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From Responding to Uncertainties and Ambiguities to More Constructive and Inclusive Debates on Commercial Sex and Sex Trafficking

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ABSTRACT


Commercial sex policies are often at the core of many anti-trafficking efforts, yet rigorous empirical evidence about the effectiveness of these policies in preventing sex trafficking is lacking. In response to ongoing debates about which commercial sex laws and policies would help prevent sex trafficking, we seek to contribute to more nuanced discussions on commercial sex policies in relation to sex trafficking victimizations. The purpose of this essay is to identify the pitfalls in the debate on how to govern commercial sex markets, emphasizing 1) the lack of recognition of the variation in laws and policies on commercial sex; 2) the moral instead of empirical underpinnings of the debate; 3) ambiguous and stigmatizing notions of vulnerability to sex trafficking victimizations; and 4) a continued reliance on a traditional criminal justice system response that may cause harm to victims. We conclude with five premises to promote more nuanced, inclusive, and collaborative debates and governance of commercial sex markets that allow countries and local jurisdictions to move away from response models for which harm-reducing effects are either unknown or refuted.

KEYWORDS

Commercial sex; sex trafficking; legislation; victimization; harm-reduction approach

Introduction

Public alarm about human trafficking victimizations has grown globally since the adoption of the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children in 2000 (hereafter: UN Palermo Protocol). The UN Palermo Protocol urged countries to implement legislation that criminalizes human trafficking as the use of force, fraud, or coercion for the purpose of exploitation. With the emphasis on force, fraud, or coercion – human trafficking differs from legal definitions of commercial sex, which involves the exchange of money or goods for sex acts and has many different facets in the commercial sex industry and may occur both online and offline (de Vries & Farrell, 2019). Minors who are engaging in commercial sex are generally considered victims of sex trafficking regardless of the extent to which there is evidence of force, fraud, and coercion. Although countries differ in their national human trafficking legislations as to what constitutes exploitation, sexual exploitation is broadly considered a key manifestation of human trafficking (Reid, 2021).

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With growing awareness about human trafficking in the sex industry (Baker, 2015; de Vries & Farrell, 2019), debates on the varying ways to govern commercial sex markets are often intricately linked to public alarm about human trafficking victimizations. That is, notwithstanding broader concerns around public health and victimization in the commercial sex industry, new commercial sex laws, or amendments to existing commercial sex laws are frequently implemented out of concerns for sex trafficking victimizations. More specifically, laws on commercial sex that involve adults often have built-in assumptions about reducing the prevalence of sex trafficking. For example, the criminalization of commercial sex in the U.S. is based on the assumption that “prostitution is inherently harmful and dehumanizing and fuels trafficking in persons” (U.S. Department of state, 2007). However, concerns about stigmatization, an increased vulnerability to human trafficking, and a disproportionate impact of the criminalization on people within marginalized communities have led several jurisdictions such as Manhattan, Baltimore, and Philadelphia to no longer prosecute those who engage in selling commercial sex (e.g., Bromwich, 2021).

Concerns about sex trafficking have also sparked numerous – albeit substantially different – legislative changes across Europe (Crowhurst et al., 2012; Wagenaar, 2019). For example, the Nordic model, which criminalizes the buyers of commercial sex, has been implemented as a presumably effective anti-trafficking strategy (e.g., in Norway, Iceland, and Northern Ireland) despite the lack of reliable evidence of its actual impact on preventing sex trafficking victimizations (Clausen, 2007; Wagenaar et al., 2013). Furthermore, when the Netherlands lifted the General Ban on Brothels Act in 2000, state officials framed this as “a realistic approach without moralizing” that would enhance anti-trafficking efforts by increasing the visibility of commercial sex markets (see also de Vries & Farrell, 2019). However, growing concerns about sex trafficking victimizations within the legalized industry (Huisman & Kleemans, 2014) has driven an ongoing debate on renegeing on the original legalization by adopting strict regulation of all forms of commercial sex and increasing the liability of buyers when they could have reasonably suspected coercion or abuse (Dutch Rapporteur, 2021; Outshoorn, 2012).

Despite being framed as effective anti-trafficking efforts, the impact of any of these laws and policies on preventing exploitation is unclear. Extant research has described the difficulties in empirically substantiating how a specific policy on commercial sex impacts the prevalence of sex trafficking victimizations, primarily because of substantial methodological impediments to measuring the prevalence of human trafficking (Farrell & de Vries, 2020; Schauer & Wheaton, 2006; Tyldum & Brunovskis, 2005). Human trafficking is best described as a hard-to-detect crime (de Vries & Radford, 2022); therefore, existing administrative records are often biased by differences in focus, capacity, and expertise to detect and report human trafficking victimizations (Farrell & de Vries, 2020; Hundman et al., 2017). In addition to challenges with the data, scholars have described substantial challenges with the methods used to produce estimates of the scale of human trafficking despite methodological advances that help improve calculating estimates on hidden populations (Farrell et al., 2009; Farrell & de Vries, 2020; Kutnick et al., 2007). Furthermore, even when official records or estimates would represent the true scale of human trafficking, drawing comparisons between socio-economically, culturally, and politically distinct countries with varying legislation on commercial sex is an ambitious and potentially harmful task.

