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DECRIMINALIZING PROSTITUTION: EMBRACING THE SWEDISH MODEL BY REMOVING THE MISTAKE-OF-AGE DEFENSE FROM NEW YORK'S STOP VIOLENCE IN THE SEX TRADE ACT

*Carley Cooke**

Virtually all theories of prostitution try to explain why individual women become prostitutes, instead of why men seek the services of prostitutes or why prostitution as a social institution seems to be ineradicable.

- Annette Jolin, *Professor of Criminology, Portland State University*¹

Police have attacked prostitution with the wrong method. They've gone after the prostitutes. I think the focus should have been on the customer.

- Chief Pierce Brooks, *Eugene (Oregon) Police Department*²

* J.D. Candidate, Brooklyn Law School, 2021. B.A., Brandeis University, 2015. This endeavor would not have been possible if not for the tireless advocacy, particularly by women of color, working to make criminal justice more equitable in New York and beyond. I would like to thank my parents for instilling in me the empathy with which I approached this issue and the confidence that I have needed to find success in law school. I would also like to thank my partner, Julian Cardillo, for his unwavering support and for making me a deeper, more mature thinker by pushing me outside my intellectual comfort zone when I need it the most.

¹ ANNETTE JOLIN, PROSTITUTION, AN INTERNATIONAL HANDBOOK ON TRENDS, POLICIES, AND PROBLEMS, 129, 135 (1993).

² Michael Shively et al., A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts, Final Report, Prepared for *The National Institute of Justice*, 1 <https://www.ojp.gov/pdffiles1/nij/grants/238796.pdf> (citing *The Eugene Register-Guard*, July 8, 1978).

In recent years, New York has re-focused on the widely debated topic of how to best manage and regulate prostitution in the United States. As a state-level issue, the debate presents an invaluable opportunity to re-examine how New York as a society views sex work. The answer in New York focuses on the idea that sex work is real work, where workers should be able to carry out their profession without stigma or fear of arrest. As it stands, the proposed reform largely focuses on decriminalizing both the purchase and sale of sex. This approach contrasts with the legal structure in Sweden, which criminalizes only the purchase or the patronizing of prostitution. The New York proposal still criminalizes patronizing prostitution from a minor but offers a mistake-of-age defense thereto. New York should close this loophole with an eye toward the Swedish model and refocus on strictly enforcing the statute against patrons. Such a solution represents a compromise between legitimizing sex work as a legal avenue toward a livelihood, while simultaneously targeting those who most threaten the safety of sex workers outside of law enforcement: male patrons soliciting sex from vulnerable minors.

INTRODUCTION

Views on prostitution³ vary widely in the United States, with a 2015 survey indicating that 46% of Americans think it should be illegal while 44% think it should be legal.⁴ In the same survey, 74% believed that prostitutes and customers should be punished equally while 18% believed the customer should mainly face liability, compared to 7% who thought the prostitute should be held solely

³ I use the terms “prostitution” and “sex work” interchangeably throughout this Note to identify females who engage in sexual acts with males for monetary profit. Issues concerning the subjective connotations between the two terms are beyond the scope of this Note.

⁴ Peter Moore, *Country Split on Legalizing Prostitution*, YOUgov (Sept. 1, 2015, 10:45AM), <https://today.yougov.com/topics/politics/articles-reports/2015/09/01/country-split-legalizing-prostitution>. The survey extended across the Northeast, Midwest, South, and West and included White, Black, and Hispanic individuals from household income levels ranging from under \$50k, \$50K–\$100K, \$100K+, and “[p]refer not to say.” *Id.*

liable.⁵ Despite such variance, today, every state in America outlaws prostitution. One state—Nevada—offers a county-based legal model wherein each county licenses and regulates brothels.⁶ The U.S. legal structure stands in stark contrast to that of Sweden, the first government to enact an approach known as the “John model” in 1999, which formally legalized the sale of sex while criminalizing the purchase of sexual services.⁷

A June 2019 New York Senate bill, entitled the Stop Violence in the Sex Trades Act (“SVSTA”), now offers a much-needed and revolutionary shift from complete criminalization to decriminalization, while continuing to criminalize patronizing prostitution from minors.⁸ However, by allowing a mistake-of-age defense to this crime, the bill contains a loophole for harmful actors to avoid liability. New York should eliminate this defense in view of the Swedish model and focus more on the purchasers of sex as opposed to the sellers. Characterizing the act of patronizing prostitution from a minor as a strict-liability offense would mean achieving the goal of bettering the lives of sex workers while simultaneously acknowledging and combatting the inherent gender inequality prevalent across the sex trade. To form a legal model that acknowledges this inequality is not to victimize all female sex workers, but rather to better address the realities and danger the profession poses, even to those who willfully enter into it.

Part I of this Note surveys the history of prostitution across its ancient origins, its development in Europe, and its practice in the United States. Part II examines current laws across the United States with a focus on the Nevada model and recent New York proposal. Part II also explores the Swedish model with an eye toward the ideological shift that inspired its enactment and implementation. Part

⁵ *Id.*

⁶ Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 *YALE J. L. & FEMINISM* 69, 86–90 (1998).

⁷ Phil Hubbard et al., *Regulating Sex Work in the EU: Prostitute Women and the New Spaces of Exclusion*, 15 *GENDER, PLACE & CULTURE* 137, 143 (2008); Beatrice Ask, *Sweden: Why We Criminalized the Purchase of Sexual Services*, CNN, (Mar. 31, 2011, 9:42 AM), <http://edition.cnn.com/2011/opinion/03/31/sweden.beatrice.ask.trafficking/index.html>.

⁸ Stop Violence in the Sex Trades Act of 2019, S.B. 6419, 2019 Leg., Reg. Sess. (N.Y. 2019).

III critiques the various legal models by examining the underlying policy implications of regulating sex work in such different ways. Part IV proposes eliminating the mistake-of-age defense in the New York proposal and challenges the contention that adopting the Swedish philosophy is incompatible with viewing sex work as legitimate work.

I. A BRIEF HISTORY OF PROSTITUTION AND RESULTANT REGULATORY EFFORTS

A. *Ancient Origins, the Medieval Era, and Twentieth Century Europe*

Prostitution is colloquially referred to as the “oldest profession in the world.”⁹ Analyzing the legal debate surrounding modern prostitution¹⁰ policy requires examining its development since the BC era. Documentation of prostitution dates back to the origin of writing itself, found in the Sumerian records from ancient Mesopotamia as early as 2400 BC¹¹ and in Hammurabi’s codes from 1780 BC.¹² Records of legal brothels may be found throughout

⁹ Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 241 (2000); Elizabeth Nolan Brown, *What the Swedish Model Gets Wrong About Prostitution*, TIME (July 19, 2014, 12:01 AM), <https://time.com/3005687/what-the-swedish-model-gets-wrong-about-prostitution/>; see also 8 *Oldest Professions in the World*, OLDEST.ORG, <https://www.oldest.org/people/professions/> (noting that, rather than prostitution, the eight earliest professions likely responded to the most basic and fundamental of human needs, such as building, farming, and toolmaking).

¹⁰ Prostitution is generally defined as engaging in sex with another person in exchange for profit. See, e.g., Stop Violence in the Sex Trades Act of 2019, S.B. 6419, 2019 Leg., Reg. Sess. (N.Y. 2019) (defining prostitution as “engaging or agreeing to engage in sexual conduct with another person in return for a fee”). Issues surrounding male and non-binary prostitution, human trafficking, and soliciting prostitution over the internet are outside the scope of this Note.

¹¹ Gerda Lerner, *The Origin of Prostitution in Ancient Mesopotamia*, 11 SIGNS: J. OF WOMEN IN CULTURE & SOC’Y 246 (1986).

¹² See THE CODE OF HAMMURABI (Leonard William King trans., 1910), <https://avalon.law.yale.edu/ancient/hamframe.asp> (referring to prostitutes as “sister[s] of God”).

ancient history, including in China during the seventh century BC,¹³ Greece in the fifth century BC,¹⁴ and the Roman Empire in the second century BC.¹⁵ The Romans embraced and promoted the practice: waitresses in restaurants could offer sexual acts in exchange for payment, brothels openly advertised their services on the front of their houses, and the police maintained a registry of “official” prostitutes and regulated their activity.¹⁶ Most Roman prostitutes were not respected and had low standing in society, possibly due to the unclean conditions of brothels,¹⁷ or the fact that prostitutes were often seen as merely fulfilling the high demand for the sex trade.¹⁸ Biblical sources and Jewish scriptures also indicate that prostitution was not only prevalent but accepted in early Jewish society.¹⁹ While speculation exists over whether “religious prostitution” existed,²⁰ it is clear that secular prostitution was pervasive.²¹

As early as the twelfth century, contrasting views on whether and how to regulate prostitution permeated across the European states.²² Continuing into the medieval era, attitudes and policies

¹³ VERN BULLOUGH & BONNIE BULLOUGH, *PROSTITUTION: AN ILLUSTRATED SOCIAL HISTORY* 92 (1978).

¹⁴ Paul Vallely, *A Brief History of Brothels*, LONDON INDEP. (Jan. 21, 2006, 1:00 PM), <https://www.independent.co.uk/news/uk/this-britain/a-brief-history-of-brothels-5336946.html> (“The cost of sex was . . . the equivalent of an ordinary worker’s day salary.”).

¹⁵ N.S. Gill, *Notes on Roman Prostitutes, Brothels, and Prostitution*, THOUGHTCO. (Mar. 10, 2020) (citing PETRONIUS ARBITER, *THE SATYRICON* (W.C. Firebaugh trans. 1922)), <https://www.thoughtco.com/roman-prostitutes-and-brothels-118841>.

