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SELLING SEX: (MORE) EVIDENCE FOR DECRIMINALIZATION

*Faelynn Carroll**

*Walter E. Block***

ABSTRACT:

This paper makes a case for decriminalization of sex work in response to recent legislation restricting sex workers' access to online platforms and to the COVID-19 pandemic. Using a feminist economic lens, we summarize the current understanding of sex work markets and analyze how agency and stigma are affected by increasingly limited access to online platforms as well as by the social and economic restrictions of COVID-19. We analyze sex work from the point of view of the same labor economics that would be applied to any other industry, rather than as a romanticized or demonized group of sexual deviants, finding destigmatization of the sex work industry as central to the increased agency and well-being of sex workers and their clients.

This paper also employs the libertarian philosophy, according to which all acts should be legal except those that employ, or threaten, violence against innocent people. According to this perspective, murder, rape, theft, arson, kidnapping, and fraud, should be prohibited;

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but, everything else, certainly including sex work, should be decriminalized.

I. DEFINITIONS AND PHILOSOPHICAL PERSPECTIVE

This paper uses bell hooks'¹ definition of feminism as opposition to sexist oppression to create a transnational feminism.² Though this paper focuses on sex work in the U.S., we use Serene Khader's transnational feminist philosophy to lay the groundwork for feminists in the U.S. to decouple themselves from liberal feminism and engage in anti-imperialism everywhere.

Khader provides a practical prescription to identifying and achieving decolonized feminism which she calls the "justice-enhancement prescription."³ She builds on Amartya Sen's concept of justice enhancement⁴ that emphasizes "context and effectiveness . . . call[ing] for rich and longitudinal empirical attention to contexts and asking case-specific questions about what will make a difference," rather than an idealized moral endpoint.⁵ Khader draws a stark contrast between her requirements for a context-rich, nuanced approach to justice and the "enlightenment teleological narratives [that suggest] the same strategies" can be used across contexts to bring about justice.⁶ She makes the case clear for bottom-up research that prioritizes the well-being of those impacted, accounting for incongruencies in stated policy goals and real outcomes.⁷

¹ This author spells her name in all lower-case letters, and we are following her lead in this.

² In her later work, hooks modifies her definition of feminism to include opposition to all intersectional oppressions. We rely on her first definition, in line with Serene J. Khader, who reasons that "taking . . . intersectionality seriously, and opposing other oppressions does not require building [it] into the concept of feminism." SERENE J. KHADER, *DECOLONIZING UNIVERSALISM: A TRANSNATIONAL FEMINIST ETHIC* 44 (2019). Khader continues, pointing out that including anti-imperialism in the definition of feminism would "define away the possibility of conflict between feminist and anti-imperialist goals, a conflict . . . endemic to transnational feminist praxis." *Id.*; see also BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 24 (1984).

³ KHADER, *supra* note 2, at 44.

⁴ See AMARTYA K. SEN, *THE IDEA OF JUSTICE* (2011).

⁵ KHADER, *supra* note 2, at 44.

⁶ KHADER, *supra* note 2, at 44.

⁷ In *DECOLONIZING UNIVERSALISM*, Khader does the philosophical leg work of decoupling liberal enlightenment, or enlightenment feminism as she calls it, from

Feminism, as defined by bell hooks, emphasizes advocacy of feminist policies that generally oppose oppression.⁸ Therefore, the feminist lens here employed understands oppression to be inherently intersectional, thus necessarily including all sexualities and gender identities, undocumented sex workers,⁹ and other marginalized groups at the center of its advocacy.¹⁰

Sex work is a value-neutral umbrella term that describes all consensual commercial sexual activities between adults.¹¹ Most sex workers, activists, scholars, and others associated with these intimate commercial transactions prefer the term “sex work” to “prostitution.”¹²

feminism generally, freeing feminism from the racist colonial history of neoliberalism. *See supra* note 2.

⁸ hooks *supra* note 2, at 24.

⁹ For the libertarian case in favor of open borders, *see, e.g.*, Walter E. Block, *A Libertarian Case for Free Immigration* 13 J. OF LIBERTARIAN STUD.: AN INTERDISC. REV. 167 (1998); Walter E. Block, *The State Was a Mistake*, Mises Daily Articles (May 25, 2004) (reviewing HANS-HERMANN HOPE, *DEMOCRACY, THE GOD THAT FAILED: THE ECONOMICS AND POLITICS OF MONARCHY, DEMOCRACY AND NATURAL ORDER* (2001)); Walter E. Block, *Hope, Jinsella and Rothbard II on Immigration: A Critique*, 22 J. LIBERTARIAN STUD. 593 (2011); Walter E. Block, *Rejoinder to Hoppe on Immigration*, 22 J. LIBERTARIAN STUD. 771 (2011); Walter E. Block, *Rejoinder to Todea on the “Open” Contract of Immigration*, 8 SCI. J. HUMANISTIC STUD. 52 (2013); Walter E. Block, *Contra Hoppe and Brat on Immigration*, 4 MGMT. EDUC. SCI. TECH. 1 (2016); Walter E. Block & Gene Callahan, *Is There a Right to Immigration? A Libertarian Perspective*, 5 HUM. RTS. REV. 46 (2003); Anthony Gregory & Walter E. Block, *On Immigration: Reply to Hoppe*, 21 J. LIBERTARIAN STUD. 25 (2007).

¹⁰ hooks, *supra* note 2, at 31 (“The foundation of...feminist struggle must be solidly based on...the need to eradicate the underlying cultural basis and causes of sexism and other forms of group oppression.”).

