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Lone Voice in the Wilderness: Centering Sex Workers' Rights in Prostitution Policy

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ABSTRACT:

Sex work and its legal status is a controversial and divisive subject amongst feminist scholars and lawmakers alike. While sex workers are often subject to violence and discrimination simply by virtue of their labor, legal institutions designed to protect individuals from such experiences tend to exacerbate their impacts on sex workers. Sympathetic lawmakers and scholars have attempted to implement laws to the benefit of sex workers but have struggled to successfully ameliorate the harms they experience both at work and during their everyday lives. This paper attempts to explicate the ways in which purportedly beneficial laws actually work to the detriment of sex workers and how even piecemeal reforms can yield substantial improvements in sex workers' lives. By surveying the effects that policing practices, the Human Trafficking Intervention Courts, and discriminatory public housing laws in New York City have on sex workers, this paper proposes legislative reforms which would improve lives and working conditions for sex workers. An examination of these institutions reveals the need to center sex workers' rights, perspectives, and voices alongside a shift toward a legislative philosophy of harm reduction in order to eradicate discrimination and violence against sex workers.

On August 14th, 2015, Amnesty International announced a new policy position calling for the international decriminalization of sex work.¹ This controversial decision was reached after years of research conducted directly with sex workers in four regions of the world as well as consultation with international organizations such as with relevant interests and experiences such as UNAIDS and WHO.² An explanatory supplement published at the time of the draft's initial release explicitly recognized the need for states to protect and respect the lives and work of sex workers, citing evidence of their marginalization and vulnerability to violence as a direct result of criminalization itself. Amnesty International's endorsement of decriminalization is unprecedented because it places sex workers' voices at the center of the conversation; this was an historic shift away from speaking *about* sex workers to *listening* to them speak about their own experiences.³ Amnesty also reaffirmed their "long-standing" opposition to human rights abuses such as trafficking, carefully distinguishing between the experience of individuals forced into sex work by a third party individual and those who freely chose the work, even if motivated by poverty or lack of opportunity.⁴ According to Amnesty, an individual should be free to engage in work of their choosing free of violence and criminalization regardless of their reason for involvement in the first place, making clear that the question of criminalization is one in which

¹ Catherine Murphy, "Sex Workers' Rights are Human Rights," Amnesty International, August 14, 2015, <https://www.amnesty.org/en/latest/news/2015/08/sex-workers-rights-are-human-rights/>.

² Alison Phipps, "'Disappearing' sex workers in the Amnesty International debate," Open Democracy, August 7, 2015, <https://www.opendemocracy.net/5050/alison-hipps/disappearing-sex-workers-in-amnesty-international-debate>.

³ Ibid.

⁴ Murphy, "Sex Workers' Rights are Human Rights."

the lives and well-being of sex workers are truly at stake.⁵ Even if the details of the proposals themselves remained up for debate or revision, the voices and concerns of sex workers were still central to the document's content and that was an unprecedented step toward respect for sex workers' human rights.

Amnesty's draft resolution was met with a cacophony of sensationalized fury. The Coalition Against Trafficking in Women (CATW), an internationally vocal anti-trafficking organization, published an open letter in protest of the resolution and its purported "decriminalization of pimps, brothel owners and buyers of sex."⁶ The letter not only characterized decriminalization efforts as solely for the benefit of "pimps" and buyers of sex, but directly defined prostitution "as a form of violence against women and an affront to human dignity."⁷ The letter drew significant attention not only for its sensationalizing language, but also for what accompanied it: a list of several dozen signatories to the letter from around the world. Among these signatories were high-ranking members of women's organizations from around the world, trafficking survivors, and prominent celebrities such as Meryl Streep, Gloria Steinem, Lena Dunham, and many others.⁸ The list of signatures is notable because it includes individuals and organizations with explicit, well-intentioned, and out-spoken interests in progress and protections for women. However, their opposition to this resolution is demonstrative of the complicated reality of the contemporary debates surrounding prostitution: that those who oppose

⁵ Amnesty International, "Sex workers' rights: Explaining our draft policy on sex work," Amnesty International UK, accessed July 29, 2016, <https://www.amnesty.org.uk/consultation-draft-policy>.

⁶ Coalition Against Trafficking in Women, Open Letter, July 22, 2015, <http://catwinternational.org/Content/Images/Article/617/attachment.pdf>.

⁷ Ibid., 3.

⁸ Ibid., 4-23.

measures aimed at supporting sex workers' rights do so out of the misguided belief that they do, in fact, have sex workers' best interests at heart. Anti-prostitution feminists and other leftist political actors assume themselves to be not only more interested in sex workers' well-being than their political opponents, but have also deemed themselves alone to be capable of ameliorating the plight of violence against women in this particular form.⁹ In other words, they are well-intentioned liberal champions of women's rights who inadvertently support policies which directly cause state-sanctioned violence against sex workers around the world.

Why is this happening? How can these well-meaning political and cultural figures be so reluctant to place sex workers' rights and interests at the center of the conversation about sex work itself? An examination of recent politics and ideology, both of which have worked in concert to suppress the voices of sex workers over the last few decades, can help explicate this unfortunate phenomenon. Since the 19th century, exaggerated narratives of "white slavery" have dominated the mainstream discourse around trafficking and, by extension, 'prostitution' in the United States. This has propagated a racially-charged understanding of prostitution as a violation of white women's sexual purity simultaneous with an understanding of prostitution as something in which "good" women do not engage.¹⁰ Throughout the 20th century, the symbolic spectacle of the trafficking victim created by the fiction of "white slavery" has continually circulated in our culture at the expense of sex workers' own voices. Violent and sensationalized stories of sex trafficking that dominate the media narrative of prostitution gain much more mainstream traction

⁹ Melissa Gira Grant, *Playing the Whore: The Work of Sex Work* (New York: Verso, 2014), 36.

¹⁰ Carol Leigh, "Anti-trafficking campaigns, sex workers and the roots of damage," Open Democracy, March 26, 2015, <https://www.opendemocracy.net/beyondslavery/carol-leigh/antitrafficking-campaigns-sex-workers-and-roots-of-damage>.

than the voices of sex workers speaking of their own lived experiences and realities.¹¹ This is not to say that there have not been substantial efforts made on the part of sex worker activists and advocates to change the dominant narrative about “prostitution”; their voices have simply been marginalized and excluded from the mainstream conversation.

While sensationalized trafficking stories continue to carry significant weight in sex work debates, recent political history can also help to explain the mainstream resistance to protecting sexual labor. The 1960s and 1970s domestic cultural revolution created the conditions for the rise of various social movements aimed at eradicating social, political, and economic inequality.¹² This was equally true for sex workers; in 1973, Margo St. James founded Call Off Your Old Tired Ethics (COYOTE), the first widely-recognized sex worker activist organization in the United States.¹³ A common denominator amongst sex worker activists and advocates, including COYOTE, has been the reclamation of popular understandings of prostitution as both sin and a criminal activity, and its redefinition as a form of freely-chosen labor protected by civil and labor rights.¹⁴

In the late 1980s and early 1990s, however, revolutionary social movements witnessed the their gradual exclusion from mainstream politics alongside the rise of increasingly conservative political actors. The context of the “culture wars” which had facilitated the rise of

¹¹ Juniper Fitzgerald, “Celebrity And The Spectacle Of The Trafficking Victim,” Tits and Sass, August 7, 2015, <http://titsandsass.com/celebrity-and-the-spectacle-of-the-trafficking-victim/>.

¹² Lisa Duggan, *The Twilight of Equality? Neoliberalism, Cultural Politics, and the Attack on Democracy* (Boston: Beacon Press, 2003), ix.

¹³ Grant, *Playing the Whore*, 22.