¹⁶ Vallely, *supra* note 14. Some prostitutes were highly regarded and influenced trends in fashion, jewelry, and hairstyles. *Id.*

¹⁷ BULLOUGH, *supra* note 13, at 48.

¹⁸ *Id.* at 47.

¹⁹ BULLOUGH, *supra* note 13, at 25.

²⁰ BULLOUGH, *supra* note 13, at 25, 27 (noting that “[r]eligious prostitution” included practices such as where a prostitute donated or was even forced to give her income to the temple, and “sacred prostitution” where the prostitute herself was viewed as a sacred and holy being, incentivizing men to retain her services).

²¹ BULLOUGH, *supra* note 13, at 28.

²² See Vallely, *supra* note 14 (comparing and discussing these views by country and time period).

toward prostitution across Europe varied considerably.²³ States, however, were prompted to take more affirmative measures toward outlawing or at least regulating the practice in the wake of the syphilis crisis that spread across Europe in the sixteenth century.²⁴ Hundreds of years later in Germany, advocates for regulating prostitution argued that keeping brothels open better protected the population against venereal diseases and having to support illegitimate children.²⁵ Similar health-driven arguments are still prevalent in the modern debate surrounding prostitution policy.²⁶ Indeed, twentieth Century European states continued wavering back and forth between attempts to regulate prostitution and abandoning state involvement altogether.²⁷

The debates in Europe extended to the early days of the United States, particularly as prostitution rapidly increased in the late nineteenth and early twentieth centuries due to urbanization, industrialization, immigration, and various social movements.²⁸ The origins of criminalizing the practice can be traced to both the social stigma applied to female sex workers as well as public health concerns surrounding the spread of venereal disease.²⁹

²³ See WILLIAM SANGER, *THE HISTORY OF PROSTITUTION: ITS EXTENT, CAUSES AND EFFECTS THROUGHOUT THE WORLD* 95–96, 168 (1858) (noting that France formally outlawed it in the sixteenth century, and that Italy’s various approaches differed depending on the “wide differences of national character in the various political divisions of Italy”) Sanger comprehensively walks through policies and regulations in-depth, broken down by country. *Id.* at 39-371.

²⁴ Valley, *supra* note 14; BULLOUGH, *supra* note 13, at 177.

²⁵ BULLOUGH, *supra* note 13, at 177.

²⁶ See *infra* notes 72, 74–77 and accompanying text.

²⁷ BULLOUGH, *supra* note 13, at 177 (noting that Denmark stopped regulating in 1906, followed by Amsterdam commencing regulation in 1911, while central European countries such as Germany, Austria, France and Italy outlawed their brothels between 1920 and 1949).

²⁸ Bingham, *supra* note 6, at 71–72.

²⁹ See generally William C. Shiel Jr., *Medical Definition of Venereal Disease*, MEDICINET, <https://www.medicinenet.com/script/main/art.asp?articlekey=11545> (last visited Sept. 25, 2020) (noting that venereal diseases, better known today as sexually transmitted diseases, are defined as “[a] disease that is contracted and transmitted by sexual contact, caused by microorganisms that survive on the skin or mucus membranes, or that are transmitted via semen, vaginal secretions, or blood during intercourse”).

B. Prostitution in the United States

In colonial America, prostitution was an unorganized and remote practice, largely due to the sheer lack of women available as wives, let alone sex workers.³⁰ “Kept women” refers to the practice, primarily in rural areas, of unmarried couples living together wherein the woman provided both domestic and intimate services in exchange for room, board, and occasionally, money.³¹ References to prostitution are also found in records of seventeenth and eighteenth century life in urban areas.³² For example, in New York City, an area near Wall Street acquired the name “Maiden Lane” by 1680 due to the “wandering liberties” of maidens of courting age in the area.³³ By 1744, Alexander Hamilton even spoke of the plethora of choices of prostitutes available to patrons in nearby Battery Park.³⁴

The prevalence of prostitution thus expanded alongside urbanization during this period,³⁵ tracking the industrial revolution of the nineteenth century.³⁶ Furthermore, the Gold Rush and exploration into the American West provided ample opportunity for both American and foreign women to capitalize on the influx of men

³⁰ Aaron D. Simowitz, *How Criminal Law Shapes Institutional Structures: A Case Study of American Prostitution*, 50 AM. CRIM. L. REV. 417, 423 (2013).

³¹ *Id.* at 418.

³² BULLOUGH, *supra* note 13, at 199.

³³ *Id.* (quoting JOHN FISKE, *THE DUTCH AND QUAKER COLONIES IN AMERICA* 65 (1899)) (criticizing John Fiske’s attributing the name to the maidens washing themselves in the area, calling this account “more of an attempt of a historian to ignore sex than face reality”).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Susan E. Thompson, *Prostitution: A Choice Ignored*, 21 WOMEN’S RTS. L. REP. 217, 222 (2000). One scholar and historian on women’s studies notes that women’s work histories during this time period “varied depending on their class standing” but that “[e]conomic necessity and the desire for an easier life drove many women to the sex trade in the decades leading up to the Civil War.” Anya Jabour, *Women’s Work and Sex Work in Nineteenth-Century America*, PBS (Feb. 22, 2016, 11:55 AM), <http://www.pbs.org/mercy-street/blogs/mercy-street-revealed/womens-work-and-sex-work-in-nineteenth-century-america/>.

Jabour also acknowledges the limited evidence available from this time period. *Id.*

flocking to the area.³⁷ As a result, prostitution became an organized practice by way of small and independent brothels, which became very popular in the nineteenth century.³⁸ Failed attempts to regulate the practice through brothels prompted other cities to instead segregate them from the rest of society into “red light” districts.³⁹ These districts contained residences wherein prostitutes could retain clients, while officials “tolerated the practice in hopes of maintaining some method of control over the prostitutes in their community.”⁴⁰ Allowing it to remain visible likely made such control possible.⁴¹

Attitudes at this time toward prostitution varied, but quickly shifted to calls for banning the practice outright, largely in response to its debilitating health effects on soldiers during the Civil War.⁴² If nothing else, many cities in the post-war era began recognizing the need for regulating prostitution so as to curb the spread of diseases.⁴³ This was accomplished by limiting the practice to particular areas wherein prostitutes were required to become officially registered.⁴⁴ Most city-level regulatory schemes, which required medical inspection, were justified under the assumption that such inspections would allow earlier detection of diseases, and thus promote the public health.⁴⁵ Only one such regulation was

³⁷ Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 430 (1998).

³⁸ Simowitz, *supra* note 30, at 429; Thompson, *supra* note 36, at 223.

³⁹ Whitebread, *supra* note 9, at 241 (citing JOHN F. DECKER, PROSTITUTION: REGULATION AND CONTROL 58 (1979)).

⁴⁰ Thompson, *supra* note 36, at 224. The name “red light” derives from the practice of men leaving their lanterns outside the house while they were inside the house as a patron. *Id.*

⁴¹ *See id.* (“[O]fficials tolerated the practice in hopes of maintaining some method of control over the prostitutes in their community.”).

⁴² DeCou, *supra* note 37, at 431.

⁴³ Simowitz, *supra* note 30, at 430; BULLOUGH, *supra* note 13, at 122.

⁴⁴ Thompson, *supra* note 36, at 224 (noting that registering also meant submitting to a required physical examination). Physicians became strong advocates of regulation, particularly in the latter half of the nineteenth century when they began recognizing both the seriousness of third-stage syphilis and the possibility that other venereal diseases could be cured if detected. BULLOUGH, *supra* note 13, at 222.

⁴⁵ BULLOUGH, *supra* note 13, at 222.

officially adopted into a city charter: the Social Evil Ordinance in St. Louis in 1870.⁴⁶ The repeal of this ordinance only four years later was fueled by ideas that prostitution was immoral and by permitting it, the city was breaching its duty to uphold morality.⁴⁷ Additionally, new forms of interstate communication paved the way for the dissemination of published sexual materials, sparking an alarmist backlash against what one commentator termed “the growing trade in obscenity.”⁴⁸

Unsurprisingly, given such backlash, morality became a driving force behind criminalizing prostitution in the twentieth century.⁴⁹ Health concerns surrounding venereal disease transmission as well as the desire to prevent public sexuality from seeping into private life sparked a “sexual purity” movement led by the Women’s Christian Temperance Union.⁵⁰ While the movement condemned the double standard that was far more tolerant of male sexual freedom than female, it did little to actually address this issue.⁵¹ Instead, the movement imposed a blanket demand of purity from both sexes and asserted motherhood as the ultimate calling of women.⁵²

⁴⁶ Thompson, *supra* note 36, at 224.

⁴⁷ *Id.* (noting that 100,000 clergymen and middle-class women signed a petition against prostitution in support of this effort).

⁴⁸ Donna Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 L. & SOC. INQUIRY 369, 394 (2002); see generally Molly McGarry, *Spectral Sexualities: Nineteenth-Century Spiritualism, Moral Panics, and the Making of U.S. Obscenity Law*, 12 J. OF WOMEN’S HIST., 8–29 (2000) (discussing censorship of sexual publications and materials during this period).

⁴⁹ Whitebread, *supra* note 9, at 241–43; DeCou, *supra* note 37, at 432.

⁵⁰ Whitebread, *supra* note 9, at 241–43; DeCou, *supra* note 37, at 432.

