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## Trafficked in Texas: Combatting the Sex-Trafficking Epidemic Through Prostitution Law and Sentencing Reform in the Lone Star State

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# Trafficked in Texas: Combatting the Sex-Trafficking Epidemic Through Prostitution Law and Sentencing Reform in the Lone Star State<sup>1</sup>

*American law has historically treated prostitution as a victimless crime, a moral trespass between two consenting individuals, rather than a potential act of violence, a product of fraud or coercion. However, growing awareness of the international sex-trafficking epidemic has brought long-settled prostitution law once more under the critical eye of academics and lawmakers as a potential tool in curbing the still-growing demand for illicit commercial sex. Whether prostitution law reform may in fact be effective remains a matter of academic debate in the United States; however, such reform has gained substantial ground abroad, with compelling results. This Note argues for “demand-centric” prostitution law reform in the United States that prioritizes enforcement efforts and sentencing against pimps and purchasers of commercial sex. Moreover, this Note argues that Texas, already a pioneer of late in state prostitution and sex-trafficking legislative reform, is the ideal jurisdiction to initiate such legal change.*

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1. See generally RANDOLPH B. CAMPBELL, GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE (2004); Texas, WIKIPEDIA, <http://en.wikipedia.org/wiki/Texas> (last visited May 22, 2018) [<https://perma.cc/DLA6-NBM9>] (“Texas is nicknamed ‘The Lone Star State’ to signify its former status as an independent republic, and as a reminder of the state’s struggle for independence from Mexico. The ‘Lone Star’ can be found on the Texas state flag and on the Texan state seal.”).

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## INTRODUCTION

In October 2015, one day after her twenty-third birthday, a San Antonio woman named Yvette sat in the Bexar County courtroom facing up to ninety-nine years in prison on charges for exploitation of a minor.<sup>2</sup> However, the path that led Yvette to this precarious circumstance began several years earlier and is marked by addiction, abuse, and desperation. Running away from home at the age of fifteen to escape a family member who had been sexually abusing her, Yvette was quickly consumed by a drug addiction; by eighteen, she was dancing at strip clubs to support herself and her habit.<sup>3</sup> At the age of twenty-one, Yvette was approached by another woman, along with a sixteen-year-old named Jade, with an offer to enter into the prostitution business. Desperate for cash, she agreed.<sup>4</sup>

This regretful decision brought her under the power of a pimp named “Red Nose.”<sup>5</sup> Yvette told the *Texas Tribune* that upon first meeting Red Nose, he made her feel protected for seemingly the first time in her young life.<sup>6</sup> Red Nose, as so commonly occurs in these situations, turned that sense of protection into coercive power, plying Yvette with drugs to keep her awake at all hours seeing clients.<sup>7</sup> Red Nose never signed his own name on anything related to his operations—advertisements, motel reservations, etc.—but rather used Yvette’s.<sup>8</sup> As

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2. Morgan Smith, Edgar Walters & Neena Satija, *She Was a Sex-Trafficking Victim, but Texas Law Labeled Her a Pimp*, TEX. TRIB. (Feb. 16, 2017, 12:00 AM), <https://www.texastribune.org/2017/02/16/she-was-sex-trafficking-victim-texas-law-labeled-her-pimp/> [<https://perma.cc/ZYT3-4HDM>]. For purposes of confidentiality and the safety of those involved, this article does not disclose the real names of either Yvette or Red Nose. Yvette is thus a pseudonym provided by the *Tribune* for the subject of this story.

3. *Id.*  
 4. *Id.*  
 5. *Id.*  
 6. *Id.*  
 7. *Id.*  
 8. *Id.*

a result, an undercover agent with the local police force responded to one such online advertisement for Jade, posted under Yvette's name. After learning Jade was a minor, the agent returned Jade to her mother's house.<sup>9</sup>

Weeks later, after attempting to escape from Red Nose, Yvette was found "viciously beat[en]" in what police officers wrote up as a domestic violence incident: "When officers arrived, they found her covered in bite marks, her face battered and one eye swollen shut."<sup>10</sup> Out of fear for the safety of her family, whom Red Nose had threatened, she continued to comply with Red Nose's demands.<sup>11</sup> The two were eventually charged with violent robbery,<sup>12</sup> which led to their respective trials for both the robbery and the exploitation of Jade, the minor.<sup>13</sup> Prosecutors urged Yvette to testify against Red Nose, but at trial, frozen with fear, she was unable to do so; the jury found her guilty on all charges.<sup>14</sup> As David Lunan, then head of the sex-trafficking unit for the Bexar County District Attorney's Office, noted: "[Yvette] was victimized, but she graduated from victim to oppressor and exploiter . . . Her loyalty to [Red Nose] was too strong to even protect herself."<sup>15</sup>

Yvette's story is representative of the double-edged sword often handed to prosecutors trying prostitution and sex-trafficking cases. In circumstances such as these, it can often be incredibly difficult to distinguish victim from exploiter, particularly when the victim, fearing retaliation, is unwilling or unable to help herself. To prevent victims from being charged as criminals, the Texas legislature, like many other

9. *Id.*

10. *Id.*

11. *Id.*

12. The robbery victim was a friend of Yvette's to whom she had previously run for help after an escape from Red Nose. When Red Nose found her again, as punishment he forced her to betray her friend, leading him to the site of the robbery. *Id.*

13. *Id.* The article also shares the story of another San Antonio woman who was convicted of exploitation of a minor. The pimp in that case had sold the defendant for sex over a two-year period, beginning when she was sixteen years old. The article reports: "The girl suffered horrific abuse at his hands—she was raped, impregnated and forced to have an abortion. When she tried to run away, the pimp carved his initials into her forearm." *Id.* The two were eventually convicted for recruiting at a San Antonio high school; the pimp received twenty years, while the girl received three. *Id.* This serves as yet another story where although the woman involved did not necessarily have clean hands, it is clear that she, too, was a victim. *Id.*

14. *Id.*

15. *Id.* Importantly, the State of Texas does provide an affirmative defense for those charged with prostitution if the accused can show that he or she was a trafficking victim. See TEX. PENAL CODE ANN. § 43.02(d) (West 2018). However, no such affirmative defense was available to Yvette for purposes of her charges for exploitation of a minor under section 21.02 of the Texas Penal Code. At any rate, such a defense would have remained unavailable as she, like many victims groomed to be dependent on their abusers, refused to testify against Red Nose. Smith, Walters & Satija, *supra* note 2.

state lawmaking bodies, has enacted aggressive legislation targeting pimps; however, as demonstrated by Yvette's story, the law as it stands does not sufficiently address the violent coercion that so often accompanies prostitution or recognize that defendants in these cases are quite often victims themselves.

Given these legislative hurdles, what alternative avenues might states pursue to aggressively target prostitution and sex trafficking while also deterring the behavior that drives these illegal enterprises? This Note proposes that effective legislative change must bring into its purview stronger criminal consequences for the "johns," or purchasers of illegal sex, and not just the pimps. Further, this Note argues that such changes to a jurisdiction's prostitution laws should aid the state in prosecuting true instances of human trafficking, which by definition include involuntary and coerced prostitution.<sup>16</sup> In doing so, this Note hopes to address the glaring absence in Yvette's story, and others like it, of the men who paid, or got paid, to exploit her.

Still, scholars and legislators are reluctant to recognize the link between prostitution and sex trafficking. Currently, there are heated legal and policy debates about the existence of a nexus between prostitution and sex trafficking and, if one exists, how the law should be reshaped to target that relationship.<sup>17</sup> Unfortunately, such debates seem to have reached a gridiron deadlock between so-called neoabolitionists, who believe that prostitution is per se coercive and should be outlawed, and nonabolitionists, who believe that certain forms of prostitution facilitate the economic independence and sexual autonomy of women. Professor Janie Chuang has termed this deadlocked debate "ideological capture"<sup>18</sup> and argues that rather than viewing legal change through a lens of economic efficiency, discussions that should be contemplating effective legal change have become overwhelmed by larger, often diametrically opposed social movements with their own ideological agendas in mind.<sup>19</sup>

In light of this phenomenon, this Note seeks to recenter the legal debate surrounding the relationship between prostitution and sex

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16. The United States defines "severe forms" of sex trafficking as trafficking "in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age" and sex trafficking generally as that induced by means of "recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act." See Trafficking Victims Protection Act, 22 U.S.C. § 7102(9)(A), (10) (2012).

17. Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1664–71 (2010) (describing the constituencies and beliefs of neoabolitionists and nonabolitionists).

18. See generally *id.*

19. *Id.*

trafficking. In doing so, it hypothesizes that prostitution law reform in which the presumption of criminal liability lies with the exploiters and, in particular, the johns may be an effective vehicle through which legislatures may target prostitution and the sex-trafficking industry. To ensure a targeted and productive discussion, this Note focuses on one U.S. jurisdiction in particular: Texas.

Texas, second only to California, is the largest hub for human trafficking in the United States.<sup>20</sup> The I-10 corridor, which runs through Houston, San Antonio, and southwestern Texas near the U.S.-Mexico border, is an infamous channel for the movement of trafficked persons.<sup>21</sup> Texas is therefore a prime state to engage in substantive legislative reform; in fact, Texas has already led the way in establishing progressive prostitution and human-trafficking laws in recent years through victim-service programs and modifications to its juvenile court system.<sup>22</sup> As a border state, Texas also has the ability to target the trafficking of migrant populations, who are particularly susceptible to the coercive nature of human trafficking.<sup>23</sup>

Part I of this Note traces the history of prostitution and sex-trafficking legislation in the United States through the last century and explains the unique approach toward prostitution legislation in Texas. Part II then discusses empirical research to date regarding the success of prostitution legal reform in its various manifestations, contrasting Sweden's demand-centric criminalization model to New Zealand's legalization scheme, then comparing each with U.S. law. Both frameworks come with costs and benefits, which will be addressed vis-à-vis their ability to decrease the prevalence of sex trafficking, which this Note maintains is inextricably intertwined with prostitution.

Ultimately, in Part III, this Note proposes that Texas should adopt a demand-centric, perpetrator-based approach to legislative reform in which a central focus would be to charge and sentence those

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20. *Hotline Statistics: Human Trafficking Cases Reported by State*, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/states> (last visited Aug. 8, 2018) [<https://perma.cc/2WEZ-76NH>].

21. Robert D. Sanborn & Dawn Lew, *Fighting Human Trafficking in Texas*, 75 TEX. B.J. 778, 779 (2012) ("The U.S. Department of Justice identified the I-10 corridor as the most heavily traveled route for human trafficking in the country, with as many as one in five victims in the United States passing through Texas.").

22. *Id.* at 780 (detailing how the Texas judiciary has developed juvenile specialty courts "to work with children referred to the juvenile justice system for prostitution and related offenses" such as the GIRLS Court in Harris County and the ESTEEM Court in Dallas County).