¹⁴ Valerie Jenness, “From Sex as Sin to Sex as Work: COYOTE and the Reorganization of Prostitution as a Social Problem,” *Social Problems* 37 (1990): 404.

the radical left politics of the 1970s began to dwindle as both Conservative and Liberal politicians and interest groups in American politics formed subtle alliances.¹⁵ The activist remnants of the 1970s sought to find their place in this shifting political landscape. In an effort to achieve what seemed politically possible, civil rights groups and organizations borne of revolutionary social movements moved increasingly toward the political right in order to accommodate the mainstream centrism coming to the fore.¹⁶ It was within this macro-political context that the sex worker activist movement in the United States and their decriminalization agenda gradually faded from the public eye, unable to fit neatly into the increasingly conservative cultural and political mainstream. The demands made by COYOTE to decriminalize sex work and treat prostitutes as workers could not be accommodated by the new moderate left, thereby disqualifying such understandings of sex work from achieving popular recognition.

Popular discussions of sex work are made even more challenging by the nature of the conversations themselves. Today, “prostitution” is understood not as a question of pragmatic policymaking, but rather through the historically- and emotionally-charged lens of morality politics. A defining characteristic of “morality politics,” (and one which is particularly crucial in understanding the stagnancy of prostitution policy) is the notion that “morality policy is lay policy.”¹⁷ Political actors and their constituents see themselves as personally and morally

¹⁵ Duggan, *Twilight of Equality?*, xix.

¹⁶ *Ibid.*, xviii.

¹⁷ Hendrik Wagenaar and Sietske Altink, “Prostitution as Morality Politics or Why it is Exceedingly Difficult to Design and Sustain Effective Prostitution Policy,” *Sexual Research and Social Policy* 9 (2012): 283.

invested in the fundamental principles being debated in discussions surrounding prostitution such as morality and sex, religion and sin, and sexual violence. Instead of defaulting to the empirical evidence or perspectives offered by experts with relevant experience and knowledge (including sex workers themselves), everyday citizens and political administrators feel entitled to assert their personal opinions as Truths and use those opinions as the basis of policy formation.¹⁸ Furthermore, prostitution policy is an emotionally charged issue and, subsequently, opinions about it are often impervious to influence by dependable evidentiary support.¹⁹ This only exacerbates the effects of how difficult it can be to gather empirical evidence in the first place. The criminalized and stigmatized nature of sex work make accurate data collection and analysis a challenging endeavor.²⁰ Taken together, these factors make the prostitution debate impossibly divisive and stagnant; the excess of unreliable statistical data gives every anti-prostitution argument a facade of scientific rationality through which to advocate their position.

This unduly negative understanding of sex work has had both material and discursive impacts on the prostitution debate. The inseparability of sex work and morality politics has contributed to what author and former sex worker Melissa Gira Grant terms the “prostitute imaginary,” through which the dominant idea of the “prostitute” has been created and from which political arguments about “prostitution” flow.²¹ This identity, produced through and by history to associate particular behaviors and forms of labor with deviance, sin, or victimization,

¹⁸ Ibid., 283.

¹⁹ Ibid., 284.

²⁰ Ibid., 281.

²¹ Grant, *Playing the Whore*, 4.

is embedded in the mainstream use of the term “prostitution.”²² At the current cultural and political stage, understanding “sex work” as a form of labor is still a process being undertaken by sex worker activists, advocates, and scholars and is not yet the dominant notion associated with practices of prostitution.²³ The production of the idea of the “prostitute” is a process undertaken by people who are largely not engaged in the sex trades themselves. Conversely, the term “sex work” derives from the words and work sex worker activist Carol Leigh and continues to be used by sex worker activist organizations, carrying with it the movement’s demands to be recognized as workers engaged in labor.²⁴ The use of the term “sex work” itself marked the beginning of sex workers’ attempts at shaping their own public image.²⁵

What becomes evident when we examine these compounding factors is that the mainstream conversation about sex work’s legitimacy as a profession misses the point. As noted before, the voices which dominate the mainstream conversation about sex work do not come from sex workers themselves, but rather from political and ideological parties with a purported stake in the debate about whether it is “good” or “bad.” And while no uniform voice can speak to the needs, desires, interests, and demands of all sex workers, the great tragedy of the mainstream conversation is that it never once asks the questions: “What do sex workers need to survive? How can the law help them avoid violence, regardless of the perpetrator? What reforms could improve their quality of life? How can we decrease the amount of violence and poverty

²² Ibid., 13.

²³ Ibid., 15

²⁴ Ibid., 23

²⁵ At the risk of homogenizing all individuals engaged in sex work, using “sex work” broadly here is an effort to defer to the desires and interests of sex workers in their own representation. Ibid.

experienced by members of this diverse community?” These questions will be the fundamental premise of this paper.

HARM REDUCTION

Sex workers often face risky and potentially harmful situations, be they in the form of violent encounters with police or customers, risk of disease contraction, poverty and homelessness, or other modes of exploitation.²⁶ The cyclical nature of the harm associated with sex work and one’s involvement in sex work in the first place make a re-orientation toward a philosophy of harm reduction even more crucial; harm reduction can and should be seen as a paradigm shift toward minimizing the occurrence of violence experienced by sex workers and away from criminalizing them.²⁷ Listed as the second principle of Amnesty International’s draft resolution on sex work,²⁸ harm reduction in this particular context recognizes the ongoing existence of sex work and, rather than seeking only to abolish it, tries instead to create policies which help to reduce the harm experienced by individuals engaged in it. Laws and policies working to reduce the negative effects of engaging in sex work, for example, are more likely to reduce the suffering experienced by sex workers than a campaign aimed solely at the eradication of the practice itself would be.²⁹

Confusion, conflation, and apprehension at the notion of “harm reduction” has precluded its widespread use and acceptance in many parts of the United States, including the federal levels

²⁶ Michael L. Rekart, “Sex-work harm reduction,” *The Lancet* 366 (2005): 2124-2125.

²⁷ *Ibid.*, 2130-2131.

²⁸ Phipps, “‘Disappearing’ sex workers.”

²⁹ Katherine Beckett, “The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing,” *Harvard Law and Policy Review* 10 (2016): 85.

of government. Concerns about what constitutes “harm reduction” initiatives make it a politically divisive term and an ambiguous concept to discuss.³⁰ Ideas about what “harm reduction” means can range from drug decriminalization to support for grassroots, user-led movements to educational initiatives.³¹ Pragmatically speaking, harm reduction refers to the “application of what works to reduce overall harm” experienced by individuals engaged in particular behaviors; in this case, harm reduction initiatives designed to decrease the harmful effects of involvement in sex work.³² While it is not my goal to establish or even apply one single, sweeping notion of “harm reduction,” this paper will assume harm reduction to mean “a set of compassionate and pragmatic approaches for reducing harm”³³ in the context of sex work in New York City, specifically. While the proposals will not universally apply across all contexts and may not encompass the full range of potential harm reduction initiatives which could apply to this context, this particular (if broad) understanding of harm reduction will underlie the approach to reform proposals taken in this paper.

Harm reduction as a fundamental theory of service provision is not unprecedented in New York. The application of a harm reduction philosophy to sex work can work to the benefit of sex workers much in the same way that it has benefited drug users.³⁴ For example, while the use of intravenous controlled substances is illegal in New York, organizations are legally allowed

³⁰ Susan E. Collins, et al., “Current Status, Historical Highlights, and Basic Principles of Harm Reduction,” in *Harm Reduction: Pragmatic Strategies for Managing High-Risk Behaviors*, ed. Alan G. Marlatt, Mary E. Larimer, and Katie Witkiewitz (New York: The Guilford Press, 2012) 4.

³¹ *Ibid.*, 5.

³² *Ibid.*, 7.

³³ *Ibid.*, 5.