In this article, we do not seek to evaluate the impact of commercial sex laws and policies on the nature and prevalence of sex trafficking victimizations. Rather, we argue why current debates unjustly focus on an uncertain impact of commercial sex legislation on the nature and scale of sex trafficking victimizations. While extant previous work has already described the empirical difficulties of assessing the impact of these laws and policies on the nature and prevalence of sex trafficking victimizations (Farrell & de Vries, 2020; Schauer & Wheaton, 2006; Tyldum & Brunovskis, 2005), we highlight *the challenges inherent to the debate about the use of commercial sex laws and policies as anti-trafficking strategies*. In doing so, we build on previous literature to problematize the debate about commercial sex laws and policies and raise critical questions regarding the link between commercial sex and sex trafficking victimizations. We add four additional shortcomings in current debates that imply certain types of governance of commercial sex markets can reduce sex trafficking victimizations.

In the next sections, we describe these challenges in further detail and present them as *the rationale for changing the debates on governing commercial sex markets*. A structural shift in ongoing debates on commercial sex laws and policies is needed to move away from traditional response models known to be ineffective or empirically unsupported, stigmatizing, and potentially harmful, and to explore the merits of alternative response models via inclusive and collaborative forms of governance. To that end, we conclude this essay by developing a set of *premises that can guide more nuanced, inclusive, and constructive policy debates* about commercial sex and sex trafficking, which should recognize agency of people, focus on health and safety, and draw attention to the responsibility of governments *and* a broader society to protect against harm.

Challenges in the debate on commercial sex laws and policies

Besides the lack of empirical evidence on a causal link between commercial sex policies and sex trafficking, the debate on the association between commercial sex and human trafficking victimizations is characterized by 1) a binary view on commercial sex legislations and a lack of recognition of the substantive variation in those legislations and their enforcement; 2) moral frames rather than empirical underpinnings; 3) ambiguities in the notions on victimhood; and 4) an emphasis on traditional criminal justice system responses. As illustrated in [Figure 1](#), these four challenges characterize the debate on commercial sex laws and policies, yet they risk ineffective and potentially harmful policies.

Variation in laws and policies, their enforcement, and contextual impacts

Public and political discourse tends to simplify the discussion on commercial sex policies to the dichotomy of criminalization versus legalization, yet there is substantive variation in commercial sex laws and policies, their enforcement, and varying impacts on certain segments of commercial sex markets. These differences, and especially the lack of recognition of these differences, challenge drawing conclusions about which law or policy is most effective in preventing harm.

For example, simplifying the debate to only one aspect of a set of policies (e.g., criminalization versus legalization) ignores both the nuances between laws on commercial sex (e.g., not distinguishing between decriminalization, regulating, and legalization) and the intersections with related laws and policies (e.g., programs to exit the commercial sex

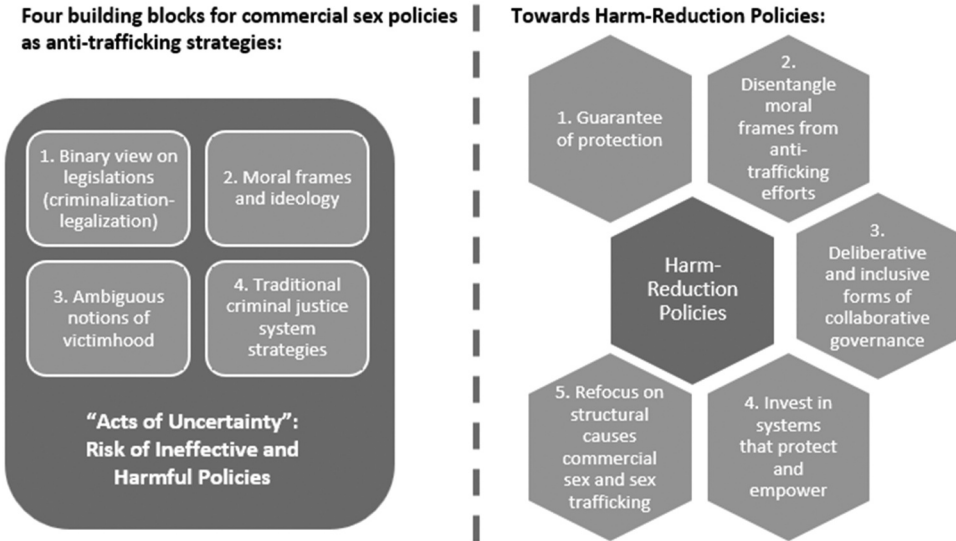


Figure 1. From “acts of uncertainty” toward recommendations for developing harm-reduction policies.

Table 1. Moral frames and legal responses to commercial sex.

	Prohibitionist	Abolitionist	Regulationist	Legalizationist
Views on commercial sex	Social unacceptance	Social unacceptance	Social acceptance	Social acceptance
Assumptions about the risk of victimization	Commercial sex as a public nuisance	Commercial sex as inherently victimizing	Commercial sex as potentially victimizing	Commercial sex as a legal right
Legislation type	Criminalization of buyers and sellers	Criminalization of buyers	(Strict) regulation	Legalization
Motivation for legislation	Eliminating public nuisance	Protection of victims	Visibility and transparency of potential victimization	Reducing moral stigma
Potential harms	Harmful impacts on victimization, adverse public health outcomes, injustice to victim	Socio-economic marginalization and stigmatization of commercial sex workers	Controlling and stigmatizing impact on commercial sex workers	Ignoring human trafficking victimizations

Adjusted table from De Vries & Farrell (2019).

industry or prosecution efforts). These important variations in both types of law or policy are discussed in more detail in an accompanying essay by Burckley et al. (in press) in this special issue and help explain the range of mixed findings about the impact of any one type of policy approach.

