

# Legalization of Sex Work in the United States: An HIV Reduction Strategy

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## INTRODUCTION

Sex work is the exchange of sexual services, either regularly or occasionally, for money or goods.<sup>1</sup> Though sex work is considered the world's oldest profession, it remains illegal in most countries. In the United States, it is up to the states, rather than the federal government, to prohibit or permit and regulate sex work. Currently, Nevada is the only state to have legalized sex work, recognizing brothels as its only permissible form.<sup>2</sup> The widespread criminalization and social stigma of the occupation has led to sex workers being one of the most marginalized and vulnerable populations, especially in regard to HIV and AIDS. Criminalization and the resulting stigma put sex workers in a position where they have lesser authority to insist on safe sex practices, face increased violence in all aspects of their lives, and cannot make proper healthcare decisions due to heightened discrimination and lack of access. As a result, female sex workers are both thirteen times more likely to be living with HIV and thirteen times more at risk of acquiring HIV than the general population.<sup>3</sup>

While sex work is seen as risky because of the workers' increased number of sexual encounters, the risks are more closely related to the policies, practices, and stigma that limit sexual and health-related decisions than they are to the act of sex itself. Therefore, legalization is imperative. Legalization of sex work in the U.S. will have the greatest impact on reducing HIV risk among people who exchange sex, because it will lessen the negative consequences of criminalization that increase HIV risk and allow for implementation of regulations that decrease HIV risk.

This Note focuses on implementing a legalization model in the U.S. specifically. Part I of this Note discusses particular consequences of criminalization that increase HIV acquisition and transmission risk among sex workers. Part II

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1. *HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/hiv/group/sexworkers.html> [<https://perma.cc/B5H2-GKJG>] (last visited Nov. 19, 2018).

2. RONALD WEITZER, *LEGALIZING PROSTITUTION FROM ILLICIT VICE TO LAWFUL BUSINESS* 87 (2011).

3. *Sex Workers, HIV, and AIDS*, AVERT (Aug. 9, 2018) <https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/sex-workers> [<https://perma.cc/DEU6-55Y6>].

explains the available legal models outside of criminalization. Part III proposes a legalization model for the U.S. and explains how the regulations positively affect HIV risk. Lastly, Part IV provides specific examples of pushback and counterarguments made against legalization.

## I. THE NEED FOR DECRIMINALIZATION

Many argue that criminalization of sex work is based in the enforcement of moral norms.<sup>4</sup> The government, on the other hand, typically justifies criminal penalties against sex work as a way to preserve public health.<sup>5</sup> Criminalization of sex, however, actually perpetuates these issues by driving sex work underground, leading to unsafe sex practices, increased violence, and inadequate healthcare, all of which increase the risk of HIV transmission and acquisition.<sup>6</sup>

### A. UNSAFE SEX PRACTICES

Proper condom use is a highly effective and cheap method of preventing HIV acquisition and transmission.<sup>7</sup> In addition to decreasing HIV risk, condoms also help to prevent sexually transmitted infections (STIs), which can increase the spread of HIV.<sup>8</sup> According to the World Health Organization (WHO), male condoms “have an 80% or greater protective effect against the sexual transmission of HIV and other STIs.”<sup>9</sup> Despite the effectiveness and low cost, many sex workers use condoms inconsistently.<sup>10</sup> It is the inconsistent condom use, rather than the number of sexual partners, that increases HIV risk among sex workers.<sup>11</sup>

The criminalization of sex work forces those who exchange sex into underground settings where there is less negotiating power to insist on condom use.<sup>12</sup> The reasons for this lessened power span from money, to fear of physical or sexual violence, to fear of arrest.<sup>13</sup> Money in relation to sex exchange impacts condom use when sex workers are offered more money to have sex without a

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4. See generally Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 542–45 (2002).

5. *Id.* at 545–46.

6. *Violence Against Women and HIV/AIDS: Critical Intersections*, WORLD HEALTH ORGANIZATION 4–5 (2005), <https://www.who.int/gender/documents/sexworkers.pdf> [<https://perma.cc/K4D3-DESZ>].

7. *Condom Effectiveness*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/condomeffectiveness/latex.html> [<https://perma.cc/V2DG-AQXN>] (last visited Jan. 30, 2019).

8. *STDs and HIV – CDC Fact Sheet*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/std/hiv/stdfact-std-hiv-detailed.htm> [<https://perma.cc/9SL2-VMW5>] (last visited Nov. 19, 2018).

9. *Condoms for HIV Prevention*, WORLD HEALTH ORGANIZATION, <http://www.who.int/hiv/topics/condoms/en/> [<https://perma.cc/TS9K-ZUFQ>] (last visited Dec. 12, 2018).

10. *Sex Workers, HIV, and AIDS*, *supra* note 3, at 11–12.

11. *Id.*

12. See *id.* at 3–4; Ashwini Sukthakar, *Sex Work, HIV and the Law*, GLOBAL COMMISSION ON HIV AND THE LAW 11 (2011) <https://hivlawcommission.org/wp-content/uploads/2017/06/Sex-work-HIV-and-the-Law.pdf> [<https://perma.cc/TE9S-LTWS>].