³⁴ Rekart, “Sex-work harm reduction,” 2123.

to “obtain, possess, and furnish” needles for patients in an effort to prevent the spread of HIV amongst drug-users.³⁵ While drug use and sex work are often categorized together under the umbrella of “high-risk behavior,”³⁶ the harm reduction model has thus far been extended only to drug users. Just as New York City has successfully adopted a needle exchange policy with a decriminalization component, providing meaningful opportunities for access to necessary social services while avoiding incarceration could lead to crucial harm-reducing benefits for sex workers.³⁷

Like the CATW open letter’s signatories, New York lawmakers have implemented a number of well-intentioned policy initiatives aimed at protecting trafficking victims in recent years, even unintentionally to the detriment of sex workers. The 2007 Anti-Trafficking bill established that “a person has been trafficked when another has advanced or profited from their prostitution by means of various coercive behavior including providing drugs, debt bondage, physical harm and coercion, and even ‘false statements’ or ‘any other act . . . which is calculated to harm the person.’”³⁸ The political debate which followed in the coming years sought to draw distinctions between prostitution and trafficking³⁹, laying the groundwork for a court system designed to assist individuals with coercive involvement in the sex trades while continually criminalizing prostitution’s willing participants. This was followed shortly by the state’s

³⁵ Chelsea Breakstone, “‘I Don’t Really Sleep’: Street-Based Sex Work, Public Housing Rights, and Harm Reduction,” *CUNY Law Review* 337 (Summer 2015): 315.

³⁶ Collins, et al., *Harm Reduction*, 5.

³⁷ Breakstone, “‘I Don’t Really Sleep,’” 371.

³⁸ Aya Gruber, Amy J. Cohen, and Kate Mogulescu, “Penal Welfare and the New Human Trafficking Intervention Courts,” *Florida Law Review* Forthcoming (May 2016): 21.

³⁹ *Ibid.*, 21.

innovative vacatur bill, passed in 2009, which allowed survivors of trafficking to have prior prostitution convictions vacated from their criminal records.⁴⁰ These legislative developments illuminate the conflation of trafficking with sex work at the United States' highest political levels, demonstrating both the limitations and the opportunities offered by political and legal reforms. While this understanding of sex work recategorizes those involved as victims (and, therefore, not as criminals), this paradigm shift is not wholly productive in the longterm.

Through a critical examination of the intentions, functions, and effects of institutions affecting sex workers' lives, this paper will attempt to re-center sex workers' interests in the conversation and propose meaningful (if piecemeal) reforms. This paper will chronologically trace sex workers' experiences interacting with the criminal justice system; the process will begin with on-the-ground encounters with law enforcement through police profiling practices, the impacts of loitering laws, and discriminatory zoning ordinances. Next, this paper will attempt to explicate the sex worker perspective of New York's recently-instituted Human Trafficking Intervention Courts, a first-of-its-kind court system designed to deal with all prostitution-related court proceedings. Finally, an examination of discriminatory housing restrictions will reveal one of the many ways in which the criminal justice system creates a revolving door of involvement for sex workers. Drawing on studies conducted by legal scholars, academics, activists, and sex workers alike, this paper will propose recommendations which can change the ways in which these systems impact sex workers themselves in spite of overarching political reality that sex work will most likely *not* be decriminalized in the immediate future. This paper, therefore, recognizes that an individual's right to engage in sex work safely, regardless of the circumstances

⁴⁰ Ibid., 22.

of their involvement, should be respected and should never preclude their access to necessary legal and social assistance.

SPATIAL DISCRIMINATION: POLICE PROFILING, LOITERING, AND ZONING ORDINANCES

Sex workers have had an historically fraught and often hostile relationship to law enforcement. This hostility has a mutually reinforcing relationship to the laws designed to curb the existence and visibility of sex work; these laws range from the overarching criminalization of sex work to the loitering laws which govern the movements and spatial politics of neighborhoods in which sex work is a prominent component of the local informal economy. People of color and trans individuals involved in the sex trades are, statistically speaking, even more likely to be subjected to discriminatory policing practices. Broad police discretion often leads to profiling individuals as sex workers not because of their proved involvement in the sex trades, but rather because their performed sexuality has been deemed deviant and dangerous to the rest of society. Laws prohibiting loitering for the purposes of prostitution also influence not only sex workers but even individuals with infrequent involvement (and sometimes even no involvement at all) in the sex trades. Their roots in vagrancy laws which once governed the politics of respectable and moral public behavior help to explicate how laws prohibiting loitering continue those antiquated processes of separating “good” from “bad” citizens. Zoning ordinances serve the related function of creating segregated spaces for individuals deemed “deviant” by the dominant culture, thereby causing both economic inequality and perpetuating a cycle of criminalization in often racially-disparate contexts. Police profiling, loitering laws, and spatial segregation work in concert to

move a revolving door of criminalization, thereby ensnaring some of the most marginalized communities in the United States, including sex workers.

POLICE PROFILING AND LOITERING LAWS

Contemporary loitering laws and the profiling practices used to enforce them stem from earlier tools of social control enacted to eradicate particular behaviors. During the first half of the 20th century, vagrancy laws designated certain behaviors (such as drug use and sex work) as deviant and sought to eradicate those behaviors by deterring their public visibility. These were used to segregate deviants from the dominant society, criminalize undesirable behavior, and eliminate red-light districts until they came under scrutiny in the 1960s and 1970s during a brief “rights revolution” in the United States’ court system.⁴¹ During this period, even the Supreme Court felt blows to overly-broad loitering or vagrancy laws; in one court case, *Papachristou v. City of Jacksonville*, the court ruled that a questionable Florida loitering law served as nothing more than “harsh and discriminatory enforcement by displeasure.”⁴² Existing vagrancy laws were seen by the courts as both too broad and too vulnerable to abuse by police exercising biased discretion.⁴³ But while vagrancy laws remain unconstitutional, loitering laws have been rewritten to subtly function as a direct substitute for the very “civility laws” they were created to replace.⁴⁴

Today, loitering-with-intent laws function as a form of social control designed to isolate and ‘banish’ marginalized communities deterring their visible presence in public spaces.

⁴¹ Katherine Beckett and Steve Herbert, *Banished: The New Social Control in Urban America* (New York: Oxford University Press, 2009), 13.

⁴² *Ibid.*

⁴³ Beckett, *Banished*, 13.

⁴⁴ *Ibid.*, 14-15.

Loitering laws, exclusion orders designed to ‘banish’ deviant individuals from particular urban spaces, and other modes of spatial social control are fundamentally counterproductive to the intention of integrating people as fully as possible into mainstream society. This leads not to reformation of behavior and acclimation to socially accepted modes of existence (as is the presumed goal of any policing tactic, diversionary or otherwise) but rather to a revolving door of perpetual criminal justice involvement.⁴⁵ This revolving door effect stems from the profiling practices developed to enforce loitering laws; the criteria for arresting an individual for “loitering for the purposes of prostitution” often prevents individuals with criminal records or past encounters with the police from even existing in public spaces for fear of being arrested or profiled as engaging in sex work.

Police profiling is a statistically demonstrable phenomenon affecting sex workers, and particularly people of color and trans individuals. The Red Umbrella Project (RedUP), a sex worker activist organization operating in New York City, conducted an extensive survey on police profiling and loitering laws in Brooklyn and Queens. The numbers in the report are staggering; in 2011 alone, officers from the 110th precinct in Elmhurst, New York conducted 10,795 stop-and-frisks, 90% of which were of black or Latina/o people. The majority of the respondents to the study (82% of non-LGBTQ and 77% of LGBTQ respondents) were people of color. Of the non-LGBTQ respondents, 28% reported having been stopped by the police (and many felt that it had been for no legitimate reason at all). For transgender and LGBTQ respondents, however, the numbers just about doubled: 59% and 54%, respectively. What this data disparity speaks to is the degree to which perception of sexual orientation, behavior, or

⁴⁵ Ibid., 17.

occupation increases the likelihood that a person be stopped by the police, often on suspicion of loitering for the purposes of prostitution.⁴⁶

Racism, poverty, transphobia, and the stigmatization of sex work have a compounding effect on communities of color and immigrants, especially for those involved in outdoor sex work. Trans communities are particularly vulnerable to discriminatory policing tactics, in part due to the fact that trans individuals are likely to be driven to sex work by the effects of systemic discrimination.⁴⁷ The National Transgender Discrimination Survey (NTDS) found that trans people are more likely to experience high levels of discrimination in every area of life, from suffering poverty and unemployment to negative interactions with the police and criminal justice system. This confluence of factors often drives transgender individuals into the sex trade in order to survive. Once involved in sex work, further stigmatization reinforces the conditions which lead to excessive policing in the form of profiling and the enforcement of loitering laws.⁴⁸ Given that strolls (locations where street-level prostitution tends to take place) are often located in low-income neighborhoods or communities of color, discriminatory loitering laws and profiling practices dramatically increase the odds of a person being criminalized simply for walking down the street in their own neighborhood.