23. Jennifer M. Chacón, *Human Trafficking, Immigration Regulation, and Subfederal Criminalization*, 20 NEW CRIM. L. REV. 96, 112 (2017) (recognizing Texas, alongside Arizona, Georgia, and Missouri, as a state whose antitrafficking legislation has been spurred by concerns about migrant smuggling and immigration control).

convicted of soliciting prostitution (now a misdemeanor<sup>24</sup>) on par with those convicted of soliciting sex from a trafficking victim (a felony<sup>25</sup>). Such a regime would necessarily place the burden of proof on the john, rather than the woman whose services have been purchased.<sup>26</sup> Under current law, the woman must demonstrate that the “transaction” was the result of coercion—that is, a trafficking offense. The proposed model reverses this standard, placing the burden on the purchaser: to avoid trafficking-level charges, he would have to demonstrate that the woman’s actions were *not* the result of fraud, force, or coercion. In other words, this approach would, in theory, target the demand side of the illegal sex trade.

Additionally, because perpetrator-based legislation does not seek to enhance sentencing for prostituted persons but rather complements victim-centric legislation in human trafficking, this strategy avoids further stigmatization of the woman involved and should assuage most counterarguments regarding sexual autonomy.<sup>27</sup> Importantly, this Note does not argue for outright decriminalization of the sale of sex, which has been shown to have a detrimental effect on the rights, recovery, and rehabilitation of trafficked persons; rather, this Note argues that perpetrator-based legislation is uniquely able to balance the interests of both victims and law enforcement.<sup>28</sup>

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24. TEX. PENAL CODE ANN. § 43.02(c-1) (West 2018).

25. See *id.* § 20A.02(b).

26. Women by no means are the sole victims of sexual violence in our society—male victims are a certain reality. However, this Note’s analysis will focus on female victims. Likewise, the issues presented in this Note reflect only a fraction of the human-trafficking epidemic. Trafficking arises from vast international economic disparities and is shaped by a myriad of factors, economic and social. This Note in no way disregards the crucial need for further study of other trafficking issues, such as forced labor trafficking. See, e.g., Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 291 & n.70 (2011) (listing publications indicating that most prostitutes are women but providing only estimates of ratio of male to female prostitutes); Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 240 (2000) (stating that while female prostitution is most common, male prostitution is increasing).

27. See Donna M. Hughes, *Combating Sex Trafficking: A Perpetrator-Focused Approach*, 6 U. ST. THOMAS L.J. 28, 38–39 (2008) (explaining how too much focus on the victims of sex trafficking can lead to victim blaming); see also Jessica Swanson, *Sexual Liberation or Violence Against Women? The Debate on the Legalization of Prostitution and the Relationship to Human Trafficking*, 19 NEW CRIM. L. REV. 592, 634 (2016) (“The sexual liberation view accepts prostitution as a legitimate occupation and supports women in this field, but also disregards the correlation to human trafficking.”).

28. See Kristina Day, *Addressing the Sex Trafficking Crisis: How Prostitution Laws Can Help*, 2 CREIGHTON INT’L & COMP. L.J. 149, 153–54 (2012) (observing how prostitution and sex trafficking increased substantially after New Zealand decriminalized prostitution in 2003).

## I. HURDLES, THEMES, AND TENSIONS IN U.S. PROSTITUTION AND TRAFFICKING LAW

### A. *An American History of Prostitution and Sex-Trafficking Laws*

Prostitution may be broadly defined as sexual activity for hire.<sup>29</sup> However, certain statutes or regulations may target specific aspects of what is largely understood to be prostitution, whether that be the active solicitation of such activity or simply loitering with the intent to solicit.<sup>30</sup> In the United States, prostitution has generally been understood as a crime against notions of morality and society at large—a purportedly victimless crime between consensual parties.<sup>31</sup> Regulation and enforcement of prostitution laws has largely been left to the states;<sup>32</sup> the states' police power is thought to be plenary over this activity.<sup>33</sup> By 1925, every state had enacted some form of antiprostitution legislation.<sup>34</sup>

Prostitution, in one iteration or another, has existed in the United States since the days of the thirteen colonies and the American Revolution.<sup>35</sup> In the eighteenth and nineteenth centuries, prostitution remained a legal, if significantly marginalized and stigmatized, institution; however, with the increase of urban development in the nineteenth century, so too increased the number and prevalence of so-called “bawdy houses.”<sup>36</sup> Most regulation of prostitution at this time came through local and city ordinances, which used broad language outlawing sexual intercourse between two nonmarried adults and other forms of adultery.<sup>37</sup> An additional strategy employed in this era, though a seemingly fruitless one, was vagrancy laws, criticized for their vagueness. For example, the District of Columbia enacted a vagrancy

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29. Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 432 (2009) (citing 63C AM. JUR. 2D *Prostitution* § 1 (2008)).

30. 63C AM. JUR. 2D *Prostitution* § 4 (describing trends of state statutes and local ordinances generally).

31. *Id.*

32. See, e.g., *Keller v. United States*, 213 U.S. 138, 144 (1909) (holding that though “the keeping of a house of ill-fame is offensive to the moral sense, . . . [j]urisdiction over such an offense comes within the accepted definition the police power . . . reserved to the states”).

33. 63C AM. JUR. 2D *Prostitution* § 4.

34. See Whitebread, *supra* note 26, at 243; see also Julie Lefler, Note, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 16–17 (1999) (detailing the evolution of state-level prostitution laws and emphasizing their discriminatory impact on the men and women involved).

35. SUSAN D. ROSS ET AL., *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* 1475 (2d ed. 1996).

36. *Id.*

37. Whitebread, *supra* note 26, at 241.



law prohibiting “wandering abroad and lodging . . . in the open air” and “wander[ing] about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself.”<sup>38</sup> Though these statutes did not appear to decrease the prevalence of prostitution in society, they did have the effect of displacing such activities to distinct, less desirable areas of town, where enforcement was limited: the notorious red-light districts.<sup>39</sup>

The beginning of the twentieth century brought with it a new breed of statutes targeting the prostitution industry, promulgated as a direct response to the formation of the red-light districts: the red light abatement laws.<sup>40</sup> These laws created a private right of action through which citizens could bring a public nuisance action that would effectively prohibit prostitution and related activities from a given property or neighborhood. First introduced in Iowa in 1909—around the same time as the federal Mann Act, discussed below—red light abatement laws had passed in forty-one of the forty-eight states by 1919.<sup>41</sup> Subsequent decades saw a rapid diminishment of red-light districts across the United States; the nation’s last surviving red-light district, located in the seaport town of Galveston, Texas, was shut down in 1957 by the state’s attorney general, Will Wilson.<sup>42</sup>

The primacy of state action in targeting prostitution, however, is not to say that the federal government has stayed completely silent in this area of the law: take, for example, the Mann Act of 1910.<sup>43</sup> The Act prohibited the transportation of women across state lines “for prostitution or debauchery, or any . . . ‘immoral purpose.’”<sup>44</sup> The efficacy of the Act in its early years is dubious at best;<sup>45</sup> however, the Act remains active law today and now, after its 1986 amendment,

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38. William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 4 (1960) (describing the District of Columbia’s vagrancy law in particular as part of a discussion about the injustice of vagrancy laws generally, yet noting their prevalence throughout history).

39. Whitebread, *supra* note 26, at 241.

40. Peter C. Hennigan, *Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era*, 16 YALE J.L. & HUMAN. 123, 152 (2004).

41. *Id.* at 127.

42. *Id.*; see also David C. Humphrey, *Prostitution in Texas: From the 1830s to the 1960s*, 33 E. TEX. HIST. J. 27, 36–37 (1995).

43. See White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)) [hereinafter Mann Act of 1910]; Heiges, *supra* note 29, at 435.

44. Heiges, *supra* note 29, at 435 (quoting Mann Act of 1910).

45. The Act resulted in the prosecutions of such figures as Charlie Chaplin and Chuck Berry in 1944 and 1959, respectively, for traveling with unmarried women across states lines. The Mann Act in its earliest forms has been widely criticized as no more than a political weapon. For further reading, see Eric Weiner, *The Long, Colorful History of the Mann Act*, NAT’L PUB. RADIO (Mar. 11, 2008, 2:00 PM), <https://www.npr.org/templates/story/story.php?storyId=88104308> [https://perma.cc/2J8D-YPML].

prohibits such interstate transportation for “any sexual activity for which any person can be charged with a criminal offense.”<sup>46</sup> However, in practice, today’s federal legislation in this area has turned almost exclusively to human trafficking, beginning with the promulgation of the Trafficking Victims Protection Act<sup>47</sup> (“TVPA”) in 2000.

The TVPA defines severe forms of sex trafficking as those “in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained eighteen years of age.”<sup>48</sup> As read today, the TVPA includes within its jurisdiction only prostitution offenses resulting from force, fraud, or coercion; interestingly, though, its legislative history reveals failed efforts to expand the TVPA to include *all* crimes of prostitution.<sup>49</sup> Those who opposed inclusion of all prostitution offenses within the sweep of the TVPA feared that doing so would divert federal enforcement resources away from investigation and prosecution of severe crimes involving force, fraud, or coercion, in favor of lesser crimes that could more easily be relegated to the jurisdiction of state prostitution laws.<sup>50</sup> Supporters; however, argued that prostitution is “inherently coercive and that therefore all prostitution prosecutions are properly prioritized as trafficking prosecutions.”<sup>51</sup> This divide between “coerced” and “uncoerced” prostitution can be readily found at the state level as well.<sup>52</sup>

While federal and state trafficking laws focus on exploitation, prostitution laws tend to emphasize public health or morality and presume consent on the part of the woman—with the exception of minors, who are presumed to be coerced as they cannot legally consent to sexual contact.<sup>53</sup> Because state trafficking laws are rarely enforced, due at least in part to the difficulty of proving coercion, adult

46. 18 U.S.C. § 2421(a).

47. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7102–7114 (2012)).

48. 22 U.S.C. § 7102(9)(a).

49. See Heiges, *supra* note 29, at 429 (pointing to federal legislation enacted in 2008 that failed to criminalize prostitution beyond sex acts induced by force, fraud, or coercion).

50. See Chacón, *supra* note 23, at 104–05 (explaining the debate over expanding federal jurisdiction to prostitution).

51. *Id.* As Professor Catharine A. MacKinnon, scholar and staunch abolitionist, aptly argues:

Slavery is internationally defined as the exercise of powers of ownership over a person. When pimps sell you for sex to johns who buy you, and you want to leave but cannot, you are a sex slave by international legal definition whether you have ever been beaten or crossed a border. That women who are pimped are exercising “agency” as independent entrepreneurs is a fantasy of privilege.

MacKinnon, *supra* note 26, at 291.

