”176

Sex work advocates argue that laws with broad provisions like FOSTA-SESTA’s can recategorize common sex work business practices, like sharing information about dangerous clients, as “trafficking activity,” and thus eliminate channels of communications for consensual sex workers to remain safe.177 Smith and Mac argue such provisions “make exploitation easier,” because their punitive mechanisms strip safety tools from sex workers, putting them at risk of dangerous client interactions or potentially of interactions with traffickers.178

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173 Vanwesenbeeck, supra note 136, at 9 (quoting sex worker organization COYOTE).
174 Id. at 10.
175 Id.
176 SMITH & MAC, supra note 1, at 125; see also Vanwesenbeeck, supra note 136, at 3 (“Criminalization (including oppressive anti-trafficking and migration policies) produces (sexual) abuse and exploitation of sex workers, because the whore-stigma legitimizes all sorts of presumptuous behavior and supports a culture of impunity for violence and aggression. Besides, illegality and stigma denies sex workers equal protection under the law and forecloses them taking recourse to the courts.”).
177 Vanwesenbeeck, supra note 136, at 5 (“Trafficking may be legally defined in such a way that sex workers’ regular practices of sharing space, sharing information, and dictating the manner in which they conduct their business are considered trafficking.”).
178 SMITH & MAC, supra note 1, at 124; Decriminalize Sex Work, What is SESTA/FOSTA, https://decriminalizesex.work/advocacy/sesta-fosta/what-is-sesta-
This is exactly what FOSTA-SESTA does and is why sex work advocates brought suit against the federal government, alleging that the law imposes several constitutional violations.\footnote{Woodhull Freedom Found. V. United States, 72 F.4th 1286, 1292 (D.C. Cir. 2023).}

In 2018 in the District of Columbia, in \textit{Woodhull Freedom Found. v. United States},\footnote{Mandy Salley, \textit{FOSTA Five Years Later}, \textsc{Woodhall Freedom Found.} (Apr. 13, 2023), https://www.woodhullfoundation.org/fosta-five-years-later/ (Woodhall is the only lawsuit thus far to challenge FOSTA-SESTA.).} the Woodhull Freedom Foundation, Human Rights Watch, Erick Koszyck (a massage parlor owner), Alex Andrews (the founder of a sex work advocacy group), and the Internet Archive (a non-profit dedicated to building an internet library free from censorship), brought a pre-enforcement facial challenge to FOSTA, arguing its key provisions violate the First and Fifth Amendments and the Ex Post Facto Clause on the following six grounds:

(1) FOSTA’s language is overbroad and chills the speech of plaintiffs and others in violation of the First Amendment;
(2) FOSTA is impermissibly vague and thus fails to provide fair notice of what it prohibits in violation of the Fifth Amendment’s Due Process Clause;
(3) FOSTA’s selectively removes Section 230 immunity for sites allowing certain content yet grants Section 230 immunity to sites for removing the same content in violation of the First Amendment;
(4) FOSTA engages in content-based and viewpoint discrimination without sufficient justification in violation of the First Amendment;
(5) FOSTA lacks a sufficient scienter requirement in Sections 2421A and 1591 creating an “impermissibly broad sweep of liability;” and
(6) FOSTA’s provisions allowing for the imposition of liability for acts occurring before the statute’s enactment violates the Ex Post Facto Clause of the Constitution.\footnote{Woodhull Freedom Found. v. United States, Civil Case No. 18-1552 (RJL), 2022 U.S. Dist. LEXIS 57747 (D.C. Mar. 29, 2022).}

\footnote{fosta/ (last visited Nov. 20, 2023) (“Without these resources, sex workers are quite literally pushed back onto the street, where they lack the means to plan client meetings ahead of time. This forces them into dangerous situations, making them more vulnerable to physical violence from un-screened clients and harassment by law enforcement.”); Vanwesenbeeck, \textit{supra} note 136, at 5–6 (“Anti-trafficking measures often seriously harm the people they are supposed to protect. Many regulations actually create mechanisms for abuse by authorities and others and invariably translate into discrimination and exploitation.”).}
A federal judge in the District of Columbia initially dismissed the case, finding the plaintiffs lacked standing because they could not prove there was an actual possibility they would be prosecuted or sanctioned under FOSTA’s challenged provisions. In 2020, however, the United States Court of Appeals for the District of Columbia Circuit reversed, holding Erick Koszyck and Alex Andrews had standing, finding their right to advertise their services and to advocate for the rights and well-being of sex workers was at threat of suppression. The court then remanded the case back to the federal district court for further proceedings. On remand, both parties filed cross-motions for summary judgment and the court subsequently granted summary judgment in favor of the United States. The plaintiffs’ arguments failed to demonstrate FOSTA-SESTA’s unconstitutionality from the six distinct violations they alleged. The plaintiffs appealed to the United States Court of Appeals for the District of Columbia Circuit.