¹¹ It is imperative to underline that our defense of this practice applies only to adults. “Scarlot Harlot,” also known as Carol Leigh, originally introduced the term “sex work” to more accurately describe the work she did, rather than continue to employ rhetoric that reduces her and her community to a stigma. *See* CAROL LEIGH WHORES AND OTHER FEMINISTS 203 (Jill Nagle ed., 1997).

¹² For the libertarian case in favor of the decriminalization of sex work, *see, e.g.*, Walter E. Block, *DEFENDING THE UNDEFENDABLE* (2008); S.E. Cupp, *Why Prostitution Should be Legal*, The Chi. Sun Times (Nov. 30, 2017, 12:58 PM), <https://chicago.suntimes.com/2017/11/30/18340560/s-e-cupp-why-prostitution-should-be-legal>; Tibor R. Machan, *The Freedom to “Escort,”* MISES INSTIT. (Apr. 11, 2006), <https://mises.org/wire/freedom-escort>; Ryan McMaken, *Catholic Theologians: Prostitution Should be Legal*, MISES INSTIT. (Jan. 1, 2013), <https://mises.org/wire/catholic-theologians-prostitution-should-be-legal-0>; Katy Smith & Walter E. Block, *Legalize Prostitution*, 20 J. ACCT., ETHICS & PUB. POL’Y 351 (2019); John Stossel, *Let’s Legalize Prostitution. It’s Time for Government to*

This is because the phrase “sex work” avoids the heavy stigmatization that the word “prostitution” carries and because sex work is representative of “all forms of [commercial] sexual labor.”¹³ A non-exhaustive description of sex work includes such examples as selling sex for money, brothel work, stripping or club dancing, the adult film industry, sugar baby work, escort work, and camera work.¹⁴

It might seem unusual for a paper to be predicated on both feminism and libertarianism, since the two philosophies diverge on many issues.¹⁵ However, there is one upon which this does not apply: Libertarians favor “capitalist acts between consenting adults,”¹⁶ including those that involve voluntary adult sexual relations. To be sure, there are many feminists who oppose the decriminalization of sex work but there are certainly some, including the authors¹⁷ of the present paper, who support the pro-decriminalization position espoused in this article.¹⁸

Step Away from Sex Work, FOX NEWS (Nov. 15, 2017), <https://www.foxnews.com/opinion/john-stossel-lets-legalize-prostitution-its-time-for-government-to-step-away-from-sex-work>; Marino Varricchio & Walter E. Block, *Prostitution, Essential and Incidental Aspects: A Libertarian Argument for Legalization*, 4 ACTA ECONOMICA ET TURISTICA 125 (2018); Jennifer Wright, *Why Prostitution Should be Legal: Sex Workers Are, for the Most Part, Just Ordinary Women Who Are Doing a Job*, HARPERS BAZAR (Apr. 26, 2018), <https://www.harpersbazaar.com/culture/politics/a20067359/why-prostitution-should-be-legal>.

¹³ CAROL LEIGH WHORES AND OTHER FEMINISTS, *supra* note 11, at 203. *See also* Sex Workers & Allies Network, *Sex Work vs Trafficking: How They Are Different And Why It Matters*, YALE GLOB. HEALTH JUST. P'SHIP (June 2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/issue_brief_sex_work_vs_trafficking_v2.pdf.

¹⁴ *See* Elena Jeffreys, *Sex Worker Politics And The Term “Sex Worker,”* 14 GLOB. SEX WORK PROJECTS 1 (2015).

¹⁵ To many social issues, a feminist policy prescription generally leans towards making social services like education, health care, and daycare free to all, where the libertarian response generally advises privatization.

¹⁶ This is the felicitous phrase of Nozick. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 163 (1974).

¹⁷ The first mentioned author of the present paper identifies as a feminist; the second, as a libertarian. A strange amalgamation? No, there are indeed overlaps, as the present paper demonstrates.

¹⁸ Transnational feminism, advocated by the first mentioned author, does not agree that market choices are necessarily more desirable than others, and specifically advocates for them to engage in wage work or not. There is no conflict here, since the second mentioned author, a libertarian, fully agrees. Patronizing a barber is a market activity; self-shaving is not. Both are fully compatible with the freedom

II. ECONOMICS OF SEX WORK

Basic supply and demand analysis of any kind of prohibited activity – whether it is for sex, drugs, alcohol, gambling, etc. – is very straightforward. Microeconomics teaches that both the supply and the demand curves will shift to the left. Why? Because both the sellers and buyers must now pay an additional cost: fines or jail sentences if and when they are caught in the illegal act. This implies that less of the product or service will be sold or bought after the prohibition is implemented. Whether the price will rise, fall, or remain roughly the same depends upon how far to the left each of these curves migrated. If the curve remains flat, then the price will remain unchanged. If the penalties are greater for the buyer, for example, if the clients of the sex workers are more heavily penalized, then the price will fall.¹⁹ This would imply that the demand curve shifts further to the left than the supply curve. If the forces of law are more greatly focused on the suppliers of sexual services,²⁰ then the supply curve will shift further to the left and prices will rise.²¹

Khader's adoption of Sen's concept of justice-enhancement acts as a practical method of comparison between differing visions of how to achieve a socially just ideal. It provides a helpful context and measuring stick when comparing legislative approaches to sex work.²² Sen's philosophy favors practical solutions which facilitate the

philosophy and similarly on the choice to enter the labor force or not. This decision should be up to each individual.