52. See *infra* Section I.B.

53. See Heiges, *supra* note 29, at 435–38 (noting how state prosecutors tend to focus on prostitution crimes that are not a result of force, fraud, or coercion).

prostituted women are often overlooked and ultimately unprotected in prophylactic legislation and are instead the focus of criminal prosecution. Illustrative of this phenomenon is the fact that as of 2012, prostituted women were arrested at nearly double the rate of johns for prostitution-related offenses: according to the FBI, 67.7 percent of prostitution-related arrests made that year were of women, while only 32.3 percent were men.<sup>54</sup> This striking discrepancy reflects not only varying political beliefs between jurisdictions but also disparate enforcement of the law, with the troubling consequence that those paying to exploit potential trafficking victims often walk free, while those same victims are often transformed into criminal defendants.

### *B. The State of the Law: Texas*

The history of prostitution law in the State of Texas is by and large similar to that found in the majority of its sister states. As in most states, the Texas legislature's approach to prostitution wavered throughout the decades between tolerance and outrage, largely following public opinion and the pressures of federal legislation such as the Mann Act. Still, unlike in other states, certain relics of the eighteenth and nineteenth centuries persisted in Texas well into the twentieth century, such as traditionally styled bawdy houses and red-light districts, most notably in Galveston and San Antonio.<sup>55</sup> As David C. Humphrey notes,

Nor was prostitution's development in Texas unaffected by many of those features that have given Texas history a distinctive flavor—the cattle kingdom of the nineteenth century, the oil booms of the twentieth century, the continuous presence of military troops and bases, and long-standing racial and ethnic divisions among the citizenry.<sup>56</sup>

Over the last fifty years, Texas's prostitution laws have evolved in light of new understandings of the social and economic inequities that so often accompany entrance into and work in prostitution. As recently as September 2017, the Texas legislature updated its primary law governing prostitution offenses such that the john, not just the prostituted person, can be convicted of the crime of prostitution and sentenced equally.<sup>57</sup> Up to the third offense, a conviction of prostitution

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54. *Crime in the United States 2012: Table 42*, FED. BUREAU OF INVESTIGATIONS, <https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/42tabledataoverviewpdf> (last visited Sept. 14, 2018) [<https://perma.cc/2EKM-TTTE>]. As best as the author can discern, the FBI has not published comparable findings for years after 2012.

55. See Humphrey, *supra* note 42, at 29–30.

56. *Id.* at 38.

57. TEX. PENAL CODE ANN. § 43.02(a), (b) (West 2018).

results in a Class A misdemeanor;<sup>58</sup> should the defendant be charged four or more times, the sentence increases to that of a state jail felony.<sup>59</sup> Under the latest version of the law, any offense is automatically a second-degree felony if it involves a minor or occurs under the belief that the prostituted person is a minor.<sup>60</sup>

Presumably, this amendment to the law will put both parties—prostituted persons and johns—on a level playing field, at least as far as the law is concerned. However, Texas, like many other states, has suffered from inequitable convictions of these parties. In 2016, for example, Texas’s Department of Public Safety reported 1,938 total male arrests for prostitution and prostitution-related offenses but 2,577 total female arrests for such offenses, a 43:57 ratio.<sup>61</sup> Of course, these statistics were collected before the latest 2017 amendments to the state’s prostitution laws; empirical data is not yet available for comparison, but the amendment does suggest the legislature’s desire to target purchasers—in most cases, men—with greater consistency and voracity.

Further indicative of the legislature’s intent to target crimes of a sexually exploitative nature, the 2017 amendments to the state’s Penal Code also included the creation of the crime of sexual coercion.<sup>62</sup> A person commits a felony “if the person intentionally threatens, including by coercion or extortion, to commit a certain offense to obtain . . . intimate visual material, an act involving sexual conduct . . . or a monetary benefit of value [or the benefit thereof].”<sup>63</sup> The section specifies that its scope applies to all threats, regardless of how they are communicated, including and especially if they are communicated via the internet or social media.<sup>64</sup> This statute not only carries with it implications for crimes related to cyberbullying and online exploitation but also is applicable to in-person exploitation or coercion; accordingly, this statute may be critical to the enhanced prosecution and sentencing of traffickers and pimps.

Like the federal TVPA, Texas state law prohibiting trafficking of persons requires a finding of force, fraud, or coercion in order to convict a person of the offense. Texas law further provides that a

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58. *Id.* § 43.02(c)(1), (c-1)(1).

59. *Id.* § 43.02(c)(2), (c-1)(2).

60. *Id.* § 43.02(c-1)(3)(A)–(C).

61. TEX. DEP’T OF PUB. SAFETY, 2016 CRIME IN TEXAS: TEXAS ARREST DATA 77–80 (2016), <http://www.dps.texas.gov/crimereports/16/citCh9.pdf> [<https://perma.cc/T8YQ-MZXX>] [hereinafter 2016 CRIME IN TEXAS].

62. PENAL § 21.18.

63. *Id.* § 21.18(b)(1)–(3), (c).

64. *Id.* § 21.18(d).

showing of force, fraud, or coercion will constitute an affirmative defense to offenses involving prostitution.<sup>65</sup> In the same 2016 Department of Public Safety report referenced above, Texas reported arresting 354 adult males for trafficking offenses related to commercial sex acts, plus an additional nine male arrests for those offenses related to involuntary servitude.<sup>66</sup> In the same year, the state arrested 129 adult females for trafficking offenses related to commercial sex acts, plus an additional five arrests for those offenses related to involuntary servitude. Though these numbers constitute only a fraction of those representing prostitution-related arrests in Texas, some of which this Note argues should likely have been investigated as trafficking offenses, they are substantial enough to rank Texas among the states with the highest prevalence of trafficking in the country.

Texas, alongside the State of Washington, was the first state to enact human-trafficking legislation in 2003.<sup>67</sup> Since then, Texas has instituted critical legislative change to its statutory framework, transformed its judiciary to better accommodate trafficking trials, particularly those involving child victims,<sup>68</sup> and supported multiple on-the-ground training programs.<sup>69</sup> In 2017, the Office of the Attorney General of Texas expanded these efforts by forming the Human Trafficking and Transnational/Organized Crime Section (“HTTOC”). This division originated as a direct response to the criminal investigation of Backpage.com, an online advertisement forum

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65. *Id.* § 43.02(d).

66. 2016 CRIME IN TEXAS, *supra* note 61, at 77–80.

67. THE POLARIS PROJECT, A LOOK BACK: BUILDING A HUMAN TRAFFICKING LEGAL FRAMEWORK 1 (2014), <http://polarisproject.org/sites/default/files/2014-Look-Back.pdf> [<https://perma.cc/E9FK-M8FE>]. The Polaris Project ranked states’ legislative efforts from 2011 to 2014 based on multiple factors, each addressing the efficacy and thoroughness of each state’s trafficking legislation; each year, Texas was ranked a Tier 1 state for its efforts to combat human trafficking. *Id.* at 4.

68. In 2007, the Supreme Court of Texas established the Permanent Judicial Commission for Children, Youth and Families (“Children’s Commission”) with the primary goal of aiding and improving the state’s child welfare system “by increasing public awareness of challenges facing children . . . and bringing attention to this important issue through judicial leadership, reforming judicial practice, and informing policy affecting child welfare.” *About Us*, CHILD. COMMISSION, <http://texaschildrenscommission.gov/about-us/> (last visited Aug. 8, 2018) [<https://perma.cc/2JUP-W937>]. In 2017, one of the Commission’s primary focuses included raising awareness among judges and attorneys responsible for child welfare cases about human trafficking as it directly impacts children in the welfare system. The Commission also coordinates with the Office of the Governor’s Sex Trafficking Team to develop and implement strategies for addressing child welfare cases in which there is a high risk of trafficking and abuse. *See* OFFICE OF THE ATTORNEY GEN. OF TEX., TEXAS HUMAN TRAFFICKING PREVENTION TASK FORCE: FISCAL YEAR 2017 REPORT OF ANNUAL ACTIVITIES 9 (2017), [https://www.texasattorneygeneral.gov/files/agency/20170212\\_htr\\_fin.pdf](https://www.texasattorneygeneral.gov/files/agency/20170212_htr_fin.pdf) [<https://perma.cc/8M5R-A5WZ>] [hereinafter TASK FORCE].

69. *See generally* TASK FORCE, *supra* note 68, at 3–15 (listing and describing the efforts of nonprofit, private, and state agencies at work within Texas to combat human trafficking); *see also* Sanborn & Lew, *supra* note 21; *supra* note 20 and accompanying text.

headquartered in Dallas that has been connected to hundreds of cases of trafficking and derives more than ninety percent of its revenue from facilitating the sale of people.<sup>70</sup> In addition to training more than five thousand people at in-person sessions across the State of Texas in 2017, the HHTOC developed a “documentary training tool” scheduled for release in January of 2018 for all 315,000 state employees. The tool defines trafficking in all its forms, outlines red flags for possible trafficking situations, and details appropriate procedures for reporting potential trafficking.<sup>71</sup>

Critically, in 2017, the Texas Human Trafficking Prevention Task Force recommended, and the state legislature enacted, an enhancement of criminal penalties for the promotion and aggravated promotion of prostitution explicitly as a way to target sex-trafficking offenses.<sup>72</sup> This is not the first time the legislature has amended the Penal Code to reflect a relationship between prostitution and trafficking; for example, the offense of compelling prostitution—a second-degree felony that can be increased to the first degree in the event of compulsion of a minor—utilizes the same “force, fraud, or coercion” language present in Texas’s trafficking statutes. The legislature’s decision to take even stronger steps toward recognizing this connection in 2017 makes clear its devotion to attacking sex crimes of all forms.

In summary, Texas’s modern statutory framework provides for enhanced penalties for pimps and traffickers but places prostituted, and often trafficked, women within a sentencing regime equivalent to that of the johns who pay to exploit them. The Texas legislature’s enhancement of penalties for facilitating prostitution suggests a willingness to view prostitution at least as a certain manifestation of human trafficking’s presence within the state, if not one of many direct results of human trafficking. This legislative backdrop presents Texas as an ideal jurisdiction for the introduction of continued prostitution law reform further prioritizing the conviction and sentencing of purchasers of commercial sex.

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70. See TASK FORCE, *supra* note 68, at 6–7 (discussing the formation of the Human Trafficking and Transnational/Organized Crime Section).

71. *Id.* at 7.

72. See *id.* at 16–17. A conviction for promoting prostitution under section 43.03 of the Texas Penal Code now results in a state jail felony, where before the 2017 amendment, a conviction would only have resulted in a Class A misdemeanor; further, a repeat offender under this statute would now be subject to a felony in the third degree rather than a state jail felony. See Act of June 12, 2017, ch. 685, 2017 Tex. Gen. Laws 3038, 3058 (codified as amended at TEX. PENAL CODE ANN. § 43.03(b) (West 2018)). Likewise, the 2017 amendments increased a conviction for aggravated promotion of prostitution under section 43.04 from a third to second degree felony. See *id.* (codified as amended at PENAL § 43.04(b)).