⁴⁶ Make the Road New York, “Report: Transgressive Policing: Police Abuse of LGBTQ Communities of color in Jackson Heights,” Make the Road, October, 2012, http://www.maketheroad.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf, 17.

⁴⁷ Red Umbrella Project, “Meaningful Work: Transgender Experiences in the Sex Trade,” *Red Umbrella Project*, accessed June 23, 2016, http://www.redumbrellaproject.org/wp-content/uploads/2015/12/Meaningful-Work-Full-Report_FINAL_3.pdf, 4.

⁴⁸ Red Umbrella Project, “Meaningful Work,” 7.

Police profiling of sex workers has a mutually reinforcing relationship to the marginalization of sexualities and identities deemed deviant by the dominant culture. Police discretion shields the micro-level racial biases which underlie notions of what is “suspicious” or what constitutes “probable cause.”⁴⁹ Criminalizing sex workers becomes a means of violently reinforcing gender norms, including the binary which excludes the lives and identities of trans individuals through policing practices.⁵⁰ It also becomes a context through which to perpetuate presumptions of black women’s sexualities as intrinsically deviant, labeling black women’s behavior as inherently “disorderly,” and justifying increased police scrutiny and even arrest.⁵¹ In this way, profiling practices serve to marginalize and criminalize sex workers and broader marginalized communities affiliated with sex work’s deviance, regardless of an individual’s actual engagement in the sex trades. The conditions for being profiled as a sex worker are appallingly ordinary. RedUp’s study explicates some of the criteria for being profiled as a sex worker; this criteria includes (but is not limited to) wearing low-hanging sweat pants or a tank top, carrying a clutch with lipgloss and condoms inside, standing in close proximity to one or more condom wrappers, or being seen in public with individuals whom officers know to have been arrested for prostitution-related activities in the past.⁵² This creates a cyclical and self-

⁴⁹ Andrea J. Ritchie, “Crimes Against Nature: Challenging Criminalization of queerness and Black Women’s Sexuality,” *Loyola Journal of Public Interest Law* 233 (2013): 367.

⁵⁰ *Ibid.*, 367-368.

⁵¹ *Ibid.*, 368.

⁵² Audacia Ray and Emma Caterine, “Criminal, Victim, or Worker? The Effects of New York’s Human Trafficking Intervention Courts on Adults Charged with Prostitution-Related Offenses,” Red Umbrella Project, October, 2014, <http://www.redumbrellaproject.org/wp-content/uploads/2014/09/RedUP-NYHTIC-FINALweb.pdf>, 20.

reinforcing system of criminalization which labels some gender performances intrinsically deviant, allegedly by association with a criminal activity.

ZONING ORDINANCES

In addition to loitering laws and profiling practices, zoning ordinances serve to alienate deviant individuals and businesses from public life. In 1995, New York City implemented the Adult Entertainment Ordinance, which precluded adult businesses from expanding and designated spaces in which they could not exist at all. The ordinance distinguished sex industry establishments from other commercial locations by prohibiting them from existing in close proximity to residential locations, schools, or locations of worship.⁵³ The ordinance allows the city to employ a “secondary effects” test to determine if an institution could have potentially negative effects on a community; if an adult business is found to negatively affect public health, safety, or welfare, the ordinance will preclude it from existing in close proximity to society’s “good” institutions. These effects have historically been demonstrated by anything from an increased crime rate to the depreciation of property values, but has also included such broad criteria as deteriorating the quality of life in a community.⁵⁴

One justification for zoning ordinances has been the protection of women and children. The paternalistic undertones of these laws make the protection of women and children the moral justification for these “quality of life” ordinances,⁵⁵ begging the question of which women and children are actually being protected by them. This presumes not only that certain women require

⁵³ Jennifer Cook, “Shaken From Her Pedestal: A Decade of New York City’s Sex industry Under Siege,” *New York City Law Review* 9 (Winter 2005): 134.

⁵⁴ Cook, “Shaken From Her Pedestal,” 133.

⁵⁵ *Ibid.*, 139.

protection from exposure to sexually explicit material, but that certain women require protection from potential involvement in the sexually exploitative sex trades themselves. This further signals the depths of trafficking's conflation with voluntary sexual labor.⁵⁶

The dominant implication of such zoning ordinances, however, are normative assumptions about sex and morality which marginalize sex workers in the first place. Zoning ordinances such as this have historically been used to segregate urban areas by separating “wholesome” institutions and spaces from those which violate society’s norms of morality and public order.⁵⁷ The measurement of secondary effects gives zoning ordinances the appearance of scientific neutrality or “reasonability.”⁵⁸ the socially constructed designations of which kinds of establishments should exist near one another illuminate the underlying moralism and degradation of sexual labor which justify such ordinances.⁵⁹ The distribution and uses of particular urban spaces has the power to materially segregate and socially project the underlying cultural norms which created it in the first place.⁶⁰ This kind of material articulation is particularly demonstrable in the case of sexual labor and its relegation to low income communities of color within NYC itself. The criminalization of visible sexual labor in particular public spaces signals that, in fact, it is inconsistent with the social norms of those public spaces. Cultural, moral, and political ideas about sex and deviance govern this construction and organization of life within urban spaces,

⁵⁶ Ibid., 140.

⁵⁷ Ibid., 156.

⁵⁸ Stephanie Lasker, “Sex and the City: Zoning “Pornography Peddlers and Live Nude Shows,” *UCLA Law Review* 49 (April 2002): 1142.

⁵⁹ Lasker, “Sex and the City,” 1142.

⁶⁰ Ibid., 1143.

thereby continually reproducing those norms.⁶¹ Not only are sex workers relegated to the margins by these political structures, but they are continually deemed deviant by the society which sees sexual labor as something to be segregated. In the case of sex workers, this becomes one more tool of spatial control designed to further segregate an already marginalized community and separate it from the bourgeois classes of society.⁶²

CONCLUSIONS

While the criminalization of sex work makes broad policy changes difficult in these areas, the application of a harm reduction philosophy could yield some feasible piecemeal reforms. The groundwork for reconsidering some of these laws is already in place; for example, the constitutionality of loitering laws and other forms of spatial policing have already been challenged by sex workers and advocates. RedUp's 2013 study *Criminal, Victim, or Worker?* draws attention to the problematic policing practices that accompany the existence of the New York Penal Law 240.37, which criminalizes loitering for the purpose of engaging in prostitution. Analogizing the law to the controversial "stop-and-frisk" laws ruled unconstitutional in *Floyd, et al. v. City of New York, et al* in 2013.⁶³ RedUP argues that the very existence of laws criminalizing 'loitering for the purposes of engaging in prostitution' should be questioned if not eliminated entirely. Their study, expanding upon a 2012 study conducted by Make the Road New

⁶¹ Ibid.

⁶² Ibid., 1159.

⁶³ Ray and Catherine, "Criminal, Victim, or Worker?" 6.

York entitled *Transgressive Policing*⁶⁴, illuminates the degree to which these loitering laws provide inroads for law enforcement to engage in unlawful racial profiling and the policing of people whose sexualities are perceived as deviant. The data represented in the report speaks to the mutually reinforcing relationship between problematic profiling practices and laws prohibiting loitering for the purposes of prostitution.⁶⁵ Having prior arrests for prostitution-related offenses and being seen on the street by an officer familiar with your criminal record is sufficient to receive a citation for loitering for the purposes of prostitution;⁶⁶ these kinds of policies only perpetuate the hostility between law enforcement and the communities they interact with.