¹⁹ Giusta gives a good general analysis of how supply and demand react to regulation, citing that high market regulation often does not stifle demand, but forces commercial sex markets underground where sex workers face higher risks, thus also keeping prices high. Marina Della Giusta, *Stimulating the Impact of Regulation Changes on the Market for Prostitution Services*, 29 EUR. J. L. & ECON. 1, 10 (2010).

²⁰ See Keith Humphreys, *How Legalization Caused the Price of Marijuana to Collapse*, WASH. POST (Sep. 5, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/09/05/how-legalization-caused-the-price-of-marijuana-to-collapse>. Humphreys reports on a case where the supply shift, to the right in this case of legalization, not prohibition, was greater than the demand shift. *Id.*

²¹ For an alternative analysis of this phenomenon, based on an empirical examination of the ivory trade, see Solomon Hsiang & Nitin Sekar, *Does Legalization Reduce Black Market Activity? Evidence from a Global Ivory Experiment and Elephant Poaching Data* 1-54 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22314, 2019).

²² AMARTYA K. SEN, *THE IDEA OF JUSTICE* (2011).

“removal of manifest injustice present in the world.”²³ To understand what constitutes manifest injustice and which policies are justice-enhancing for sex workers, the nature of this market must first be understood.

Economic research on sex work has traditionally focused on the negative correlation between stigma and agency.²⁴ More recent scholarship has produced models articulating agency as continuum with an inverse relationship to stigma, which has varied implications across different segments of sex work.²⁵ This more nuanced understanding of agency as “a continuum of contractual arrangements that underpins a high degree of segmentation in the industry” allows policy discussions to move past the false dichotomy between agency and stigma and to refocus on how to cultivate agency-enhancing conditions.²⁶

Recognition of the spectrum of experience from sex workers of all identities, across highly diverse sectors of the industry, requires acknowledging a plurality of narratives as true. Though economic models are essentializations by nature, representing diverse perspectives within models can be a form of advocacy when created in partnership with sex workers.

Bettio’s model of sex work is governed by constraints to agency and reputation caused by stigma: “Recognizing that both agency and stigma come in degrees lends credibility to the suggestion that the higher the stigma imposed, the lower the agency.”²⁷ Della

²³ Amartya Sen, *The Research of Social Choice Theory*, 39 SOC. CHOICE & WELFARE 259, 262 (2012).

²⁴ Among the widely-accepted and documented scholarly and policy research linking increased stigma of sex work to decreased agency in the form of increased physical and psychological danger, public vitriol, outright hate crimes and the like on sex workers are: Amnesty Int’l, *Norway: The Human Cost of ‘Crushing’ the Market: Criminalization of Sex Work in Norway* AI Index AFR 36/4034/2016 (May 26, 2016); Maria Perrotta Berlin et al., *Prostitution and Violence: Evidence from Sweden* 1-42 (Ctr. for Econ. Pol’y Rsrch., Discussion Paper No. DP15188, 2020); Cecilia Benoit, *Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers*, 55 J. SEX RSCH. 457 (2017); Marina Della Giusta et al., *Stigma and Risky Behaviors Among Male Clients of Sex Workers in the UK*, 23 FEMINIST ECON. 23 (2017); and Teela Sanders, *Becoming an Ex-Sex Worker: Making Transitions Out of a Deviant Career*, 2 FEMINIST CRIMINOLOGY 74 (2007).

²⁵ Francesca Bettio et al., *Sex Work and Trafficking: Moving Beyond Dichotomies*, 23 FEMINIST ECON. 1 (2017).

²⁶ *Id.* at 1.

²⁷ *Id.* at 17-18.

Guista's earlier research into the relationship between reputational capacity and sex work pricing clarifies how reputation dictates prices and thus determines which segment of the industry an individual can enter.²⁸ She creates "a very simple rational action model based on stylized facts from sex trade [that] suggest liberal policies that maximize public welfare by lifting stigma" are most effective.²⁹ We use the above referenced research to evaluate the three main legal statuses for sex work: criminalization, legalization, and decriminalization.

III. CRIMINALIZATION

Proponents of criminalization claim that making sex work illegal curbs the supply of sex work, discourages sex trafficking and its plethora of associated harms, and upholds societal values around the nuclear family and monogamous, heterosexual marriage.³⁰ When governments outlaw activities or substances, it is implied that people need to be protected from unknowable harms, such as addiction in the case of drugs like heroin and meth.³¹ With highly addictive substances, such policies make sense, but only to protect children or others who may not have the capacity to fully comprehend risks and consequences of their behavior.³² On the other hand, criminalization pushes sex work

²⁸ Della Giusta, *supra* note 19, at 20.

²⁹ Della Giusta, *supra* note 19, at 20.

³⁰ The campaign to implement the Swedish Model in Northern Ireland proposed to be a solution against sex trafficking and a moralizing policy to counter what it portrayed as the harms of "prostitution." See Susann Huschke and Ellís Ward, *Stopping the Traffick? The Problem of Evidence and Legislating for the "Swedish Model" in Northern Ireland*, 8 ANTI-TRAFFICKING REV. 16, 20 (2017).

³¹ Stephen Morse, *Legal Regulation of Addictive Substances and Addiction*, in ADDICTION NEUROETHICS: THE ETHICS OF ADDICTION NEUROSCIENCE RESEARCH AND TREATMENT 261, 265 (Adrian Carter et al., eds., 1st ed. 2012).