13. Sukthakar, *supra* note 12, at 11.

condom.<sup>14</sup> They may also be offered more money by clients who are known to be HIV positive.<sup>15</sup> An organization that works with HIV positive sex workers in Senegal said, “[s]ex workers have told us that when they ask a client to use a condom, he offers double the price to have sex without the condom. These women are trying to provide for their children and families, so they take the offer.”<sup>16</sup>

Physical and sexual violence also impact condom use by creating unequal power dynamics which make condom negotiation difficult.<sup>17</sup> Even in situations where a sex worker would have negotiation power, they may not have “the time and space available to negotiate condom use with clients.”<sup>18</sup> Many sex workers fear that visible condoms or negotiation will increase their likelihood of arrest,<sup>19</sup> and the law enforcement practice of confiscating condoms as evidence of prostitution has heightened this fear.<sup>20</sup> Officers oftentimes profile suspects based on “who they are, what they are wearing, and where they are standing” rather than surveilling for actual illegal behavior.<sup>21</sup> A study by the Open Society Foundation, conducted in the U.S. and five other countries, found evidence of police harassment, abuse, extortion, and exploitation against sex workers who carry condoms.<sup>22</sup> Research shows that such practices:

[c]an directly influence HIV acquisition risk by forcing [female sex workers] to rush transactions with their clients, forgo condoms, or engage in risky sexual practices, or by displacement of [female sex workers] to isolated or hidden venues, where they have less ability to control transactions (e.g., client selection, types of sexual acts, or condom use).<sup>23</sup>

Where there is no risk of arrest or criminal sanction, sex workers will be in a better position to insist on condom use, thereby significantly decreasing their

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14. *HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items*, *supra* note 1; *see, e.g., Sex Workers, HIV, and AIDS*, *supra* note 3, at 4.

15. *HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items*, *supra* note 1.

16. *Africa's Sex Workers Have a Hard Time Leaving Streets*, VOA NEWS (Nov. 1, 2009) <https://www.voanews.com/a/a-13-2007-02-13-voa17/342251.html> [<https://perma.cc/9ZRA-JUDP>].

17. *Sex Workers, HIV, and AIDS*, *supra* note 3, at 2, 4.

18. *10 Reasons to Decriminalize Sex Work*, OPEN SOCIETY FOUNDATIONS 4 (2015) <https://www.opensocietyfoundations.org/sites/default/files/decriminalize-sex-work-20120713.pdf> [<https://perma.cc/HZQ7-LW2J>].

19. *Id.*

20. *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities*, HUM. RTS. WATCH (July 19, 2012), <https://www.hrw.org/report/2012/07/19/sex-workers-risk/condoms-evidence-prostitution-four-us-cities> [<https://perma.cc/J4BZ-QDHV>].

21. *Id.*

22. *How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe*, THE OPEN SOCIETY FOUNDATIONS 3 (2012), <https://www.hivlawandpolicy.org/sites/default/files/Criminalizing%20Condoms%20%20How%20Policing%20Practices%20Put%20Sex%20Workers%20and%20HIV%20Services%20at%20Risk%20in%20Kenya%2C%20Namibia%2C%20Russia%2C%20South%20Africa%2C%20the%20United%20States%2C%20and%20Zimbabwe%20%28Shields%29.pdf> [<https://perma.cc/4AEH-882H>].

23. K. Shannon et al., *Global Epidemiology of HIV Among Female Sex Workers: Influence of Structural Determinants*, THE LANCET, Jan. 3, 2016, at 8–9.

chances of HIV acquisition. After the passage of the Prostitution Reform Act in New Zealand, a major evaluation of the Act in 2008 revealed that two-thirds of sex workers felt the law “gave them more leverage to refuse a client or the client’s requests.”<sup>24</sup> Removal of criminal prohibitions also makes it easier for HIV prevention programs and sex worker initiatives to encourage condom use. A 2015 South African study found that such programs have reduced HIV incidence in female sex workers by 76% and clients by 65%.<sup>25</sup> These studies show that decriminalization of sex work will have a positive impact on practicing safe sex and reducing HIV risk within the community.

## B. INCREASED VIOLENCE

Much of the violence and abuse faced by sex workers is attributed to their work being criminalized.<sup>26</sup> In the current system, sex workers do not have the power to protect themselves from violence and abuse from clients, law enforcement, intimate partners, and others in their personal lives.<sup>27</sup> Many sex workers are reluctant to report physical and sexual violence, because doing so would reveal their engagement in criminalized conduct.<sup>28</sup> When they do report, their stories are often dismissed, especially in situations where law enforcement officers see the workers as deserving of the violence.<sup>29</sup> In a 2016 study of sex workers in Alaska (Alaska Study), survey participants who had been victims of crime within their work lives “reported being turned away [from police] 80% of the time.”<sup>30</sup>

Violence both directly and indirectly impacts HIV transmission and acquisition risk among sex workers.<sup>31</sup> For example, sexual violence increases HIV risk due to the lacerations and abrasions caused by force.<sup>32</sup> Worsening matters, sex workers are susceptible to sexual violence not only from clients, but also from intimate partners and police officers.<sup>33</sup> 26% of the participants in the Alaska Study reported being sexually assaulted by police.<sup>34</sup> In Bangladesh, between 1999 and 2000, HIV surveillance revealed “between 52% and 60% of street-based sex

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24. *Id.*

25. Linda-Gail Bekker et. al, *Combination HIV Prevention for Female Sex Workers: What is the Evidence?*, THE LANCET, July 21, 2014, at 81.

26. *10 Reasons to Decriminalize Sex Work*, *supra* note 18, at 1.

27. *Violence Against Women and HIV/AIDS: Critical Intersections*, *supra* note 6, at 1, 4 (“Criminalization of sex work contributes to an environment in which violence against sex workers is tolerated, leaving them less likely to be protected from it.”).

28. WEITZER, *supra* note 2, at 49.

29. *Id.*

30. Tara Burns, *People in Alaska’s Sex Trade: Their Lived Experiences and Policy Recommendations* 135 (May 2015) (unpublished M.A. thesis, University of Alaska) (on file with University of Alaska School Library).

31. *Violence Against Women and HIV/AIDS: Critical Intersections*, *supra* note 6, at 2.

32. *Id.*; *Sexual Violence and HIV*, WORLD HEALTH ORGANIZATION, <https://www.who.int/svri/issues/hiv/en/> (<https://perma.cc/G5WH-WPLK>) (last visited Feb. 27, 2019).