## II. THE LAW AT WORK: MODELS AND EMPIRICAL RESULTS OF CURRENT LEGISLATIVE REFORM AT HOME AND ABROAD

Because of the difficulties associated with proving fraud, force, or coercion in court—consider, for example, the fear of retaliation, emotional vulnerability, or even failures on behalf of law enforcement illustrated by Yvette’s story—many women are unable to meet the burden that most current federal and state-level sex-trafficking legislation requires.<sup>73</sup> To address this phenomenon, state legislatures and nations abroad have experimented with different statutory regimes that, to varying degrees, increase, decrease, or altogether eliminate certain criminal penalties for prostitution and related offenses as a means of targeting sex trafficking while preventing likely victims from becoming defendants.

This Part addresses examples of the two most common sentencing regimes employed by foreign legislatures in this pursuit, compares them with U.S. law, and attempts to reconcile certain empirical difficulties in assessing their success or failure. It also addresses common counterarguments to these various statutory frameworks. Ultimately, this Part will provide the backdrop for Part IV, which advocates for the implementation of a perpetrator-based sentencing regime that would best complement Texas’s current sentencing scheme.

### *A. Demand-Centric Criminalization: Sweden*

Sweden’s statutory framework targeting prostitution takes the explicit approach that prostitution is unequivocally violence against women and children.<sup>74</sup> Accordingly, in 1999, Sweden outlawed the purchase of commercial sex, recognizing such purchasers as exploiters

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73. See generally Lynda M. Baker et al., *Exiting Prostitution: An Integrated Model*, 16 VIOLENCE AGAINST WOMEN 579 (2010) (discussing complications with burdens of proof).

74. See Day, *supra* note 28, at 156; Marie de Santis, *Sweden’s Prostitution Solution: Why Hasn’t Anyone Tried This Before?*, WOMEN’S JUST. CTR., [https://justicewomen.com/cj\\_sweden.html](https://justicewomen.com/cj_sweden.html) (last visited Jan. 22, 2018) [<https://perma.cc/4LQ8-M794>] (discussing the obstacles to passing legislation similar to that of Sweden). In support of its prostitution law, the Swedish government has stated:

In Sweden, prostitution is regarded as an aspect of male violence against women and children. It is officially acknowledged as a form of exploitation of women and children that constitutes a significant social problem . . . [G]ender equality will remain unattainable so long as men buy, sell and exploit women and children by prostituting them.

*Prostitution and Trafficking in Human Beings*, MINISTRY INDUSTRY, EMP. & COMM. 1 (Apr. 2005), [http://nordicbaltic-assistwomen.net/IMG/pdf/Sweden\\_Factsheet\\_on\\_Prostitution\\_and\\_Trafficking-2.pdf](http://nordicbaltic-assistwomen.net/IMG/pdf/Sweden_Factsheet_on_Prostitution_and_Trafficking-2.pdf) [<https://perma.cc/3Q4J-3QCT>].

of women, and began prosecuting the purchase of commercial sex as sexual abuse and violence against women.<sup>75</sup> The sale of commercial sex in Sweden, importantly, has been *decriminalized*, meaning that the sale of commercial sex is neither legal (i.e., explicitly condoned or regulated by the state) nor criminalized (i.e., subject to criminal penalties). In so doing, Sweden has focused its law enforcement and prosecution efforts on the johns and effectively removed the prostituted women from the criminal sphere. The law further provides for police training that helps law enforcement officers recognize and aid prostituted persons seeking to leave the industry.<sup>76</sup>

Underlying Sweden's policy is its tradition of creating gender equality, which ultimately manifested in the establishment of the Ministry of Gender Equality—the Swedish agency responsible for the drafting and enactment of the 1999 reform.<sup>77</sup> The introduction of the 1999 law represents a culmination of the evolving Swedish welfare state, conceptually originating in the 1920s and founded on the premise that government policy should ultimately seek to improve the lives of marginalized individuals.<sup>78</sup> Though the United States, like Sweden, is recognized as a leader in combatting the illegal sex industry, its differences from Sweden in modern policy approaches may be traced to the two countries' divergent political and social identities at large.<sup>79</sup>

Sweden's innovative approach to prostitution and trafficking legislation has garnered positive results in reducing crime within its borders. In February 2017, the Scottish government conducted a comprehensive review of the state of international policy toward the criminalization of the purchase of prostitution, with a particular eye on

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75. See de Santis, *supra* note 74 (examining Sweden's legislation).

76. *Id.*; see Day, *supra* note 28, at 156 (stating how Sweden has criminalized the buyers of sex).

77. JOHN T. PICARELLI & ANNA JOHNSON, FOSTERING IMAGINATION IN FIGHTING TRAFFICKING: COMPARING STRATEGIES AND POLICIES TO FIGHT SEX TRAFFICKING IN THE U.S. AND SWEDEN 19 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223060.pdf> [<https://perma.cc/MGB6-XU8F>].

78. *Id.* at 22.

79. For example, the United States, more so than other western countries, frequently prioritizes prosecutorial and retributive efforts over rehabilitative initiatives that might be more widely associated with a "welfare state." For further reading on these differences, see, for example, ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003) (tracing the history of and comparing modern trends of U.S. and European foreign policy and international relationships); and Rachel O'Connor, The United States Prison System: A Comparative Analysis 80 (Mar. 19, 2014) (unpublished M.A. thesis, University of South Florida), <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=6282&context=etd> [<https://perma.cc/VCK7-7DW8>], which illustrates differences in European and U.S. criminal justice systems—for example that the average sentencing length in the United States is twenty-nine years, while in the Netherlands, it is only seven.



Sweden's empirical results over the last twenty years.<sup>80</sup> Like many studies that seek to collect and summarize data regarding prostitution and sex trafficking, the Scottish study acknowledged certain methodological hurdles in accurately estimating the numbers.<sup>81</sup> The primary hurdle is the internet: an accurate accounting of prostitution and sex-trafficking cases can no longer be limited to those uncovered on the street as the forum for selling sex is shifting to the online world.<sup>82</sup> Still, the estimated numbers collected in the study's analysis of Sweden's 1999 reform are compelling.<sup>83</sup>

According to the study, in 1995, four years before enactment, Swedish law enforcement reported encounters with approximately 650 women related to prostitution offenses.<sup>84</sup> By 2010, about a decade after the promulgation of the 1999 reform, this number had decreased to an average of two hundred women who encountered law enforcement prostitution units.<sup>85</sup> As the study demonstrates, these numbers are most striking when compared to rates of prostitution and sex trafficking in Sweden's neighbor state, Denmark, where the purchase of sex is legal.<sup>86</sup> Though the population of Sweden is nearly double that of Denmark, rates of prostitution in Sweden are only one-tenth of that in Denmark. Again, while these results seem promising, it is difficult to definitively tell whether this trend is merely due to a shift in forum to the internet, or even to a larger-scale displacement to neighbor states with vastly different laws regarding the sale and purchase of commercial sex.

Perhaps most importantly, however, the Swedish law has achieved what few other statutory regimes have successfully been able to accomplish in this area of the law: a drastic change in public attitudes toward prostitution, with the vast majority of Swedes now looking negatively upon johns who purchase sex.<sup>87</sup> This success is arguably due

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80. EMMA FORBES, MARGARET MALLOCH & LAURA ROBERTSON, SCOT. CTR. FOR CRIME & JUST. RES., EVIDENCE ASSESSMENT OF THE IMPACTS OF THE CRIMINALISATION OF THE PURCHASE OF SEX: A REVIEW 1 (2017), <https://beta.gov.scot/publications/evidence-assessment-impacts-criminalisation-purchase-sex-review/pages/1/> [<https://perma.cc/BYU3-WMF3>].

81. See *id.* at 20.

82. *Id.* While the study acknowledges the reasonable possibility that the substantial decrease in street prostitution may be in fact a reflection of the prostitution industry going "underground" or transitioning into the escort service model, which largely relies on internet advertisements, any studies supporting this assertion have been severely limited as these types of activity are difficult to monitor, let alone quantify. *Id.*

83. *Id.* at 20–21.

84. *Id.*

85. *Id.*

86. *Id.* at 22.

87. Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 MICH. J. INT'L L. 133, 148 (2011).

in part to the normative goals that so often characterize Swedish legislation.<sup>88</sup> In this regard, the main purpose of the 1999 reform was prevention; thus, the decrease in arrests related to prostitution and incidents of street prostitution may well be a product of the social change facilitated by the statute. As one study stated: “In 1996 a survey study showed that only forty-five percent of women in Sweden and twenty percent of men wanted to criminalize a male sex purchaser. In 1999 eighty-one percent of women and seventy percent of men wanted to criminalize the purchase of sex.”<sup>89</sup>

However, these broad social goals likely were the cause of some prosecutorial inconsistencies during the early enforcement of the law as well. This new social attitude initially distracted courts from focusing on the direct victims, instead ruling consistent with the idea that this law was about preventing harms to the public. For example, a 2001 ruling of the Swedish Supreme Court held that the prostituted person’s “consent” constituted a mitigating factor when analyzing the actual harm done.<sup>90</sup> This holding embodied the early interpretation that the law served to primarily codify offenses against the public, rather than the specific prostituted person herself.<sup>91</sup> The district court in that case held, and the Swedish Supreme Court affirmed, that crimes against the public warrant a lesser degree of punishment than crimes against a person. To drive that point home, the purchaser ultimately only received a fine.<sup>92</sup>

This weak sentencing framework failed to initially incentivize police enforcement of the law.<sup>93</sup> However, throughout the last ten years, the Swedish courts have begun to realize that valid consent is often an impossibility in most if not all circumstances involving prostitution, and accordingly have increased sentencing to reflect the crime as one directly targeted at the person.<sup>94</sup> For a jurisdiction looking to implement this statutory model, addressing these interpretative weaknesses inherent in the drafting of the Swedish law should be a priority. In other words, legislation within this model should explicitly

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88. See, e.g., NANNA KILDAL & STEIN KUHNLE, *NORMATIVE FOUNDATIONS OF THE WELFARE STATE: THE NORDIC EXPERIENCE* (2005) (discussing the history and continuity of normative standards in policy and legislation that have shaped and continue to influence the social and political environments of the Scandinavian states).

89. Waltman, *supra* note 87, at 148.

90. *Id.* at 153.

91. *Id.*

92. *Id.*

93. *Id.* at 153 n.125 (describing prosecutor and police consensus that prioritization of enforcement and investigation is at least partially a result of relatively low criminal penalties associated with these offenses).

94. *Id.* at 153–54.

state that the law's primary function is to protect individuals, relegating normative benefits to society as a whole as a natural consequence of effective enforcement.