³² From the libertarian point of view it makes absolutely no sense to command the populace not to utilize hard drugs. If they are so stupid as to do so, they do not deserve to vote for office holders. They cannot be trusted in the ballot box. But they are allowed this option. And they are now supposed to be smart enough to choose leaders who will veto their foolish choices? For the libertarian case for the legalization of drugs, all of them without exception, see, e.g., Walter E. Block, *Drug Prohibition: A Legal and Economic Analysis*, J. OF BUS. ETHICS 689 (1993); Walter E. Block, *Drug Prohibition and Individual Virtue*, 8 REV. POL. ECON. 433 (1996); Walter E. Block, *Drug Legalization Might Save the 'Big Uneasy'*, THE MAROON (Jan. 18, 2007), <https://loyolamaroon.com/100851/uncategorized/drug-legalization->

away from the protections and support of formal institutions and into the black market that attracts riskier clients, offers pimps for so called protection, and necessitates quick transactions which undermine sex workers' negotiating power.³³

Sex work criminalization has reached a boiling point for those trying to survive in the United States today. COVID-19's magnification of underlying issues and institutional weak points places increased pressure on members of this profession.³⁴ They are already facing life-threatening conditions imposed by the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA"), which has the stated intent of targeting online sex trafficking.³⁵ However, FOSTA is only one example in a string of recent legislation that targets such market participants under the guise of anti-sex trafficking measures. Also using section 230 of the Communications Decency Act to target commercial sex online, the Eliminating Abusive

might-save-the-big-uneasy; Walter E. Block, *Objections to Drug Legalization Unfounded*, THE MAROON (Jan. 26, 2007), <https://loyolamaroon.com/102772/uncategorized/objections-to-drug-legalizations-unfounded>, reprinted in Walter E. Block, *Drug Legalization: How to Radically Lower the Number of Murders in New Orleans*, LEWROCKWELL.COM (Jan. 27, 2007), <https://www.lewrockwell.com/2007/01/walter-e-block/cut-the-murder-rate-in-new-orleans>; Walter E. Block, *Legalization Debate Continues*, THE MAROON (Feb. 16, 2007), <https://loyolamaroon.com/102837/uncategorized/legalization-debate-continues>, reprinted in Walter E. Block, *Rejoinder to Prof. Perlstein on Legalizing Drugs in New Orleans*, LEWROCKWELL.COM (Jan. 27, 2007), <http://archive.lewrockwell.com/block/block74.html>; Walter E. Block, Katherine Wingfield & Roy Whitehead, *Re-Evaluating America's Failing Drug Control Laws*, 28 OKLA. CITY L. REV. 119 (2003); Meaghan Cussen & Walter E. Block, *Legalize Drugs Now! An Analysis of the Benefits of Legalized Drugs*, 59 AM. J. OF ECON. & SOCIO. 525 (2000); Violet Obioha & Walter Block, *War on Black Men: Arguments for the Legalization of Drugs*, 31 CRIM. JUST. ETHICS 106 (2012); Luke L. Whalin & Walter E. Block, *Racial Discrepancies in the Participation Between Alcohol Prohibition and the Drug War*, 3 ACTA ECONOMICA ET TURISTICA 119 (2017).

³³ Bettio et al., *supra* note 25, at 10.

³⁴ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-385, SEX TRAFFICKING, ONLINE PLATFORMS AND FEDERAL PROSECUTIONS 10 (2021).

³⁵ See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (2018). This Act is also often referred to as FOSTA-SESTA, reflective of the individual bills in the House and Senate. The final version passed into law essentially rolled SESTA into FOSTA. For a brief history of FOSTA/SESTA, see Steptoe & Johnson LLP, *Section 230: Major Legislation and its Future in 2021*, LEXOLOGY (July 29, 2021), <https://www.lexology.com/library/detail.aspx?g=51f60fa6-f008-426e-bbb9-b5662d5bcc8e>.

and Rampant Neglect of Interactive Technologies Act (“EARN IT Act”)³⁶ takes even further steps than FOSTA to squash the online sex market. It requires that websites provide a backdoor for law enforcement to access their data, threatening loss of liability protection for instances of non-compliance.³⁷ “The EARN IT Act falsely suggests that we must choose between protecting children and other fundamental rights, including privacy and free expression,” according to Human Rights Watch child rights and technology researcher, Jung Han.³⁸ Indeed, FOSTA’s language includes similarly concerning connotations which misdirect enforcement efforts away from sex traffickers.

Employing the term “prostitution,” FOSTA makes no differentiation between consensual sex work and sex trafficking.³⁹ In fact, the language of the bill explicitly implicates online sex work as facilitating sex trafficking, as exemplified in the title of section three of the act called “Promotion of Prostitution and Reckless Disregard of Sex Trafficking.”⁴⁰ Grouping the two industries further contributes to stigmatization and targeting of consensual sex workers and directs law enforcement’s attention towards them rather than sex traffickers. FOSTA adds unprecedented levels of liability to online platforms, plus potential fines and up to ten years in prison, for the owner of a website found to “promote or facilitate the prostitution of another person.”⁴¹

³⁶ Commonly known as the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 or the EARN IT Act of 2020. To Establish a National Commission on Online Child Sexual Exploitation Prevention, and for Other Purposes, S. 3398, 116th Cong. (2d Sess. 2020) [hereinafter EARN IT Act].

