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THE CASE FOR DECRIMINALIZATION OF SEX WORK IN SOUTH AFRICA

CHI ADANNA MGBAKO,* KATHERINE GLENN BASS,** ERIN BUNDRA,***
MEHAK JAMIL,**** JERE KEYS,† AND LAUREN MELKUS‡

ABSTRACT

Activists for sex worker rights in South Africa are leading a sophisticated national campaign to decriminalize sex work.¹ This Article serves as an act of solidarity with these activists' continued efforts to fight for and realize sex workers' human rights by examining the negative impact that criminalizing prostitution has on sex workers' rights and presenting evidence-based arguments to show that South Africa should enact legislation to fully decriminalize sex work. South African sex workers' real-life experiences with violence, police abuse, and lack of access to health care and the justice system, highlighted through interviews conducted by the authors during fieldwork in South Africa in November 2011, are included in this Article as testimony to the human rights violations caused by the criminalization of sex work.

Part I demonstrates how the legal frameworks of criminalization, partial criminalization, and legalization and regulation of sex work are costly, ineffective, and harmful approaches to sex work. Part II presents evidence from New Zealand, the only country to fully decriminalize sex work, to show the positive impact decriminalization has had on the lives and rights of sex workers. The experience of New Zealand suggests that making sex work legal through

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1. See Melissa Turley, "Relying on Sex to Survive: The Fight for Decriminalization in South Africa," PULITZER CENTER ON CRISIS REPORTING (Aug. 31, 2012), <http://pulitzercenter.org/reporting/south-africa-sex-work-decriminalization-sweat-womens-legal-centre>.

decriminalization has a positive impact on violence against sex workers, does not result in an increase in trafficking into forced prostitution or youth in the sex trade, and has no influence on the level of demand for sex work.

Part III advocates for the decriminalization of sex work in South Africa as the only legal regime that will uphold sex workers' rights. Finally, Part IV demonstrates how decriminalizing sex work will fulfill South Africa's constitutional and human rights commitments by promoting sex workers' rights to free choice of work, association, access to health care, security of the person, and human dignity.

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DECRIMINALIZATION OF SEX WORK IN SOUTH AFRICA

I. SEX WORK AND LEGAL REFORM

A. *Criminalization of Sex Work in South Africa: A Failed Experiment*

The 1957 Sexual Offences Act and subsequent amendments created the current legal regime of total criminalization of sex work in South Africa.² It is illegal to do sex work or be associated with sex work, and therefore sex workers, clients, brothel keepers, and others are subject to arrest and prosecution. The Sexual Offences Act grew out of the apartheid-era Immorality Act, which banned sex between races.³ Thus, the modern law that criminalizes sex work in South Africa is rooted in apartheid-era laws' failed attempt to control consensual adult sexual behavior. This sub-section explores how criminalization of sex work in South Africa is ineffective, wastes government money and, most importantly, leads to human rights abuses against sex workers, including stigma, police abuse, lack of access to justice, barriers to health services, abuse from clients and other individuals with whom sex workers transact, and lack of labor rights.

1. Ineffective and Costly

The ultimate goal of South Africa's criminalization of sex work is the eradication of sex work. In this regard, criminalization has failed. Sex work is a reality in South Africa, and throughout the world, and criminalization has reduced neither the supply nor the demand for sex work.⁴ Criminalization has only wasted government money and fuelled human rights abuses against sex workers. States waste money on police enforcement and court costs associated with the criminalization of sex work.⁵ The South African government spends at least 14 million rand (\$1,620,206 USD) a year to police and prosecute sex work.⁶ Convictions resulting from the prosecution of prostitution cases are much higher than convictions for serious crimes. For instance in 2000, cases

2. See Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.), available at <http://www.info.gov.za/view/DownloadFileAction?id=77866>. Provisions against sex work include penalties against "Any person who entices, solicits or importunes in any public place for immoral purposes" and "Any person 18 years or older who—(a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward." *Id.* at Laws Amended or Repealed by Section 68—Act 23 of 1957.

3. DESMOND TUTU HIV FOUNDATION, KEY POPULATIONS, KEY SOLUTIONS 48 (2011).

4. *Id.* at 43.