33. *See id.*

34. Burns, *supra* note 30, at 135.

workers reported being raped” at the hands of law enforcement.<sup>35</sup> Violence perpetrated against sex workers creates a sense of powerlessness over their lives.<sup>36</sup> This leads to sex workers prioritizing coping with the violence over maintaining their health and preventing HIV.<sup>37</sup> The constant violence oftentimes leads to “low self-esteem, emotional stress, and depression.”<sup>38</sup> Many sex workers report drug and alcohol use as a coping mechanism for the stressors and abuse.<sup>39</sup> Such behaviors exacerbate risk of violence, lack of control, and risky sexual behavior.<sup>40</sup>

Where sex work is decriminalized, sex workers do not have to fear arrest, in turn empowering them to work with law enforcement to seek protection from or redress for physical and sexual violence.<sup>41</sup> When sex workers partnered with police in India, condom use rose to 85% and HIV prevalence “fell from over 11% to less than 4%” in just a three-year span.<sup>42</sup> This empowerment was also evidenced in New Zealand, where a survey conducted by the Prostitution Law Review Committee (PLRC) revealed that 57% of sex workers noticed a positive change in police behaviors since the legalization of sex work.<sup>43</sup>

### C. ENGAGEMENT IN HEALTH SERVICES

Criminalization of sex work contributes to the stigmatization of the occupation and the health vulnerability of sex workers.<sup>44</sup> Social marginalization is increased through both the imposition of legal penalties on sex workers prosecuted for specific acts and the assignment of criminal status to all sex workers, regardless of any particular arrest, charge, or prosecution.<sup>45</sup> This wide-ranging condemnation contributes to pervasive discrimination, stigma, and ill treatment in social institutions and services by health providers, police, and the general public.<sup>46</sup> Although

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35. *Violence Against Women and HIV/AIDS: Critical Intersections*, *supra* note 6, at 1.

36. *Id.*

37. *See id.*

38. *Id.*

39. *See id.*

40. *See id.*

41. *10 Reasons to Decriminalize Sex Work*, *supra* note 18, at 2.

42. *HIV and the Law: Risks, Rights & Health*, THE GLOBAL COMMISSION ON HIV AND THE LAW 42 (2012), <https://hivlawcommission.org/wp-content/uploads/2017/06/FinalReport-RisksRightsHealth-EN.pdf> [<https://perma.cc/WZM6-7LEX>].

43. WEITZER, *supra* note 2, at 99.

44. *See, e.g., Sex Workers, HIV, and AIDS*, *supra* note 3, at 2; *10 Reasons to Decriminalize Sex Work*, *supra* note 18, at 4.

45. Joanne Csete and Jonathan Cohen, *Health Benefits of Legal Services for Criminalized Populations: The Case of People Who Use Drugs, Sex Workers and Sexual and Gender Minorities*, JOURNAL OF LAW, MEDICINE & ETHICS 816, 820 (2010); The United Nations Development Programme (UNDP) published a report highlighting the damaging effects of criminalized sex work and women’s health saying, “Criminalization increases vulnerability to HIV by fueling stigma and discrimination, limiting access to HIV and sexual health services, condoms and harm reduction services, and adversely affecting the self-esteem of sex workers and their ability to make informed choices about their health.” *Sex Work and the Law in Asia and the Pacific*, UNDP 1 (2013), <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/sex-work-and-the-law-in-asia-and-the-pacific.html> [<https://perma.cc/KMV7-SLDU>].

46. Csete and Cohen, *supra* note 45, at 820–21.

removal of criminal sanctions will not eliminate stigma completely, there may be less judgment from health care professionals when the work is legally recognized.

Amnesty International reports that criminalization negatively impacts sex workers' access to health services and healthcare information such as preventative measures, testing, and general STI and HIV treatment options.<sup>47</sup> Heightened discrimination within healthcare settings, due to the illegality of sex work, comes in different forms: outright refusal of services once the occupation is discovered, blatant judgment and lack of respect that makes the sex workers feel uncomfortable, inferior quality of care, and even denial of consent in healthcare decisions.<sup>48</sup> For example, in Miami, sex workers reported they avoided healthcare visits "out of fear of discrimination."<sup>49</sup> In Nepal, one sex worker stated, "[w]hen I visited a VCT [voluntary counselling and testing] clinic, health personnel were not polite and immediately asked me if I was as sex worker. A doctor asked me outright, '[a]re you HIV positive?' This discouraged me from going to the clinics."<sup>50</sup> Sex workers cannot effectively seek out proper healthcare with such social and structural barriers in place. The decriminalization of sex work is one step in ensuring sex workers have adequate access to HIV counseling, prevention, testing, and treatment, in turn decreasing HIV risk within the community.

In addition to giving sex workers the tools to properly manage and protect their health, the removal of criminal prohibitions allows sex workers to partner with the government, outreach groups, and amongst themselves to address health-related issues within sex work.<sup>51</sup> Where criminal laws are enacted against sex work, sex worker collectives cannot effectively organize.<sup>52</sup> Conversely, when sex work is legalized, there can be more open sex worker community empowerment-based responses and initiatives focused on obtaining proper health care services.<sup>53</sup> The success of these initiatives can be attributed to sex workers' ability to "organize health services for themselves," which are typically "more respectful and more frequently used than other non-sex worker led services."<sup>54</sup> Sex workers who do not feel comfortable going to the everyday clinic can instead go to sex worker focused, and sometimes led, healthcare centers. For example, peer-led

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47. Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers, AMNESTY INTERNATIONAL 10 (2016), <https://www.amnesty.org/en/documents/pol30/4062/2016/en/> [<https://perma.cc/7CKJ-QWBF>].

48. See *Sex Workers, HIV, and AIDS*, *supra* note 3, at 2.

49. G. Paz-Bailey et al, *Prevalence of HIV Among U.S. Female Sex Workers: Systematic Review and Meta-Analysis*, AIDS BEHAV., Oct. 20, 2016, at 2.

50. *HIV in Asia and the Pacific: Getting to Zero*, UNAIDS 41 (2011), [http://www.unaids.org/sites/default/files/media\\_asset/20110826\\_APGettingToZero\\_en\\_1.pdf](http://www.unaids.org/sites/default/files/media_asset/20110826_APGettingToZero_en_1.pdf) [<https://perma.cc/5H35-VYUV>].