Despite these early shortcomings, Sweden's prostitution law has ultimately been successful in decreasing incidents of street prostitution and reducing trafficking within its borders. Perhaps most importantly, Sweden has laid the groundwork for the development of statutory frameworks that target the demand side of the illegal sex industry—the purchasers—by recognizing their inextricable role in an epidemic of violence against women.<sup>95</sup> One study of two hundred prostituted women in San Francisco found that seventy percent of these women reported being raped or similarly victimized by purchasers “beyond the prostitution contract” an average of 31.3 times each.<sup>96</sup> Similarly, eighty-four percent of fifty-five female survivors of prostitution in Portland, Oregon, had been victims of aggravated assault over one hundred times per year, and fifty-three percent reported being sexually tortured by their purchasers more than once per week.<sup>97</sup> These staggering numbers reflect a near-universal norm that purchasers largely go unpunished for their exploitative activities and, coupled with the impressive statistical results of the Swedish law, present a compelling argument that such demand-centric legislation is dearly needed here at home.

### *B. Legalization and Regulation: New Zealand*

Despite the international attention on human-trafficking crimes over the last twenty years and the increasing understanding of prostitution's role in its perpetuation, some jurisdictions continue to

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95. Kelsey Fleharty, Comment, *Targeting the Tricks of the Trade: A Comparative Analysis of Prostitution Laws in Sweden and the United States*, 15 OR. REV. INT'L L. 443, 464 (2013) (“Though the Swedish Model can hardly be heralded as a panacea, it has proven effective in de-normalizing the purchase of sex and promoting a view of prostitutes as victims rather than autonomous and willing participants.”).

96. Mimi H. Silbert & Ayala M. Pines, *Occupational Hazards of Street Prostitutes*, 8 CRIM. JUST. & BEHAV. 395, 397 (1981); see also Linda Lowen, *Physical Abuse of Prostitutes Is Common*, THOUGHTCO., <https://www.thoughtco.com/prostitution-statistics-rape-physical-abuse-3534139> (last updated May 13, 2017) [<https://perma.cc/J5DA-QH5N>] (describing the same study and similar ones indicating that a majority of prostituted women were also victims of sexual violence as children).

97. Susan Kay Hunter, *Prostitution Is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 91, 93–94 (1993); see also Hyunjung Choi et al., *Posttraumatic Stress Disorder (PTSD) and Disorders of Extreme Stress (DESNOS) Symptoms Following Prostitution and Childhood Abuse*, 15 VIOLENCE AGAINST WOMEN 933, 942 (2009); Melissa Farley, *Prostitution Is Sexual Violence*, PSYCHIATRIC TIMES (Oct. 1, 2004), <http://www.psychiatristimes.com/sexual-offenses/prostitution-sexual-violence> [<https://perma.cc/9U4U-Z9CX>] (relating representative stories of sexual violence, violence to which prostituted women are especially susceptible, and providing statistical evidence that prostituted women suffer an increased risk of developing PTSD as a result of violent treatment from both pimps and purchasers).

experiment with various forms of legalization and regulation of the industry. Representative of these legislative regimes are New Zealand and the State of Nevada.<sup>98</sup> This section will analyze the structure, history, success, and consequences of legalization, using New Zealand as a paradigm, and will ultimately argue that the legalization of prostitution in any form fails to improve work conditions, secure safety, or advance sexual autonomy.

The New Zealand Parliament enacted the Prostitution Reform Act of 2003 with the intent to create safer work environments for sex workers. The Act arose out of general concern that the criminalization scheme in place prior to the Act disproportionately and unjustly targeted workers rather than their clients.<sup>99</sup> The sex industry figured predominantly in New Zealand's history and culture, dating back to the first recorded expeditions to the island by western nations in the eighteenth century, which included trade with the native Maori people of, among other things, goods for sexual services.<sup>100</sup> Until the late nineteenth century, prostitution was a tolerated, if criminalized, industry largely controlled by vagrancy and public nuisance statutes—not unlike its treatment in the United States at the time.<sup>101</sup> Through the twentieth century, health and safety concerns led to outright prohibitions of prostitution in public places.<sup>102</sup> However, in the 1970s and 1980s, increased awareness of and public sentiment for the HIV/AIDS crisis, coupled with sex-worker activism, ignited serious public debate for the first time regarding the legalization of prostitution.<sup>103</sup>

After New Zealand legalized prostitution in 2003, Auckland, its largest city, witnessed a two hundred to four hundred percent increase

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98. Pursuant to Nevada state law, licensed brothels may only operate in counties with a population of less than seven hundred thousand. See NEV. REV. STAT. § 244.345 (2017). With the exception of licensed “houses” of prostitution, solicitation of or engagement in prostitution is illegal in the State of Nevada. See *id.* § 201.354(1). Interestingly, under Nevada law, courts may order those convicted of soliciting prostitution to undergo rehabilitative treatment. See *id.* § 201.354(7). The maximum penalty for prostitution in the state is a gross misdemeanor and a maximum fine of not less than \$1,300. See *id.* § 201.354(3)(c).

99. Paul Bellamy, *Prostitution Law Reform in New Zealand*, N.Z. PARLIAMENTARY LIBR. 3–4 (July 2012), <https://www.parliament.nz/resource/en-NZ/00PLSocRP12051/c62a00e57bd36e84aed237e357af2b7381a39f7e> [<https://perma.cc/V7HF-7X2Q>] [hereinafter *Prostitution Law Reform in New Zealand*].

100. *Id.* at 1–3 (citing Jan Jordan, *The Sex Industry in New Zealand: A Literature Review*, N.Z. MINISTRY JUST. 23–24 (Mar. 2005), <https://www.justice.govt.nz/assets/Documents/Publications/sex-industry-in-nz.pdf> [<https://perma.cc/ZB5F-QWBN>]).

101. See *id.*

102. *Id.*

103. *Id.*

in street prostitution.<sup>104</sup> The Prostitution Reform Act subjected the newly legalized industry to health and safety requirements and brothel certification processes; further, the Act authorized “territorial authorities” to regulate the location of brothels and oversee other related zoning requirements.<sup>105</sup> Finally, the Act formed the Prostitution Law Review Committee, a committee of eleven members appointed by the Minister of Justice and charged with reviewing the effectiveness of the decriminalization scheme vis-à-vis its purpose: improving the working conditions of sex workers.<sup>106</sup> Despite regulations and oversight, however, the efficacy of the Reform Act has received mixed reviews in recent years, owing largely to the difficulty in collecting and reviewing reliable data within the industry.

Review of the Reform Act, most significantly, has struggled to calculate either a net positive, neutral, or negative effect of the Act as it relates to work conditions because these so often depend on the worker’s status and location within the industry. Workers operating out of licensed brothels arguably have seen the greatest benefit from promulgation of the Act—their work environments may now be regulated like those within any other industry, and they may bring lawsuits against employers for violations without fear of being found criminals themselves.<sup>107</sup> Proponents of a legalized prostitution industry such as that in New Zealand vehemently argue that the most exploitative working conditions of sex workers are a product of the marginalization, stigma, and criminal consequences for workers who might otherwise come forward to report such conditions within the criminalized context.<sup>108</sup>

However, the prognosis for street-based workers has been radically different in New Zealand and even more difficult to quantify.<sup>109</sup> Significantly, the Reform Act carries no restrictions on locations in which street-based workers may operate. For this reason,

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104. See Day, *supra* note 28, at 154 (citing Melissa Farley, *What Really Happened in New Zealand After Prostitution Was Decriminalized in 2003?*, PROSTITUTION RES. & EDUC., <http://www.prostitutionresearch.com/Report%20on%20NZ%2010-29-2008.pdf> (last visited Jan. 24, 2017) [<https://perma.cc/NZS8-95QU>]). While this purported increase is significant, it may be difficult to know if the percentages represent an increase at all or simply a shift in workers no longer having to work undercover from the eyes of law enforcement.

105. See *Prostitution Law Reform in New Zealand*, *supra* note 99, at 5 (discussing the effects of New Zealand’s Reform Act).

106. *Id.*

107. See Jan Jordan, *The Sex Industry in New Zealand: A Literature Review*, N.Z. MINISTRY JUST. 59–60 (Mar. 2005), <https://www.justice.govt.nz/assets/Documents/Publications/sex-industry-in-nz.pdf> [<https://perma.cc/ZB5F-QWBN>] (noting the benefit to workers within the prostitution industry).

108. *Id.*

109. See *Prostitution Law Reform in New Zealand*, *supra* note 99, at 6–7.

as well as the often-fleeting or intermittent durations of time spent working within the industry, any number representing the current street-based workforce must be treated with caution.<sup>110</sup> Still, recent studies have found that street-based workers are substantially more likely than their brothel-based counterparts to be the victims of violence, threats, rape, and theft—crimes usually perpetrated by clients.<sup>111</sup> Street-based workers also reported harassment and violence from men posing as clients, as well as harassment from the public generally.<sup>112</sup>

In addition to these unintended consequences for street-based workers, the legalization of prostitution in New Zealand has also resulted in perverse consequences in the context of investigation and prosecution of sex-trafficking crimes. Unlike many other countries, sex-trafficking cases in New Zealand are solely handled by the nation's immigration task force, Immigration New Zealand ("INZ").<sup>113</sup> However, even INZ's focus on trafficking is a relatively new development, as the agency did not make the crime a top enforcement priority until 2014.<sup>114</sup> Naturally, this sort of enforcement body by definition is not primarily focused on or staffed for domestic issues. As a result, in 2015, the New Zealand government amended its criminal code, officially codifying the crime of domestic human trafficking.<sup>115</sup> Still, for many domestic victims of trafficking, this update to the law may have been too little, too late.

*The New Zealand Herald*, in an article discussing these legal changes, described several cases in which the perpetrator could have been, and likely should have been, convicted of a human-trafficking offense but for the unavailability of enforcement.<sup>116</sup> One of the many stories discussed in the article describes a sixty-year-old brothel owner who seduced a teenager online into meeting him and subsequently forced the girl into the sex trade.<sup>117</sup> The brothel owner was charged with child exploitation rather than trafficking. These stories predominantly involved migrant women, who often are the most vulnerable to such

110. *Id.*

111. *Id.*

112. *Id.*

113. See *Policy & Law: People Trafficking*, IMMIGR. N.Z., <https://www.immigration.govt.nz/about-us/policy-and-law/integrity-of-the-immigration-system/people-trafficking> (last visited Aug. 8, 2018) [<https://perma.cc/F7ZG-2JVQ>].

114. See Olivia Carville, *Exposed: The Dark Underbelly of Human Trafficking in New Zealand*, N.Z. HERALD (Sept. 22, 2016, 10:43 AM), [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11711211](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11711211) [<https://perma.cc/68DC-HJX4>].

115. In so doing, trafficking crimes in New Zealand may now be pursued by domestic law enforcement authorities, as well as immigration authorities. See Crimes Act 1961, s 98D(4) (N.Z.).