During oral argument, the Justice Department argued FOSTA-SESTA is simply an “aiding and abetting law,” and “[the provisions in question are] talking about the underlying criminal transaction [of prostitution], not the concept of prostitution as a whole.” In response, one of the officers on the panel, Judge Patricia Millet, stated the provision essentially criminalizes “operating a computer with a bad intent” and is tantamount “to banning library owners from pushing to decriminalize prostitution.” Another officer on the panel, Judge Justin Walker, proposed that “Backpage wasn’t running the prostitution business. It was the board—the equivalent of a bulletin board for sex traffickers to advertise.” The officers’ statements implicated FOSTA-SESTA’s challenged provisions would be struck down by the court. However, in 2023, the court ultimately affirmed the lower court’s grant of summary judgment in favor of the United States, promptly following the guidance of three recent United States Supreme Court decisions.

182 Electric Frontier Foundation, supra note 163.
183 Id.
186 Id.
188 Gerstein, supra note 172.
189 Id.
190 Id.
191 Id. (quoting Judge Patricia Millet, “[i]t says it is illegal to own the library with a bad intent . . . and the First Amendment is fine with that?”).
192 Id.
The court heavily relied upon the Supreme Court’s decision in *United States v. Hansen*. The provision of the statute being challenged in *Hansen* for unconstitutional overbreadth paralleled the challenged provision in *Woodhull*.\(^{195}\) In *Hansen*, the Court upheld 8 U.S.C. § 1324(a)(1)(A)(iv)—a federal immigration statute—prohibiting individuals from “encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such [activity] is or will be in violation of law.”\(^{196}\) The Court reversed the Ninth Circuit’s holding that the statute criminalized “‘statements or conduct that are likely repeated countless times across the country every day,’”\(^{197}\) For example, “‘encouraging an undocumented immigrant to take shelter during a natural disaster, advising an undocumented immigrant about available social services, telling a tourist that she is unlikely to face serious consequences if she overstays her tourist visa, or providing certain legal advice to undocumented immigrants.’”\(^{198}\)

The Court held the provisions in Section 1324(a)(1)(A)(iv) were not overbroad, because Congress used the words “encourage” and “induce” “as terms of art referring to criminal solicitation and facilitation (thus capturing only a narrow band of speech).”\(^{199}\) Critics of *Hansen* aptly summarize the undercurrent and implications of the decision as follows:

> The Court had two choices in this case: instruct Congress and all legislatures to use the words they actually mean (and normal people use) when they write laws; or force the public to accept—and try to comply with—criminal laws written in specialized language unknowable to most non-lawyers.\(^{200}\)

In *Hansen*, the Court relied upon its reasoning in *Gonzalez v. Google*\(^{201}\) and *Twitter v. Taamneh*,\(^{202}\) which presented questions regarding the applicability of Section 230(c)(1) immunity of the Communications Decency Act to the Anti-Terrorism Act, another “aiding and abetting” statute. The two cases were novel as they presented the Court with its first opportunity to review Section 230.\(^{203}\)

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197 *Id.* at 768 (quoting United States v. Sineneng-Smith, 910 F.3d 461, 475 (9th Cir. 2018)).

198 *Id.*

199 *Id.* at 771 (“The terms ‘encourage’ and ‘induce’ are among the ‘most common’ verbs used to denote solicitation and facilitation.”).

200 Buckley, *supra* note 194.


203 *Id.*
In Gonzalez, a father, Reyando Gonzalez, brought suit against Google after his daughter was killed in a terrorist attack by ISIS in 2015. Gonzalez sought relief under the federal Anti-Terrorism Act, arguing “Google placed paid advertisements in proximity to ISIS-created content and shared the resulting ad revenue with ISIS.” The Ninth Circuit agreed with the district court, holding Google was not subject to immunity under the Communications Decency Act. Still, the Ninth Circuit agreed with the district court’s ruling that the plaintiffs could not prove that Google’s advertising of ISIS related content was the proximate cause of the subsequent terrorist attacks that the victims suffered.