Moreover, the impact of commercial sex legislation on sex trafficking victimizations is hard to measure due to substantive differences in the enforcement of commercial sex laws and policies (Skilbrei, 2019). For example, research has indicated that new commercial sex legislation, such as the Swedish Purchase Act, has not been enforced universally in the country, causing differences between the law on paper and local practices (Holmström & Skilbrei, 2017; Skilbrei, 2019). Similarly, the U.S. is still one of the places with

a criminalization approach toward the commercial sex industry. Yet, there is substantive variation in the enforcement of these laws and a growing number of prosecutors who do not want to prosecute for commercial sex (see above). Furthermore, although the UK has implemented a partial criminalization approach that criminalizes activities related to the sale, organization, and purchase of sex such as brothel-keeping, pimping, curb-crawling, and buying sex in public places, several local policy initiatives in the country support protection rather than enforcement-based models (Sanders & Campbell, 2014). This movement toward non-prosecution, non-enforcement, and protection-based approaches aligns with broader criticism on biases in and potential harm due to the criminal justice system response (discussed further below).

Besides variation in laws and policies, and enforcement differences, systematic reviews of research studying the impact of commercial sex laws on health outcomes and wellness suggest that social contexts (e.g., high versus low-income countries) constitute a critical factor in evaluating the efficacy and harms of different regulatory approaches to commercial sex (see McCann et al., 2021). In particular, many unknown layers of commercial sex markets may explain why the same type of legislation can have different effects across varying geographic and time contexts (Skilbrei, 2019; Weitzer, 2005). For example, evaluations of legislation in the Netherlands or New Zealand – where partial legalization/regulation of commercial sex markets exist – suggest that some aspects, including the safety and well-being of commercial sex workers, may have improved while other problems such as stigma and exposure to violence in specific segments of commercial sex markets continue to exist (Goodyear & Weitzer, 2011). Several other studies suggest that some facets of commercial sex markets may be immune to specific criminalization, decriminalization, or regulation efforts (Agustín, 2007; Skilbrei, 2019).

Similarly, public concerns or rhetoric may be another contextual factor influencing how policies affect those involved in commercial sex. To illustrate, while policy debates seem to increasingly focus on the buyer's liability in an attempt to protect commercial sex workers, commercial sex workers continue to be marginalized due to what the general public perceives as unwanted or antisocial behaviors. Such public concerns may, in turn, influence civil and criminal legislation. For example, public pressure has been a reason for some cities to enforce regulatory approaches such as curb-crawling prohibitions, and relocating the visible presence of commercial sex to less central and nonresidential zones (Boels, 2015; Skilbrei, 2019).

While these practical contexts cause a discrepancy between the implementation and the true content of commercial sex legislation (Kingston & Thomas, 2019; Skilbrei, 2019), few studies consider these varying contexts in their policy evaluations (Skilbrei, 2019; Wagenaar et al., 2017). As a result, there is a substantive lack of evidence on the impacts of specific types of legislations, based on which the implementation, enforcement, and even evaluations of legislation on commercial sex often rely on moral rhetoric and ideology (Kingston & Thomas, 2019; Skilbrei, 2019). The next section describes four main moral frameworks that have shaped commercial sex legislation by linking commercial sex and sex trafficking in varying ways.

Moral perspectives on commercial sex

The implementation and enforcement of commercial sex laws depend in part on which moral perspective one holds toward commercial sex (see [Figure 1](#)), which often

incorporates assumptions about the link between commercial sex and human trafficking (see, for a discussion, de Vries & Farrell, 2019; Huisman & Nelen, 2014). However, scholars and practitioners are divided in their views toward the interconnectivity between commercial sex and human trafficking (Chuang, 2010; de Vries & Farrell, 2019; Reid, 2021; Wagenaar et al., 2017), even when it concerns minors (e.g., Gerasimov & Oude Breuil, 2021; Oude Breuil, 2008).

Four moral frames that incorporate assumptions about the sex industry's risk of human trafficking victimizations have been identified in the literature, for which we summarized the views on commercial sex, assumptions about the risk of human trafficking victimizations, and the rationale and harms of a certain type of legislation (see also Table 1). First, a prohibitionist perspective emphasizes the immorality of engaging in commercial sex, labeled as a public nuisance rather than a potential crime and victimization problem. This perspective drives legislation that criminalizes both buyers and providers of commercial sex. However, as another essay in this special issue describes in more detail (Burckley et al., *in press*), criminalizing the entire commercial sex market has been found to increase several victimization and adverse public health outcomes and is broadly scrutinized due to harmful impacts of arrests of those involved in commercial sex work. Previous literature has expressed particular concern about the harmful impacts of a criminalization model for young people or others in the commercial sex industry who are at risk for victimization or for being arrested because of their gender identification, sexual orientation, and/or race/ethnicity (Boukli & Renz, 2019; Bryant-Davis & Tummala-Narra, 2017; Fehrenbacher et al., 2020).