116. See Carville, *supra* note 114.

117. *Id.*

exploitation: a majority of the stories cited by the article involved false promises, confiscation of passports and other identification materials, and extensive periods of both physical and sexual abuse.<sup>118</sup> As the article aptly points out: “By failing to label these exploitation cases as trafficking—and, therefore, not obtain convictions, New Zealand has skewed international figures on the prevalence of the crime in the South Pacific.”<sup>119</sup>

Though the United States has consistently ranked New Zealand as a destination country for trafficking crimes,<sup>120</sup> attempts to quantify the prevalence of trafficking within the island nation have faced the same difficulties as attempts to quantify its prevalence in other nations. As the study on Sweden’s statutory framework pointed out, many, if not most, instances of trafficking are shifting to the internet.<sup>121</sup> Further, even when investigations would likely be successful, prosecutors often are unable to secure a conviction due to the substantial evidentiary hurdles they face—particularly the reliance almost exclusively on

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118. *Id.* Interestingly, the article also discusses the major role that Backpage.com—the Dallas-based personal advertisement website whose adult classifieds section has since been shut down for facilitating trafficking—has played in New Zealand sex trafficking. The article discusses the ire of U.S. senators in response to the website’s activity, as well as the website’s major role in the Canadian trafficking hub of Toronto. Toronto investigators reported routine monitoring of Backpage’s adult classifieds section as part of their investigations. In contrast, the article notes New Zealand authorities contacted for the story had never heard of Backpage, strongly suggesting a continued lack of domestic enforcement against trafficking crimes.

119. *Id.* As the article further notes,

New Zealand government officials have acknowledged and vowed to combat labour trafficking of migrant workers, but there appears to be reluctance to admit domestic sex trafficking of any kind occurs [in New Zealand]. When the *Herald* put questions about sex trafficking to the police, we were referred to INZ who referred us back to the police.

*Id.*

120. For the past five years, the U.S. Department of State’s annual Trafficking in Persons Report has described New Zealand as a destination country for human trafficking. See U.S. DEP’T OF STATE, 2017 TRAFFICKING IN PERSONS REPORT 300 (2017), <https://www.state.gov/documents/organization/271339.pdf> [<https://perma.cc/99L5-GD37>] [hereinafter TIP REPORT 2017]. However, since New Zealand’s enactment of a comprehensive anti-trafficking law and establishment of an anti-labor-trafficking task force, the country’s status in the report has improved, though it is still considered a destination country for South Pacific islanders who are particularly vulnerable to labor trafficking. In 2017, the report ranked New Zealand as a Tier 1 country for its efforts to combat human trafficking but criticized its nearly nonexistent rate of prosecution for trafficking crimes and critiqued its child sex-trafficking statute, which requires a showing of fraud or coercion, as being below standards of international law in this area. See *id.* at 299.

121. For resources regarding the relationship between the internet and human trafficking, see, for example, Erin I. Kunze, *Sex Trafficking via the Internet: How International Agreements Address the Problem and Fail to Go Far Enough*, 10 J. HIGH TECH. L. 241 (2010); Ryan Dalton, Note, *Abolishing Child Sex Trafficking on the Internet: Imposing Criminal Culpability on Digital Facilitators*, 43 U. MEM. L. REV. 1097 (2013); and Marguerite A. O’Brien, Note, *Free Speech or Slavery Profiteering?: Solutions for Policing Online Sex-Trafficking Advertisement*, 20 VAND. J. ENT. & TECH. L. 289 (2017).

victim testimony, which can be difficult to obtain as victims are often fearful or reluctant to testify against their abusers.

In sum, New Zealand's legalization appears to have had some significant benefits for brothel-based workers, insofar as these women now have legal recourse for unsafe or unsanitary working conditions.<sup>122</sup> However, despite these benefits, legalization appears to have exacerbated the vulnerability of women in the sex industry who were already considered the most at risk for abuse and violence: street-based workers and migrant women.<sup>123</sup> Most significantly, the legalization, at least until very recently, seems to have taken the heat off of traffickers, domestic or otherwise. Though New Zealand proudly claims that it has had only two trafficking convictions in recent years, the numbers are likely misrepresentative and skewed due to failures to report and misclassifications of offenses under the nation's current statutory framework.<sup>124</sup>

Though Sweden's approach presents its own prosecutorial hurdles, a state or nation looking to reform its own prostitution laws with an eye on deterring trafficking should consider adopting such a demand-centric model, emphasizing rehabilitation for the prostituted persons involved, over a legalization model, which is likely to place those who are already the most vulnerable at even greater risk. Though certain levels of regulation and legalization may constitute a reasonable long-term goal, such changes in legislation, particularly in the strongly conservative state of Texas, are unlikely to happen with any particular speed. Accordingly, a shift toward a demand-centric framework constitutes the best immediate approach for legislative reform in this area.

### *C. Autonomy Concerns and Ideological Capture*

The policy debate surrounding the existence of a functional relationship between prostitution and human trafficking and, in particular, whether that relationship should be targeted through aggressive legislation is largely dominated by two diametrically opposed groups: the nonabolitionists and neoabolitionists. This Section will contrast these two opposing views, analyze their most prominent arguments, and illustrate the way in which U.S. prostitution and human-trafficking laws have ultimately codified one over the other.

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122. See Jordan, *supra* note 107, at 59–60.

123. See *Prostitution Law Reform in New Zealand*, *supra* note 99, at 6–7.

124. See TIP REPORT 2017, *supra* note 120, at 299; Carville, *supra* note 114.



Individuals identifying with the nonabolitionist movement defy strict categorization but share the belief that prostitution should be either decriminalized or legalized outright and regulated as any other industry would be.<sup>125</sup> Today, nearly all nonabolitionists focus their scholarly work and efforts toward ensuring safer working environments for voluntary sex workers.<sup>126</sup> In the eyes of the nonabolitionist contingent, preventing women from making a meaningful choice to engage in sex work and deriving a meaningful existence from that work denies those women their agency and rights to sexual autonomy.<sup>127</sup> Nonabolitionists vehemently argue that criminalized prostitution serves only to increase the danger and violence to which sex workers are so often subjected. Consequently, they advocate for the legalization of prostitution like in New Zealand, which nonabolitionists believe empowers women to act as free agents in a market with a demand for commercialized sex.<sup>128</sup>

Neoabolitionists—those that argue that the entirety of the sex industry should be outlawed—as a group comprise somewhat surprising political contingents: radical feminists, evangelical Christians, and political conservatives.<sup>129</sup> The central tenet of feminist neoabolitionism is that, at its core, prostitution is exploitation and a form of violence against women; neoabolitionism does not distinguish between either voluntary or coerced prostitution, relying on the legal and ontological impossibility of consenting to exploitation.<sup>130</sup> As Professor Janice Raymond, writing for the neoabolitionist group Coalition Against Trafficking in Women (“CATW”), argues:

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125. See Chuang, *supra* note 17, at 1670 (“Opposing the neo-abolitionist view is a diverse group of advocates who share disagreement with the neo-abolitionist agenda, whether for political, moral, or pragmatic reasons, but who are otherwise difficult to categorize under one label other than ‘non-abolitionist.’”).

126. Neoabolitionist literature appears to prefer the term “prostituted person” when referring to a woman engaged in prostitution, while nonabolitionist literature consistently uses the term “sex workers,” a difference indicative of the competing ideologies these groups represent.

127. See Chuang, *supra* note 17, at 1670 (describing the nonabolitionist rejection of the neoabolitionist concept of “false consciousness,” or the inability of a prostituted person to recognize her own oppression).

128. See, e.g., Ane Mathieson et al., *Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. FOR SOC. JUST. 367, 370 (2015).

129. Chuang, *supra* note 17, at 1664–65; see Gabrielle Simm, *Negotiating the United Nations Trafficking Protocol: Feminist Debates*, 23 AUSTL. Y.B. INT’L L. 135, 138 (2004) (“[I]t is impossible to distinguish between free and forced prostitution as the indiscriminate use by men of a woman’s body for their sexual satisfaction leaves no room for female subjectivity, sexuality or the possibility of consent.”).

130. See Chuang, *supra* note 17, at 1664 (“In [the neoabolitionist] view, choice and consent are not possible because prostitution is an institution of male dominance and results from the absence of meaningful choices.”).

There is no doubt that a small number of women say they choose to be in prostitution, especially in public contexts orchestrated by the sex industry. In the same way, some people choose to take dangerous drugs such as amphetamine. However, even when some people consent to use dangerous drugs, we still recognize that is harmful to them, and most people do not seek to legalize amphetamine. In this situation, it is *harm* to the person, not the *consent* of the person that is the governing standard.<sup>131</sup>

Ultimately, feminist neoabolitionists tend to view the continued entrance of women into prostitution work not as a decision grounded in meaningful choice but rather as a survival strategy. They often cite sex-based discrimination in other contexts, particularly within employment settings, as severe limitations on a woman's economic power of choice and mobility.<sup>132</sup>

Meanwhile, for evangelical Christians and most political conservatives, the question of abolitionism has less to do with income, economic mobility, and free choice, and more to do with considerations of morality and conscience.<sup>133</sup> All three factions, however, embrace the "abolitionist" epithet. In addressing potential reform or remedies to prostitution regimes, certain neoabolitionists argue for a demand-centric regime—wherein the purchaser is punished and the prostituted person is not—and look to Sweden as the ideal legislative model.<sup>134</sup>

Neoabolitionism, strengthened by its diverse constituencies within the political sphere, has been instrumental in shaping the United States' approach to prostitution and sex trafficking. Beginning in the George W. Bush Administration with the promulgation of the TVPA, federal law's stance on prostitution has heavily adopted the politically conservative narrative. Arguably, the United States has also historically adopted this moralistic view, as demonstrated through its early attempts at the elimination of prostitution through vagrancy statutes and zoning laws. Today, the TVPA limits federal grants under

131. Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, COALITION AGAINST TRAFFICKING WOMEN 8 (2003), <http://catwinternational.org/Content/Images/Article/41/attachment.pdf> [<https://perma.cc/2H8M-3K8U>].

132. See MacKinnon, *supra* note 26, at 273–74 (citing studies conducted by Melissa Farley of Prostitution Research & Education in San Francisco, California):

Based on information from the women themselves, women in prostitution are observed to be prostituted through choices precluded, options restricted, possibilities denied. . . . Prostitution here is observed to be a product of lack of choice, the resort of those with the fewest choices, or none at all when all else fails.

133. See Chuang, *supra* note 17, at 1665 (describing the evangelical abolitionist movement as one rooted in the desire to sustain patriarchal, heterosexual societal norms and expectations of sexuality within the confines of marriage, while more moderate or liberal Christians "apply a pro-business model of bringing women out of prostitution and into the (legitimate) service market").

134. See *id.* at 1669 (explaining that most neoabolitionists have adopted a "toleration" approach to prostitution laws, wherein the criminal law targets brothel owners, pimps, and purchasers, and excludes criminal liability for the prostituted person).

its purview to organizations that strictly adopt a neoabolitionist perspective.<sup>135</sup>

These diametrically opposed factions in the arena of prostitution law reform play a significant and direct role in the development and promulgation of legislation that could be used to target human trafficking. This is because the use of prostitution laws to target sex trafficking implicitly requires and acknowledges that these two sectors of the sex industry are inextricably intertwined. Under a neoabolitionist construction of sex work, prostitution is functionally indistinguishable from sex trafficking.<sup>136</sup> According to the neoabolitionist, the force, fraud, and coercion showing so often required under sex-trafficking statutes is implicit in the exploitative act of selling one human being to another for the purpose of sexual gratification.<sup>137</sup> Taking this logic to its fullest extreme, a purely neoabolitionist legislative regime might convict and sentence offenders of prostitution and sex-trafficking laws equally, likely with the heaviest penalties for the purchasers, traffickers, and pimps. The prostituted person, on the other hand, would likely be offered or placed in rehabilitative treatment.