5. See Julie Pearl, *The Highest Paying Customers: America's Cities and the Costs of Prostitution Control*, 38 HASTINGS L.J. 769 (1987).

6. WOMEN'S LEGAL CENTRE, EVERY SEX WORKER, HUMAN RIGHTS DEFENDER 30-31 (2011).

involving prosecutions for prostitution resulted in convictions in 33% of cases, while convictions for carjacking stood at 2.3%, aggravated robbery at 2.3% and rape at 7.56%.⁷ The ongoing crime problems in South Africa may no longer be about lack of resources, but about the inefficient use of government resources—the government wastes money by policing sex work instead of directing resources to serious and genuine crimes involving victims.

2. Stigma

Law plays an important role in influencing societal attitudes. Criminalization stigmatizes sex workers as criminals, which negatively affects the way society views them.⁸ Because sex workers are criminalized, communities often believe abuses against sex workers are justified. As a result, sex workers suffer stigma, discrimination, and abuse from many facets of society including police, health workers, schools, banks, and other service providers.⁹ Criminalization also has an effect on family life. Despite being breadwinners for their families, stigma causes many sex workers to feel shame and to try and hide their profession. Sex workers also report that their children face stigma.¹⁰ As one sex worker argued, “Sex work is our job—we work to put food on the table for our children and people are judging us. The government has to do something about people judging us.”¹¹

3. Police Abuse

Criminalization creates an enormous power imbalance between sex workers and police. This results in police abuse against sex workers in the form of improper arrests and detention, as well as economic, sexual, and physical abuse.¹²

7. *Id.* at 31 n.31.

8. WORLD HEALTH ORGANIZATION, *Violence Against Women and HIV/AIDS: Critical Intersections—Violence Against Sex Workers and HIV Prevention*, 3 INFORMATION BULLETIN SERIES 1 (2005), available at <http://www.who.int/gender/documents/sexworkers.pdf>.

9. ANNA-LOUISE CRAGO & JAYNE ARNOTT, RIGHTS NOT RESCUE: A REPORT ON FEMALE, TRANS, AND MALE SEX WORKERS' HUMAN RIGHTS IN BOTSWANA, NAMIBIA, AND SOUTH AFRICA 3 (2008); Interview with Sex Workers attending Creative Space session at SWEAT, in Cape Town, S. Afr. (Nov. 9, 2011).

10. Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9.

11. *Id.*

12. Police abuse against sex workers has been documented throughout the world. See, e.g., JUHU THUKRAL & MELISSA DITMORE, REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY (2003), available at <http://www.sexworkersproject.org/downloads/Revolving->

DECRIMINALIZATION OF SEX WORK IN SOUTH AFRICA

Police improperly arrest and detain sex workers. Police often improperly use municipal by-laws, including those concerning loitering and nuisance, to harass and arrest sex workers,¹³ and force them to pay arbitrary fines even when they have not contravened these by-laws.¹⁴ Sex workers have also reported that police arrest them for being “known sex workers,” even when they are engaged in activities unrelated to sex work.¹⁵ In addition, police often place arrested sex workers in dirty cells and may rob them of their possessions while they are jailed.¹⁶ Sex workers have also faced brutal treatment while in detention. In one incident, Cape Town police kicked a sex worker while she was in custody with such force that they damaged her internal organs, nearly killing her.¹⁷ Police will often hide or remove their name badges when dealing with sex workers, making it nearly impossible for harassed sex workers to report these types of police abuses.¹⁸ Many sex workers get trapped in this cycle of arbitrary arrests and detention that only serves to further entrench sex workers’ vulnerability. For instance, sex workers with outstanding fines for prostitution, and arrest warrants for not paying these fines, are prevented from seeking employment because of the threat of being found and arrested.¹⁹

Police also economically abuse sex workers. Police officers often fine

Door.pdf; CAMBODIAN PROSTITUTES UNION & CAMBODIAN WOMEN’S DEVELOPMENT ASSOCIATION, SURVEY ON POLICE HUMAN RIGHTS VIOLATIONS OF SEX WORKERS IN TOUL KORK (2002), *available at* http://www.worldwideopen.org/uploads/resources/files/751/SXINCM003_Survey_on_Police_Human_Rights_Violations_Tuol_Kork.pdf; CAROL JENKINS, FINAL REPORT TO UNAIDS: POLICE AND SEX WORKERS IN PAPUA NEW GUINEA (1997), *available at* http://www.walnet.org/csis/papers/jenkins_papua.html; ANNA-LOUISE CRAGO, ARREST THE VIOLENCE: HUMAN RIGHTS ABUSES AGAINST SEX WORKERS (2009), *available at* http://www.soros.org/initiatives/health/focus/sharp/articles_publications/publications/human-rights-violations-20091217/arrest-violence-20091217.pdf.