³⁷ Jared Trujillo, *Vulnerable LGBTQ+ Sex Workers Targeted Again by Politicians*, ADVOCATE (Jul. 1, 2020, 4:57 PM), <https://www.advocate.com/commentary/2020/7/01/vulnerable-lgbtq-sex-workers-targeted-again-politicians>.

³⁸ *US: Senate Should Reject EARN IT ACT, Child Online Sexual Exploitation Measure Won’t Protect Children*, HUMAN RIGHTS WATCH (Jun. 1, 2020, 12:00 AM), <https://www.hrw.org/news/2020/06/01/us-senate-should-reject-earn-it-act>.

³⁹ “Human trafficking occurs when a trafficker exploits an individual with force, fraud, or coercion to make them perform commercial sex or work.” *Sex Trafficking, CTR. FOR DISEASE CONTROL & PREVENTION*, <https://www.cdc.gov/violenceprevention/sexualviolence/trafficking.html> (Jan. 28, 2021). This is an unfortunate choice of nomenclature, since there is nothing pernicious about “traffic.” A better characterization might be rape, or sexual slavery or coerced sex.

⁴⁰ *Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

⁴¹ *Id.*

More than thirteen sex workers went missing and two died only months after FOSTA went into effect.⁴² Reports of deaths, suicides, increased rapes and violence, and loss of homes and financial security poured out from the sex work community and its advocates immediately after FOSTA was passed in 2018.⁴³ Those forced to work the streets were met by opportunistic pimps looking to take advantage of sex workers' financial insecurity by offering access to clientele and physical protection at elevated rates.⁴⁴ Meanwhile, the legislation failed to successfully target sex trafficking online. Lura Chamberlain's in-depth legal analyses of FOSTA published in the Fordham Law Review adds,

law enforcement professionals have complained that their investigations into sex trafficking cases have been 'blinded' – they no longer have advertisements to subpoena, digital records to produce for prosecutors, and leads that bring them to live crime scenes full of evidence . . . [but] this blindness is not for lack of anything to see . . . sex trafficking is as prevalent as ever.⁴⁵

Disturbingly, no formal evidence exists that can document FOSTA's progress towards its stated outcomes. Chamberlain's analysis concludes that "it is not clear that FOSTA's . . . goals can be feasibly achieved through its implemented changes."⁴⁶ FOSTA's only clear impacts are its overwhelming harms and injustice.

In the language of COVID-19, sex workers have now become essential workers, unable to access income in virtual spaces.⁴⁷ Prior to

⁴² Caty Simon, *On Backpage, TITS & SASS* (Apr. 25, 2018), <https://titsandsass.com/on-the-death-of-backpage>.

⁴³ *Id.*

⁴⁴ Gaby Del Valle, *Why Decriminalizing Sex Work is a Life or Death Issue*, NYLON (Sep. 13, 2018, 8:00 AM), <https://www.nylon.com/articles/sex-work-activism-sesta-fosta-life-death-issue>.

⁴⁵ Lura Chamberlain, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171, 2174-75 (2019).

⁴⁶ *Id.* at 2201.

⁴⁷ "Essential workers" is a key term related to in-person work during COVID-19. "According to the U.S. Department of Homeland Security, essential workers are those who conduct a range of operations and services that are typically essential to continue critical infrastructure operations. Critical infrastructure is a large, umbrella term encompassing sectors from energy to defense to agriculture." *COVID-19: Essential Workers in the States*, NAT'L CONF. STATE LEGS. (Jan. 11, 2021),

2019, sex workers used sites like Craigslist and OnlyFans to conduct and promote their business virtually through marketing, client screening, cam work, and setting rates and expectations with clients. However, during the pandemic, sex workers have had no option but to conduct business increasingly in person.⁴⁸ Essential work has generally resulted in higher transaction costs and occupational hazards. Among sex workers, the severity of these outcomes depends largely on their reputational capacity.⁴⁹ Sex workers with the lowest reputational capacities, like street workers, incurred the highest costs.⁵⁰ Further, they receive the least amount of support, being largely out of reach from federal assistance programs including the CARES Act passed in 2020.⁵¹ Sex workers who are undocumented, have criminal records, or otherwise live outside of the government and social institutions are most affected since the financial support they receive from informal activities is now more limited in scope than ever.⁵²

IV. LEGALIZATION (THE NORDIC MODEL)

Sex work has been legalized across a large swath of Europe, beginning in Sweden in 1999, the Netherlands in 2000,⁵³ Germany in 2002,⁵⁴ then spread to Norway in 2009, Canada in 2014, Finland and Northern Ireland in 2015, France in 2016, Ireland in 2017, and Israel

<https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx#:~:text=According%20to%20the%20U.,to%20defense%20to%20agriculture.>

⁴⁸ Anna Liss-Roy, *Excluded from Stimulus, DC's Sex Workers Find Support from Local Groups*, WUSA9 (Nov. 21, 2020, 2:40 PM), <https://www.wusa9.com/article/news/local/sex-workers-stimulus-dc-virginia-maryland-tamika-spellman-homeless/65-89424668-b195-460c-b8c8-249da5062528>.

⁴⁹ Della Giusta, *supra* note 19, at 10.

⁵⁰ *Id.*

⁵¹ Coronavirus Aid, Relief, and Economic Securities (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (codified as amended in 15 U.S.C. § 9001 note (Short Title); *see also* 15 U.S.C. § 9009a(B) (2020).

⁵² Anna Liss-Roy, *supra* note 48.

⁵³ 1 July 2016, HC Rep (2016-17) col. 26 (UK).