Still, nonabolitionists reject the idea that prostitution and sex trafficking should ever be grouped together under legislative reform and resist the idea that restrictions on voluntary sex work could affect the prevalence of sex trafficking within a jurisdiction.<sup>138</sup> Inherent in the nonabolitionist's legislative paradigm would be the availability of judicial remedies for sex workers for dangerous work conditions or injuries experienced while working.<sup>139</sup> As demonstrated in New Zealand, however, though these sorts of regulation do seem to help certain classes of sex workers, their benefits do not seem to reach the most vulnerable workers within the industry, particularly those most susceptible to crimes of trafficking.<sup>140</sup> Further, while sex trafficking typically remains a crime in these "legalization" jurisdictions, law enforcement is disincentivized from closely investigating sex-worker

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135. *See id.* at 1654–55.

136. *See* Simm, *supra* note 129, at 138.

137. *See* MacKinnon, *supra* note 26.

138. *See* Chuang, *supra* note 17, at 1671 ("With respect to non-abolitionist engagement with the trafficking movement, non-abolitionist feminists insist on a distinction between trafficking and prostitution, with the 'trafficking' label applying only to those cases that fit into the paradigm of forced or coerced labor.").

139. *See id.* (describing the nonabolitionist belief that criminalization of prostitution marginalizes the industry and forces the workers to bargain for their health and safety "in the shadows").

140. Importantly, some nonabolitionists do recognize that the concept of prostitution as sexually liberating, more than a necessary economic choice, likely rings true for only a small segment of women engaged in the industry. *See* Simm, *supra* note 129, at 140 (discussing the beliefs of self-identified "Third World feminists").

environments for signs of illegal trafficking.<sup>141</sup> Additionally, significantly at-risk populations, such as those lacking legal immigration status, are far less likely to come forward to report unsafe work environments or abuse.

This Note does not argue, nor need to argue, that one perspective is morally superior to the other in the debate over prostitution. However, understanding the competing ideologies that dominate the current debate over legislation governing prostitution and sex trafficking, particularly within the United States, provides a better grasp as to where the law stands today and where it is likely going. Thus, in light of this understanding, it becomes clear that expedient progress toward effectively targeting traffickers and the ultimate exploiters of prostituted persons—the purchasers—likely requires the adoption of the neoabolitionist perspective when drafting and proposing new legislation.

When prostitution is viewed as forming one-half of a nexus with human trafficking, the neoabolitionist strategy targeting pimps, johns, and other third parties enabling prostitution is the most expedient policy to eliminate sex trafficking. Importantly, the solution presented by this Note does not reach the criminal culpability or legal status of prostituted women themselves, but rather focuses on the sentencing applied to third parties. By not increasing the criminal consequences for women and ultimately leaving such consequences to the discretion of the state, this solution seeks to find some middle ground with the nonabolitionist perspective. The solution, however, also does not argue that the sale of sex should be immediately decriminalized or legalized outright, as studies show that in such contexts law enforcement and rehabilitative groups actually lose direct access to the victims who need the greatest assistance.

### III. BRINGING ACCOUNTABILITY HOME TO TEXAS THROUGH SENTENCING REFORM

Yvette, the young San Antonio woman on trial for robbery and exploitation of a minor, was eventually sentenced to twenty-three years in prison: eight for the robbery and fifteen for exploitation.<sup>142</sup> Red Nose, her pimp, never went to trial for either of these charges; instead, he took a plea deal the day before Yvette's trial, accepting ten years for trafficking a minor. He was never charged with the robbery.<sup>143</sup>

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141. For example, consider New Zealand's slow response over the last fifteen years to addressing sex-trafficking offenses within its own borders. *See supra* Section II.B.

142. *See* Smith, Walters & Satija, *supra* note 2.

143. *Id.*

Because of Yvette's fear of testifying against her abuser, Red Nose, the jury never learned of the abuse she suffered at his hands.<sup>144</sup> While Yvette cannot claim that her hands were completely clean in facilitating the prostitution of the minor, it is clear that in her case, like so many others, her continued involvement in prostitution under Red Nose was not a true choice, but a means of survival. This involvement came as a direct result of Red Nose's violence and intimidation; such violence and intimidation should, and most likely would, have satisfied the evidentiary burden needed for a sex-trafficking conviction against Red Nose, mitigating or potentially absolving Yvette's complicity in the crime.<sup>145</sup>

Thus far, this Note has addressed the various prosecutorial hurdles in successfully attaining convictions for sexual exploitation and trafficking against pimps and purchasers alike: because these cases rely almost exclusively on the testimony of victims, they will collapse if the victim is unwilling or unable to testify against her abuser. Further, it is unclear how frequently testimony alleging fraud, force, or coercion alone would be sufficient to vitiate the criminal liability of victims in cases like Yvette's, particularly where the exploitation of a minor is at issue.

As noted above, the Texas legislature has been active in this area of the law with its passage of the new crime of sexual coercion and its enhancement of sentences for the promotion of prostitution.<sup>146</sup> Similarly, the legislature's decision to make sentencing for the solicitation of prostitution on par with the sale of sex demonstrates its willingness to recognize the culpability of the men purchasing commercial sex—men who statistics indicate have regularly avoided prosecution for their involvement in these crimes.<sup>147</sup> Still, there remains an ominous gap in the administration of justice in these cases. Yvette's representative story elucidates the clear injustice in holding men and women equally accountable in these situations, particularly when the women's participation is so often an act of survival. Further, continuing to view these women as only criminals perpetuates the negative stigma frequently associated with prostituted persons and inhibits the accessibility of rehabilitative help.

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144. *Id.*

145. See TEX. PENAL CODE ANN. § 8.05(a)–(b) (West 2018) (recognizing the affirmative defense of duress, defined generally as compulsion to commit the criminal act by threat of imminent death or serious bodily injury, or, for crimes that do not constitute a felony, compulsion by force or threat of force); *id.* § 43.02(d) (finding of force, fraud, or coercion as an affirmative defense to prostitution).

146. See *id.* § 21.18; *supra* Section I.B.

147. PENAL § 43.02(a)–(b).

Accordingly, paradigmatic legislative reform should involve two principal components: (1) an enhancement in sentencing for solicitation convictions above that for convictions for the sale of sex and (2) legislative recognition that the women<sup>148</sup> so frequently inculpated in these crimes are almost always victims themselves. Such reform would ideally involve some form of restitution to, or at least rehabilitation for, the victim should the john fail to demonstrate that she acted freely and autonomously, a burden of proof discussed below. These changes would ultimately seek to correct the startling absence from Yvette's story of the men who repeatedly paid to use her.

Section III.A will address each of these components, as well as the potential benefits and hurdles of enforcement as exemplified by those experienced in Sweden. It will then consider the specific strategies that would best persuade the Texas legislature to adopt such changes in light of its strong neoabolitionist policies. Finally, it will propose methods of enforcement that would be utilized by agencies already in place within Texas that target trafficking and provide rehabilitative resources for victims. Section III.B proposes the long-term goal of adopting a fully demand-centric legislative framework such as that in Sweden, which decriminalizes but does not legalize the sale of sex. Recognizing that this proposal represents a substantial and perhaps unlikely change in both Texas law and U.S. domestic policy more generally, this Part will also suggest supplementary, smaller changes that would complement the Texas legislature's—or any state legislature's—adoption of the two principles of holding purchasers accountable and facilitating rehabilitative efforts for victims.

#### *A. One Step Forward: Proposed Legislative Changes for Texas*

Given the recent legislative developments within the state over the past several years and its vocal commitment to targeting and prosecuting sex-trafficking crimes, Texas stands in an ideal position to engage in substantive change of its prostitution laws. In light of the legislative innovations abroad, Texas should begin to shift its legislative model to one that is demand-centric and perpetrator-based—one that emphasizes the prosecution and sentencing of the purchasers of illegal commercial sex. As mentioned above, preliminary legislative steps in this regard must involve two components: (1) a heightening of the sentencing guidelines for purchasers of sex that is greater than those

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148. Again, for ease of terminology, this Note refers to prostituted persons generally as “women” and purchasers of sex as “men.” Though statistical evidence shows that the majority of prostituted persons and trafficking victims are women, this Note in no way means to detract from these harmful activities that affect men as well.

for the prostituted person and (2) emphasizing the critical importance of the wide availability of rehabilitative resources for the victims involved in these illegal transactions.

The first component seeks to begin the process of replicating the demand-centric framework currently in place in Sweden. By increasing accountability for purchasers, the state will be able to target the demand side of the illegal sex industry, which has for so long remained a relatively low priority for law enforcement efforts.<sup>149</sup> Specifically, Texas should charge the crime of solicitation of prostitution equal to that of the crime of soliciting a sex-trafficking victim: as a felony in the state.<sup>150</sup> However, sentencing need not be so draconian in order to satisfy this proposed model—so long as the sentencing of the purchaser is greater than that of the prostituted person, the demand-centric model should be satisfied pursuant to a deterrence theory of punishment.

Opponents of this change, such as those identifying with the nonabolitionist movement, will likely argue that such a sentencing regime fails to distinguish voluntary sex workers from violently trafficked victims and ignores the sexual autonomy of the men and women involved on either side of the transaction. This criticism may be qualified in several ways. First, and critically, this Note does not argue for the legalization of prostitution but rather proposes a long-term trend toward decriminalization. Whether under a demand-centric decriminalization regime or a criminalization regime, voluntary consent to the sale of sex does not factor into the sentencing of the purchaser because the *intent* of the purchaser remains the same. While voluntary sex workers would almost certainly take issue with policies that diminish demand for their services, this heightened sentencing framework would not sentence a voluntary sex worker any more or less severely because of her agency in the situation. Further, the long-term goal of decriminalization seeks to ultimately remove criminal penalties for the prostituted women involved, one of the primary objectives of nonabolitionism.

Second, most purchasers do not stop to discern whether the woman with whom they are engaging is actually a “voluntary sex worker” or, in reality, the victim of fraud, force, or coercion—a sex-trafficking victim. The woman’s “enjoyment” of the exchange is necessarily one of the many illusions of prostitution for men,<sup>151</sup>

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149. See 2016 CRIME IN TEXAS, *supra* note 61; *Crime in the United States 2012: Table 42*, *supra* note 54.