13. Police also arrest sex workers using public drinking/drunkenness, soliciting and public indecency. Interview with Stacey-Leigh Manoek, Attorney, Women’s Legal Centre, in Cape Town, S. Afr. (Nov. 9, 2011); *see also* Interview with Tshwaranang Legal Advocacy Centre Staff, in Johannesburg, S. Afr. (Nov. 7, 2011).

14. WOMEN’S LEGAL CENTRE, *supra* note 6, at 20, 61.

15. Interview with the SWEAT Outreach Staff including sex workers, in Cape Town, S. Afr. (Nov. 8, 2011).

16. *Id.*

17. Nicolás Fick, *Sex Work and Law Enforcement, Sex Workers Experiences with the Local Law Enforcement in South Africa*, 8 RESEARCH FOR SEX WORK 4, 5 (June 2005), *available at* <http://www.sexworkersproject.org/downloads/R4SW8.pdf>.

18. Interview with Stacey-Leigh Manoek, *supra* note 13.

19. Telephone interview with Sally Shackleton, Executive Director, SWEAT (Mar. 7, 2012).

sex workers and keep the money for themselves or demand bribes in exchange for not arresting a sex worker.²⁰ For some sex workers, the cost of a police bribe to evade arrest can equal an entire night's worth of work.²¹ In other instances, police have exhibited shameless levels of exploitation: in one reported example, a police officer in Cape Town demanded a sex worker give him money in lieu of arrest; when the sex worker told him she possessed only a meager 10 rand (\$1.16 USD), he even demanded that small sum as a bribe.²² Whilst the government condemns people who make a living through sex work, its own officials and agents are economically benefiting off sex workers' earnings. This form of hypocrisy is also reflected in the fact that police confiscate condoms from sex workers to use as evidence of prostitution.²³ As the government tries to fulfill competing goals—distributing condoms while simultaneously arresting sex workers for possessing them—it wastes resources and confuses messages.

Police physically and sexually abuse sex workers. Sex workers report that police demand sexual favors in exchange for release from jail or to avoid arrest; they physically assault and rape sex workers; they encourage or condone prisoner sexual abuse of transgender female sex workers assigned to male prison cells; and they transport and abandon sex workers in dangerous and remote locations.²⁴ Sex workers also report incidents when police have shot them with rubber bullets, pepper sprayed their genitals,²⁵ thrown them into police vans,²⁶ and sprayed them with tear gas.²⁷

20. See U.S. GOV'T, GENDER-BASED VIOLENCE ASSESSMENT REPORT: SOUTH AFRICA, 27 (2011); Interview with Tshwaranang Legal Advocacy Centre Staff, *supra* note 13.

21. Interview with Tshwaranang Legal Advocacy Centre Staff, *supra* note 13.

22. Decriminalization Working Group meeting, Sally Shackleton, SWEAT, (Cape Town, S. Afr., Nov. 10, 2011) [hereinafter Sally Shackleton presentation].

23. Interview with Tim Barnett, former New Zealand MP, and Mickey Meji, SWEAT staff, in Cape Town, S. Afr. (Nov. 8, 2011) [hereinafter Barnett and Meji interview].

24. Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9; Interview with the SWEAT Outreach Staff including sex workers, *supra* note 15.

25. CRAGO & ARNOTT, *supra* note 9, at 2.

26. Interview with the SWEAT Outreach Staff including sex workers, *supra* note 15. Sex workers described what they called 'dumping' where police officers would force a sex worker into a police van and 'dump' her in a remote location with no means of transportation. This often happens late at night and thus puts sex workers in dangerous situations where they might be raped or assaulted.