51. *10 Reasons to Decriminalize Sex Work*, *supra* note 18, at 4.

52. *Id.*

53. *Sex Workers, HIV, and AIDS*, *supra* note 3, at 11.

54. *10 Reasons to Decriminalize Sex Work*, *supra* note 18, at 4 (referencing S. Jana et al., *The Sonagachi Project: A Sustainable Community Intervention Program*, AIDS EDUC. AND PREVENTION, Oct. 16, 2004).



drop-in healthcare centers have been implemented in eighteen Myanmar cities, providing free healthcare and reaching over 62,000 sex workers per year.<sup>55</sup> Sex workers who visit the centers do not have to fear the stigma or discrimination they may encounter at other centers, because all of the centers' "community educators" are local sex workers.<sup>56</sup> In India, community-led interventions achieved an increase in condom use and decrease in STIs.<sup>57</sup> These initiatives illustrate that the removal of criminal prohibitions on sex work is the most effective way to empower sex workers to take control of their health and lessen HIV risk within their community.

## II. CHOOSING A LEGAL MODEL

After the removal of criminal prohibitions, governments can choose between maintaining a strictly decriminalized system, legalizing selling but criminalizing buying, or legalizing both buying and selling and implementing regulations. Countries typically choose a model based on their own specific state interests. This section discusses New Zealand's decriminalization model; Sweden's Nordic Model; and Nevada's, Germany's, and the Netherlands' legalization models.

### A. NEW ZEALAND

New Zealand's sex work model can be seen as a success primarily because of its inclusiveness.<sup>58</sup> New Zealand's Prostitution Reform Act is categorized as a decriminalization model, but the Act also implemented a number of regulations regarding who can exchange sex, zoning requirements, and condom use.<sup>59</sup> Despite these limited regulations, the inclusiveness of allowing brothels, escort services, erotic massage parlors, self-employed sex workers, and even street-based sex workers, subject to local public nuisance laws, has achieved success.<sup>60</sup> Under the Act, police, social services, and the health department conduct periodic inspections of sex worker businesses.<sup>61</sup> Local governments determine zoning regulations and city councils govern advertising.<sup>62</sup> The local regulations vary: some councils pass bylaws while others do not; but local councils may not outright prohibit sex work.<sup>63</sup> Following the passage of the new law, the duty to maintain

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55. *Sex Workers, HIV, and AIDS*, *supra* note 3, at 11.

56. *Id.*

57. *Id.*

58. New Zealand's legal prostitution includes street-based prostitution, formal brothels, massage parlors, owner-operated services, and more. WEITZER, *supra* note 2, at 97–98. “[L]egalization cannot fully resolve the problem of illegal prostitution, although it is intended to reduce it. New Zealand may be an exception: the inclusiveness of its legal order reduces the incentive to operate illegally.” *Id.* at 100–01.

59. *See id.* at 97–98.

60. *Id.*

61. *Id.* at 97.

62. *Id.* at 98.

63. *Id.* at 98.

licensing shifted from sex workers to business owners.<sup>64</sup> Now, brothels that employ three or more workers must obtain certificates.<sup>65</sup> Even though street-based sex work is allowed, it only exists in three cities, ranging from less than fifty street workers in one city to around 120 in another.<sup>66</sup> A review board for the Prostitution Reform Act concluded that decriminalization and limited regulation achieved many of its goals and that sex workers were better off in the new system than they were prior to the passage of the law.<sup>67</sup>

#### B. SWEDEN

Sweden's approach to sex work, also known as the Nordic Model, is to legalize selling but criminalize buying.<sup>68</sup> This approach is also implemented in Norway, Iceland, Nepal, India, Korea, Finland, and Israel,<sup>69</sup> and its purpose is to lessen and eventually eliminate demand.<sup>70</sup> While facially this model seems to be successful in that it may punish pimps and other exploiters, in reality, it forces sex workers into clandestine locations to access clients.<sup>71</sup> The Global Network of Sex Work Projects lists increased social stigma, the lack of a rights-based approach, the lack of access to quality health care, and attitudes among service providers and police as unintended consequences of the Nordic Model.<sup>72</sup> Many of the negative consequences are also intended and justified as "necessary to achieve the overarching goal of a society where there is no sex work."<sup>73</sup> As a result, Amnesty International has denounced the Nordic model, because sex workers are still penalized and face more safety and violence risks.<sup>74</sup>

#### C. NEVADA

Nevada is the only U.S. state with legalized prostitution.<sup>75</sup> Nevada's brothel owners and sex workers must abide by several rules and regulations, including thorough background checks for the owners and health checks for the sex

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64. WEITZER, *supra* note 2, at 99.

65. *Id.*

66. The three cities are Auckland, Christchurch, and Wellington. *Id.* at 98.

67. *Id.* at 100.

68. *HIV and the Law: Risks, Rights & Health*, *supra* note 42, at 36.

69. *Amnesty Prostitution Policy Document*, AMNESTY INTERNATIONAL, <https://www.hivlawandpolicy.org/sites/default/files/Amnesty%20Prostitution%20Policy%20document%20C2%A0.pdf> [<https://perma.cc/574G-2WVR>] (last visited Feb. 4, 2019).

70. *10 Reasons to Decriminalize Sex Work*, *supra* note 18, at 1.

71. *See id.*

72. *Challenging the Introduction of the Nordic Model*, GLOBAL NETWORK OF SEX WORK PROJECTS 10-12 (2017), [http://www.nswp.org/sites/nswp.org/files/sg\\_to\\_challenging\\_nordic\\_model\\_prf03.pdf](http://www.nswp.org/sites/nswp.org/files/sg_to_challenging_nordic_model_prf03.pdf) [<https://perma.cc/U9XC-RHX3>].

73. *Id.* at 4.

74. *See Policy to Protect the Human Rights of Sex Workers*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/qa-policy-to-protect-the-human-rights-of-sex-workers/> [<https://perma.cc/4963-ZESM>] (last visited Dec. 12, 2018).