⁵¹ Whitebread, *supra* note 9, at 241–43; DeCou, *supra* note 37, at 432.

⁵² Whitebread, *supra* note 9, at 242 (quoting ALAN HUNT, *GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION* 115, 115 (Cambridge Univ. Press 1999)) (noting that activists went so far as to encourage mothers to teach their children “self-denial, by mortifying as far as possible, the desire of the flesh”); see also BULLOUGH, *supra* note 13, at 270–71 (discussing the relationship between abstinence and prostitution in the late 19th and early 20th centuries).

Finally, social pressure led to Congress's passage of the White Slave Trade Act (better known as the Mann Act) in 1910,⁵³ outlawing the transportation of prostitutes across state lines, and the Standard Vice Repression Law, nationally outlawing prostitution entirely in 1919.⁵⁴

II. CURRENT LAWS REGULATING PROSTITUTION

A. United States

Prostitution is currently illegal *per se* in all 50 states except Nevada, and maintains the criminal nature instituted on the federal level in the early twentieth century.⁵⁵ This prohibitionist model of prostitution law seeks total eradication of the practice and thus criminalizes all players involved.⁵⁶ Today, federal law does not impose direct criminal sanctions for engaging in prostitution.⁵⁷

⁵³ An Act to further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes . . . any person who shall . . . transport . . . in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with intent and purpose to . . . compel such women or girl to become a prostitute . . . shall be deemed guilty of a felony. . . .

The Full Text of the Mann Act, PBS, <https://www.pbs.org/kenburns/unforgivable-blackness/mann-act-full-text/> (last visited Oct. 8, 2020).

⁵⁴ Whitebread, *supra* note 9, at 243.

⁵⁵ DeCou, *supra* note 37, at 433–34.

⁵⁶ Jean D'Cunha, *Prostitution Laws—Ideological Dimensions and Enforcement Practices*, 27 *ECON. AND POL. WKLY.* 34, 34 (1992).

⁵⁷ Rather, the federal level is limited to prohibiting transporting prostitutes between states (18 U.S.C. § 1952 (2014), 18 U.S.C. § 2421 (2015)) and coercing and enticing a person to engage in prostitution (18 U.S.C. § 2422 (2006)). The law also forbids admission of foreigners into the United States who have “engaged in prostitution within 10 years of the date of application for a visa,” (8 U.S.C. § 1182 (2013)) and imposes up to 10 years imprisonment for importing a person for prostitution or “any other immoral purpose” (8 U.S.C. § 1328 (1990)). Criminal penalties also attach for “Prostitution Near Military and Naval Establishments.” 18 U.S.C. § 1384 (1994).

Instead, beginning in 1925, states began passing laws criminalizing prostitution, with all 50 ultimately enacting such a law.⁵⁸

Despite strict state and federal laws banning prostitution in the United States, it remains prevalent: data collected in the 1990's estimated that, at the time, between 250,000 and 1,300,000 women worked either as a part-time or full-time prostitute,⁵⁹ with "approximately 1.5 million [total] customers per week."⁶⁰ Thus, a "tolerated form" exists today in most states.⁶¹ Priscilla Alexander, a former prostitute who co-edited a compilation of essays written by women in the sex work industry, argued that this form constitutes "de facto legalization" of prostitution controlled by third-parties.⁶² In the 1980's in San Francisco, for example, ordinances regulating massage parlors and escort services were really designed to regulate and control prostitution rather than prevent it outright.⁶³ According to police testimony, when law enforcement raided such institutions, they often did not charge female workers with prostitution-related offenses, instead imposing minor infractions, such as disobeying a regulatory requirement.⁶⁴ Rather than impose criminal penalties, officials revoked the institutions' licenses to operate, which, Alexander argues, promoted a turnover of workers and did little to eradicate the practice."⁶⁵

⁵⁸ Whitebread, *supra* note 9, at 243.

⁵⁹ Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKLEY WOMEN'S L.J. 47, 48 n.3 (1995) (internal citations omitted).

⁶⁰ Thompson, *supra* note 36, at 225 (citing DEBRA L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 257 (1989)). Noting the lack of current data on the United States' underground sex trade, the Department of Justice partnered with the Urban Institute in 2010 and funded a comprehensive study on eight U.S. cities, ultimately estimating these cities' sex trade economies in 2007 ranging from \$39.9 million to \$290 million. Dank et al., *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities*, THE URB. INSTIT., 2 (2014).

⁶¹ Thompson, *supra* note 36, at 225.

⁶² Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY, 184, 191 (Frederique Delacoste & Priscilla Alexander, 1987).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

i. Nevada

Although prostitution is illegal in Nevada, state law permits individual counties with populations less than 700,000 to lawfully operate “houses of prostitution,” or brothels.⁶⁶ Soliciting and engaging in prostitution outside of the brothel setting is a misdemeanor, punishable by up to six months imprisonment or a fine up to \$1,000, and soliciting prostitution outside of the brothel may be a gross misdemeanor, punishable by up to six months imprisonment or a fine up to \$1,500.⁶⁷ Legalizing brothel operations allows the state to tax and control the industry, with individual counties imposing their own regulations.⁶⁸ Out of Nevada’s seventeen counties, seven permit legal brothel operations, seven ban the practice, and three permit it only in certain areas of the county.⁶⁹ The Board of County Commissioners for each county typically makes decisions surrounding whether to grant or revoke brothel licenses.⁷⁰ The local chief of police may promulgate specific rules for regulating brothels, which are then generally adopted by city councils.⁷¹ Other public officials and “madams” running each brothel may impose further regulations.⁷²

The Nevada Administrative Code prohibits engaging in prostitution except within “a licensed house of prostitution.”⁷³ The law also emphasizes regulating health within the prostitution industry, with the Nevada Statutes and Nevada Administrative Code

⁶⁶ *Id.* at 210; NEV. REV. STAT. § 201.354 (2019); NEV. REV. STAT. § 244.345 (2011).

⁶⁷ NEV. REV. STAT. § 201.354 (2019); NEV. REV. STAT. § 193.150 (2001).

⁶⁸ Nicole A. Hough, *Sodomy and Prostitution Laws Protecting the Fabric of Society*, 3 PIERCE L. REV. 101, 113–14 (2004).

⁶⁹ *US Federal and State Prostitution Laws and Related Punishments*, PROCON, <https://prostitution.procon.org/us-federal-and-state-prostitution-laws-and-related-punishments/#3> (last updated May 4, 2018).

⁷⁰ Bingham, *supra* note 6, at 89.

⁷¹ *Id.*

⁷² *Id.* According to Bingham, “[s]ome of those rules involve regulating when prostitutes go into town, changing employment, or discouraging freelancing and promoting control over prostitutes.” *Id.*

⁷³ NEV. REV. STAT. ANN. § 201.354 (2019).

requiring those engaged in prostitution to undergo HIV testing.⁷⁴ The Nevada Administrative Code also requires that prostitutes working in licensed brothels use condoms and submit to monthly testing for HIV and syphilis as well as weekly testing for other sexually-transmitted illnesses, reflecting the legislative priority of protecting public health.⁷⁵ County ordinances impose responsibility on the brothel houses themselves:

According to county ordinances in “legal counties,” a licensed brothel must subject its employees to weekly medical examinations, prohibit patronage of any person under eighteen, and refuse to employ any male except for purposes of maintenance. Failure to comply with these requirements may result in the revocation of the house’s license, fines, and even imprisonment. . . . The legalization of prostitution thus allows officials to exert a substantial degree of control over prostitution related conduct. This control does not appear to exist in the counties that prohibit prostitution. In these counties, both the practice of prostitution and its related activities tend to be scattered and less visible.⁷⁶

Despite arguable issues with Nevada’s approach, some have speculated that the decision made by some of its counties to legalize prostitution reflects a tolerant attitude emanating from the frontier era, recognizing that brothels are not dangerous or threatening, but rather fulfill a long-standing demand.⁷⁷

⁷⁴ Bingham, *supra* note 6, at 89. Interestingly, one who tests positive for HIV after engaging in prostitution is guilty of a class B felony, punishable by 2–10 years’ imprisonment, up to a \$10,000 fine, or both. NEV. REV. STAT. § 201.358 (1995).

⁷⁵ Bingham, *supra* note 6, at 90.

⁷⁶ Whitebread, *supra* note 9, at 243.

⁷⁷ Bingham, *supra* note 6, at 85 (quoting HELEN REYNOLDS, *THE ECONOMICS OF PROSTITUTION* 98 (1986)). Further, because Nevada is not densely populated, legal prostitution provides a revenue stream consistent with the state’s economic reliance on tourism. *Id.* at 85.

ii. The New York Proposal

On June 10, 2019, the New York State legislature introduced Senate Bill S6419, known as the Stop Violence in the Sex Trades Act (“SVSTA”).⁷⁸ The bill’s Senate Sponsor Memo states that the Act’s purpose and general idea is “[t]o repeal statutes that criminalize sex work between consenting adults, but keep laws relating to minors or trafficking, and to provide for criminal record relief for people convicted of crimes repealed under this bill.”⁷⁹

Under a section titled “Justification,” the memo provides:

Trying to stop sex work between consenting adults should not be the business of our criminal justice system. . . . Criminalization drives sex work into the shadows in an underground illegal environment where sex workers face increased violence, abuse, and exploitation, and are more vulnerable to trafficking. Though anti-sex work laws may have originally been conceived as a protection of society’s morals and perhaps even women, these laws now criminalize women and LGBTQ people for acts of survival and resistance to the force of economic insecurity. Decriminalizing sex work upholds the rights of those who trade sex, reduces violence and trafficking, and increases labor protections.⁸⁰

Additionally, the memo crystalizes the policy decision that decriminalization supports a “more nuanced legal approach to the sex trades” as opposed to treating all players as either criminals or victims:⁸¹

History shows us that criminalizing sex work between consenting adults does not end the demand for sex work, and it certainly does not improve the lives of people who participate in the sex trades by choice, circumstance, or coercion, or people who are

⁷⁸ Stop Violence in the Sex Trades Act of 2019, S.B. 6419, 2019 Leg., Reg. Sess. (N.Y. 2019).