27. Fick, *supra* note 17, at 4.

4. Lack of Access to Justice

Police often impede sex workers' access to justice when they are the victims of violent crimes. Because of the continual police harassment they face, sex workers are reluctant to report cases of rape committed against them for fear of additional ill treatment.²⁸ Even when sex workers do report rape, physical assaults, robbery, or other crimes committed against them, the police do not take them seriously. As one sex worker noted, "If we go to the police to report abuse, we're made fun of, we're told 'you deserve it.' They chase you away."²⁹ Police may even harass sex workers who do report abuse, especially when the perpetrator is a police officer. One sex worker brought a case against a police officer who had physically abused her, only to have the officer arrest her weekly in retaliation.³⁰

Due to criminalization, prosecutors also rarely take complaints of abuse from sex workers seriously. Sex workers are often afraid to report crimes against them out of fear that they themselves will be prosecuted for breaking anti-prostitution laws.³¹ One transgender sex worker reported her sexual assault to a prosecutor, only to have the prosecutor suggest she downgrade the rape charge to robbery. When she refused, the prosecutor told her that he would have her arrested for prostitution if she did not stop bothering him.³²

5. Lack of Access to Health Services

Criminalization impedes successful HIV public health intervention practices.³³ Sex workers, their clients, and family members make up 19.8% of new HIV infections in South Africa.³⁴ Sex workers face an increased risk of HIV and STI infections because criminalization fuels stigma against sex workers in health services and fosters police abuse of sex workers. It also dissuades sex worker involvement in the development of health policy decisions that affect them.

28. U.S. GOV'T, *Gender-Based Violence Assessment Report*, *supra* note 20; Interview with the SWEAT Outreach Staff including sex workers, *supra* note 15.

29. Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9.

30. Interview with Tshwaranang Legal Advocacy Centre Staff, *supra* note 13.

31. *Id.*

32. Interview with the SWEAT Outreach Staff including sex workers, *supra* note 15.

33. Special Rapporteur, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Human Rights Council, p. 17, U.N. Doc. A/HRC/14/20 (Apr. 27, 2010) [hereinafter Special Rapporteur on the right to health].

34. SOUTH AFRICA CENTRE FOR EPIDEMIOLOGICAL MODELING AND ANALYSIS, *MODE OF TRANSMISSION STUDY* (2010).

Criminalization stigmatizes sex workers as criminals, which negatively affects how health workers view them. This leads to discrimination in health care settings that obstructs sex workers' access to services and information. As one sex worker noted, "It's not easy for sex workers to go to health clinics because of the way we're treated. It's hard for us to even tell health staff we're sex workers because of the way they react. We have to lie about ourselves and our stories just to be treated better."³⁵ Health professionals' often negative and disapproving attitudes towards sex workers also drive sex workers to delay seeking treatment for STI infections, HIV testing, and post-exposure prophylaxis medication.³⁶ In addition, due to its illegality, the isolated nature of sex work often leaves sex workers hidden from health outreach services that do exist.³⁷

Police abuse associated with criminalization also increases sex workers' vulnerability to health risks. Police regularly confiscate condoms from sex workers to use as evidence of prostitution and demand unprotected sex from sex workers who seek to avoid arrest.³⁸ Constant police harassment discourages some sex workers from attempting to access health services out of fear that revealing their occupational identity at health clinics will lead to arrest. In addition, HIV-positive sex workers who get caught in the common cycle of arbitrary police arrest and detention may be denied access to their antiretroviral drugs (ARVs) when in detention.³⁹

Under criminalization in South Africa, sex workers rarely have formal input in the formulation of health policy decisions that affect them because of their illegal, stigmatized status.⁴⁰ This impedes the creation of responsive health care services for sex workers, as policy makers cannot identify the interventions that would be most effective for sex workers without consulting sex workers themselves. Health workers, for instance, need training to know how best to assist sex

35. Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9.

36. Interview with the SWEAT Outreach Staff including sex workers, *supra* note 15; see Special Rapporteur on the right to health, *supra* note 33, at 17.

37. See Ilse Pauw & Loren Brener, *You are Just Whores—You Can't be Raped': Barriers to Safer Sex Practices Among Women Street Sex Workers in Cape Town*, 5 CULTURE, HEALTH & SEXUALITY 465, 474 (2003).