75. WEITZER, *supra* note 2, at 87.



workers. These checks must be cleared before they can start work.<sup>76</sup> The mandatory health tests and rules on condom use have proven effective in reducing HIV risk – no sex worker within a Nevada brothel has tested positive for HIV since testing was mandated in 1985.<sup>77</sup> The brothels also provide additional safety precautions such as alarm buttons, listening devices, and management surveillance.<sup>78</sup> These systems are designed to promote safety and deter violence.<sup>79</sup> An in-depth study into the brothels concluded, “safety was one of the most important advantages that women stressed in their choice to work in brothels. They felt, and our research backs this up, that Nevada’s legal brothels offer the safest environment available for women to sell consensual sex.”<sup>80</sup> The research also found that the police were rarely called and that the image of oppression that is often placed on brothels did not align with the reality of Nevada’s brothels.<sup>81</sup> However, because brothels are highly regulated, some sex workers may find constant HIV and STI testing to be too demanding or confining.<sup>82</sup> In order to ensure inclusiveness and keep unauthorized sex work to a minimum, it is crucial to red-light districts that offer a multiple sex work avenues as well as street-based prostitution acceptance zones.

#### D. GERMANY AND THE NETHERLANDS

Both Germany and the Netherlands offer red light districts with traditional brothels along with, inter alia, erotic bars, sauna clubs, and massage parlors.<sup>83</sup> In Frankfurt, Germany, red light districts include erotic bars, sauna clubs, massage parlors, and hotel-brothels – hotels or inns where landlords rent rooms to workers for half or full days.<sup>84</sup> In these hotel brothels, workers are completely independent of management.<sup>85</sup> Like the Nevada brothels, each room in these hotel-brothels has an alarm system, and management surveils areas outside of the bedrooms.<sup>86</sup> These safeguards allow workers to protect themselves in the event of any unruly

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76. *Id.* at 88.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (quoting Kathryn Hausbeck and Barbara Brents, *Nevada’s Legal Brothels*, SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY 272 (2010)).

81. WEITZER, *supra* note 2, at 88.

82. *Id.* at 89; Alexandra Lutnick and Deborah Cohan, *Criminalization, Legalization or Decriminalization of Sex Work: What Female Sex Workers Say in San Francisco, USA*, 41 (2009) (One survey participant in a San Francisco study stated, “I worked in a legal prostitution setting in Nevada. I did that for a couple of weeks to see what it was like. The amount of controls and lack of freedom was horrendous. You know, I don’t want someone else telling me how to work. And I don’t think it is necessary really.”).

83. WEITZER, *supra* note 2, at 121, 151.

84. *Id.* at 121.

85. *Id.*

86. *Id.* at 133, 135.

customers and management to intervene where they see potential for a situation to escalate.<sup>87</sup>

Erotic bars, massage parlors, and sauna clubs exist in Netherlands' red-light districts as well; however, window brothels are prevalent.<sup>88</sup> *Tippelzones*, designated street-based sex work tolerance zones, exist but only few remain.<sup>89</sup> Approximately 20% of sex workers work in windows, 25% in brothels, about 50% as escorts or at home, and only 1% in the street.<sup>90</sup> Similar safety precautions are taken with alarm buttons in the windows and surveillance areas, installed by management and police officers, outside of the rooms.<sup>91</sup> When safety was evaluated by the Ministry of Justice, it concluded that "the vast majority" of sex workers within the various venues "often or always feel safe."<sup>92</sup>

### III. THE IMPACT OF LEGALIZATION AND REGULATION

Legalization of sex work would allow for the implementation of regulations aimed at decreasing the risk of HIV for those who exchange sex. Regulations are beneficial not only for those who exchange sex, but also for their clients, intimate partners, and needle sharing partners. With this in mind, and prioritizing health as the important State interest, I propose that the U.S. legalize sex work on the federal level and regulate health care standards, including HIV and STI testing, zoning and employment rights. This system would allow for brothels and red-light districts with street prostitution tolerance zones. To demonstrate how such regulations decrease the risk of HIV, this section pulls evidence from numerous jurisdictions with either legalized sex work or successful sex worker outreach programs. It is worth noting that the U.S. has a different culture, society and legal system from some of the countries mentioned hereinafter, such as India and Thailand. Despite the prevalence of religious-based laws in these countries, sex work is still legal in some way. Comparatively, the U.S. also has numerous sex worker and human rights organizations that could collaborate with the government to ensure a smooth and productive transition to a legalized system.

#### A. IMPLEMENTATION OF HEALTHCARE STANDARDS

Legalization rather than criminalization is more productive in lowering HIV risk and improving health outlooks for sex workers, because criminalization "creates significant barriers to developing targeted HIV prevention efforts."<sup>93</sup> The proposed legalization model should include multiple tools and strategies, such as

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87. *Id.* at 135.

88. *Id.* at 150.

89. WEITZER, *supra* note 2, at 151.

90. *Id.* at 150.

91. *Id.* at 198.

92. *Id.* at 198 (quoting A.L. Daalder, *Lifting the Ban on Brothels*, THE HAGUE: WODC/MINISTRY OF JUSTICE (2004)).

93. *HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items*, *supra* note 1.