Second, although a prohibitionist view on commercial sex has dominated public and policy discourse in the U.S. growing concerns about crime and victimizations in the sex industry since the 1990s have created a growing support for an abolitionist perspective. This perspective continues to rely on the criminalization of sex purchasing and facilitation but emphasizes the vulnerability of sex workers to victimization, specifically sexual exploitation, and sex trafficking (Chuang, 2010; De Vries & Farrell, 2019; Huisman & Nelen, 2014). The Nordic model, which criminalizes purchasing but not selling commercial sex, is widely presented as a central example of an abolitionist approach to commercial sex. While often being mentioned in anti-trafficking debates as a potentially effective approach to tackle sex trafficking (Crowhurst & Skilbrei, 2018), critics have cited this model as a “blatant rejection of harm reduction or support for sex workers” (Sanders & Campbell, 2014, p. 539) and scrutinized the model's impact on preventing sex trafficking when human trafficking prosecutions and protection for human trafficking victims remain behind (Clausen, 2007; Wagenaar et al., 2013). Others have expressed concern about the stigmatizing and controlling effect of marginalizing commercial sex workers to vulnerable populations, deprived of agency, and incapable of making entry or exit decisions (Agustín, 2006, 2013; Bastia, 2006; J. Doezema, 2002).

Third, while prohibitionist and abolitionist perspectives stress the social unacceptance of commercial sex, adherents of a regulationist framework describe the existence of commercial sex as a social fact, regardless of potential criminalization. In particular, adherents of a regulationist framework suggest that strict regulation would help maintain the visibility and control of the commercial sex industry to reduce the opportunity to exploit and safeguard the health and wellness of those trading sex. While regulationists share with abolitionists a focus on the increased vulnerability to exploitation in the commercial sex

industry, they differ in their suggested approach (e.g., criminalizing buyers versus regulating commercial sex). This approach, however, has been criticized for its controlling impact on commercial sex workers and for facilitating sex trafficking victimizations due to traffickers using the legal system to obtain official work permits to exploit in the regulated commercial sex industry (Huisman & Kleemans, 2014; Wagenaar et al., 2017).

Fourth, legalizationists emphasize that engaging in commercial sex can be voluntary and should be fully legalized to reduce its moral stigma. Dutch policies on commercial sex are often described through either a regulationist or legalizationist framework, although the current landscape of commercial sex policies is comprised of a complex web of different policies that are subject to ongoing debates (Dutch Rapporteur, 2021; Outshoorn, 2012). New Zealand is often mentioned as an example of a country that has decriminalized all forms of commercial sex with the Prostitution Reform Act, legalizing brothels and street walking in designed areas (Crowhurst et al., 2012; Skilbrei, 2019). It is important to note that decriminalization or legalization does not seem to imply a free market, but rather the implementation of alternative ways, not through the penal code, to control the commercial sex market (Skilbrei, 2019). This approach has also been criticized, in part for ignoring the pervasive stigma of commercial sex work and the continued risk of human trafficking victimizations (see, for a discussion of varying commercial sex legislation types, de Vries & Farrell, 2019; Wagenaar et al., 2017)

These four frames offer *moral* guidance for commercial sex legislation (Weitzer, 2010). However, the laws and policies resulting from these moral frames are not concerned with an empirical question about which policies prevent exploitation, promote wellness, or reduce other types of victimization that are potentially associated with entering or exiting the commercial sex industry (Holmström & Skilbrei, 2017). Moreover, these efforts seem to suppress broader concerns about public health and safety in the commercial sex industry, the socio-economic marginalization of those selling commercial sex, and the historical stigmatization associated with commercial sex (Wagenaar & Altink, 2012; see, for a broader discussion, Proven & Schuster, 2017).

Furthermore, current debates on the general morality of commercial sex tend to neglect perceptions on morality within the populations involved in commercial sex. To illustrate, recent qualitative research provides evidence that the issue of morality impacts the wellbeing of those involved in the commercial sex industry. Turcotte and Lanctôt (2021) found that sex workers in Quebec set up rules and boundaries around the sexual services they would provide to protect their sense of self. Breaching these boundaries brought on a mix of shame, guilt, and anger that impacted their sense of self. Political debates on commercial sex legislation often do not include these voices representing the populations involved in commercial sex. Moreover, and as explained in the next section, these debates build on a dominant narrative on who is most likely to experience victimization.

Ambiguous notions of vulnerability

Regardless of which moral frames dominate ongoing debates on commercial sex legislation, the implementation of commercial sex laws as anti-trafficking strategies builds on ambiguous assumptions about who is most likely to experience victimization and deserving of

protection (see [Figure 1](#)). Extra legal protections are often afforded to children and vulnerable victims, contributing to the complex tasks of identifying vulnerability and balancing personal autonomy, governmental control, and societal responsibility to protect vulnerable individuals (Reid & Jones, 2011).

The legal protection of children and “vulnerable victims”

While personal autonomy and freedom are highly valued; as a society, we place boundaries on personal autonomy of children in order to ensure child protection. In many countries, laws severely limit the autonomy of minors when it comes to engaging in potentially harmful behaviors. For example, minors are not legally allowed to engage in many activities which are legally permissible for adults such as smoking tobacco, drinking alcohol, soldiering, owning lethal weapons, signing a credit card contract, and other activities considered potentially harmful. Child labor is highly regulated in the U.S. and other countries: Minors are generally not allowed to operate motor vehicles at work, perform logging or sawmilling, work in construction, conduct door-to-door sales of products, or engage in other occupations considered potentially hazardous.