38. Interview with the SWEAT Outreach Staff including sex workers, *supra* note 15.

39. *Id.*

40. Interview with David Scamell, Program Officer, Open Society Foundations, in N.Y.C., N.Y. (Nov. 1, 2011). For political reasons, it is difficult to allow criminalized groups to engage in policy discussions; however, if these groups were decriminalized they could help shape better public policies to address the health concerns of marginalized groups.

workers. But it is difficult to fight for such necessary trainings and other specialized responses when the groups who need them are forced into the shadows due to their criminalized status.⁴¹

6. Abuse From Clients and Others with Whom Sex Workers Transact

Criminalization makes sex workers vulnerable to abuse from clients, hotel management, and intimate partners. Clients are more likely to abuse sex workers when they know that sex workers are very unlikely to go to or receive support from police because they are criminalized. In addition, a Cape Town study found that street-based sex workers are vulnerable to client abuse because the covert nature of sex work forces them to operate in isolated areas where they are susceptible to violent interactions with clients.⁴² Furthermore, sex workers who work indoors will often pay hotel managers a fee to use the premises for their work. As such, hotel management can be a source of abuse for indoor sex workers and often have control over them because they know that sex work is illegal. Sex workers report incidents of rape by hotel management and beatings by hotel security. In addition, hotel management may force sex workers to return fees to disgruntled clients.⁴³ Some sex workers may also be at an increased risk of intimate partner violence. Their partners may become jealous or threaten to report them to the police for prostitution if they complain of domestic abuse.⁴⁴ Sex workers experiencing intimate partner violence are also unlikely to seek protection from the law because under criminalization it is the law that persecutes them.⁴⁵

7. Lack of Labor Rights

Under criminalization, South African sex workers' labor rights are violated in several ways. The illicit nature of sex work forces sex workers to operate in isolation and impedes efforts to collectively organize sex workers. Without collective action, a large power imbalance exists between sex workers and brothel owners or pimps, who may abuse sex workers by demanding they work long hours and forcing them to work

41. *Id.*

42. Pauw & Brener, *supra* note 37, at 472.

43. Interview with Tshwaranang Legal Advocacy Centre Staff, *supra* note 13.

44. Interview with Sally Shackleton, Executive Director, SWEAT, in Cape Town, S. Afr. (Nov. 8, 2011).

45. Telephone interview with Sally Shackleton, Executive Director, SWEAT (Mar. 7, 2012).

in unsafe conditions.⁴⁶ Indoor brothel-based sex workers in South Africa report that they generally have little control over their earnings, working hours, leave time, or the agency fees that owners charge them.⁴⁷ In Johannesburg, where much of the sex work industry takes place in hotels, sex workers report that hotel owners and security staff often make abusive demands of sex workers and threaten to fine them, turn them out on the street, or have them arrested if they complain.⁴⁸ As one sex worker explained, “Right now, no one wants to file a complaint against a hotel manager because they are afraid they will be arrested.”⁴⁹ Outdoor sex workers have more control over their hours and wages, but in return, they face a much greater risk of violence and arrest.⁵⁰

B. *Partial Criminalization Results in Continued Harm to Sex Workers*

Sweden was the first country to introduce the legal approach of partial criminalization, often referred to as the “Swedish Model” or the “Nordic Model.” Under partial criminalization, everyone involved in the sex industry, except sex workers themselves, is breaking the law. Therefore, sex workers are decriminalized while the activities of clients, brothel owners, and others remain illegal. This section argues against partial criminalization as a viable legal model for sex work. We explore the ways in which partial criminalization is unenforceable, costly, and results in continued harm to sex workers in the form of police harassment, stigmatization, lack of access to health services, and violence.

The goal of partial criminalization is an end to the demand and purchase of sexual services.⁵¹ Yet, partial criminalization has produced

46. WORLD AIDS CAMPAIGN, SEX WORK AND THE LAW: THE CASE FOR DECRIMINALIZATION 7 (2010) available at <http://www.desireealliance.org/conference/Sex%20Work%20and%20the%20Law%20-%20case%20for%20decrim-2.pdf>.