⁷⁹ *Senate Bill 6419*, THE N.Y. ST. S., <https://www.nysenate.gov/legislation/bills/2019/s6419> (last visited Oct. 8, 2020).

⁸⁰ *Id.*

⁸¹ *Id.*

profiled as sex workers. . . . Sex workers want decriminalization so they can work in a legal environment, work without fear of the police, report any violence they experience, and report trafficking when it affects their peers. It is time to put people before antiquated moral judgments.⁸²

Part A of the Act⁸³ would replace the current version of New York Penal Law § 230.00, as amended by Chapter 169 of the laws of 1969, which provides a blanket ban on prostitution.⁸⁴ In its place, the Act specifically defines prostitution, then distinguishes categories of “patroniz[ing] prostitution,” “advanc[ing] prostitution,” and “profit[ing] from prostitution.”⁸⁵ It does not prohibit prostitution between adults, subject to certain exceptions. For example, the Act criminalizes prostitution itself when it occurs in a school zone.⁸⁶ It also criminalizes, in varying degrees, patronizing, advancing and promoting, and profiting from prostitution.⁸⁷ However, these actions are qualified: patronizing prostitution is limited to cover situations where the person being patronized is a minor,⁸⁸ with enhancements for “aggravated patronizing” where the person guilty of patronizing has sexual relations with the minor.⁸⁹ The Act also maintains criminal provisions for sex trafficking minors⁹⁰ and eliminates accomplice

⁸² *Id.*

⁸³ S.B. 6419.

⁸⁴ “A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee. Prostitution is a class B Misdemeanor.” 1969 N.Y. Sess. Laws § 230.00 (McKinney).

⁸⁵ S.B. 6419.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* Varying degrees correspond to the age of the person being patronized: third degree for ages 15–17 years old (class A misdemeanor), second degree for ages 13–14 (class E felony), and first degree for ages less than 13 years old (class D felony). *Id.*

⁸⁹ *Id.* Similarly, promoting prostitution is criminalized but limited to when the actor knowingly advances prostitution either “by compelling a person by force or intimidation to engage in prostitution, or profits from such coercive conduct by another;” or if the actor “[a]dvances or profits from prostitution” of a minor. *Id.*

⁹⁰ *Id.* § 230.34.

liability previously imposed on the prostitute herself.⁹¹ However, the Act includes a mistake-of-age defense, excusing culpability if the defendant reasonably believed the prostitute was not a minor.⁹²

By limiting the scope of prostitution penal law solely to deal with minors and forceful coercion, the Act reflects the policy decision that the law should not interfere with sexual transactions consummated between consenting adults.⁹³ As a natural consequence of this limited scope, the Act purports to prioritize the agency and safety of sex workers as individuals and collective groups.⁹⁴ For example, the government has historically used the current Act's provision concerning promoting prostitution to prosecute sex workers who work together either in the same physical locations or when advertising their services.⁹⁵ By altering this provision alone, SVSTA ensures groups of sex workers will not be forced to conceal these activities, thus promoting the ability of sex workers to be safer and more successful by working together.⁹⁶

Also notable is Part C of the Act which amends New York's so-called multiple dwelling law—a provision criminalizing the use of a dwelling “for the purpose of prostitution.”⁹⁷ By contrast, SVSTA would prohibit using a dwelling for the purpose of criminal conduct related to prostitution under § 230 of the penal law as amended in

⁹¹ *Id.* § 230.35.

⁹² *Id.* § 230.07.

⁹³ *See supra* notes 79–80 and accompanying text (making clear, in SVSTA's Senate Sponsor Memo, that one justification for decriminalization is to remove government interference in consensual sex between adults).

⁹⁴ *Id.*

⁹⁵ Melissa Gira Grant, *A Historic Breakthrough for Sex Workers' Rights*, NEW REPUBLIC (June 9, 2019), <https://newrepublic.com/article/154111/new-york-bill-decriminalization-prostitution-sex-worker-rights>.

⁹⁶ *Id.* DecrimNY, a sex workers advocacy group instrumental in drafting, researching, and advocating for SVSTA, tweeted, “[t]he bill amends statutes so that consenting adults who trade sex, collaborate w/ or support sex working peers, or patronize adult [sex workers] are not criminalized.” Daniel Kreps, *New York Lawmakers Introduce Bill to Decriminalize Prostitution Statewide*, ROLLING STONE (June 10, 2019, 4:26 PM), <https://www.rollingstone.com/culture/culture-news/new-york-lawmakers-bill-decriminalizing-prostitution-846402/>.

⁹⁷ Stop Violence in the Sex Trades Act of 2019, S.B. 6419, 2019 Leg., Reg. Sess. (N.Y. 2019).

Part A.⁹⁸ Thus, prosecutions under multiple dwelling law would be limited to defendants using a dwelling for promoting, advancing, or profiting from prostitution from minors or by coercive force.⁹⁹

Part B of SVSTA also eliminates provisions that criminalize “loitering for the purpose of engaging in a prostitution offense,” enacted in 1977, which advocates say have been applied arbitrarily by law enforcement to target individuals, often transgender people or people of color, for wearing particular clothing or carrying condoms in public.¹⁰⁰ These changes are consistent with the socio-economic goals articulated by Audacia Ray¹⁰¹, a former sex worker and vocal advocate for decriminalization, who wrote: “This is not just about decriminalizing workers or the absence of criminal codes. It’s about making sure people who work in the sex trades have access to making a living in the sex industry in a way that is not a crime.”¹⁰²

SVSTA is the first attempt at decriminalizing prostitution in New York, and “the most comprehensive decriminalization effort ever initiated in the United States.”¹⁰³ The *New York Times* reported that sex workers appeared satisfied that politicians were finally acknowledging their point of view and provided a link to DecrimNY’s live Facebook video from the day the bill was introduced, wherein multiple current and former sex workers made emotional statements expressing their pride and gratitude for SVSTA’s proposed changes.¹⁰⁴ Indeed, the bill is unique in part due to its drafters and sponsors prioritizing these voices, although it is

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Jesse McKinley, *Could Prostitution Be Next to Be Decriminalized?*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/nyregion/presidential-candidates-prostitution.html>. The article also discusses how this provision is also provided in a separate bill altogether, Senate Bill S2253, which would formally repeal Penal Code § 240.37 that prohibits loitering for the purpose of engaging in prostitution. *Id.*; Grant, *supra* note 95.

¹⁰¹ Ms. Ray is a DecrimNY steering committee member and New York City Anti-Violence Project director. Grant, *supra* note 95.

¹⁰² *Id.*

¹⁰³ Jesse McKinley, *Bills to Decriminalize Prostitution Are Introduced. Is New York Ready?*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/nyregion/prostitution-legal-ny.html>.

¹⁰⁴ *Id.*

important to note that it could not possibly reflect the viewpoints of all sex workers in the state.

Jessica Ramos, co-sponsor of SVSTA and a newly-elected New York State Senator representing the Thirteenth District¹⁰⁵, and Alexandria Ocasio-Cortez, junior Congresswoman representing New York's Fourteenth Congressional District, have changed the way lawmakers think about sex workers by actually meeting with people within the industry to hear their concerns and then engaging these individuals throughout the drafting phases.¹⁰⁶ Alexis Grenell, a democratic political strategist, sees this evolving approach to prostitution legislation as an important opportunity to stop viewing sex workers as voiceless victims and instead work *with* them as they would any other constituent community "entitled to representation and attention."¹⁰⁷ State Senator Ramos consistently frames the discussion as making sex workers the focus: "Decriminaliz[ation] . . . will protect many of my neighbors . . . [and] will finally make strides against trafficking by empowering sex workers to report violence against them. Sex work is work and everyone has an inherent right to a safe workplace."¹⁰⁸

SVSTA's changes address attitudes held by the public beyond the sex workers' community: Data for Progress and Decrim NY released a poll in May 2019 wherein democratic voters indicated they supported full decriminalization by a 3-to-1 margin.¹⁰⁹

¹⁰⁵ These Districts includes the Jackson Heights area of Queens which "has long been the center of anti-sex work policing that disproportionately targets immigrant trans women. But immigrant trans sex workers remain a visible and organized part of the community." Grant, *supra* note 95.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Shira Tarlo, *New York Lawmakers Introduce Sweeping Bill to Decriminalize Sex Work*, SALON (June 10, 2019, 6:45 PM), <https://www.salon.com/2019/06/10/new-york-lawmakers-introduce-sweeping-bill-to-decriminalize-sex-work/>.

¹⁰⁹ Grant, *supra* note 95; Dominic Holden & Otilia Steadman, *We Asked All the 2020 Candidates if the US Should Stop Arresting Sex Workers. Only Four Said Yes.*, BUZZFEED NEWS (May 30, 2019, 4:22 PM), <https://www.buzzfeednews.com/article/dominicholden/sex-work-legalize-2020-presidential-candidates>.