Including commercial sexual activity in this list of restricted work for minors aligns with other child labor restrictions. This is likely why the UN Palermo Protocol and other Conventions such as the ILO (International Labor Organization) Conventions (e.g., Minimum Age Convention No. 138 and the Worst Forms of Child Labor Convention No. 182) require governments to give priority to eliminating child engagement (child is defined as all under the age of 18 years) in the worst forms of child exploitation, child labor, including prostitution, pornography, and illicit activities (International Labour Organization [ILO], 2002, 2018a, 2018b). The extra protections afforded to those under the age of 18 years are primarily derived from developmental psychology research and our understanding of one’s ability to consent, withstand manipulation, and make sound decisions during childhood and adolescence (Reid & Jones, 2011; Steinberg & Scott, 2003).

Nonetheless, there is some debate around how to respond to children and adolescents engaged in what has been labeled “survival sex” or engaging in commercial sexual activities in exchange for basic survival needs such as shelter, food, or drugs (also referred to as “transactional sex”). While some consider survival sex involving minors a form of child sex trafficking and seek to prosecute those facilitating this activity including businesses and sex buyers, others consider this exploitation but not sex trafficking due to the lack of trafficker facilitation and third-party financial gain (Raino, 2017), stress a general exposure to violence and victimization – not just exploitation and trafficking – among youths in the commercial sex industry (e.g., Gerasimov & Oude Breuil, 2021; Oude Breuil, 2008), or highlight the multitude of reasons for youths to become and stay involved in commercial sex markets such as a lack of social support and financial hardships (Curtis et al., 2008; Horning, 2013; Krisch et al., 2019; Marcus et al., 2014), which may be exacerbated by those commercial sex laws and policies that criminalize their behaviors.

In addition to children and adolescents, certain adults are provided special legal protection as “vulnerable victims.” Vulnerable victims are crime victims who are unusually vulnerable due to age, physical or mental condition, or who are otherwise particularly susceptible to the criminal conduct. Similar to children, severely vulnerable people are entitled to more protection based on our understanding of the limits of one’s ability to detect and withstand manipulation or coercion due to certain vulnerabilities or conditions (Grundy, 2011;

Pearson et al., 2022; Reid, 2018). Many consider legal protection for vulnerable persons from commercial sexual exploitation through increasing penalties for those who knowingly prey on specific vulnerabilities (e.g., U.S. Sentencing Guideline Manual § 3A1.1, 2007) as a benefit that outweighs the harms resulting from any potential limits to personal autonomy. While increasing penalties may provide legal justice, these measures alone do not address the disadvantaged circumstances extending from childhood commercial sexual exploitation – such as lack of education, no job skills, and substance dependency – that also keep adults entrapped in a life that they would leave behind if provided the opportunities to exit (Baker et al., 2010; Dalla, 2006b, 2006a). Numerous studies have documented that the majority of adults involved in commercial sex became involved before the age of 18 years, around the age of 15 (see, for a global review, Krisch et al., 2019; see also Curtis et al., 2008; Kennedy et al., 2007; Nixon et al., 2002), further casting doubt of their opportunity to choose to exit.

Harmful consequences of vulnerability frameworks

Although being identified as a vulnerable victim facilitates access to victim services and protection for some victims, the vulnerability label is a contested issue in the literature. Several researchers have highlighted the diminished sense of self that accompanies identification as a *victim* of commercial sexual exploitation, and therefore are concerned with the identification of those who are involved in commercial sexual activity, even minors, as exploited and vulnerable victims (Dodsworth, 2014; McMahan-Howard, 2017). Herman (2011) discusses this conundrum surrounding victims of interpersonal violence – that the very fact of acknowledging victimization or exploitation may evoke shame, as some may view being labeled a victim as a sign of weakness and failure (p. 267). First, it is recommended that one use and explain the term within its legal context – a person who has experienced harm as opposed to a person who has engaged in illicit activities. Second, solutions to this detrimental labeling effect should focus on providing people who experience trauma with information regarding the impact of trauma and exploitation, including shame- and fear-based responses, in order to facilitate release from the toxic cycle of feeling ashamed of being ashamed (Herman, 2011).

Moreover, the vulnerability framework – while frequently used in public and political discourse on commercial sex legislation – does not guarantee protection and may even have a stigmatizing impact. Public and political discourse build on socially constructed hierarchies of victimhood (Boukli & Renz, 2019; Carrabine, 2004), placing the “ideal victim,” representing an innocent, blameless, and extremely vulnerable victim who experienced egregious harms, on top of the hierarchy (Christie, 1986; Elias, 1986; Srikantiah, 2007). Few victims meet this profile and many are, therefore, excluded from access to victim services and social justice when their experiences deviate from the iconic victim narrative (Srikantiah, 2007). This iconic victim narrative builds on false dichotomies of being innocent versus blameworthy, vulnerable versus invulnerable, dignified versus undignified, and deserving versus undeserving of protection (Boukli & Renz, 2019; Musto, 2009; see for a further discussion, de Vries & Cockbain, 2023, forthcoming). Such dichotomies are often rearticulated in the debate on the association between commercial sex and sex trafficking.