47. CHANDRE GOULD, SELLING SEX IN CAPE TOWN: SEX WORK AND HUMAN TRAFFICKING IN A SOUTH AFRICAN CITY 40-48 (2008).

48. Interview with Tshwaranang Legal Advocacy Centre Staff, *supra* note 13. Hotel owners charge sex workers a fee to work at the hotel, charge additional fees if the sex workers take time off, and may fine sex workers if they refuse to see a client or engage in particular acts. Failure to pay these fines or complaining may cause sex workers to be turned out, even in the middle of the night.

49. *Id.*

50. GOULD, *supra* note 47, at 50.

51. Ann Jordan, *The Swedish Law to Criminalize Clients: A Failed Experiment in Social Engineering*, CTR. FOR HUMANITARIAN RIGHTS & HUMANITARIAN LAW, Apr. 2012, at 1 (“[T]he Swedish Government has been unable to prove that the law has reduced the number of sex buyers or sellers . . .”); see also WORLD AIDS CAMPAIGN, *supra* note 46, at 21.

no clear evidence of reduction in sex purchasers or sex workers.⁵² While the Swedish government trumpets the Swedish Model as a success, it presents no convincing evidence in support of its assertions.⁵³ In *The Swedish Law to Criminalize Clients: A Failed Experiment in Social Engineering*, Ann Jordan argues that Sweden's evaluation of its law is undermined by a flawed methodology, which renders many of its claims "speculative" and biased.⁵⁴ For instance, the government claims the law is successful because it has reduced street-based prostitution in Sweden but assumes, without evidence, that this reflects an actual reduction in the number of sex workers in Sweden. However, research with sex workers in Sweden suggests that street-based sex workers have simply gone "underground" by procuring clients and conducting business indoors and online.⁵⁵ In addition, the government had no data regarding estimates of the number of men soliciting sex before and after the law's enactment, so any claim as to an evidence-based reduction of this number is speculative.⁵⁶ The government similarly lacks data on other relevant indicators, and yet it is undeterred from making claims as to the law's "success."⁵⁷

The futile attempts to enforce partial criminalization are costly. Sweden's experience speaks to the expense of partial criminalization. In the years after partial criminalization passed in Sweden, the Swedish police earmarked SEK 7 million (9,108,995 ZAR; \$1,054,172 USD) per year to enforce the law.⁵⁸ Despite the money the Swedish government has spent, there have been fewer than 500 successful prosecutions of

52. Jordan, *supra* note 51, at 1; *see also* WORLD AIDS CAMPAIGN, *supra* note 46, at 21.

53. Jordan, *supra* note 51, at 1, 5 ("Sweden's claims of success are not supported by any reliable evidence.").

54. *See id.* at 6 (noting that the "conclusions were made without factual backup and were at times of a speculative character") (citing SUSANNE DODILLET & PETRA ÖSTERGREN, THE SWEDISH SEX PURCHASE ACT: CLAIMED SUCCESS AND DOCUMENTED EFFECTS 2 (2011) available at <http://www.nswp.org/sites/nswp.org/files/Impact%20of%20Swedish%20law.pdf>); *see also* Jordan, *supra* note 51, at 7-8.

55. *See* Jordan, *supra* note 51, at 7.

56. *See id.* at 6.

57. *See id.* at 6-8.

58. "The Swedish legislation has not achieved all its intended effects. The enforcement has had its weaknesses and the unknown quantities amongst prostitutes and clients for sex are still huge." MINISTRY OF JUSTICE AND THE POLICE—WORKING GROUP ON THE LEGAL REGULATION OF THE PURCHASE OF SEXUAL SERVICES, PURCHASING SEXUAL SERVICES IN SWEDEN AND THE NETHERLANDS: LEGAL REGULATION AND EXPERIENCES 55 (2004), available at http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing_sexual_services_in_sweden_and_the_nederlands.pdf.

clients since the law's enactment in 1999.⁵⁹

Under partial criminalization, sex workers themselves are technically not criminalized, however, clients, brothel-owners, and others associated with sex work do remain criminalized. Because all other actors in the sex work industry are criminalized, sex workers remain “guilty by association” and vulnerable to police harassment. For example, in order to gather evidence against clients, police subject sex workers to questioning and intrusive searches. Sex workers can also be forced to testify against clients at trial.⁶⁰