The Supreme Court consolidated Gonzalez with Taamneh, as the plaintiff’s claims arose from a similar set of facts. The question for the Court in each case was whether Google and Twitter were subject to civil liability under Section 230 for violating the Anti-Terrorism Act for “aid[ing] and abet[ting], by knowingly providing substantial assistance,” or “conspir[ing] with the person (ISIS) who committed such an act of international terrorism.” The heart of each plaintiff’s claim was that the defendants failed to detect and remove a substantial number of ISIS-related accounts, posts, and videos. The Court held the plaintiffs in each case failed to prove that Twitter and Google knowingly provided assistance by merely transmitting posts from ISIS to each platform’s users. Thus, the Court declined to include Section 230 in its analysis because the plaintiffs “appear[ed] to state little, if any, plausible claim for relief.” Although the Court did not apply the Communications Decency Act in its analysis, the decision may be a harbinger for future Section 230 cases.

Following Hansen and Taamneh, the United States Court of Appeals for the District of Columbia Circuit held in Woodhull that FOSTA-SESTA was not vague or overbroad, because “FOSTA’s clarification that Section 230 withholds immunity for violations of federal sex trafficking laws comports with the First Amendment.” Particularly, the district court held that the FOSTA-SESTA provision amending the Federal Sex Trafficking Act—by creating civil and criminal penalties for an online platform’s promotion or facilitation of prostitution—were aiding and abetting laws. In doing so, the D.C. Court of Appeals “narrowed” the scope of FOSTA-SESTA to criminal acts of aiding and

205 Gonzalez v. Google LLC, 2 F.4th 871, 880 (9th Cir. 2021).
206 Id. at 871.
208 Gonzalez, 2 F.4th at 781; Taamneh, 598 U.S. at 471.
209 Gonzalez, 598 U.S. at 622; Taamneh, 598 U.S. at 471.
210 Gonzalez, 598 U.S. at 622.
211 Nina Totenberg, Supreme Court Unanimously Sides with Twitter in ISIS Attack Case, NPR: LAW (May 18, 2023, 12:45 PM), https://www.npr.org/2023/05/18/1176856351/supreme-court-twitter-google-social-media.
212 Woodhull Freedom Found., 72 F.4th at 1292.
213 Id. at 1299.
Spring 2024] DECRIMINALIZING PROSTITUTION 363

abetting—not expressive speech otherwise protected under the First Amendment, such as speech advocating for the rights of sex workers. Thus, the D.C. Court of Appeals held that “FOSTA does not criminalize promoting prostitution broadly. It only punishes aiding or abetting the ‘prostitution of another person,’ which has a much narrower reach.”

Furthermore the court held that FOSTA-SESTA’s provisions are not unconstitutional because, “Section 230’s text has always withheld immunity for speech that violates federal criminal law.” Therefore, so long as a host of an online platform allowing sex workers to advertise their services does not actively participate in the facilitation of the sale of such services, the host is still afforded Section 230 immunity.

This holding is a catch-22 for online platforms allowing sex workers to advertise their services. Although the D.C. Court of Appeals “narrowed” FOSTA-SESTA’s scope by reading the statute as an aiding and abetting law, the law is harmful and still remains on the books. An online platform can either run the gamble of allowing sex workers to advertise their services at risk of a court finding the act constitutes the “promotion” or “facilitation” of prostitution, violating the Federal Sex Trafficking Act, or prevent sex workers from using their platforms all together to play it safe. This practice is similar to how the Full Criminalization, Partial Criminalization, and End-Demand models place sex workers’ safety at risk. Each regulatory model places varying levels of regulations upon sex workers to comply with, which reflexively creates more dangerous environments for sex workers to navigate and survive in. At bottom, the writing is on the wall for both sex workers and hosts of online platforms supporting and allowing sex workers to advertise their work.