B. Sweden

Sweden prioritizes combatting trafficking and prostitution under the view that true gender equality is not attainable in a society that allows women and girls to be bought and sold like commodities for sexual exploitation by men.¹¹⁰ Fully legalizing prostitution (in contrast to Sweden's current model laid out below) is understood as normalizing and inevitably encouraging sexual violence through male dominance over women.¹¹¹ Permitting such exploitation disadvantages and marginalizes women, infringing guaranteed protections of human dignity.¹¹² Swedish policy is centered around the notion that male demand constitutes the root cause of prostitution, and that the practice is "a form of male sexual violence against women and children."¹¹³ Arguments like this were first promulgated in the 1980's by feminist and women's groups who argued that prostitution was a tool of oppression wielded by the patriarchy to the detriment of women as a class.¹¹⁴ As a result, these advocates demanded that Sweden's government criminalize the buyers, or the male oppressors, and lend assistance and resources to women and girls—the victims of prostitution.¹¹⁵

The issue of how to regulate prostitution came into the public eye in response to significant criticism of a government commission established in 1976 that investigated sexual crimes and proposed lesser penalties for rape.¹¹⁶ This backlash, combined with criticism that total decriminalization permitted the government to passively condone criminality, prompted the government to establish the

¹¹⁰ Gunilla Ekberg, *The Swedish Law that Prohibits the Purchase of Sexual Services*, 10 VIOLENCE AGAINST WOMEN, 1187, 1188 (2004).

¹¹¹ *Id.* at 1190.

¹¹² *Id.* at 1189.

¹¹³ *Id.* at 1188–89.

¹¹⁴ *Id.* at 1191; Yvonne Svanstrom, *Criminalising the John—a Swedish Gender Model*, in THE POLITICS OF PROSTITUTION 225, 225 (Cambridge U. Press 2004).

¹¹⁵ Ekberg, *supra* note 110, at 1191.

¹¹⁶ Svanstrom, *supra* note 114, at 227. Twelve women's groups emerged to demand a new commission to examine prostitution. *Id.*

Commission on Prostitution in 1977.¹¹⁷ After four years of investigating the practice, the Commission's report, published in 1981,¹¹⁸ framed prostitution as an issue of "human dignity" wherein all clients were men.¹¹⁹ Armed with this conclusion, the Commission argued that prostitution could not coexist with ideals of individual equality and freedom—longstanding values integral to the Swedish identity.¹²⁰ The report discouraged criminalization as a solution: "It might have a deterrent effect on the clients, but it would risk further stigmatisation of the women, and prostitution would go underground."¹²¹ Police, judicial authorities, and liberal political parties also held this view and opposed criminalization, while the conservative political party demanded full criminalization.¹²² The resulting bill in 1982 accomplished little by way of regulating prostitution except for prohibiting public pornography shows and providing funding for future research groups to study prostitution with an eye toward young women at risk of entering the practice.¹²³

¹¹⁷ Hubbard et al., *supra* note 7, at 143. The Minister of Social Affairs established the Commission on prostitution by appointing one individual who was assisted by experts, and interested parties and organizations could submit opinions on the commission's proposals. Svanstrom, *supra* note 114, at 226.

¹¹⁸ Svanstrom, *supra* note 114, at 227.

¹¹⁹ *Id.* Ms. Svanstrom elaborates on the inherent contradiction within the report and more generally in public and political discussion:

[B]oth men and women were seen as victims of a commercialized society in which individuals were objectified. To eliminate prostitution, an overall change in gender roles in society had to come about. Karen Soder, the Minister of Social Affairs, stated that 'prostitution cannot be seen as a woman's question. However, at the same time I want to emphasize that the woman is the most exploited and vulnerable exposed party in prostitution.' Thus . . . a patriarchal and commercial society was the ground for prostitution, but the question was to be regarded as a human question, which in a sense degendered it.

Id. at 230.

¹²⁰ *Id.* at 228.

¹²¹ *Id.* at 227.

¹²² *Id.* at 228.

¹²³ *See id.* at 229 ("The left observed that the original official investigation into prostitution 'was the mountain that brought forth a mouse—at least concerning actual suggestions from the government.'").

Throughout the 1990s, the idea that men dominated women through prostitution, combined with general apprehension about sex trafficking, resulted in a nationwide ideological shift toward viewing prostitution as “unacceptable exploitation.”¹²⁴ Accordingly, more than fifty bills aimed at regulating prostitution were introduced in parliament between 1983-1993, approximately thirty of which proposed criminalizing only the client¹²⁵ of the sexual transaction.¹²⁶ While some bills requested criminalizing both the client and the prostitute, none advocated for criminalizing only the prostitute.¹²⁷

The Commission on Prostitution subsequently proposed criminalizing the purchase, but not the sale, of sexual services in 1995.¹²⁸ Again, the underlying policy argument was that “[p]rostitution was a question of oppression, and prostitutes and their clients would not become more equal if they were both criminalized.”¹²⁹ The proposal was enacted in July 1998 as part of the Violence Against Women (*Kvinnofrid*) Act and remains in effect today.¹³⁰

A joint statement made by the governments of France and Sweden expressly referenced the viewpoint that prostitution constitutes sexual exploitation of women.¹³¹ In contrast to New York’s proposed SVSTA, the statement provides:

¹²⁴ Hubbard et al., *supra* note 7, at 143. Sweden viewed the Netherlands’ liberal, full legalization model in particular as promoting trafficking. *Id.*

¹²⁵ The client is colloquially referred to as the “john” in academic and political discourse on prostitution policy. *See generally* Svanstrom, *supra* note 114.

¹²⁶ *Id.* at 233. The bills were introduced by all political parties and always by at least one woman representative from that party. *Id.*

¹²⁷ *Id.*

¹²⁸ Hubbard et al., *supra* note 7, at 143.

¹²⁹ Svanstrom, *supra* note 114, at 236.

¹³⁰ Hubbard et al., *supra* note 7, at 143. A 2003 statement by the Ministry of Industry, Employment, and Communications resolutely expounds the gendered-policy roots of the Act, declaring that “[b]y adopting the legislation Sweden has given notice to the world that it regards prostitution as a serious form of oppression of women and children and that efforts must be made to combat it.” *Id.*

¹³¹ Margot Wallstrom, *Joint Statement from the Ministry for Foreign Affairs in France and from the Ministry for Foreign Affairs in Sweden*, GOV’T OFF. OF SWED. (Mar. 8, 2019), <https://www.government.se/statements/2019/03/joint->

France and Sweden have taken a clear position against normalizing prostitution as work. Our view is that prostitution should always be perceived as an exploitation of someone's vulnerability—thus prostitution should never be considered a job. To consider prostitution as legal 'sex work,' decriminalizing the sex industry in general and making procuring legal is not a solution to keeping women and children in vulnerable situations safe from violence and exploitation, but has the opposite effect and expose them to higher level of violence, while at the same time encouraging prostitution markets—and thus the number of women and children suffering abuse—to grow.¹³²

A government study published in the early 2000s suggested that the law caused “a spatial switching of sex work from street to off-street modes . . . (rather than eradicating or reducing the incidence of sex work to any significant extent).”¹³³ A 2010 news article reported that “[t]he drop in street prostitution has been a little less dramatic in Stockholm than in all of Sweden. . . . [W]hile the number of streetwalkers was slashed in Stockholm during the decade ending in 2008, they had multiplied in Copenhagen and Oslo in the same period.”¹³⁴ In 2015, the *New York Times* reported that “[t]he stigma against prostitutes [in Sweden] remains widespread . . . making it difficult for women to get help from social services and the police, and stoking their fear of eviction or loss of custody of their children.”¹³⁵

statement-from-the-ministry-for-foreign-affairs-in-france-and-from-the-ministry-for-foreign-affairs-in-sweden/.

¹³² *Id.*

¹³³ Simowitz, *supra* note 30, at 449.

¹³⁴ *Sweden's Prostitution Law a Success: Report*, AFP/THE LOCAL (July 3, 2010), <https://www.thelocal.se/20100703/27580>.

¹³⁵ David Crouch, *Swedish Prostitution Law Targets Buyers, but Some Say it Hurts Sellers*, N.Y. TIMES (Mar. 14, 2015), <https://www.nytimes.com/2015/03/15/world/swedish-prostitution-law-targets-buyers-but-some-say-it-hurts-sellers.html>.

III. CRITIQUES OF DIFFERENT APPROACHES TO REGULATING PROSTITUTION

A. Full Criminalization

Prostitution was the driving force behind the first piece of United States legislation to specifically target women as the object of criminal penalties—the Select Civil Service Act, passed in May, 1917.¹³⁶ It should be noted that many who favor criminalizing all activities associated with prostitution appear to do so out of genuine concern for the prostitute herself.¹³⁷ Generally, three justifications are advanced: (1) the act itself is immoral, and the law should not permit immorality in general;¹³⁸ (2) prostitutes are victims who rarely voluntarily choose to enter the industry, so outlawing the practice helps protect the well-being of these women;¹³⁹ and (3) prostitution is closely tied to and perpetuates other crimes, such as human trafficking and the drug trade.¹⁴⁰ In the United States, legislation has addressed the perceived need to curb the moral corruption prostitution is thought to represent. However, some studies have questioned just how many Americans actually adopt this view and suggest that a majority do not actually believe criminalization is an effective means of controlling or reducing prostitution.¹⁴¹

¹³⁶ Esther Heffernan, *Banners, Brothels, and a "Ladies' Seminary": Women and Federal Corrections*, in *ESCAPING PRISON MYTHS* at 39, 46 (John W. Roberts ed., The American University Press, 1994). The federal law condemned women spreading venereal disease among war camp troops, characterizing this as a crime against the war effort. The Law Enforcement Division of the War Department was tasked with carrying out penalties and in so doing, specifically created the Section on Reformatories and Houses of Detention to deal with incarcerating women and girls. *Id.*

¹³⁷ See Jessica N. Drexler, *Governments' Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 *DICK. J. INT'L L.* 201, 209 (1996) (citing the "worry that this profession will continue to exploit and demean women").