Despite the law's surface intent of discouraging sex buyers, it also seeks to pressure sex workers to abandon selling sex by stigmatizing sex workers.⁶¹ Such stigmatization goes hand-in-hand with discrimination against sex workers.⁶² Partial criminalization also subjects sex workers to negative health consequences and continued exposure to violence. Sex workers' access to health services and information may be undermined by their need, under partial criminalization, to go “underground” and further out of reach of health services.⁶³ In order to limit their clients' potential exposure to police, sex workers may feel pressure to negotiate more quickly with clients for services. In doing so, they are left without adequate time to assess whether a client seems dangerous and to negotiate safer sex practices.⁶⁴ Laws criminalizing the buying of sex may also encourage “women to move to more hidden and thus potentially dangerous locations”⁶⁵ where they may need to

59. From 1999-2003, there were 682 prosecutions and approximately 210 combined sentences and guilty pleas. From 2004-2006, there were 779 prosecutions and 282 combined sentences and guilty pleas. DODILLET & ØSTERGREN, *supra* note 54, at 16.

60. *Id.* at 21-22.

61. Ann Jordan, *The Swedish Law to Criminalize Clients: A Failed Experiment in Social Engineering*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW-CENTER FOR HUMAN RIGHTS & HUMANITARIAN LAW 12 (April 2012), <http://rightswork.org/wp-content/uploads/2012/04/Issue-Paper-4.pdf> (“Sex workers report that criminalization of clients in Sweden has reinforced and increased the social stigma about prostitution.”) (“The government and its supporters hope that, by using negative images to increase stigma of sex workers and their customers, public pressure will force them to conform (at least superficially) to the views of the majority.”) (internal citations omitted).

62. *Id.* at 12.

63. *Id.*

64. See WORLD AIDS CAMPAIGN, *supra* note 46, at 10 (“The clients would want women to jump into their car more quickly if they knew they were being watched, giving the women less time to judge the situation”); *id.* at 22 (“By prohibiting the purchase of sex the risk of HIV transmission increases, since sex workers are given less time outdoors to negotiate safe sex with clients (e.g. prior to getting into a client's car to avoid the potential arrest of the client).”).

65. Jordan, *supra* note 51, at 10.

rely on dangerous individuals or groups to connect them to clients and protect their activities from police detection.⁶⁶

C. *Legalization and Regulation: Underground Markets and Continued Harm*

Sex work should not be illegal. It should be viewed as a form of labor, and workers within the sex industry should benefit from the legal protections that other workers enjoy. There are two pathways to make sex work legal, whereby it is viewed, at least formally, as a legitimate form of labor and its participants benefit from legal protections: legalization and decriminalization.⁶⁷ Under a legalization or regulation framework, sex work that occurs outside the bounds of state regulation or control remains illegal.⁶⁸ However, these approaches to sex work tend to overregulate the sex industry and treat it as fundamentally different from other forms of labor, thus leading to the creation of underground markets where sex workers remain criminalized and vulnerable.⁶⁹ This section will explore how two common features of legalization and regulation schemes—compulsory HIV/AIDS testing for sex workers and mandatory government registration of sex workers—fuel stigma and result in an underground class of sex workers who refuse to adhere to these misguided regulations and thus remain criminalized and vulnerable.

Regimes of legalization and regulation also often require sex workers to officially register with the government, but many sex workers choose to work illicitly instead of registering because of associated social stigmas attached to sex work.⁷⁰ This results in a separate class of sex workers who continue to work illegally, thus remaining unprotected and vulnerable to abuse.⁷¹ Such unlicensed and illegal sex workers can comprise a substantial proportion of the sex worker population. In Queensland, Australia, for instance, where sex work is legalized and regulated, nearly 90% of all sex workers in the province operate

66. *Id.* (“As sex workers move into more hidden locations to avoid the police, they may end up in the hands of third parties to keep the police away and help find clients.”)

67. Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 *FORDHAM INT’L L.J.* 1178, 1209 (2010).

68. *Id.* at 1208.