Under both federal and state law in Nevada, the ultimate issue of criminalizing sex work in its entirety remains as an undercurrent that may be gaining traction in the state. Currently, victims of sex trafficking in Nevada may face criminal penalties for their forced, non-consensual work, alongside consensual sex workers. Such enforcement practices function as a deterrent for both trafficking victims and consensual sex workers alike from asking law

214 Id. at 1306.
215 Id.
enforcement for assistance when in life-threatening situations. The National Institute of Justice has found that law enforcement underreported sex trafficking incidents because of failures to properly fill out an incident report, or because officers have trouble identifying trafficking behavior itself. This same problem arises for casino workers who are also tasked with identifying and reporting sex trafficking. Reporting prostitution activity can be dangerous if the casino workers are undocumented or if the trafficker notices that the worker is reporting them to management or law enforcement. Also, if employees or employers within the hotel and casino industry fail to identify trafficking, they can be subjected to both criminal and civil liability under federal law. Moreover, if casino or “hotel employees recognize indicators of sex trafficking, yet fail to act, and instead allow the criminal activity to occur on hotel property, the hotel itself effectively profits from the trafficking.” Criminalizing sex work is not only harmful to consensual sex workers, it places all parties involved at risk of criminal and civil penalties, including deportation.

VI. Conclusion

Criminalising sex work isn’t working. At its core, exchanging sex for money—like migrancy, drug use, and abortion—is a legitimate and pragmatic human response to specific needs. Prohibiting it produces evasiveness and risk-taking among sex workers, driving them into the margins and exposing them to even more harm.

—Molly Smith & Juno Mac

218 See Sports and Sex (Trafficking), Duke Univ. https://scienceandsociety.duke.edu/sports-and-sex-trafficking/#:~:text=Sex%20workers%20are%20treated%20by,workers%20as%20victims%20of%20trafficking. (last visited Jan. 12, 2024) (“Sex workers are treated by police as criminals rather than victims and given the underworld nature of the profession, a profound mutual distrust has developed between law enforcement and sex workers.”).

219 Sauvageau, supra note 216 (“Two out of three studies reported by the National Institute of Justice found sex trafficking often went underreported by law enforcement, either because the incident reports were incomplete or because officers did not have sufficient training to identify sex trafficking.”).


221 Shea M. Rhodes, Sex Trafficking and the Hotel Industry: Criminal and Civil Liability for Hotels and Their Employees, Vill. at 1, https://cseinstitute.org/wp-content/uploads/2015/06/Hotel_Policy_Paper.pdf (last visited Feb. 11, 2023) (“In cases where hotel representatives or employees receive financial benefits for permitting these acts to occur on site, they are participating in or at least profiting from human trafficking, and can be prosecuted and held civilly liable under existing Federal law.”).

222 Id.

223 SMITH & MAC, supra note 1, at 171.
Sex work in Nevada must be decriminalized. It is harmful to criminalize an individual’s autonomy. It is harmful to criminalize an individual’s means of participating in the economy in a capitalist society. It is harmful to criminalize an individual for their state of being. When a woman’s home state benefits from the selling of her labor—her body—she should not be punished for doing so. Bodily autonomy is critical to this practice, and regulation strips autonomy from a sex worker’s life; one’s body is one’s property. The Nevada economy has historically relied upon sex work and its failure to decriminalize sex work continues to make sex for pay a sin on the books.

In the casino gaming space, sex work remains, and will remain, a constant. It is also uniquely situated in Nevada as the only partially-legalized industry of its kind. Further, one of the “key ideas used to treat prostitution as ‘not work’ is the idea that [sex workers] are simply holes: that [sex workers] are offering up purchased consent,”\(^{224}\) not labor. Sex workers are integral laborers in the Nevada economy and must be legally recognized as such. Fully or partially criminalizing a woman’s property and labor rights to her body is to strip her of her bodily autonomy. Stripping a woman of her right in any capacity to use her property to participate in a capitalist economy is harmful—it is to force her to starve when she need not to.

In Las Vegas, to partially criminalize a woman’s property and labor rights to her body is to make her body a sin on the books. Decriminalization of sex work is essential to protecting the rights and labor of sex workers in Las Vegas, especially in its casino gaming spaces. Prostitution is everywhere, has been everywhere, and is “notoriously hard to get rid of, at least through criminal law.”\(^{225}\) Therefore, Nevada law makers must decriminalize sex work because the state and the gaming industry currently benefit from the indulgence of the “sin” itself.

\(^{224}\) \textit{Id.} at 44.

\(^{225}\) \textit{Id.} at 8.