¹³⁸ *Id.* at 206.

¹³⁹ *Id.* at 206–07.

¹⁴⁰ *Id.* at 206, 208–09.

¹⁴¹ See Thompson, *supra* note 36, at 240 (“[A] 1980 survey of 15,000 people found that . . . 75% thought there was a better way to deal with prostitution than

Whatever its intentions, criminalization does not achieve its stated justifications¹⁴² because enforcement is gender-based, targeting the “supply side” of the transaction.¹⁴³ A 2008 report on reducing the demand for prostitution compiled for the Department of Justice found that “[m]en who solicit sex would be correct in assuming that there is a low risk of arrest and legal sanction.”¹⁴⁴ Recent statistics support this assumption: 70,000 to 80,000 people are arrested annually for prostitution in the United States, with approximately one customer arrested for every nine prostitutes or pimps.¹⁴⁵ Approximately 70% of individuals arrested for prostitution offenses are female while only 10% are male customers.¹⁴⁶ One explanation for this discrepancy involves the drastically lower cost in pursuing street prostitutes than “invest[ing] the time and manpower to attract Johns [and] then ambush them without issue as they attempt to consummate the transaction.”¹⁴⁷ Donna M. Hughes, a human trafficking expert at the University of Rhode Island, believes that an antiquated idea of ““bad women’ lur[ing] men into bad behavior” drives police to resist arresting male clients of prostitutes out of a desire to avoid shaming the man’s

criminalization.” (internal citations omitted)); Drexler, *supra* note 137, at 208–10 n.86. A Boston study found that only 14% of those surveyed viewed prostitution as immoral, “69% of the 15,000 respondents in a survey by a California Assembly favored legalization” and 46% of respondents from a national sample thought prostitutes did “more harm than good.” *Id.* (citing Linda M. Rio, *Psychological and Sociological Research and the Decriminalization or Legalization of Prostitution*, ARCHIVES SEXUAL BEHAV., 205, 206–07 (1991)).

¹⁴² Hubbard et al., *supra* note 7, at 137–39.

¹⁴³ Whitebread, *supra* note 9, at 244; *see also* Eleanor M. Miller et al., *The United States, in PROSTITUTION: AN INTERNATIONAL HANDBOOK ON TRENDS, POLICIES, AND PROBLEMS*, 300, 313 (Nanette J. Davis ed., 1993) (attributing arrest patterns skewed against female prostitutes to “gender inequality and the double standard that makes it appropriate for men to engage in sex with multiple partners but inappropriate for women”).

¹⁴⁴ Michael Shively et al., *A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts, Final Report*, THE NAT’L INST. OF JUST., 64 (2012).

¹⁴⁵ *Prostitution in the United States*, HG, <https://www.hg.org/legal-articles/prostitution-in-the-united-states-30997> (last visited Oct. 11, 2020).

¹⁴⁶ Miller et al., *supra* note 143, at 313.

¹⁴⁷ HG, *supra* note 145.

whole family.¹⁴⁸ Additional legal justifications include theories that prostitutes “are the most visible actors (they do the soliciting), they are the repeat offenders, and they profit financially.”¹⁴⁹ One author argues convincingly that the ability of police to easily target prostitutes is an “[a]rrangement . . . well calculated to protect both the client and the pimps.”¹⁵⁰ This is supported by the fact that prostitutes are consistently “hassled and fined but never to the point of being totally removed from the streets, where they are always available for male customer demand.”¹⁵¹ This model promotes the bargaining power of clients and pimps at the expense of the sex worker, who ultimately bears the risk of criminal sanctions.¹⁵²

This power imbalance also places sex workers at greater risk of physical or psychological harm while engaged in prostitution.¹⁵³ In addition to fearing arrest, sex workers in actual imminent danger, either at the hands of pimps or clients, cannot turn to law enforcement for protection.¹⁵⁴ In the context of escaping a pimp relationship, Kathleen Barry, an internationally-renowned scholar in the area of female sex work, opines that “[t]he last resort for escape is to go to the police. But this is hardly an option for women who know they are legally and morally condemned by those from whom they would seek help.”¹⁵⁵ Instead of being a resource for sex workers with nowhere to turn, police and the criminal justice system as a whole become yet another source of fear and anxiety for sex workers.¹⁵⁶

Criminalization does nothing to deter the demand for prostitution or address the means by which individuals become sex workers.¹⁵⁷ Instead, criminal penalties worsen the lives of sex

¹⁴⁸ Nicholas Kristof, *Targeting the Johns in Sex Trade*, N.Y. TIMES (Feb. 26, 2014), <https://www.nytimes.com/2014/02/27/opinion/kristof-targeting-the-johns-in-sex-trade.html>.

¹⁴⁹ Miller et al., *supra* note 143, at 313.

¹⁵⁰ Simowitz, *supra* note 30, at 441.

¹⁵¹ KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 220 (1995).

¹⁵² Simowitz, *supra* note 30.

¹⁵³ BARRY, *supra* note 151, at 226.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 213.

¹⁵⁶ *Id.* at 221.

¹⁵⁷ Miller et al., *supra* note 143, at 314.

workers and impair their ability to function peacefully and productively in society.¹⁵⁸ In addition to the financial constraints associated with arrest and prosecution, criminalization isolates sex workers by harming or severing social ties to family or support systems who disapprove of the choice to enter sex work.¹⁵⁹ In an effort to avoid arrest, sex workers may isolate themselves from social services or healthcare agencies.¹⁶⁰ These issues can deepen dependency on pimps, who may be the only place to turn for bail money, child care, or legal representation.¹⁶¹ Even without the involvement of a pimp, arrests or convictions stigmatize sex workers, making it difficult to seek other employment or portray themselves as law-abiding citizens.¹⁶² Labeling prostitutes as criminals reinforces their identity as such, deepening their psychological dependence on returning to the work and making women more reluctant to leave.¹⁶³ Furthermore, inconsistent and intermittent police enforcement of prostitution and related offenses breeds insecurity, driving sex workers to new cities where they are even more isolated or resourceless.¹⁶⁴ This insecurity is heightened by the wide latitude extended to police, which is frequently used to arrest or even harass sex workers in public through vague anti-loitering statutes.¹⁶⁵ While prostitutes themselves suffer the greatest harms, the public at large bears the massive costs police expend in enforcing criminalization, both financially and in man-power.¹⁶⁶

B. Full Legalization

At the other end of the spectrum from criminalization, a model that legalizes prostitution accepts the practice as a necessary evil and assumes, like decriminalization, a model that imposes no criminal

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ DeCou, *supra* note 37, at 445.

¹⁶¹ Miller et al., *supra* note 143, at 314.

¹⁶² Lucas, *supra* note 59, at 59.

¹⁶³ Thompson, *supra* note 36, at 241; BARRY, *supra* note 151, at 226.

¹⁶⁴ Miller et.al, *supra* note 143, at 313–14.

¹⁶⁵ *Id.* at 318–19.

¹⁶⁶ See Bingham, *supra* note 6, at 91.

sanctions for engaging in prostitution.¹⁶⁷ However, unlike decriminalization, where statutory repeal is often the extent of state involvement in the sex trade, a legal sex trade inherently requires government involvement by way of regulation.¹⁶⁸ This regulation can take the form of a system of state-regulated brothels, as seen in Nevada.¹⁶⁹

Despite its success in controlling STD and HIV infection within the sex trade,¹⁷⁰ the Nevada model remains problematic because it grants significant power and control over prostitution to the government and law enforcement—even so far as regulating prostitutes' personal relationships.¹⁷¹ Although most regulations provide restrictions on brothels,¹⁷² significantly, many statutes severely restrict the activities of prostitutes themselves.¹⁷³ While these restrictions are concerned with criminalizing independent prostitution outside of the brothel structure,¹⁷⁴ they read as surprising sacrifices of freedom:

The prostitutes are prevented from raising their own children, driving a car within the city limits, and shopping between the hours of five P.M. and eight P.M. . . . women may eat in restaurants only accompanied by the manager of the brothel, they may not dress in a way that invites speculation about

¹⁶⁷ Drexler, *supra* note 137, at 216.

¹⁶⁸ *Id.*

¹⁶⁹ BARRY, *supra* note 151, at 228.

¹⁷⁰ See Thompson, *supra* note 36, at 242. However, even in the public health space, Nevada's laws are problematic as they strictly enforce HIV and STD testing for prostitutes but impose no such requirements on brothel patrons. Bingham, *supra* note 6, at 89–90 (1998). Nevada Administrative Code provides that prostitutes must require their customers to use condoms, but again, this places all responsibility on the sex worker and none on the customer. *Id.* at 88 n.127.

¹⁷¹ D'Cunha, *supra* note 56, at 39.

¹⁷² Such as where they “can geographically exist, how many houses are allowed, how many hours per day or week houses are allowed to operate, the number of prostitutes the houses can have, and the size of the buildings themselves.” Miller et al., *supra* note 143, at 309.

¹⁷³ See, e.g., *id.* (citing various detailed restrictions).