HIV counseling and testing programs, condom and lubrication distributions, Pre-Exposure Prophylaxis, and Post-Exposure Prophylaxis, to decrease HIV acquisition and transmission risk associated with sex work, UNAIDS recommends scaling up health services for sex workers and emphasizes the importance of “combining HIV prevention strategies for sex workers, including integrating condom distribution with other HIV services and increasing links between HIV services and other sexual and reproductive health services, such as family planning services, gynecological services and maternal health.”<sup>94</sup> When sex work is regulated with a focus on improving health, regulations can require brothel owners and management to ensure their workers have access to such services. For sex workers who work independently, private and sex-worker led clinics, such as in Myanmar and India, can provide those services.<sup>95</sup>

HIV counseling and testing (HTC) in combination with other prevention methods is an essential part of reducing HIV risk among sex workers.<sup>96</sup> For example, in Ethiopia, an organization’s peer education and outreach initiative reached “more than 16,000 young people who sell sex” in just over one year.<sup>97</sup> In Guatemala, a sexual health clinic achieved a 75% decrease in HIV among sex workers after “offer[ing] targeted HTC and follow-up services.”<sup>98</sup> When similar targeted programs were implemented in Chile and El Salvador, HIV prevalence among sex workers fell significantly in both countries as well.<sup>99</sup>

As previously discussed, condoms are a highly effective and cheap method of preventing the spread of HIV.<sup>100</sup> Thailand’s groundbreaking 100% Condom Use Programme saw an increase in condom use “from 14% in 1989 to more than 90% in 1992.”<sup>101</sup> Even though condom use may be hard to mandate, when sex work is legalized and the mandate is in place, many sex workers feel they have more power to insist on condom use and refuse clients who try to have sex without a

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94. *Sex Workers, HIV, and AIDS*, *supra* note 3, at 7 (Citing *Prevention Gap Report*, UNAIDS (2016)).

95. *See id.* at 11.

96. *See id.* at 8.

97. *Id.*; Sex work is not criminalized in Ethiopia. *See* IMMIGRATION AND REFUGEE BOARD OF CANADA, <https://www.refworld.org/docid/58d538fa4.html> [<https://perma.cc/DV52-BGGB>] (last visited Dec. 13, 2018).

98. *Sex Workers, HIV, and AIDS*, *supra* note 3, at 7; Sex work is legal in Guatemala. *100 Countries and Their Prostitution Policies*, PROCON <https://prostitution.procon.org/view.resource.php?resourceID=000772#guatemala> [<https://perma.cc/JGK3-CAWM>] (last visited Dec. 12, 2018).

99. *Sex Workers, HIV, and AIDS*, *supra* note 3, at 7; Sex work is legal in Chile, but brothel-keeping is illegal. U.S. DEPARTMENT OF STATE <https://www.state.gov/j/drl/rls/hrrpt/2006/78884.htm> [<https://perma.cc/8KEW-REJ5>] (last visited Dec. 12, 2018); In El Salvador, sex work is legal at the national level, but many cities penalize selling or buying at the local level. *100 Countries and Their Prostitution Policies*, PROCON <https://prostitution.procon.org/view.resource.php?resourceID=000772#elsalvador> [<https://perma.cc/N7NN-TZDS>] (last visited Dec. 12, 2018).

100. *Condom Effectiveness*, *supra* note 6.

101. Some concerns about this program were raised because of sex workers’ absence from participation. Though monumental, we would need to model a similar program with a focus on sex workers. *Sex Workers, HIV, and AIDS*, *supra* note 3, at 7.

condom.<sup>102</sup> In New Zealand, condom use among sex workers has been widely adopted and has lowered the rate of HIV transmission in the sex worker population.<sup>103</sup> When condoms are not used, clients and employers can be charged with an offense enforced by the Health Department.<sup>104</sup> With consistent and proper condom use, HIV transmission will be substantially reduced.<sup>105</sup>

Pre-Exposure Prophylaxis (PrEP) and Post-Exposure Prophylaxis (PEP) should also be made available to more sex workers through health insurance, employers, or outreach programs and clinics. PrEP is a daily HIV prevention medication.<sup>106</sup> When taken consistently, PrEP is highly effective and can reduce HIV risk by up to 92%.<sup>107</sup> A South African study revealed that “combining PrEP with HTC could reduce HIV transmission between sex workers and their clients by up to 40%.”<sup>108</sup> PEP, on the other hand, is HIV prevention medication taken after potentially being exposed to HIV.<sup>109</sup> It must be taken within seventy-two hours of the potential exposure.<sup>110</sup> Although PEP is not meant for regular use, in a legalized system where other HIV prevention tools are practiced, PEP can be made available for emergency exposure situations such as sexual assault or needle-shares with an HIV positive person. Considering the effectiveness of both medications, ensuring access to as many sex workers as possible, through various means, will be a significant step in reducing HIV risk.

Lastly, mandatory testing can be implemented in brothels. Though this practice may seem problematic to some sex workers and those who advocate for strictly decriminalization without regulations,<sup>111</sup> mandatory testing has been “widely accepted among members of Nevada’s brothel culture.”<sup>112</sup> Sex workers in Nevada’s brothels must undergo weekly STI testing and monthly HIV testing.<sup>113</sup> This method proves to be effective, particularly since no sex worker within a

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102. WEITZER, *supra* note 2, at 99 (“[T]wo-thirds [of sex workers] felt that the law gave them more leverage to refuse a client or his requests.”).

103. NZAF, <https://www.nzaf.org.nz/hiv-aids-stis/hiv-aids/hiv-in-new-zealand/> [<https://perma.cc/DX6Y-9QUQ>] (last visited Nov. 19, 2018).

104. *See, e.g.*, WEITZER, *supra* note 2, at 99.

105. UNAIDS *Guidance Note on HIV and Sex Work*, UNAIDS, Annex 2 at 8, [http://www.unaids.org/sites/default/files/sub\\_landing/files/JC2306\\_UNAIDS-guidance-note-HIV-sex-work\\_en.pdf](http://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf) [<https://perma.cc/23X5-QZ5V>]; *see, e.g.*, *Sex Workers, HIV, and AIDS*, *supra* note 3, at 7 (The Avahan program out of southern India “was estimated to have increased condom use to such an extent that new HIV infections among female sex workers had reduced by between 48% and 67%.”).

106. *Pre-Exposure Prophylaxis (PrEP)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/hiv/risk/prep/index.html> [<https://perma.cc/CST7-JAM2>] (last visited Feb. 5, 2019).

107. *Id.*

108. *Sex Workers, HIV, and AIDS*, *supra* note 3, at 8.