150. PENAL § 20A.02(b).

151. In an article investigating why men purchase sex, the author spoke with one of seven hundred men who had been interviewed for an international research project “seeking to uncover the reality about men who buy sex.” After being asked what he looks for when purchasing sex, he

accordingly, the purchaser's subjective belief as to the consent of the woman—and whether she is working voluntarily or has been coerced into doing so—should not serve as a mitigating, or aggravating, factor in sentencing but rather be disregarded. Finally, prostitution in the United States is commonly viewed as the product of economic necessity.<sup>152</sup> Whether choices of survival can truly be viewed as choices arising out of a woman's agency is a distinction that severely demarcates the differences between neoabolitionists and nonabolitionists.<sup>153</sup> However, both sides agree that voluntary sex workers make up only a slim percentage of women engaged in prostitution, and an even smaller one when reviewing data solely regarding street-based workers.<sup>154</sup> Accordingly, harm from the grouping of prostitution and sex trafficking, at least in this context, appears to be minimal in relation to the benefits it might secure for the majority.

To be fair to purchasers who made efforts to ensure the women they interacted with were not trafficked, however, this first component of heightened sentencing for purchasers of prostitution should also incorporate some affirmative defense to conviction. For example, although the purchaser's subjective beliefs as to the woman's situation should be disregarded, if the purchaser can present *objective* evidence that the woman was operating freely and independently at his time of purchase<sup>155</sup>—and thus that she was free from any fraud, force, or coercion—his sentencing should at least be mitigated. Though this defense does indeed present a substantial hurdle for the purchaser, it is merely the mirror image of that currently in place for a woman raising an affirmative defense to prostitution charges: an objective showing of fraud, force, or coercion.<sup>156</sup>

In addition to heightened sentencing, the second component asserts that substantive legal reform must contain provisions

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responded: "I want my ideal prostitute not to behave like one . . . to role-play to be a pretend girlfriend, a casual date, not business-like or mechanical. To a third person it looks like we're in love." Julie Bindel, *Why Men Use Prostitutes*, GUARDIAN (Jan. 14, 2010, 7:37 PM), <https://www.theguardian.com/society/2010/jan/15/why-men-use-prostitutes> [<https://perma.cc/V5WG-MUZ4>].

152. See, e.g., Jane E. Larson, *Prostitution, Labor, and Human Rights*, 37 U.C. DAVIS L. REV. 673, 681 (2004) (explaining that the theory of economic necessity is shared by both neoabolitionists and nonabolitionists, though each group utilizes the premise in furtherance of their relative policy goals: decriminalization as intervention versus decriminalization as recognition of bodily autonomy).

153. See *supra* Section II.C.

154. See Simm, *supra* note 129, at 140.

155. The criteria for objective evidence could be incorporated within the legislation or left for determination by the courts.

156. TEX. PENAL CODE ANN. § 20A.02(a)(3) (West 2018).



emphasizing the importance of rehabilitative efforts and victim identification by law enforcement. It is primarily for this purpose that this Note does not go so far as to propose the decriminalization of prostitution; decriminalization, absent appropriate resources or regulation that typically would accompany legalization, may actually shield victims from the eyes of law enforcement and in some instances even exacerbate coercive situations by eliminating opportunities for intervention.

Instead, the legislature should first focus on strengthening rehabilitative efforts for prostituted women as it has done for those already identified as victims of sex trafficking. Texas already has a particularly strong framework in this regard.<sup>157</sup> Taking yet another note from the Swedish Reform Act, to improve even further, it would be critical for Texas to set in motion statewide training for law enforcement officers regarding victim identification and interviewing—measures complementary to those already in place within the state. Finally, reforms of this type should consider utilizing any fines assessed on the purchaser as part of his conviction toward an end that facilitates rehabilitation efforts; in cases involving severe abuse or violence, the legislature should assess these fines instead as restitution to the victim.

Given the overwhelmingly politically conservative nature of the Texas legislature,<sup>158</sup> a basic proposal rooted in principles of neoabolitionism such as the one set out by this Note should not have too much difficulty. Because of the already predominant hold neoabolitionism has in U.S. law and public policy, any successful legislative proposal will most likely have to be couched within its terms. Fortunately, the recent statistical data discussed *supra* Section II.A showing the positive effects of a demand-centric framework in Sweden would shift what is otherwise a political discussion to a factual, empirical one.

The real difficulty will follow in effective, comprehensive, and consistent enforcement. As a result, the legislature should focus on drafting the bill in such a way that leaves its interpretation clear so as

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157. See *supra* Section I.B.

158. As of 2017, of 150 state house members, ninety-five were Republicans and fifty-five were Democrats; of thirty-one senators, twenty were Republicans and eleven were Democrats. Jackie Wang, *Curious Texas: Are All Texans Republicans?*, DALL. MORNING NEWS (Jan. 17, 2018), <https://www.dallasnews.com/life/curious-texas/2018/01/17/curious-texas-texans-republicans> [<https://perma.cc/5FDK-N5VS>]. Both of the state's U.S. senators (Senators John Cornyn and Ted Cruz) are Republicans. *Id.* Both the Texas House of Representatives and the Texas Senate have been consistently dominated by the Republican Party since the late nineties and early 2000s. Rick Perry served as the state's first Republican governor beginning in 1999. See *The Partisan Composition of the Texas Legislature*, TEX. POL. PROJECT, [http://texaspolitics.utexas.edu/archive/html/leg/features/0303\\_01/slide2.html](http://texaspolitics.utexas.edu/archive/html/leg/features/0303_01/slide2.html) (last visited June 6, 2018) [<https://perma.cc/N7SM-GKZV>].

to avoid enforcement issues such as those in Sweden, where inconsistent interpretation of the law led to low enforcement priority.<sup>159</sup> Successful enforcement of a demand-centric sentencing regime would require close cooperation with law enforcement and judicial agencies such as the state attorney general's office. Further, legal reform of this type would substantially bolster the state's explicit intent to target trafficking: by adopting these proposals, the legislature would effectively communicate a strong public policy against sexual exploitation of any kind. Texas should look to furthering this public policy through educational programs for its citizenry illustrating that the coerciveness and violence inherent in prostitution and trafficking exist not just abroad but also, and especially, domestically.

*B. The Next Steps: An Integrated Approach Toward a Long-Term Goal*

Ideally, the legislative changes proposed by this Note should be the first in a long-term trend toward a full-fledged, demand-centric decriminalization regime that is complemented by comprehensive rehabilitative services and a judiciary that recognizes true victims as victims and exploiters as exploiters. Decriminalization, coupled with appropriate resources, would provide those within the sex industry access to the help they need without fear of legal repercussions and in a manner that may satisfy even those on the nonabolitionist side of the debate.<sup>160</sup>

Still, legislative change is never quick and never easy—particularly legislative change that proposes to completely restructure a sizeable portion of the criminal code. Justice Brandeis once astutely asserted that states may serve as laboratories of democracy;<sup>161</sup> this Note ultimately argues that Texas, with its unique history, proactive policies, and political climate, stands as the prime jurisdiction in which to effect these changes. Continued success in the fight against sex trafficking, however, will necessarily be the result of a coordinated governmental effort: the division and tensions between federal and

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159. See Waltman, *supra* note 87, at 153 n.125.

160. See, e.g., Noel Busch-Armendariz & Stephanie Wahab, *Smarter U.S. Prostitution Laws Would Help AIDS Fight*, U. TEX. NEWS (Dec. 1, 2014), <https://news.utexas.edu/2014/12/01/smarter-us-prostitution-laws-would-help-aids-fight> [https://perma.cc/XRG8-ZNRE] (“By facilitating safer sex practices, decriminalization would also lead to a reduction of HIV/AIDS infection . . . It would also facilitate access to anonymous, nonjudgmental, free and voluntary HIV testing and more engagement in services when sex workers themselves are involved in the creation and delivery of those services.”).

161. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

state law create a substantial hurdle to consistent enforcement that is absent within the Swedish model.

Still, there are myriad other means of addressing the relationship between sex trafficking and prostitution on which jurisdictions, Texas included, may focus and that likewise deserve attention. Studies have recently emerged that bring to light the relationship between the child welfare system and prostitution and trafficking. These studies indicate that the frequently unstable foster system, coupled with foster children's often early exposure to physical or substance abuse, creates the perfect storm of factors rendering them especially susceptible to the influence of a coercive pimp or trafficker.<sup>162</sup>

Further efforts should likewise be taken to address workplace discrimination and educational opportunities for women, particularly those in low-income, at-risk communities. If entry into prostitution is truly a choice of economic necessity, states and private institutions should work to devote resources to ensuring that women need never be left with so few choices for survival. This same principle applies within the context of migrant women and families and members of the LGBTQIA+ community, as well as other marginalized groups in society, that have been found to be most at risk for violence and abuse within the commercial sex industry.<sup>163</sup> Perhaps most importantly, awareness initiatives and rehabilitative groups should work to educate young men and women about the importance of consent and respect for bodily autonomy as part of a larger movement that seeks to recognize prostituted and trafficked individuals like Yvette—not as defendants, and as more than just victims, but as survivors.

## CONCLUSION

Ultimately, this Note proposes that a demand-centric criminalization scheme for prostitution-related offenses serves as the most efficient legislative framework available today to combat the near-universally coercive nature of the sex-trafficking industry, to correct

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162. See, e.g., Allison Newcombe, *An Advocate's Guide to Protecting Trafficking Victims in the Child Welfare System*, 34 CHILD L. PRAC. 145 (2015); *Addressing Child Sex Trafficking from a Child Welfare Perspective*, CASEY FAM. PROGRAMS (Sept. 2014), [www.casey.org/media/child-sex-trafficking.pdf](http://www.casey.org/media/child-sex-trafficking.pdf) [<https://perma.cc/3CBF-H9MK>]; Elliott Gluck & Richa Mathur, *Child Sex Trafficking and the Child Welfare System*, CHILD WELFARE SPARC (July 2014), <http://childwelfaresparc.org/wp-content/uploads/2014/07/Sex-Trafficking-and-the-Child-Welfare-System.pdf> [<https://perma.cc/59PE-C8K8>].

163. See Carville, *supra* note 114 (describing the common theme of sexual exploitation of migrant women left unchecked after New Zealand legalized prostitution); *The Vulnerability of LGBTI Individuals to Human Trafficking*, U.S. DEP'T STATE (June 2017), <https://www.state.gov/documents/organization/272968.pdf> [<https://perma.cc/V9RB-6YRS>].

disparities in law enforcement and prosecution, and to facilitate rehabilitative alternatives and opportunities for the women whose lives have been affected. This Note, however, uniquely takes this argument one step further not only by focusing on a single jurisdiction—Texas—but also by conducting its analysis and describing its solution in light of policies that will be most effective given the social and political climate of that state. Further, this Note adopts the neoabolitionist approach to understanding the relationship between prostitution and sex trafficking as the most pragmatic approach and the one most conducive to prompt, effective legislative change. In so doing, this Note contributes to a movement seeking to move this often polarizing and legislatively paralyzed debate forward and create change for women the law has thus far failed to protect.

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