¹⁷⁴ Simowitz, *supra* note 30, at 448.

their occupation, and they may not sunbathe nude or semi-nude.¹⁷⁵

A regulation in one Nevada city limits those with whom prostitutes can associate with, prohibiting them from “having friends within the town, including pimps, boyfriends, husbands, and others defined by the police department.”¹⁷⁶ It would be dubious to claim that these restrictions are concerned with the sex worker’s well-being. Instead, they are designed to protect former male clients who do not want to have to face the prostitute they retained.¹⁷⁷

University of Nevada professor Ellen Pillard described the brothel-licensing model as “licensing pimps,” not prostitutes.¹⁷⁸ Some critics go further and liken the government itself to a pimp, as under the legalization model, “the government controls with whom, when, and where the prostitute engages in prostitution through a rigid series of time, place, and manner restrictions.”¹⁷⁹ Under Nevada’s system, once a worker decides to become employed in a brothel, she gives up any choice she may have had about who her clients are, how much she charges, and the hours she works.¹⁸⁰ In fact, the hours are extremely demanding, typically requiring “fourteen hour shifts, every[]day, for a three-week period.”¹⁸¹

In addition to severely restricting sex workers’ agency, legalization actually appears to promote prostitution-related arrests. Ironically, FBI data reveals that Nevada ranked number 1 across all fifty states in 2016 in its number of prostitution arrests, with 10.83 arrests per 10,000 people.¹⁸² This number is significant when observed in the context of the state with the second most prostitution-related arrests that year, Wyoming, which reported a

¹⁷⁵ Drexler, *supra* note 137, at 225.

¹⁷⁶ Miller et al., *supra* note 143, at 309.

¹⁷⁷ *Id.*

¹⁷⁸ Simowitz, *supra* note 30, at 448 (internal quotations omitted).

¹⁷⁹ Thompson, *supra* note 36, at 242–43.

¹⁸⁰ *Id.* at 243.

¹⁸¹ *Id.*

¹⁸² *US and State Prostitution Arrests*, PROCON (May 14, 2018, 11:24 AM), <https://prostitution.procon.org/view.resource.php?resourceID=000120> (last visited Oct. 11, 2020).

staggeringly lower 3.10 per 10,000 people.¹⁸³ The stark difference between Nevada and other states makes it difficult to argue that Nevada's legalized system in any way curbs criminalizing sex workers, even if one assumes there are other contributing factors at play.

Indeed, legalization appears to confine sex workers even further than criminalization, forcing a woman to choose between subjecting herself to an extremely regulated system—likened by some analysts to imprisonment¹⁸⁴ or “modern day slavery”¹⁸⁵—or maintaining her personal freedom, albeit at the risk of dealing with police confrontation and criminal sanctions.¹⁸⁶

C. Decriminalization & the Swedish Model

Criticism of Sweden's decriminalization model largely centers around the ideological argument that it furthers the stigma that prostitutes already endure.¹⁸⁷ Some sex workers' advocacy groups¹⁸⁸ express grave concern that the stigmatization is wielded against sex workers to take away custody of their children, “since they are assumed to be incapable of making healthy decisions.”¹⁸⁹ However, Stockholm's lead detective in the city's prostitution unit, Simon Haggstrom, insists this is a wholly unintended consequence and that Stockholm's social services' standpoint is “just because you're selling sex you are not a bad mother. Those two things have

¹⁸³ *Id.* Spots three through ten ranged from 2.25 (Tennessee) to 1.370 (Hawaii). *Id.*

¹⁸⁴ BARRY, *supra* note 151, at 232.

¹⁸⁵ *See, e.g.,* Thompson, *supra* note 36, at 244.

¹⁸⁶ *Id.*

¹⁸⁷ *See* Michelle Goldberg, *Swedish Prostitution Law Is Spreading Worldwide—Here's How to Improve It*, THE GUARDIAN (Aug. 8, 2014), <https://www.theguardian.com/commentisfree/2014/aug/08/criminsalise-buying-not-selling-sex>.

¹⁸⁸ One such group is the Rose Alliance, a Swedish sex workers' organization with approximately 150 members funded by two non-profit foundations. Michelle Goldberg, *Should Buying Sex Be Illegal?*, THE NATION (July 30, 2014), <https://www.thenation.com/article/archive/should-buying-sex-be-illegal/>.

¹⁸⁹ Goldberg, *supra* note 187.

nothing to do with each other.”¹⁹⁰ As the same news article points out, however, the legislature should codify that stance if it is truly held by these services.¹⁹¹ Swedish prostitutes also fear eviction because landlords of prostitutes can be prosecuted under the current law for pimping.¹⁹² While highly problematic, this issue could be resolved by amending the prostitution law so that it explicitly targets those who are actually involved in exploitation, without doing away with the Swedish model altogether.¹⁹³

The stigma also extends to theoretical observations that the model furthers gender inequality by implying men are capable of consenting to sex and being held criminally liable while women are not.¹⁹⁴ Put differently, criminalizing the purchase of sex means women lose agency to do what they want with their body, even if that means engage in prostitution.¹⁹⁵ A 2010 report by the Swedish Ministry of Justice acknowledged this “loss” but justified it by invoking what it states is the true purpose of the law: to reduce prostitution overall.¹⁹⁶ The report also attempted to quash concerns that the model would increase violence against prostitutes, finding no evidence of this issue since the law’s passage.¹⁹⁷

Finally, from a practical standpoint, some argue that criminalizing only the purchase of sex drives the practice underground, thus making it more dangerous for sex workers. However, no accessible empirical evidence supports this contention.¹⁹⁸ In fact, the National Criminal Investigation Department of Sweden reported that its telephone interceptions with traffickers and pimps show a disappointment with the country’s sex

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Brown, *supra* note 9.

¹⁹⁵ Zeeshan Aleem, *16 Years Since Decriminalizing Prostitution, Here’s What’s Happening in Sweden*, MIC (Mar. 13, 2015), <https://www.mic.com/articles/112814/here-s-what-s-happened-in-sweden-16-years-since-decriminalizing-prostitution>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 MICH. J. INT’L L. 133, 147 (2011).

trade market.¹⁹⁹ One news article cites the International Sex Guide website, wherein a man requesting tips ahead of his trip to Sweden was discouraged by other users to not “waste your time looking for anything . . . [prostitution] is illegal and totally dead in Sweden.”²⁰⁰

Despite its critiques, and assuming the ultimate goal is to curb prostitution altogether, punishing the purchase but not the sale of sex has proven successful in Sweden—at least according to its government. The 2010 report²⁰¹ estimated that street prostitution had been cut in half since 1999. Subsequently, a 2015 news article called this claim “an understatement” after interviewing Mr. Haggstrom.²⁰² Although critics attribute this reduction to the driving of sex work off the streets and into the shadows, there is evidence that the law has nevertheless reduced prostitution rates overall. A 2008 report published by Swedish researchers estimated that approximately three hundred prostitutes existed on the streets, with an additional three hundred women and fifty men advertising their services online, compared with the 2,500-3,000 estimated prostitutes in 1995.²⁰³

Rather than demand small statutory changes, sex workers’ advocacy groups who oppose the Swedish model seem focused on the fact that sex work is work and people should be able to exercise their choice to engage in the profession.²⁰⁴ Even leading up to the passage of the Violence Against Women Act in Sweden, “some feminist debaters outside parliament but present in the media supported a view of prostitution as sex work.”²⁰⁵

¹⁹⁹ *Id.*

²⁰⁰ Goldberg, *supra* note 187.

²⁰¹ *Id.*

²⁰² *Id.* This detective contrasted the mere eight prostitutes this journalist herself observed in one evening: “Before the law was introduced, on an ordinary night, you could have eighty women walking in the street.” *Id.*

²⁰³ Waltman, *supra* note 198 (citing Charlotta Holmström, *Prostitution och människohandel för sexuella ändamål i Sverige: Omfattning, förekomst och kunskapsproduktion [Prostitution and Trafficking for Sexual Purposes in Sweden: Extent, Occurrence, and Knowledge Production]*, in PROSTITUTION I NORDEN: FORSKNINGSRAPPORT [PROSTITUTION IN THE NORDIC: RESEARCH REPORT] 303, 314 (Charlotta Holmström & May-Len Skilbrei eds., 2008)).

²⁰⁴ Brown, *supra* note 9.

²⁰⁵ Svanstrom, *supra* note 114, at 242.

But this grass-is-always-greener debate between the Swedish model and other approaches, such as New York's decriminalization proposal, extends both directions. With the most recent debate in New York centered around SVSTA, some sex worker advocates prefer the Swedish model.²⁰⁶ Sonia Ossorio, president of the New York City chapter of the National Organization for Women, opposes SVSTA because she believes such decriminalization constructs a new sex trade industry while protecting harmful actors such as pimps, whom she believes would become legitimate "promoters" of consensual adult prostitution under the law.²⁰⁷ Instead of decriminalization or total legalization, she supports the Nordic model.²⁰⁸ Dorchen Leidholdt, director of Sanctuary for Families and Chairwoman of the New York State Anti-Trafficking Coalition, agrees that the Nordic model would "shrink demand, shrink the market, and shrink the industry."²⁰⁹ On the other hand, she believes decriminalization would constitute a "public-policy disaster" and "increase the size of this predatory industry" in New York.²¹⁰

IV. INCORPORATING SWEDISH PHILOSOPHY INTO NEW YORK'S PROPOSAL

Despite advocacy in Sweden and New York to embrace the philosophy and policy of the other, the idea that sex work is work need not be at odds with the view that it is also a means by which men can assert dominance over women in some way, thus contributing to social inequality along gender lines.²¹¹ SVSTA is a necessary attempt to provide both economic freedom for sex workers to legally generate income and to curb the stigma attached to sex work by freeing it from the scrutiny of law enforcement.²¹²

²⁰⁶ McKinley, *supra* note 103.