⁵⁴ *Id.* at 29.

in 2018.⁵⁵ Legalization promised to liberate sex workers from criminal status while simultaneously lowering demand for sex work by criminalizing its clients. Legalization (the Nordic Model) claims to reincorporate sex workers into society through regulation and social services, including access to police protection, while denouncing all sex work as exploitation of women.⁵⁶

Pro-legalization messaging portrays all sex workers as victims in need of a savior and proposes itself as the redeeming solution.⁵⁷ A report published in 2019 by the Swedish Institute, explains how the Nordic Model seeks to increase agency for sex workers by criminalizing their clients, thereby “disrupting the market and reducing the demand” for sex work.⁵⁸ The Nordic Model “also marks prostitution as a societal activity to be curtailed.”⁵⁹ Swedish researcher, Cecilie Høigård, who helped develop the Nordic Model, details the narratives of victimized sex workers that inspired the policy:

[W]e developed close relationships with the prostituted women . . . heard about their experiences of past abuse, extreme poverty and violence . . . They told us what it was like to use their bodies and vaginas as rental apartments for unknown men to invade, and how this made it necessary to separate their body from their self . . . eventually the women feel worthless, dirty and disgusting . . . These feelings were very similar to accounts we’d heard from victims of other sexual violence, such as incest, rape and domestic violence.⁶⁰

⁵⁵ See Berlin et al., *supra* note 24; see also Gwladys Fouché, *Sex Ban Puts Us at Greater Risk*, THE GUARDIAN (May 26, 2009, 7:01 PM), <https://www.theguardian.com/society/2009/may/27/prostitution-norway>.

⁵⁶ Morse *supra* note 31, at 1.

⁵⁷ This is an accurate assessment of the pro-legalization position, vis a vis the de-criminalizing goal supported in the present paper, at least as depicted in the literature. See *Why Sex Work Should Be Decriminalized*, HUM. RTS. WATCH (Aug. 7, 2019, 3:31 AM), <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized>. However, from the perspective of libertarianism, the two – legalization and de-criminalization – are synonymous.

⁵⁸ ANTHONY J.A. OLSSON, PROSTITUTION POLICY IN SWEDEN – TARGETING DEMAND 6 (Swedish Inst. 2019).

⁵⁹ *Id.*

⁶⁰ Cecilie Høigård, *The Presence of Pain in the Debate on Prostitution*, 111 INT’L WOMEN’S NEWS 11, 11 (2016).

By incorrectly labeling victims of sex trafficking and other examples of non-consensual sex work as representative of the industry as a whole, legalization definitionally eliminates any conceptual agency for sex work.⁶¹ Proponents often explain how even sex workers who openly declare their choice of profession are coerced into it by a lack of good job opportunities, concluding that such coercion means the work is non-consensual.⁶² However, both Berg and Bettio highlight the Marxist thread to point out that following this argument to its logical conclusion would classify all wage work as coercion.⁶³ the

⁶¹ Bettio et al., *supra* note 25, at 5.

⁶² Bettio et al., *supra* note 25, at 11.

⁶³ Block argues: This is hardly limited to work for wages. AL GORE inveighs against what he calls “garbage imperialism.” AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 155 (1992). This is the idea that even when a group of poor people explicitly agree to have waste material dumped in and near their property (for an agreed upon fee!) it is still coercive, because “their poverty forces them to do so.” *Id.* at 154. Lack of funds “compels” virtually all of us to undertake actions we would not otherwise undergo. Yes, if sex workers could be paid as much, and more, by engaging in more desirable acts, they would undoubtedly leave this field. But this hardly demonstrates that their initial decision to enter this profession was involuntary.

Carroll replies: Amartya Sen’s definition of poverty includes “poor economic opportunities as well as systemic social deprivation.” Amartya Sen, *The Research of Social Choice Theory*, 39 *SOC. CHOICE & WELFARE* 259, 262 (2012). Drawing attention to the fact that poverty exists in economic and social forms is relevant for sex workers since sex work is often cited as the best economic opportunity available to them, but effectively excludes them from many social support systems, amounting to the kind of social deprivation that Sen associates with poverty. Block’s above example of garbage imperialism thus provides a perfect example of people doing their best under immense constraints, left to choose between few and generally bad options. As Block says of sex workers, if better options were available, they would surely choose something else. However, Carroll argues in this article that federal decriminalization is the first, most immediately helpful step for sex workers to gain legitimacy and agency under current conditions in the United States. Then, Carroll argues that local jurisdictions should be able to decide for themselves what kinds of social services to offer current or former sex workers, if regulation is needed, and further policy details.

Block opines: I see the controversial paragraph with which this footnote began not as a libertarian point, but as one of basic economics: All voluntary trades, all consensual capitalist acts, without exception, benefit both parties in the ex-ante sense, otherwise they simply would not occur. *See generally* HENRY HAZLITT, *ECONOMICS IN ONE LESSON* (1946).

option to work or go hungry is not limited to sex work.⁶⁴ Having clarified the argument, it is clear that legalizing sex work does not change these alleged coercive conditions.