While police discretion may be difficult to regulate or prevent, an examination of its effects could be the first step toward reform. Some scholars have already explored potential means of holding law enforcement officers and institutions accountable for biased policing practices, but few conclusive proposals have been made.⁶⁷ Katherine Beckett, a Professor in the Law, Societies and Justice Program from the University of Washington, points to applying a harm reduction model to policing as a crucial step toward eradicating the negative effects (if not the prevalence) of police profiling and discretion. According to Beckett, “an alternative policy

⁶⁴ Make The Road New York is a non-profit organization who, for 17 years, has been dedicated to advancing policies to the benefit of Latino and working class communities in New York. They focus on a number of key issue areas including housing assistance, workplace justice, healthcare, youth empowerment, LGBTQ rights, and civil rights. Make the Road New York, “Who We Are,” Accessed August 2, 2016, <http://www.maketheroadny.org/whoweare.php>.

⁶⁵ Ibid.; Ray and Caterine, “Criminal, Victim, or Worker?” 17.

⁶⁶ Ray and Caterine, “Criminal, Victim, or Worker?” 19.

⁶⁷ Beckett, “Uses and Abuses of Police Discretion,” 79-80.

framework that seeks to redress [] human suffering,”⁶⁸ can lead lawmakers to implement programs designed with the interests of citizens, such as sex workers, in mind. For example, reconsidering the criteria for profiling an individual as a sex worker could not only prevent wrongful arrest, but begin the reformulation of how the law interacts with individuals with “deviant” sexualities.

Lastly, the outright elimination of zoning ordinances governing adult businesses ought to be considered by lawmakers in New York. Not only do these primarily serve a discriminatory and segregating function, but their influence over public perception of sexuality and sexual deviance have doubly negative effects for sex workers at the cultural level.⁶⁹ Shifts in the social and legal stigmatization of sex work require the erasure of material regulations which exclude them from broader society (in the form of zoning ordinances, in this instance). Taken together, these policies of spatial discrimination perpetuate sex workers’ exclusion from society and create a revolving door of criminalization: once an individual has been arrested once, their visibility in public spaces is sufficient to presume their guilt over and over again.

HUMAN TRAFFICKING INTERVENTION COURTS

In 2013, New York state became the first to implement a series of courts designed explicitly and solely for the purposes of dealing with potential instances of trafficking: the Human Trafficking Intervention Courts (HTICs). In some ways, the courts have demonstrated a significant divergence from the problematic criminalization of individuals arrested for prostitution-related offenses. Evidence of the decriminalizing premise of these courts can be

⁶⁸ Ibid., 80.

⁶⁹ Lasker, “Sex and the City,” 1143.

found in the stated intention of their creation: to reorient the relationship between potential victims of trafficking and to “promote a just and compassionate resolution” to prostitution-related cases.⁷⁰ The underlying assumption, however, is that any individual involved in the sex trades is intrinsically a victim of trafficking, as noted by RedUp’s 2013 report, and that they would *all* “prefer to do another job.”⁷¹

Prior to the creation of the HTICs, defendants facing prostitution-related charges could have a variety of in-court experiences depending upon the courthouse, the prosecutor, and presiding judge on a given day. This meant that some defendants could receive expedient and empathetic treatment in court, and even be offered social services instead of incarceration, while others might have a completely different experience. In the latter case, defendants could accumulate misdemeanor or violation charges on their criminal record without a second look from the court itself or any provision of alternative services.⁷² In spite of some continued variance in the practices of the HTICs, the uniformity established by the new court system in created an unprecedented amount of experiential consistency for defendants.⁷³ A crucial component of this consistency has stemmed from the consolidation of the majority of each

⁷⁰ Ray and Caterine, “Criminal, Victim, or Worker?” 3.

⁷¹ Since the inception of the courts in 2013, RedUP has been one of the only organizations engaged in a public dialogue via online publications regarding the function and impact of the courts on trafficking victims and sex workers alike. RedUP conducted a thorough in-house survey of the courts’ impact in Brooklyn and Queens, evaluating a year of the courts’ day-to-day functions and publishing a “sex worker-led report” in October of 2014. They further explicated these findings at a rally at City Hall in September, 2015, where they presented member testimony to a City Council oversight hearing about the courts themselves. This study offers an opportunity to not only incorporate the voices of sex workers into the evaluation of such legislative reforms, but to place their recommendations center-stage in the discussion of future improvements. Red Umbrella Project, “New York’s Human Trafficking Intervention Courts,” accessed June 14, 2016, <http://www.redumbrellaproject.org/advocate/nyhtic/>.

⁷² Gruber et al., “Penal Welfare,” 30.

⁷³ *Ibid.*, 31.

borough's prostitution-related proceedings into a single court room, on a single day, in front of a single judge trained to handle human trafficking court proceedings.⁷⁴ While a 2016 study⁷⁵ of the HTIC noted that training was inconsistently distributed to court officials across boroughs, their interviewees did indicate that they “embrace[d] the notion that a judge should act differently when adjudicating in HTIC.”⁷⁶ This shift in demeanor and approach to defendants is a unique facet of the HTICs⁷⁷ one which demonstrates a movement away from prior treatment of defendants in prostitution cases as run-of-the-mill criminals.

Proponents of the HTICs have also praised its de-emphasis on incarceration in favor of social services. This is manifested in the courtroom itself as defendants are offered opportunities to move forward with their lives without doing any jail time, theoretically decreasing their involvement in the criminal justice system. This process entails an agreement made with the court itself for the defendant to receive an Adjournment for Consideration of Dismissal (ACD) upon completion of a mandatory services program. The courts themselves determine what program of services a defendant will be required to complete; these programs will generally include anywhere from three to seven ‘meetings’ with a prescribed organization. Once the service program has been completed and the defendant avoids rearrest for a designated six-month period, they are granted an ACD. The ACD, which seals and dismisses the convictions in

⁷⁴ Ibid., 32.

⁷⁵ This forthcoming study, entitled “An Experiment in Penal Welfare: The New Human Trafficking Intervention Courts,” seeks to evaluate the effects of the HTIC system since its creation in 2013. The authors include two law professors as well as Kate Mogulescu, the founder and supervising attorney of the Exploitation Intervention Project at the Legal Aid Society of New York. Ibid., 1.

⁷⁶ Ibid., 33.

⁷⁷ Ibid., 34.

question,⁷⁸ provides a clean slate to individuals who would otherwise accumulate a detrimental criminal record, thereby theoretically offering them the opportunity to begin their post-conviction life anew. Failure to complete the mandatory program can result either in the assignment of a new program or in the denial of the ACD altogether. Furthermore, if a person is rearrested during the six-month period following their completion of the mandatory program, their charges remain and the process starts over entirely. Defendants are not required to accept the ACD or the mandatory services, and some may choose to pursue a full trial, but the intention of the court is to avoid the wrongful conviction of victims of trafficking and to offer them alternative services in place of penalization. If they do choose to reject the offer of an ACD, they will have the opportunity to pursue a full trial to challenge the charges leveled against them.⁷⁹ Given the incentives created by the ACD itself, however, it seems unlikely that many defendants would choose to pursue a full trial; not only would it require the expenditure of time and resources, but it risks being saddled with the prostitution charge forever.

The services offered to defendants are generally characterized by access to therapy or other resources which might help them get back on their feet. While some may have been offered social services before the HTICs, it is now the relative norm for defendants in these courtrooms. These services can range from one-on-one, trauma-based psychotherapy to group therapy, art therapy, life skills workshops, and sometimes even yoga.⁸⁰ The new services offered are,

⁷⁸ Ray and Caterine, “Criminal, Victim, or Worker?” 12-13.

⁷⁹ Ibid.

⁸⁰ Ray and Caterine, “Criminal, Victim, or Worker?” 12-13.

furthermore, meant to be not only relevant but uniquely beneficial and tailored to the lives, needs, and goals of the defendants themselves.⁸¹

Significantly, the acceptance of an ACD is *not considered an admission of guilt*.⁸² This reorientation of the criminal justice system away from requiring an admission of guilt in order to gain services through the legal system is, in many ways, a step forward. It is intended to signal to defendants that, in spite of their presence in a courtroom, they are not actually guilty of a crime and therefore not being treated as criminals. It is, however, still a limited change to the status quo criminalization of sex work; while a defendant does not have to admit guilt in order to receive an ACD, they still experience the arrest and court proceedings associated with criminalization.