This debate, however, demonstrates a complex paradox about who is vulnerable and granted protection (Munro & Scoular, 2012), especially in the context of commercial sex legislation where vulnerability frameworks are used to justify measures of control. Specifically, while the iconic victim narrative sets a bar too high and limits the identification

of human trafficking victimizations to the most egregious harms, the vulnerability label has also loosely been applied to describe entire groups and communities as “victims of special interest” who have “extreme vulnerability,” also mentioning LGBTQ+ people and people of color (Boukli & Renz, 2019). However, marginalizing entire groups or communities to being vulnerable and deprived of agency can have a stigmatizing impact (Bryant-Davis & Tummala-Narra, 2017). In addition, research has shown that recognizing or constructing vulnerabilities within specific communities does not necessarily equal protection for members of these communities (Bryant-Davis & Tummala-Narra, 2017; Musto, 2016). In particular, research has documented a higher degree of victim blaming toward LGBTQ+ people and people of color in the commercial sex industry who are more likely to face criminalization for their involvement in commercial sex while they are at the same time depicted as vulnerable populations that are at increased risk to exploitation (Boukli & Renz, 2019; Bryant-Davis & Tummala-Narra, 2017; Fehrenbacher et al., 2020). As systemic inequalities may, in fact, increase the risk of exploitation, research has documented the cumulative trauma resulting from experiencing discrimination and not being identified as a victim worthy of protection, which translates to a continuous cycle of stigma and marginalization and specific challenges related to access to housing, legal aid, and victim support services for trafficked people from marginalized communities (Boukli & Renz, 2019; Bryant-Davis & Tummala-Narra, 2017; Fehrenbacher et al., 2020).

The ambiguity within notions of vulnerability is at the core of the debate on the association between commercial sex and sex trafficking that tends to rearticulate a forced versus voluntary dichotomy (D. J. Doezema, 2010; O’Connell Davidson, 2006). Human trafficking laws were intended to add clarity on forced and exploitative situations, yet the three indicators of human trafficking – force, fraud, or coercion – are limited in many ways. Many law enforcement officers, judges, and juries fail to comprehend these concepts, complicating the likelihood of justice for victims and successful prosecutions of sex trafficking (Farrell et al., 2019, 2012) and scrutinizing the foregrounding of criminal justice system responses to respond to both commercial sex and human trafficking.

Foregrounding a failing criminal justice system response

The criminal justice system response has long been the traditional and preferred vehicle to respond to both commercial sex and human trafficking (Bernstein, 2012; Farrell & Cronin, 2015; Sanders & Campbell, 2014): Encodings of commercial sex and related facets such as pornography, sexual violence, and sex trafficking in criminal law have melded the political “left” and “right” and people with varying other ideologies and backgrounds in their support for punitive criminal justice system responses (Bernstein, 2012). Even in the case of decriminalizing the commercial sex industry, the enforcement of commercial sex laws and the identification of human trafficking victimizations within the commercial sex industry is often primarily mandated to the police (e.g., Huisman & Kleemans, 2014).

However, foregrounding a criminal justice system response to commercial sex and sex trafficking (see also [Figure 1](#)) has received much scrutiny and controversiality due to observed ineffectiveness and potential harm, stigmatization, social marginalization, increased exposure to violence, and limited access to support services among individuals who often already lack social support networks (Curtis et al., 2008). Therefore, scholars have expressed concern that criminalization models and a complex web of regulations may

worsen marginalization and victimization rather than offering legal protection (Sanders & Campbell, 2014).

Furthermore, the police response to sex trafficking problems has resulted in fewer victims being identified and provided services and fewer perpetrators prosecuted than anticipated based on claims about the size of sex trafficking problems. In the U.S., scholars have identified a number of limitations to the current approach to policing sex trafficking, including public and police officer myths about sex trafficking and its victims (Farrell et al., 2014, 2015), institutional practices that promote reactive as opposed to proactive responses, and victim distrust of police and other state authorities (Farrell et al., 2019).

Responding to vulnerabilities through the criminal justice system is particularly challenged by the historically poor relationship between the police and participants in the commercial sex industry (Curtis et al., 2008; Farrell et al., 2019; Wilson & Dalton, 2008). For example, in the U.S., police traditionally tasked to respond to commercial sex have primarily maintained their role in responding to sex trafficking concerns in the commercial sex market – sometimes with the same vice units previously tasked with arresting those trading sex now identifying and “rescuing” victims of sex trafficking (Farrell & Cronin, 2015; see, for similar discussions outside the context of the U.S., Matthews, 1993, 2005). Similarly, recent research on sex trafficking investigations in illicit massage businesses suggests that vice investigators tasked with responding to newly prioritized human trafficking problems recycle approaches primarily used in response to commercial sex complaints (de Vries & Farrell, 2022).

An undeniable drawback of any criminalized model as applied to commercial sexual exploitation is then the risk of criminalizing those who are victims of human trafficking (Farrell et al., 2019; de Vries & Farrell, 2022) and/or have experienced other forms of victimization (Evens et al., 2019; Lyons et al., 2017). Providing legal protection from prosecution to victims of commercial sexual exploitation from crimes committed due to manipulation and coercion should be among one of the most obvious types of protections afforded to victims, but this does not always occur, particularly when law enforcement and prosecutors rely on traditional tactics such as raids, arrests, and shutdowns of commercial sex venues. Prosecution of human trafficking victims has occurred despite the provisions in legislation for victims, including victim protection from prosecution even if entangled in illicit activities such as commercial sex (if criminalized in a specific country) or because law enforcement conflates several aspects seen in human trafficking victimizations with vice problems, document fraud, and undocumented immigration status, or smuggling (Farrell et al., 2019; Irwin, 2017).