Though policy makers behind the Nordic Model may intend to be compassionate, by casting all sex workers as victims legalization reinforces the ancient legacy of stigma which perpetuates physical violence towards sex workers and precludes them from social acceptance.⁶⁵ In the perspective of Della Giusta's reputational model, conflating sex work and sex trafficking is plainly inaccurate.⁶⁶ Criminalizing sex buyers pushes transactions underground, resulting in higher risks to sex workers, thus increasing the market price and holding the supply of sex work at a constant level – the opposite of the legislation's intent.⁶⁷

Some argue that legalization creates fewer harms for sex workers than criminalization. However, since neither distinguishes between sex trafficking and sex work, regulations that are a product of legalization⁶⁸ continue to hamper the rights, earnings, and safety of consensual sex workers.⁶⁹ “A stark opposition between criminalization and legalization therefore imposes a false dichotomy on a much more complex issue with the unintended consequence of hindering agency and the well-being of sex workers.”⁷⁰ Research from Norway and Canada, both countries that use the Nordic Model, indeed found that sex workers' negotiating power is still hampered and their safety continues to be at risk.⁷¹ The Norwegian study highlights regulations, including permitting bans on sex workers operating out of shared work spaces, forming unions or other work in groups, and strict limitations on where sex work can be conducted.⁷² This creates costs

⁶⁴ Heather Berg, Working for Love, Loving for Work: Discourses of Labor in Feminist Sex-Work Activism, 40 FEMINIST STUD. 693, 695-97 (2014); Bettio et al., *supra* note 25, at 11.

⁶⁵ See *supra* note 24.

⁶⁶ Della Giusta et al., *supra* note 19, at 20.

⁶⁷ Della Giusta et al., *supra* note 19, at 20.

⁶⁸ For the libertarian, “legalization” would imply no government regulations at all. This sort of “legalization” is very different.

⁶⁹ Bettio et al., *supra* note 25, at 17.

⁷⁰ Bettio et al., *supra* note 25, at 17.

⁷¹ AM. C.L. UNION, IS SEX WORK DECRIMINALIZATION THE ANSWER? WHAT THE RESEARCH TELLS US 6 (2020), <https://www.aclu.org/report/sex-work-decriminalization-answer-what-research-tells-us>.

⁷² ULLA BJØRNDAL OSLO, DANGEROUS LIAISONS, 33 (2012).

and barriers to entry that prohibit workers' autonomy and earnings.⁷³ These findings are echoed by studies of legalized sex work in Germany and the Netherlands.⁷⁴ Further research from the Netherlands examining correlations between sex workers' reliance on informal economic actors and sex worker autonomy found that the lack of legislative, and thus regulatory, recognition of the existence of informal networks meant that the state offered no formal alternatives to pimps, errand runners, and scouts.⁷⁵ The informal actors took advantage of sex workers' lack of options and often charged exploitive prices, while at the same time, lowering sex worker incomes.⁷⁶ It concludes that "[a]t this time, Dutch sex workers still have to find an acceptable compromise between working autonomously and exploitation, even in a regulated sex industry."⁷⁷

V. DECRIMINALIZATION

In the context of COVID-19, sex work advocates in the US – including Amnesty International, Human Rights Watch, and the American Civil Liberties Union ("ACLU") – have spoken out in a unified call for decriminalization.⁷⁸ A compilation of research on sex work policy published by the ACLU in 2020 summarizes the case for decriminalization, citing positive outcomes from areas that have decriminalized sex work.⁷⁹ The report found that practitioners in New Zealand feared arrest less and were more likely to contact the police if

⁷³ *Id.*

⁷⁴ See generally Marianne H. Marchand et al., *Migration, (Im)mobility, and Modernity: Toward a Feminist Understanding of the 'Global' Prostitution Scene in Amsterdam*, 27 *MILLENNIUM: J. INT'L STUD.*, 955 (1998).

⁷⁵ Prostitution Act, Deutscher Bundestag: Drucksachen[BT], https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf (Ger.); see also Maite Verhoeven & Barbra van Gestel, *Between Visibility and Invisibility: Sex Workers and Informal Services in Amsterdam*, 23 *FEMINIST ECON.* 110, 129 (2017).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ For a non-exhaustive list, see *Organizations that Support the Decriminalization of Prostitution*, DECRIMINALIZE SEX WORK, <https://decriminalizesex.work/why-decriminalization/organizations-endorsing-decriminalization> (last visited Aug. 17, 2021).

⁷⁹ AM. C.L. UNION, *supra* note 76, at 8.

they felt threatened.⁸⁰ Rhode Island provides an unexpected example of benefits from decriminalization during its period of (inadvertent)⁸¹ decriminalized indoor sex work from 1980-2009. Arrest rates fell significantly in Rhode Island during decriminalization, and, notably, the state experienced a 30% decrease in rape.⁸²

A summary of criticisms of decriminalization and their counter arguments lay in the aforementioned reasons for supporting either criminalization or legalization: both cite their perceived need for a societal rejection of sex work as an inherently violent system that victimizes sex workers, most often women. Critics may also caution that full decriminalization would open the flood gates for anyone to become a sex worker, thereby encouraging what they characterize as a societal ill.⁸³ However, the New Zealand government's impact assessment of decriminalization after five years found no change in the population percentage of sex workers.⁸⁴ The New Zealand Legal Council's separate, independent impact assessment of decriminalization ("the PRA") concluded:

The PRA has been in force for five years. During this time, the sex industry has not increased in size and many of the social evils predicted by some who opposed . . . decriminalization . . . have not been experienced . . . the PRA has been effective in achieving its purpose, and the Committee is confident that the vast majority of people involved in the sex industry are better off . . . than they were previously.⁸⁵

⁸⁰ AM. C.L. UNION, *supra* note 76, at 8.