The HTICs are not a perfect alternative to full decriminalization. While RedUP notes that the incarceration rate amongst defendants in prostitution-related court proceedings has decreased, the mandatory services offered to defendants seeking an ACD do not always address the survival-oriented aspects of their lives which might drive them to sex work in the first place. These programs, while well intentioned, may not always speak to the needs of individual defendants; they certainly do not begin to address the larger structural barriers which often prevent people from leaving the sex trades even if they want to such as poverty, lack of access to education or employment opportunities, and unstable housing.⁸³ Defendants often face almost insurmountable structural and systemic barriers which necessitate their involvement in the sex trade, and such circumstances are unlikely to be resolved by the mandated sessions in question.

⁸¹ Gruber et al., “Penal Welfare,” 35.

⁸² Ray and Caterine, “Criminal, Victim, or Worker?” 12-13.

⁸³ Ray and Caterine, “Criminal, Victim, or Worker?” 14.

Furthermore, as individuals' cases remain open during the period of time in which they work to complete the ACD, even the fact of their arrest could potentially prevent them from seeking employment outside of the sex trade, thereby increasing the possibility that they will be rearrested.⁸⁴

Furthermore, the well-intentioned premise of service provision does not preclude the occurrence of paternalism or coercion. A degree of controversy surrounds the idea that a court can or should compel a defendant — a defendant deemed a victim, rather than a criminal, by the very founding principles of the court itself — to engage in mandatory therapy of any kind in exchange for exemption from criminal justice involvement.⁸⁵ The intention of the mandatory service provision is seemingly rehabilitative, rather than punitive; however, this intention does not necessarily preclude defendants from interpreting the assignment of services as coercion or even as a subtler mode of criminalization.⁸⁶ Judges and prosecutors have even, at times, used incarceration as a way of seemingly protecting defendants whose life circumstances were deemed potentially dangerous. For example, a woman who had revealed an experience being trafficked by a recent boyfriend was subsequently sent to jail for her own alleged “protection.”⁸⁷ While this new system certainly signals movement away from the desire to punish arrestees toward an interest in providing services which look closely at each individual's particular

⁸⁴ Ibid.

⁸⁵ Gruber, et al., “Penal Welfare,” 29.

⁸⁶ Ibid., 30.

⁸⁷ Gruber, et al., “Penal Welfare,” 35.

circumstance and might meaningfully benefit their lives, this does not preclude the existence of coercive power dynamics between prosecutors and judges and defendants.⁸⁸

RedUp's sex worker activists have spoken out about two particular, harm-reduction based reforms which could improve the HTICs. The first is the need for collaboration between criminal justice systems, law enforcement officials, and local sex worker organizations. RedUP recommends peer advocacy as a supplement to social services, arguing that "support from people with experience in the sex trades . . . could create a more supportive environment and a better understanding of what is happening in the courtroom."⁸⁹ RedUP concludes by advocating for "collaboration with, organizing by, and listening to people in the sex trades," in the process of creating and implementing policies and services intended for their benefit.⁹⁰ Bringing the voices and perspectives of sex workers into the legal conversation about their own rights (or lack thereof) is a necessary prerequisite to building meaningful bridges between law enforcement and marginalized communities as well as building the foundations for productive future reform efforts.

The second proposal noted by RedUp's study is a fundamental reconsidering of the processes of engaging with sex workers. Even when post-conviction relief is available to people deemed victims by the judicial system, the process of arresting and convicting sex workers or victims of trafficking intrinsically criminalizes them; this criminalization can cause both psychological and physical harm while precluding any trusting relationship between sex workers

⁸⁸ Ibid.

⁸⁹ Ray and Caterine, "Criminal, Victim, or Worker?" 8.

⁹⁰ Ibid., 25.

and the legal system. Arrest and court involvement not only criminalize individuals but also tend to re-victimize sex workers and victims of trafficking alike. This criminalization does not address the larger structural issues which push people into the sex trades in the first place, nor do they reduce the harm done to people working in the sex trades, especially people whom they have profiled as being involved in sex work.⁹¹ As RedUP points out throughout the study, the question of whether or not sex workers should even have to engage with this system in any capacity should be closely interrogated. While the stated intention of the HTICs is to prevent defendants from being convicted as criminals, does their initial arrest not signal to them that they are being treated as such by the law enforcement and the courts? And are these circumstances under which sex workers and trafficking victims might find an improved relationship to the judicial system, or is such a structure likely only to reinforce their distrust of it?

Seattle's Law Enforcement Assisted Diversion Program (LEAD) serves as a potential model for piecemeal improvements to the HTICs. Under this program, individuals arrested for drug- or prostitution-related offenses are not booked or detained to await trial, but are rather assigned a LEAD case manager with whom they must meet with to create a plan of rehabilitative action. While the courts maintain the ability to charge the arrestee, it is presumed that individuals who complete their initial screening and a full intake assessment with an assigned LEAD case manager within thirty days of referral will not be charged.⁹² Unlike the mandatory therapy sessions assigned to defendants through New York's HTICs, LEAD case workers remain actively involved in the completion and evaluation of an arrestee's plan of action; this can include home

⁹¹ Ray and Catherine, "Criminal, Victim, or Worker?" 5.

⁹² Beckett, "Uses and Abuses of Police Discretion," 90.

visits, following up with recalcitrant clients, and work one-on-one to help clients achieve educational or personal goals, find employment and job training opportunities, or gain access to childcare and housing opportunities.⁹³

The most significant difference between the two programs is LEAD's fundamental premise upon principles of harm reduction. Rather than requiring immediate abstinence from the behavior in question (i.e. drug use or sex work), case managers are trained to recognize that behavioral changes are likely to happen very gradually and that some continued engagement with the criminalized behavior in question is inevitable. In fact, case workers recognize that the road to abstinence may not even exist for some individuals.⁹⁴ This clearly diverges from the HTIC policy regarding re-arrest; under LEAD's model, an individual trying to leave sex work would be more likely to have time to find meaningful occupational opportunities outside of the sex trades because they could continue to maintain a source of income throughout the process.

PUBLIC HOUSING DISCRIMINATION

For sex workers, cycles of criminalization do not end in the court room. Once an individual has been arrested for or convicted of a prostitution-related offense, even accepting an ACD cannot protect them from experiencing various modes of structural discrimination in other areas of life. Any encounter with the criminal justice system can potentially preclude an individual from qualifying for legal employment opportunities, often continuing lasting cycles of poverty without access to crucial social services. Often the motivation for engaging in sex work in the first place can derive from circumstances such as structural barriers to consistent housing, food, and other survival necessities. This is true in a broader sense for low income communities

⁹³ Ibid., 91.

⁹⁴ Ibid., 85.

of color and trans or gender nonconforming individuals, but the effects are exacerbated for those involved in the sex trades. Not only are sex workers likely to be unable to afford their own residence, but individuals who have accumulated a criminal record are typically in the most dire need of public housing assistance. Public housing is often the only safe, realistic, and stable option for individuals with any involvement with the criminal justice system to pursue, particularly after a period of incarceration. Ineligibility for public housing opportunities dramatically increases their chances of joining the ranks of the United States's homeless population,⁹⁵ leaving sex workers to engage in street work or making them vulnerable to abusive pimps or traffickers who could take advantage of their tenuous living situation.