An additional complexity in human trafficking cases is that the line between victim and offender is commonly blurred (Henderson & Rhodes, 2022; Serie et al., 2018). For example, the victim-to-offender pathway in sex trafficking is more common than observed for some other crime types (Raphael & Myers-Powell, 2010). Some victims of sex trafficking, due to threats and coercion from their sex traffickers, are forced to recruit new victims. Victims may manage illegal business financial transactions, for example, renting cars and hotel rooms in victims' names. In this way, traffickers avoid prosecution and maintain control over victims by threatening them with arrest and prosecution if they exit the operation. This type of grooming inevitably results in the arrest and prosecution of sex trafficking victims, who have been threatened and coerced into involvement in criminal operations of their traffickers (Reid, 2018).

Although practitioners have argued that arrests, or threats of arrests, are the only way out for some victims (Connell et al., 2015; see, for a critical review, Musto, 2013), arrests are not only ineffective but also harmful. The perceived risk of arrests can increase a victim's reliance on exploiters when the system cannot protect against incarceration (Musto, 2013; Williams, 2009). Furthermore, arrests can worsen marginalization by giving people criminal records, which can stigmatize and decrease one's social and economic opportunities, creating a pathway for engaging in industries where the risk of (re-)victimization may be higher while protection is lower compared to other industries (Bryant-Davis & Tummala-Narra, 2017; Fehrenbacher et al., 2020; de Vries & Farrell, 2022). As such, the clear injustice of using systems of punishment as a pathway out of exploitation conflicts with the stated purpose of the criminal justice system and escalates victimization and marginalization.

As an alternative to arrests resulting in criminal convictions or the potential of detention in jail or prison, some jurisdictions in the U.S. have created prostitution- or trafficking-diversion programs, sometimes called Human Trafficking Intervention Courts (HTICs). Although there are many approaches used in these courts, including mandated counseling and opportunities for service provision, there is little evidence that participation in these programs reduces trafficking or even improves participant outcomes (Blakey et al., 2017; Cassidy, 2014; Gruber et al., 2016; White et al., 2017). Although there is some evidence of HTIC participation decreasing participant involvement in commercial sex and improving individual outcomes in the short term and improving (Clifasefi et al., 2017; Collins et al., 2015; Mueller, 2012; Rempel et al., 2018), the support is weak and more recent research looking the impact of HTIC participation across time (Erica Koegler et al., 2020) finds that prostitution-diversion programs do not lead to long-term disengagement from commercial sex. Despite a desire to provide specialized care to trafficking victims, the reality is that HTICs are criminal-diversion courts where people prosecuted for prostitution offenses are offered mandated services in lieu of criminal conviction and jail (Gruber et al., 2016).

Despite incremental improvements in the treatment of sex trafficking victims by the criminal justice system, a criminal justice system response prioritizes the investigation and prosecution of human trafficking above the protection of victims by perceiving the collaboration of a potential victim of human trafficking or commercial sex worker as a necessary component for successful prosecutions (Cleiren et al., 2015; Farrell et al., 2019). For example, most countries continue to require that victims of sex trafficking assist with prosecutions of human traffickers to receive immigration remedies and victim services and avoid prosecution for engaging in illegal activities during their exploitation in human trafficking (Dodsworth, 2014; Farrell et al., 2014). However, extant research is clear about why victims are reluctant to cooperate, listing numerous reasons: a) Traffickers are known to threaten victims and their family members, making potential victims reluctant to provide a statement (Sadruddin et al., 2005); b) victim-centered protocols are often at odds with traditional responses followed during human trafficking investigations and prosecutions, further endangering and traumatizing victims (Farrell et al., 2019, 2014); c) psychological effects of trauma can impede a victim's ability to cooperate and testify (Sadruddin et al., 2005; Zimmerman et al., 2011; Zimmerman & Pocock, 2013); and d) victims who agree to participate with law enforcement are sometimes deemed unreliable.

In contrast to a more reactive police response to commercial sex and sex trafficking, some laws and regulations are informed by a legal principle called the "precautionary principle", which has gained much controversy since its emergence in European

environmental law in the 1970s (Foster et al., 2000). This principle underscores the responsibility to act when there are concerns about harmful behaviors or events, but uncertainty about the probability or degree of harm (Sunstein, 2005; Tosun, 2013). The precautionary principle has also informed policy responses to commercial sex, creating the space to act based on beliefs and convictions about harm rather than evidence (Hubbard et al., 2016).

While the precautionary principle encourages proactive and preventive approaches, research demonstrates that also the precautionary principle mandates a primary responsibility of the police to respond to commercial sex and human trafficking concerns. However, in many countries, the police may have lost their legitimacy due to a historically complex relationship with people involved in commercial sex (Farrell & Cronin, 2015; Farrell et al., 2019). In addition, by setting a low bar for preventive and risk-averse interventions, there are widespread concerns about stereotyping and biases in the adoption of a precautionary approach to risk profiling, targeted surveillance, and managing presumable “high-risk populations” through crime control and prevention responses (Crawford, 2009). Similarly, the literature has demonstrated that preventive interventions through risk assessments can be racialized and gendered (Faulkner & Nyamutata, 2020; Vaughn, 2019). Against that background, risk prevention efforts can be harmful when they trigger selective crime control and surveillance responses toward victimization rather than efforts that empower and increase resiliency and safety (Musto, 2016; Vaughn, 2019).

Conclusions: five premises to guide a structural shift in the debate

With growing concerns about human trafficking since its criminalization in 2000, the implementation of new laws and policies and amendments to existing laws and policies on commercial sex are often based on unfounded claims about the impact of these laws and policies on the nature and prevalence of sex trafficking victimizations. However, as discussed by Burckley et al. (in press) in this special issue, it is impossible to support claims about certain governance types being more or less effective in preventing sex trafficking victimizations due to the empirical literature being uncertain and underdeveloped.