⁸¹ Lawmakers admitted to creating an accidental loophole that technically decriminalized indoor prostitution during this period. See Lynn Ardit, *How R.I. Opened the Door to Prostitution*, PROVIDENCE J. (Nov. 14, 2014, 2:43 PM), <https://www.providencejournal.com/article/20141114/News/311149994>.

⁸² AM. C.L. UNION, *supra* note 76, at 6.

⁸³ The optimal number of plumbers, engineers, farmers, professors -- and sex workers -- can only be approached under laissez faire capitalism, where all adults are free to determine which types of goods and services they want to provide to the market.

⁸⁴ GILLIAN ABEL, LISA FITZGERALD & CHERYL BRUNTON, THE IMPACT OF THE PROSTITUTION REFORM ACT ON THE HEALTH AND SAFETY PRACTICES OF SEX WORKERS 65-66 (Health Rsch. Couns. of New Zealand 2007).

⁸⁵ PROSTITUTION L. REV. COMM., REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003 168 (2008).

Having debunked the efficacy of moralizing policies to shame sex workers or sex purchasers into changing their preferences, decriminalization provides the clearest path towards reducing harms to sex workers and society generally. Decriminalization is the only legal option that supports destigmatization⁸⁶ of sex work and makes space for increased agency. With consensual sex work permitted in the light of day, sex workers would have the greatest amount of bargaining power, rights, protections, and ability to call on law enforcement for protection.

⁸⁶ From a libertarian perspective, people should be free to stigmatize whichever industry they wish. Sex workers have no right not to be stigmatized by those who wish to do so. Their only right is a negative one: not to be prohibited by law, victimized by violent predators, etc. However, it cannot be denied that stigma in legislation, media, popular language, etc., leads to real violence and victimization. Jamie Livingston, *The Stigma-Violence Cycle*, CREST.BD (July 6, 2016), <https://www.crestbd.ca/2016/07/06/stigma-violence-cycle>. A pertinent recent example is the “China virus” rhetoric from Trump and his followers paired with the increase in hate crimes towards Asian Americans. *Covid ‘Hate Crimes’ Against Asian Americans on Rise*, BBC (May 21, 2021), <https://www.bbc.com/news/world-us-canada-56218684>. Freedom of speech is of course a great value; but intelligent systems build-in behavioral nudges that create virtuous cycles for their health and longevity. See Peter G. Klein, *Nudges for Thee, But Not for Me*, MISES INST. (Apr. 7, 2017), <https://mises.org/blog/nudges-thee-not-me>; Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron* 1-43 (AEI-Brookings Joint Ctr. for Regul. Stud., Working Paper No. 03-2, 2003); CASS R. SUNSTEIN & RICHARD H. THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008); Mario J. Rizzo & Glen Whitman, *The Camel’s Nose is in the Tent: Rules, Theories and Slippery Slopes*, 51 UCLA L. REV. 539 (2003); Glen Whitman & Mario J. Rizzo, *Paternalist Slopes*, 2 N.Y.U. J. L. & LIBERTY 411 (2007). The difficulty from a libertarian point of view only arises if the “system” is legislatively mandated. Another problem is the *reductio ad absurdum*. Violence against innocent people arises from soccer games, violent movies, court findings unpopular in some quarters, etc. Dave Schneider, *History’s Worst Soccer Riots*, CLEATS (2018), <https://vocal.media/cleats/history-s-worst-soccer-riots>; Linda Carroll, *Do Violent Movies Cause Aggression? The Answer May Depend*, NBC NEWS (Sept. 17, 2014, 2:05 PM), <https://www.nbcnews.com/better/wellness/do-violent-movies-cause-aggression-answer-may-depend-n205556>. Apropos of the latter is the recent verdict of guilty against ex-police officer Derek Chauvin. Greg Moore, *Will America Riot Once the Derek Chauvin Trial Ends?*, Ariz. Republic (Apr. 3, 2021, 6:00 AM), <https://www.azcentral.com/story/opinion/op-ed/greg-moore/2021/04/03/if-derek-chauvin-acquitted-or-guilty-will-there-riots/4823203001>. Here is a contrary to fact conditional: if he were found innocent, violence would likely have erupted. Does this mean we should ban soccer games, violent movies, unpopular court findings? Of course not. See Klein, *supra* note 91; Sunstein & Thaler, *supra* note 91; SUNSTEIN & THALER, *supra* note 91; Rizzo & Whitman, *supra* note 91.

VI. CONCLUSION

COVID-19's harsh socioeconomic and health realities have disproportionately affected marginalized populations, who now have even fewer opportunities to earn a living wage. Since marginalized groups who live out of reach of governmental law enforcement and economic assistance are vastly overrepresented in the sex industry, FOSTA's elimination of access to online platforms for sex work has placed increasingly dire constraints on their income and physical safety. Though FOSTA and similar legislation may have noble intentions, the increased transaction costs and the increased stigma they placed on sex work has made the world a more violent, dangerous place. Concerningly, FOSTA has hampered efforts to curb sex trafficking which it was supposed to prohibit.

Legalization also falls prey to many of the same paternalistic false assumptions as criminalization and fails to deliver on its promises of protecting sex workers and sex-trafficked people. With the need for decriminalization more urgent than ever, the uncertainty and chaos of COVID-19 also present an opportunity for progress. No legislation can suddenly materialize a just society. However, broad federal decriminalization that empowers local jurisdictions to tailor further policy details to their local needs has the best hope of bringing sex workers a few steps closer to Sen and Khader's vision of justice-enhancement.