109. *Post-Exposure Prophylaxis (PEP)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/hiv/risk/pep/index.html> [<https://perma.cc/2ZH2-PHEW>] (last visited Dec. 12, 2018).

110. *Id.*

111. *See, e.g.*, Lutnick and Cohan, *supra* note 82, at 41.

112. WEITZER, *supra* note 2, at 88 (internal citation omitted).

113. *Id.*

Nevada brothel has tested positive for HIV since testing was mandated in 1985.<sup>114</sup>

### B. DESIGNATED WORK SPACES

A legalized system in the U.S. should regulate specific areas and venues where sex workers can work. Regulated work spaces promote safer working conditions and allow sex workers to work in partnership with the justice system.<sup>115</sup> Research shows that where sex workers conduct business has an impact on their vulnerability and access to numerous services.<sup>116</sup> UNAIDS states, “Where sex workers are able to assert control over their working environments and insist on safer sex, evidence indicates that HIV risk and vulnerability can be sharply reduced.”<sup>117</sup> The workers have a defense system among themselves, the owners, and law enforcement where needed.<sup>118</sup> Similarly, red-light districts can be policed for unruly, potentially violent clients rather than policed for sex workers.<sup>119</sup>

The lack of safety faced by sex workers in criminalized systems contributes to vulnerability that increases HIV risk.<sup>120</sup> A legalized system would allow sex workers to assert control over every aspect of their occupation and provide for essential support systems when it comes to safety.<sup>121</sup> Where sex work is legalized and brothels and red-light districts are allowed, such safe working conditions have proven to be both in effect and effective.

### C. EMPLOYMENT RIGHTS

Legalizing sex work includes ensuring employment rights that legitimize sex work as an occupation and afford rights that would be found in any other workplace.<sup>122</sup> The lack of rights currently contributes to the social marginalization sex workers face.<sup>123</sup> As such, the International Labour Organization (ILO) has addressed sex workers’ occupational safety and health services needs in labor standards and has recommended officially recognizing sex work as an occupation.<sup>124</sup>

A recent UNDP report highlighted problems that occur when sex workers do not have such legal rights, saying:

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114. *Id.*

115. *10 Reasons to Decriminalize Sex Work*, *supra* note 18, at 3.

116. G. Paz-Bailey et al, *supra* note 49, at 2.

117. *UNAIDS Guidance Note on HIV and Sex Work*, *supra* note 105, at 4.

118. *See* WEITZER, *supra* note 2, at 88, 133.

119. *See, e.g., id.* at 198.

120. *Violence Against Women and HIV/AIDS*, *supra* note 6, at 2–3.

121. *See generally Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, *supra* note 47, at 15.

122. *10 Reasons to Decriminalize Sex Work*, *supra* note 18, at 1.

123. *See id.*

124. *HIV and the Law: Risks, Rights & Health*, *supra* note 42, at 40.

Sex workers in all countries of the region except New Zealand and the state of New South Wales (Australia) lack the labour rights afforded to other workers, including the legal right to a safe and healthy workplace and to reasonable terms and conditions of employment . . . Labour laws and social security laws that do not recognize sex work as legitimate work contribute to stigma and marginalization of sex workers.<sup>125</sup>

Providing rights such as freedom from discrimination, wage and hours related rights, the right to a safe working environment and health insurance was one of the goals of New Zealand's Prostitution Reform Act.<sup>126</sup> The Act succeeded by bringing sex workers under various labor protections, including providing sex workers with employment contracts "that outline hours, benefits, wages, conditions, and duties."<sup>127</sup> One important employment right that comes with such contracts is the right to refuse sex at any time even if a contract is already in effect.<sup>128</sup> A 2008 Prostitution Law Review Committee evaluation revealed that more than 90% of sex workers were aware that they had these legal and employment rights under the new law.<sup>129</sup>

In addition to the various regulatory bodies that create and enforce employment rights for sex workers in New Zealand,<sup>130</sup> the New Zealand Prostitute's Collective, brothel operators, and Labour Inspectorate work together to develop workplace health and safety standards for sex work.<sup>131</sup> In the U.S., the Department of Labor administers and enforces wage and hours law, workplace safety and health laws, workers' compensation, and more. Collaboration similar to that used in New Zealand should be used in the U.S. throughout the entire legalization process to ensure sex workers' workplace needs are properly addressed.<sup>132</sup> Such rights encourage safer sex practices and empower sex workers to take control of every aspect of their work. They also ensure safer work environments, free of the fear of violence or arrest that typically leads to risky sexual behaviors, and better allow sex workers to organize collectively to address risk factors in their workplaces.

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125. *Sex Work and the Law in Asia and the Pacific*, *supra* note 45, at 23–24.

126. WEITZER, *supra* note 2, at 97.

127. Emily van der Meulen, *When Sex is Work: Organizing for Labour Rights and Protections*, LABOUR/LE TRAVAIL 155 (2012).

128. *Id.*

129. WEITZER, *supra* note 2, at 99.

130. The regulatory bodies in New Zealand include the Ministry of Health, Ministry of Business Innovation and Enterprise, Ministry of Justice, Occupational Safety and Health, Immigration New Zealand, Medical Officers of Health, Inland Revenue Department, and the Police. NZPC, <http://www.nzpc.org.nz> [<https://perma.cc/RVL9-56LL>] (last visited Feb. 7, 2019).

131. *See id.*

132. "[S]ex workers in partnership with others have led the development of effective, evidence-informed services that help to reduce their vulnerability to HIV and mitigate the hostile environments that perpetuate their vulnerability." *The Gap Report*, UNAIDS 197 (2014), [http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS\\_Gap\\_report\\_en.pdf](http://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS_Gap_report_en.pdf) [<https://perma.cc/GQV2-MZUW>].