²⁰⁷ *Id.*

²⁰⁸ *Id.* "Nordic model" is another term for the Swedish approach. Brown, *supra* note 9.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See *supra* notes 118–120 and accompanying text.

²¹² See Melissa Gira Grant, *A Historic Breakthrough for Sex Workers' Rights*, NEW REPUBLIC (June 9, 2019), <https://newrepublic.com/article/154111/new-york-bill-decriminalization-prostitution-sex-worker-rights> ("Police don't

However, once we accept that sex work is work, we must go one step further to identify and acknowledge the harm that the work can pose to workers and the root sources of this harm.

No matter the legal model regulating it, sex work is a calculated risk for the physical and psychological safety of sex workers.²¹³ HG.org points to recent statistics demonstrating that the death rate for prostitutes is 204 out of every 100,000, and that they are physically assaulted, on average, at least once per month.²¹⁴ By focusing so much on the idea that sex work is work, SVSTA must be careful not to promote the idea that women gladly choose to enter the industry as an entirely positive decision, free from the financial or professional constraints that are often a driving factor.²¹⁵ While women should be able to choose to enter into sex work and not be punished for it, we should not ignore the reality that many would not do so if they felt they had other realistic options.²¹⁶ Where the client enters the transaction for the purpose of having sexual relations, it seems the sex worker is already at a disadvantage and unequal to the client because she depends on the transaction for her income, not merely sexual enjoyment.²¹⁷

only arrest people for the work they do, or think they are doing, but for carrying on with their daily lives, like walking to the subway or wearing leggings—both of which the NYPD have considered violations of a law against ‘loitering for the purposes of prostitution.’”).

²¹³ 2 MELISSA HOPE DITMORE, *ENCYCLOPEDIA OF PROSTITUTION AND SEX WORK* 364–66 (2006).

²¹⁴ HG, *supra* note 145.

²¹⁵ See generally Chris Bodenner, *The Divide Over Prostitution on the Feminist Left*, ATLANTIC (Feb. 26, 2016, 10:25 AM), <https://www.theatlantic.com/notes/2016/02/the-divide-over-prostitution-on-the-feminist-left/471168/> (surveying widely differing views over the lack of true choice in entering prostitution and “the ‘happy hooker’ narrative that’s so popular in the media”).

²¹⁶ See generally Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. OF TRAUMA PRACTICE 33, 60 (2004) (finding that the profession is “multitraumatic” and condemning the “widespread misinformation about prostitution, based on propaganda that neutralizes the harms . . . and which is disseminated by organizations that present prostitution as legitimate, if unpleasant, labor”).

²¹⁷ See BARRY, *supra* note 151, at 229 (“Contrary to the belief that women are in control and hold the power in prostitution encounters, [Sam] Janus and [Barbara] Bess, in their *Sexual Profile of Men in Power*, found that the client is always the powerful one.”).

Criminalizing the purchase of sex is a way to combat this inherent inequality.²¹⁸ But fully embracing the Swedish model—which views all sex work as gendered violence—in New York would be far too radical to constitute a viable possibility.²¹⁹ Additionally, fully criminalizing only the purchase of sex would be at odds with the goal of recognizing sex work as work because it imposes criminal penalties on half of what would otherwise be a legal transaction. Instead, if a stigma must exist, New York should try to shift it to the male client by expanding the ability of law enforcement to prosecute them under the circumstances outlined in SVSTA.²²⁰ This is not to say we should shame a sex worker’s clients, but rather, this shift should be seen as acknowledging the fact that when harm is committed in a prostitution transaction, the male client is the source of this harm.²²¹ In other words, sex work should be considered legitimate work; in those few circumstances where the state views it as criminal, any illegitimacy should be attributed to the male client, who must not be offered any loopholes to avoid liability.²²²

SVSTA provides an invaluable first step to achieve these goals by prohibiting patronizing prostitution from minors or in school zones.²²³ Criminalizing these actions shifts the focus to the harmful male client doing the patronizing and thus, creeps slightly toward the Swedish model.²²⁴ However, SVSTA should go further and

²¹⁸ See *supra* notes 118–20 and accompanying text.

²¹⁹ Simowitz, *supra* note 30, at 449.

²²⁰ Stop Violence in the Sex Trades Act of 2019, S.B. 6419, 2019 Leg., Reg. Sess. (N.Y. 2019).

²²¹ This is not to minimize the very real harm that pimps also impose on sex workers, but the scope of this proposal is limited to the transaction between the sex worker and her client.

²²² S.B. 6419.

²²³ *Id.*

²²⁴ Ekberg, *supra* note 110, at 1188. SVSTA defines patronizing as:

(a) pursuant to a prior understanding, the actor pays a fee to another person as compensation for such other person or a third person having engaged in sexual conduct with the actor; or (b) the person pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such other person or a third person will engage in sexual conduct with the actor; or

eliminate an important defense sought to be included in the proposal. The “mistake of age” defense reads, “[i]n any prosecution for patronizing a person for prostitution in the first, second, or third degrees or patronizing a person for prostitution in a school zone, it is a defense that the defendant did not have reasonable grounds to believe that the person was less than the age specified.”²²⁵ In other words, a defendant-client is off the hook if he reasonably but mistakenly believed that the person from whom prostitution was sought was not a minor. Thus, while making a great stride in protecting minors from exploitation, the proposed Act simultaneously thwarts its own efforts by inserting a loophole to prosecution, allowing culpable men to avoid responsibility and liability for their actions. While the focus of the Act is on eliminating the criminality of the sex worker,²²⁶ permitting this defense to stand would increase the difficulty for New York to prosecute clients. Holding male clients accountable should be just as important to the advocates behind SVSTA as decriminalizing prostitution. Such a goal represents a commitment to finally fighting the long-standing divergence in how police and prosecutors enforce prostitution law between men and women. More broadly, closing a loophole for the harmful male patron would be to acknowledge the inequality inherent in sex work and begin taking steps toward combatting this.

Eliminating the defense should replicate a later provision of SVSTA concerned with sex trafficking of a child: “Knowledge by the defendant of the age of such child is not an element of this offense and it is not a defense to a prosecution therefor that the defendant did not know the age of the child or believed such age to be eighteen or over.”²²⁷ This zero-tolerance mindset should be applied to the client in all areas of prostitution. SVSTA should adopt this language throughout, rather than giving certain clients an “out.”

(c) the person solicits or requests another person to engage in sexual conduct with the actor in return for a fee.

S.B. 6419 § 230.00.

²²⁵ *Id.* § 230.07.

²²⁶ *See supra* notes 79-80 and accompanying text.

²²⁷ S.B. 6419 § 230.34–a.

A. *Foreseeable Challenges to Eliminating the Mistake-of-Age Defense*

On a practical level, eliminating the reasonable mistake-of-age defense would likely be criticized because several state legislatures have enacted such a defense for statutory rape.²²⁸ Introducing a stricter policy disallowing such a defense could be criticized in the same way the Swedish model has been criticized: that men are capable of being held responsible while women are not.²²⁹ This challenge will require arguing that men do not need this protection because they are already positioned at an advantage to female sex workers. However, acknowledging this inequality would be met with significant pushback from individuals, including some SVSTA advocates, who strive to encourage others to view prostitution as a legitimate business transaction that women should be able to freely enter into.²³⁰

In this way, the Swedish philosophy would likely be viewed as anti-feminist, demeaning women's position in society by characterizing sex workers as weaker than men²³¹—particularly among those that argue that prostitution is always a business transaction between equal, consenting parties.²³² But if one party would not complete the transaction if she could generate income a different way, can it truly be deemed consensual? Arguing that the sex worker and her client are genuinely equal parties is to ignore the inherently different motivations with which the sex worker and the client approach the transaction.

Acknowledging the dangers of sex work could also pose challenges to decriminalization altogether. Some will inevitably ask, if prostitution is so dangerous, why should it be legal? This challenge should be answered by the fact that decriminalizing means

²²⁸ See Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R.5th 499 (1997) (tracking cases, criticisms, and developments in common and statutory law rebutting statutory rape as a strict-liability crime).

²²⁹ Brown, *supra* note 9.

²³⁰ S.B. 6419.

²³¹ See Brown, *supra* note 9 (arguing that the Swedish approach “strips women of agency and autonomy”).

²³² S.B. 6419.

sex workers can turn to the police or utilize state and city resources without fear of arrest and prosecution.²³³

CONCLUSION

If the goal of SVSTA is truly to improve the lives of sex workers, the legislature can, and should, adopt the prevailing Swedish view that gender inequality is an inherent component of the sex trade wherein women supply, and men demand. As Megan Murphy, a journalist who has written extensively on international prostitution laws, wrote, “[r]ather than approaching prostitution as an issue of moral deviance, as had been done in the past, researchers, women’s rights activists and social workers shifted the dialogue to focus on social inequality.”²³⁴ Furthermore, in applying the policy considerations guided by the acknowledgement of these inequities, New York should eliminate the reasonable mistake-of-age defense in SVSTA. SVSTA must close this loophole in order to hold harmful solicitors of prostitution responsible.

²³³ See Tarlo, *supra* note 108.

²³⁴ Aleem, *supra* note 195.