While trans and gender nonconforming sex workers tend to experience discrimination in a variety of ways and contexts, lack of access to affordable housing is a particularly insidious phenomenon. The National Transgender Discrimination Survey of 2008-2009 (NTDS) found that there are high levels of discrimination against trans individuals seeking housing and employment, leading to a prevalence of homelessness amongst transgender individuals involved in the sex trades.⁹⁶ For trans youth, being ostracized from one's family drives individuals to engage in various forms of informal economic activity, including sex work, in order to access basic survival needs;⁹⁷ this involvement, however, often leads to disqualification from necessary housing assistance. While homelessness affects trans populations more broadly, it is a

⁹⁵ Corinne A. Carey, "No Second Chance: People with Criminal Records Denied Access to Public Housing," *University of Toledo Law Review* 36 (2004-2005): 552.

⁹⁶ Red Umbrella Project, "Meaningful Work," 17.

⁹⁷ Dina Kopansky, "Locked Out: How the Disproportionate Criminalization of Trans People Thwarts Equal Access to Federally Subsidized Housing," *Temple Law Review* 124 (Fall 2014): 138.

particularly significant problem for those involved in sex work. Of those reporting involvement in the sex trade in the NTDS, over 48% of trans individuals reported having experienced homelessness at some point in their lives. Of those without any claimed involvement in the sex trades, only 14.2% had experienced homelessness. Trans persons who had sought assistance at shelters often experienced various forms of discrimination, including harassment, physical or sexual assault, and even exclusion or eviction from the shelters themselves. Evidence of discrimination was dramatically more apparent for individuals with experience in the sex trades.⁹⁸

Women of color are also disproportionately affected by lack of access to affordable or subsidized housing opportunities. Housing insecurity feeds into a cycle of criminalization which is particularly salient for women of color, especially those with involvement in the sex trades. Lack of access to housing is a key component of the spatial marginalization which forces women and other individuals into areas characterized not only by poverty but by increased informal and criminalized economic activity. Racism, poverty, and the prevalence of police profiling in these functionally segregated communities compound to create the circumstances which push individuals into informal economies and the criminal justice system itself.⁹⁹ Furthermore, discriminatory federal and local housing restrictions make reentry from prison and life with a criminal record almost untenable. Criminal records keep individuals in neighborhoods where

⁹⁸ Red Umbrella Project, “Meaningful Work,” 17.

⁹⁹ George Lipsitz, “‘In an Avalanche Every Snowflake Pleads Not Guilty’: The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights,” *UCLA Law Review* 59 (August 2012): 1749.

they are likely to be continually rearrested and thereby disqualified from public housing that might otherwise provide them with security and stability.

The effects of homelessness and unstable access to affordable or federally subsidized housing are particularly significant for sex workers. Homelessness can—and often does—drive individuals to either begin or continue to exchange sex for survival necessities, whether or not they otherwise would choose such work.¹⁰⁰ Involvement in the sex trade and lack of dependable housing can have mutually reinforcing impacts on each other; not only does lack of stable housing increase the need to engage in survival sex in order to meet basic needs, but prostitution convictions can disqualify a person from living in public housing or similar benefits, leading to an exacerbated cycle of poverty, homelessness, and violence.¹⁰¹ This contributes to the cyclical relationship between sex work and criminalization: an individual without access to housing, education, and employment is more likely to remain in sex work than they would be if they had access to these basic necessities of independent living, and are subsequently vulnerable to the accumulation of a criminal history which disqualifies them from crucial assistance.

Homelessness further exacerbates the dangers associated with sex work itself. Vulnerability to physical violence, substance abuse, and emotional and psychological trauma are amplified when a sex worker does not have access to a private space for either personal or professional purposes.¹⁰² Street-based sex workers—those without access to private or indoor spaces—are at a significantly higher risk of various forms of violence. Meeting clients in the

¹⁰⁰ Carey, “No Second Chance,” 565.

¹⁰¹ Breakstone, ““I Don’t Really Sleep,”” 343-344.

¹⁰² Breakstone, ““I Don’t Really Sleep,”” 361-362.

street forces sex workers to vet customers as quickly as possible for the purposes of discretion, sometimes causing them to agree to work they might otherwise reject. Street-based client interactions increase the likelihood of accepting a dangerous client.¹⁰³ Some of the most marginalized sex workers are forced to work on the streets to varying degrees, thereby increasing the likelihood of engaging in dangerous behaviors or becoming victims of violent encounters.¹⁰⁴

Both federal and local laws, as well as discretion exercised by local Public Housing Authorities (PHAs), prevent sex workers from accessing affordable and subsidized public housing. Even an individual found to have had any association with a sex worker on a landlord's property is vulnerable to eviction from a private residence; this precludes both landlords as well as boyfriends or other personal associates from providing housing to sex workers. Landlords can evict or repossess any portion of a privately owned apartment building if tenants engage in sex work on the premises. Similar laws prevent the establishment of "houses of prostitution," or locations where prostitution is the intended purpose of the establishment itself. Both laws, tellingly, apply only to sex workers and their associates, but reserve no penalties for clients found to be purchasing the services of a sex worker.¹⁰⁵

Housing discrimination against sex workers stems from the era of broken windows policing and "tough on crime" politicians. The history of recent exclusionary housing policies in the U.S. begins with the 1988 Anti-Drug Abuse Act, in which Congress sanctioned the eviction

¹⁰³ Ibid., 344.

¹⁰⁴ Ibid., 342-343.

¹⁰⁵ Breakstone, "I Don't Really Sleep," 348-9.

of public housing tenants who engaged in criminal activities.¹⁰⁶ With the rise of “tough on crime” legislation throughout the 1990s, these exclusionary policies became increasingly expansive and more strictly enforced; President Bill Clinton’s 1996 State of the Union address coined the idea of the “one strike” rule for public housing applicants. This was quickly followed by the Housing Opportunity Extension Act in that same year, establishing the first federal legislation explicitly sanctioning the exclusion of applicants with criminal records from access to public housing.¹⁰⁷ By 1998, Congress had legalized the potential exclusion of applicants with any kind of criminal activity on their records for an arbitrarily established “reasonable [amount of] time” following an individual’s conviction with the Quality Housing and Work Responsibility Act. This had the effect of legislating the discretion which enabled such policies to become as wide and sweeping as they remain to this day.¹⁰⁸

The precedent set by these restrictive laws is exacerbated by a shortage of available public housing space. The U.S. struggles to maintain a sufficient supply of public housing to meet the demand amongst low-income individuals and families without the means of either renting or purchasing their own residence. This disconnect between supply and demand has encouraged authorities to make arbitrary and discriminatory distinctions between “deserving” and “undeserving” tenants. With the ability to legally exclude individuals with convictions or

¹⁰⁶ Carey, “No Second Chance,” 560.

¹⁰⁷ *Ibid.*, 561.

¹⁰⁸ *Ibid.*, 562.

arrests on their record under the guise of ‘discretion,’ public housing authorities are able to reduce the strain on their limited available space.¹⁰⁹

Federal policy stipulates that a felony conviction can disqualify an individual from attaining public housing for a minimum of five years post-conviction. Broad or arbitrary admissions policies further limit access to public housing for individuals with misdemeanors, infractions, or even arrests that did not result in a conviction on their records,¹¹⁰ as is the case for sex workers in New York. PHAs across the United States can legally reject potential tenants’ applications based solely on arrest records, even in cases where innocence was established in court and charges were dropped.¹¹¹ Arrests for non-violent crimes can be cause for almost immediate disqualification from access to affordable housing opportunities. Not only do these admissions policies tend to exclude individuals with prostitution-related convictions on their record, but the ease with which individuals can be re-arrested on prostitution related charges makes this an even more severe problem for people who engage (or are profiled as having involvement) in the sex trades.

The prevalence of discriminatory housing policies extends to the state level as well. In New York City, the New York City Housing Authority (NYCHA) governs the provision of public housing as well as the Section 8 Leased Housing Program to low income individuals throughout the city. While all public housing is governed broadly by federal legislation, local housing authorities are granted discretion in designing the admissions policies and guidelines which

¹⁰⁹ Carey, “No Second Chance,” 553.

¹¹⁰ *Ibid.*, 546.