Because empirical evidence that would support commercial sex legislation as anti-trafficking strategies is lacking, these laws and policies may be described as “moral acts of uncertainty”: These acts are based on preconceived convictions about an empirically unsupported and ambiguous link between commercial sex and sex trafficking victimizations (see also de Vries & Farrell, 2019). By necessity, designing the response to uncertainties and ambiguities relies on existing (moral) frames, routines, and knowledge derived from the approach to other crimes (Crawford, 2009). With rhetoric, ideology, and ambiguity characterizing the debate on commercial sex policies, it becomes clear that a simple policy adjustment such as the legalization or criminalization of commercial sex ignores the complex and multi-faceted nature of commercial sex markets (Chuang, 2010; de Vries & Farrell, 2019; Wagenaar et al., 2017). Furthermore, the enforcement of most laws on commercial sex and sex trafficking is often delegated to the criminal justice system. However, criminalization, the risk of being arrested, and the lack of trust in police due to the historically complex relationships between the police and the commercial sex industry delegitimize many current response models (Farrell & Cronin, 2015; Farrell et al., 2019). In

other words, there is a clear need to consider alternative approaches that can protect by means of empowerment rather than control. However, empirical evidence on alternative, effective, and harm-reduction laws and policies for commercial sex markets is also lacking (see also the accompanying essay by Burckley et al. (in press) in this essay). As such, we do not seek to imply the effectiveness of specific alternative approaches but call for a change in direction in the debates about preventing sex trafficking victimizations via governance types on commercial sex markets. We do so by highlighting four main pitfalls in current debates that 1) deny much of the variation in commercial sex markets and between types of laws and policies to govern these markets; 2) are largely driven by rhetoric and ideology; 3) incorporate and rearticulate ambiguous notions of vulnerability and victimhood in the context of sex trafficking victimizations; and 4) foreground a criminal justice system response that has been scrutinized for its ineffectiveness in reducing sex trafficking victimizations and potential harms to trafficked people, especially those in more disadvantaged, marginalized, and minority positions (see also Figure 1 for a summary of key arguments).

In addition to providing the rationale for the need to change policy debates on commercial sex laws and policies to respond to human trafficking victimizations, we suggest five premises for policy debates to move away from foregrounding harmful and ineffective models toward a search for alternative models (see “towards harm-reduction policies” in Figure 1). First, debates should focus on efforts to *protect potential victims*. For example, the protection of potential victims should be separated from mandatory cooperation with the prosecution of traffickers as this creates a condition, a barrier, for protection. Second, the *disentanglement of moral frames and ideology from anti-trafficking efforts* is a precondition for engaging in constructive conversations that focus on protection from coercion, force, and fraud.

Third, while managerial and coalition politics characterize the role of governments in regulating commercial sex (Wagenaar et al., 2017), there is a need for *deliberative and inclusive forms of collaborative governance in decision-making processes*. These inclusive forms of governance should involve community-based organizations and people involved in the commercial sex industry such that legislation is not merely imposed, which runs the risk of further marginalizing people in the commercial sex industry by affecting and neglecting their autonomy. In particular, the primary role of the police in the enforcement of commercial sex policies and the conditional victim support depending on police collaboration should be reconsidered, given the complex relationship between police and participants in the commercial sex industry. If police are involved, there should be clear referral systems put in place that allow victim service providers and community-based organizations to inform interventions.

Fourth, changing commercial sex policies may be secondary to *policy efforts that strengthen a system to protect and empower*, although it is evident that criminalization is generally ineffective and harmful (see McCann et al., 2021; see also the accompanying essay by Burckley et al. (in press) in this special issue). Because failing institutional systems create further vulnerabilities, resources may need to be reallocated toward policies that secure exit options through alternative employment opportunities, education, and housing, which participants in the commercial sex market have also indicated as necessary preconditions for them to leave commercial sex and exploitative markets (Curtis et al., 2008). More systematic research is required to empirically investigate which alternative response models are harm-reducing,

Fifth, there is a need to *refocus and engage in conversations about how structural causes for engaging in commercial sex markets and the risk of human trafficking victimizations could be addressed*. To illustrate, legislating commercial sex venues out of business is a means to avoid arrests, but it is unclear how these efforts empower those individuals who engage in commercial sex due to a lack of other socio-economic opportunities. More research should consider the potential unintended consequences of policies, even when some advantages are seen (i.e., to prevent policies that may protect some victims, while harming others).

Rather than criminalizing those engaging in commercial sex, these five premises may provide the foundation for inclusive and collaborative conversations about the degree to which laws and policies prevent exploitation, create safety, and secure exit options for people engaging in commercial sex, address health concerns, create broader opportunities to make a living wage and reduce disadvantage and inequality as reasons for why circumstances force some people to engage in hazardous work. As such, we extend previous work suggesting that, for policy to work in the interest of commercial sex workers, enduring partnerships between commercial sex workers, policymakers, practitioners, and researchers are needed (e.g., Sanders & Campbell, 2014). To conclude, the implementation of any intervention and legislation should be evaluated by the degree to which they empower and protect individuals from exploitation and other forms of victimization and trauma. A protection framework similar to the one discussed in the context of labor trafficking conditions, with a focus on personal safety and empowerment to protect, for example, through structural solutions that address inequality and marginalization, should be a model to support and empower people regardless of whether their work is protected or not by legal policy.

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