#### IV. POTENTIAL PUSHBACK

Even though legalization comes with significant benefits, pushback is likely to occur from some, because legalization creates a scenario where there is still legal versus illegal sex work.<sup>133</sup> No matter how limited the regulations are, there will always be some workers who are ineligible legally, such as minors, undocumented immigrants, and perhaps those with active STIs.<sup>134</sup> However, the health benefits of legalization outweigh this exclusion. Additionally, sex workers who are eligible may try to avoid taxation and mandatory health requirements, while brothel owners and managers may try to avoid licensing and registration. Conversely, when licensing and registration is simple and inexpensive, compliance will be easier to achieve.<sup>135</sup>

As it relates to sex workers' feelings on a strict decriminalization model versus a legalization model, data is limited; but according to author Ronald Weitzer:

Every conceivable form of legalization would be rejected by at least some eligible prostitutes, who would see no benefits in abiding by the new restrictions (e.g., mandatory registration or health examinations) and would resent the infringement on their freedom. While some streetwalkers, for example, would accept a policy zoning street transactions into a locale away from residential areas provided that it is safe and unthreatening for prostitutes and customers alike, others would reject this arrangement for personal reasons.<sup>136</sup>

Of course, any new law is likely to face some sort of opposition. Nevertheless, with time, legalization will start to be accepted and gradually less stigmatized. This was evidenced in Nevada, where legal brothels have garnered support from 52% of Nevadans overall, a number that is even higher in the counties with legalized brothels.<sup>137</sup>

A 2009 San Francisco study of mostly street-based sex workers also attempted to answer the question of how sex workers themselves feel about legalization versus strict decriminalization.<sup>138</sup> The study revealed that 71% of the participants supported the removal of all laws that make sex work illegal; 79% felt sex workers "should determine their own working conditions without being taxed or regulated by government;" and 84% approved of mandatory health screenings to be able to conduct sex work.<sup>139</sup> Study participants' primary complaint in regard to

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133. WEITZER, *supra* note 2, at 100.

134. *Id.*

135. In New Zealand, licensing requirements has not led to a two-tiered system of legal versus illegal venues, because the certificates are relatively easy to acquire and are inexpensive (about \$200). *Id.* at 99.

136. *Id.* at 84.

137. *Id.* at 89.

138. Lutnick & Cohan, *supra* note 82.

139. *Id.* at 42–43.



legalization was taxation.<sup>140</sup> Unfortunately, the disparate preferences of wanting legal protection without paying taxes cannot coexist.

Despite the potential for some continued illegal work, legalization can still achieve success that outweighs the potential negatives. For example, New Zealand had numerous goals in passing the Prostitution Reform Act, including reducing victimization and exploitation of sex workers and institutionalizing labor rights for workers.<sup>141</sup> After much research, the PLRC “concluded that legalization had achieved many of its objectives and that the majority of individuals involved in the sex industry were better off now than under the prior system.”<sup>142</sup> Furthermore, additional research shows that where sex work has been legalized in some way, HIV prevalence among sex workers is significantly lower than other countries where sex work is criminalized.<sup>143</sup>

Another significant counterargument to legalizing sex work is that it promotes or provides a cover for sex trafficking.<sup>144</sup> As noted by numerous organizations working toward improving sex work conditions, including UNAIDS and the Global Commission on HIV and the Law, it is extremely important to differentiate between sex work and sex trafficking.<sup>145</sup> Sex work is consensual and entered into freely through the negotiation of sexual services whereas sex trafficking comprises of various forms of exploitation involving coercion and deceit.<sup>146</sup> Far too often, the two are conflated, in turn denying sex workers’ “autonomy and agency.”<sup>147</sup> According to UNAIDS, many anti-sex trafficking projects, through this broad conflation, often disrupt and weaken efforts to provide sex workers with access to HIV prevention, treatment, care, and support.<sup>148</sup> As a result, the Global Commission on HIV and the Law recommends that those projects target cases of sexual exploitation specifically without interfering with services and programs designed to improve the health and human rights of voluntary adult sex workers.<sup>149</sup>

## CONCLUSION

As discussed throughout this Note, there is strong evidence to support the assertion that criminalization of sex work increases HIV acquisition and transmission risk among sex workers. Compared to criminalization of sex work,

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140. *Id.* at 42.

141. WEITZER, *supra* note 2, at 97.

142. *Id.* at 100.

143. Aaron Reeves et al., *National Sex Work Policy and HIV Prevalence Among Sex Workers: An Ecological Regression Analysis of 27 European Countries*, THE LANCET, Jan. 24, 2017 at 1.

144. *See Policy to Protect the Human Rights of Sex Workers*, *supra* note 74.

145. *See HIV and the Law: Risks, Rights & Health*, *supra* note 42, at 43; *UNAIDS Guidance Note on HIV and Sex Work*, *supra* note 105, at Annex 3.

146. *UNAIDS Guidance Note on HIV and Sex Work*, *supra* note 105, at Annex 3.

147. *Id.*

148. *Id.*

149. *HIV and the Law: Risks, Rights & Health*, *supra* note 42, at 39.

legalization is the better model in that than it legitimizes sex work as an occupation. Such recognition affords sex workers greater safety through their ability to organize and collaborate with the government and law enforcement.<sup>150</sup> It also encourages safer sex practices by shifting power from the client to the worker and allows for sex worker collectives and HIV prevention programs to conduct better outreach.<sup>151</sup> Though stigma and discrimination will not immediately disappear, legalization “affects the degree to which workers feel empowered to assert their rights to managers, clients, and government officials.”<sup>152</sup>

In the U.S., legalization is a much better solution to the current state of prostitution laws, especially in the fight against HIV among sex workers. With improving health as the primary focus, legalization and regulation of sex work by will achieve great success by combining methods that have proven to be effective with regard to safety and health in Nevada, Germany, the Netherlands and New Zealand, while also employing the inclusiveness of New Zealand’s model. To truly decrease HIV risk within the sex worker population in the U.S., legalization of sex work is imperative.

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150. *10 Reasons to Decriminalize Sex Work*, *supra* note 18, at 1.

151. *Id.*

152. WEITZER, *supra* note 2, at 100.