¹¹¹ *Ibid.*, 566.

determine an applicant's eligibility.¹¹² This means that the NYCHA has the final say over whether or not an applicant's criminal record necessarily disqualifies them from public housing opportunities. Even relative to restrictive federal policies, the NYCHA places particularly stringent restrictions on access to public housing. For example, the NYCHA can evict individuals for a variety of offenses, among which is "non-desirability." In addition to potentially justifying racial exclusion or segregation, this categorization can include conduct deemed to meet a variety of vaguely worded standards, but the criteria of principal concern here is a "sex or morals offense." Left undefined by the statute itself, a "sex or morals offense" can be interpreted to include any prostitution-related charge, serving as a catch-all excluding sex workers with any kind of criminal history (as well as trafficking victims).¹¹³

This government-sanctioned stance on housing access for individuals with criminal histories has even had a spillover effect to private residences. Private landlords, for example, increasingly screen and reject potential occupants with criminal histories of any kind based on the precedent set by PHA policies. This kind of exclusion is generally premised on the intent to protect other tenants, as is the case with PHA admission regulations.¹¹⁴ This means that not only are sex workers and other "undeserving" applicants unable to access federally subsidized housing opportunities, but even potentially affordable private landlords are likely to turn them away based on any existing criminal history. This is a significant issue for sex workers in NYC; under New York Real Property Law § 231(3), a tenant's lease is rendered void if they are

¹¹² Breakstone, "I Don't Really Sleep," 354.

¹¹³ *Ibid.*, 357.

¹¹⁴ Carey, "No Second Chance," 553.

arrested one or more times for a prostitution-related offense occurring on the premise over the course of a single year.¹¹⁵ Not only does this mean that a single failed attempt to engage in sex work in the safety of a private residence can be grounds for eviction, but sex workers are unlikely to even have the ability to challenge eviction in court. In addition to the reality that sex workers may be unable to access sufficient legal representation to challenge eviction, this can preclude an individual's eligibility for future access to both public and private housing opportunities.¹¹⁶ Individuals who have either left the sex trades or who were trafficked during the time of their conviction can be permanently disqualified from accessible public housing and almost guaranteed a lifetime of housing insecurity or homelessness.

The stated intention of these exclusionary policies is the protection of other tenants from living near potentially dangerous individuals. This justification, however, is undermined by the reality that non-violent convictions, including low-level drug convictions or non-violent “sex crimes,” can immediately disqualify an individual for public housing for several years if not longer.¹¹⁷ Overly restrictive criteria dictating who can or cannot gain access to affordable public housing does not signal a genuine desire to protect other tenants from potentially dangerous—or in this case, sexually deviant—neighbors; instead, it demonstrates a punitive interest in establishing who is deserving or undeserving of having access to housing, a fundamental component of survival.

¹¹⁵ Breakstone, “I Don’t Really Sleep,” 350.

¹¹⁶ Ibid.

¹¹⁷ Carey, “No Second Chance,” 546.

Access to private spaces through affordable or public housing could significantly improve the personal and professional lives of sex workers. Having an apartment or other personal residence in which to live and work allows sex workers to bring clients into their own private spaces, thereby decreasing their exposure to potential violence and allowing for better control and filtering of clients. Not only do workers have greater opportunities to establish their own mechanisms for security in their personal space, but they are more likely to be able to engage in a more extensive client vetting process than would be possible in a car or on the street. This vetting process can allow for the necessary time and space to bargain with a client and to make sure that safe sex practices will be employed (such as the use of condoms). While bringing a client into an apartment is not without risk, it does significantly decrease risks associated with street sex work in addition to the obvious personal benefits of having a personal space.¹¹⁸

Given the demonstrable benefits available to sex workers when offered private spaces, legislators ought to reconsider the broad restrictions placed on access to public housing in New York City and beyond. Abandoning policies which automatically reject applicants with any kind of criminal record is a necessary first step toward meaningful harm reduction;¹¹⁹ the wholesale exclusion of individuals with arrests or convictions of any kind without any circumstantial consideration has indelibly discriminatory effects. Implementing individualized assessment procedures can allow PHA officials determine whether or not an individual is a legitimate threat to other tenants,¹²⁰ thereby resolving some degree of this discriminatory exclusion. Similarly, the

¹¹⁸ Breakstone, “I Don’t Really Sleep,” 344-345.

¹¹⁹ Carey, “No Second Chance,” 594.

¹²⁰ Ibid.

NYCHA itself could restructure both its admissions restrictions and eviction policies to facilitate meaningful improvements for sex workers' lives. Eviction rules which ban individuals for engagement in prostitution in their own private residence are not only fallacious attempts at protecting community health and safety, but work to the direct detriment of sex workers, serving as another level of criminalization to be experienced on a daily basis. The NYCHA's wholesale exclusion of individuals with criminal histories deemed to fall under the broadly established "sex and morals" category of "non-desirability" similarly creates an overly-restrictive means of criminalizing both sex workers and individuals who have been trafficked.¹²¹ Given New York's recent shift away from criminalizing sex workers, changing eviction and admission policies which harm both sex workers and victims of trafficking alike could be a valuable step toward stabilizing the lives of some of NYC's most marginalized individuals.

CONCLUSION

Taken together, the institutions and potential changes proposed here do not create a perfect world for sex workers. Absent meaningful ideological interrogation at the local and national political level, sex workers will continue to face violent institutional discrimination, exclusion, and criminalization. Even the full decriminalization of sex work, while a first step toward legally resolving some of these problems, still falls short without a sociocultural reorientation which values the lives, work, and bodies of sex workers as people deserving of human rights. This does not mean, however, that piecemeal changes to a very broken system cannot chip slowly away at the barriers sex workers face to improved quality of life. This paper has sought to demonstrate the various avenues through which meaningful reforms can be

¹²¹ Breakstone, "I Don't Really Sleep," 372.

implemented within a very particular context. At the heart of these proposals, however, is the recognition that without social policies created with harm reduction and the wellbeing of sex workers in mind, they will continue to suffer violence in all facets of their lives.

Even New York's paradigm shift toward victimization of sex workers falls woefully short of decriminalizing them, in part due to the absence of an explicit harm reduction philosophy. Both sex workers and trafficking victims are arrested and, ultimately, placed in a court room for their innocence to be determined by people with little intimate understanding of their respective lives. The uniformity of the arrest experience across the spectrum of categorical descriptors projected onto sex workers demonstrates the problematic conflation of these labels, irrelevant even of the good intentions claimed by public and political figures on the left.¹²² The sensationalized narratives of trafficking which dominate even left-leaning contemporary discourse can no longer be heard at the expense of sex workers' rights and well-being. While the creation of HTICs intended to keep victims from being treated as criminals, they have only perpetuated their criminalization under the guise of institutional support and service provision. Governments must focus on building and implementing harm-reduction-oriented policies if they hope to improve the lives of sex workers in the short-term.

Regardless of the kinds of reforms undertaken, no discussion of sex work can truly center sex workers' best interests without the meaningful inclusion of sex workers' voices in the conversation. Unsurprisingly, sex worker activists know more than anybody else about their own experiences and are more likely to have the collective capacity to propose meaningful legal reforms than any group of external parties. Sex workers should be allowed and encouraged to

¹²² Grant, *Playing the Whore*, 38.

speaking critically of the conditions of their work experience and propose changes to their working environments without being told condescendingly that they should not be involved in their work in the first place. This form of silencing only ensures that sex workers hold their tongues when asked about any grievances they might have or problems they would like solved, further obscuring the realities of sex work itself.¹²³ As Melissa Gira Grant explains, sex workers should not be “invited to publicly investigate the politics of their own lives only if they’re also willing to serve as a prop for someone else’s politics.”¹²⁴ Not only does this surface-level inclusion perpetuate a disconnect between sex workers and popular representations of them, but it denies the relevant political actors access to the most well-equipped minds on the subject of sex work. Be they activists or advocates, the voices heard most loudly in the political conversations about sex work need to have both intimate experience with the realities of sex work as well as the unprecedented focus on the well-being of sex workers above all else.

¹²³ Grant, *Playing the Whore*, 39.

¹²⁴ *Ibid.*, 41.

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