69. *See id.*

70. *See* Janice Raymond, *Prostitution on Demand: Legalizing the Buyers as Sexual Consumers*, 10 *VIOLENCE AGAINST WOMEN* 1156 (2004); Mgbako & Smith, *supra* note 67, at 1208.

71. Mgbako & Smith, *supra* note 67, at 1208.

illegally.⁷²

The mandatory health checks generally required for sex workers in a legalized framework perpetuate stigma against them and fail to address the HIV crisis in a meaningful and effective way.⁷³ Specifically, singling out sex workers for compulsory HIV testing perpetuates the false and stigmatizing notion that they are vectors of disease.⁷⁴ Influential health and human rights groups, including the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the Office of the High Commissioner for Human Rights, have argued that mandatory HIV testing is bad public health practice because, through stigmatization, it alienates vulnerable groups like sex workers and pushes them away from the resources they need to safeguard their health and the health of their partners.⁷⁵

A legal scheme that results in a parallel legal universe in which sex workers remain effectively criminalized because they refuse to adhere to misguided state regulations that further their stigmatization is not a framework that supports sex workers' rights. What is needed instead is a "legal regime that draws all sex workers out of the shadows" and upholds their rights.⁷⁶

II. DECRIMINALIZATION AND ITS POSITIVE IMPACT: NEW ZEALAND CASE STUDY

In June 2003, New Zealand became the first and only country to fully decriminalize sex work when it passed the Prostitution Reform Act (PRA).⁷⁷ One of New Zealand's key objectives in decriminalizing sex

72. See N.Z. MINISTRY OF JUSTICE, *3 Directory of Countries*, MINISTRY OF JUSTICE, <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/international-approaches/3-directory-of-countries> (last visited June 30, 2013) [hereinafter *Directory of Countries*].

73. *Sex, Work, Rights: Reforming Canadian Criminal Laws on Prostitution*, INFORMATION SHEET 2, (Canadian HIV/AIDS Legal Network, Toronto, Ontario), Nov. 1, 2005, at 1, available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=199>.

74. Chi Mgbako, *Sex Workers in Greece Face Forced HIV Testing, While Those in Malawi Fight Back*, THE HUFFINGTON POST (June 11, 2012), www.huffingtonpost.com/chi-mgbako/greece-forced-hiv-testing_b_1585301.html.

75. *Id.*; Office of the High Comm'r for Human Rights and Joint U.N. Programme on HIV/AIDS (UNAIDS), *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated version*, at 86-87, HR/PUB/06/9 (2006).

76. Mgbako & Smith, *supra* note 67, at 1215.

77. N.Z. MINISTRY OF JUSTICE, REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003 13 (2008), available at <http://www.justice.govt>.

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work was to improve sex workers' safety.⁷⁸ During the passage of the legislation, the New Zealand Parliament amended the Prostitution Reform Bill to form the Prostitution Law Review Committee (the Committee) to study the effects of the law and report after it had been in place for five years.⁷⁹ The Committee's final report (the Committee Report), along with other published studies on the effects of decriminalization in the country, provides insights into the positive impact of decriminalizing sex work. Although New Zealand has a generally different political and social history than South Africa, the similar experiences of human rights abuse and exploitation faced by sex workers in both locales under criminalization makes New Zealand a fruitful case study to provide evidence of the positive impact decriminalization could have in South Africa.⁸⁰

In New Zealand, the Committee established under the Prostitution Reform Act and appointed by the government represented a range of interested sectors including sex workers, the faith community, and women, and was chaired by a former police commissioner. The Committee concluded that decriminalization "had a marked effect in safeguarding the right of sex workers to refuse particular clients and practices, chiefly by empowering sex workers through removing the illegality of their work."⁸¹ Studies conducted in New Zealand after decriminalization concluded that sex workers have better working conditions,⁸² receive improved access to health services,⁸³ take precautions to stop the spread of STIs,⁸⁴ and enjoy better relations with police,⁸⁵ increased access to justice when they are victims of crime, and increased confidence and well-being.⁸⁶ Additionally, there was no evidence that de-

nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf. [hereinafter N.Z. MINISTRY OF JUSTICE].

78. *Id.* at 22.

79. Prostitution Reform Act 2003, Part 4 (N.Z.), available at <http://www.legislation.govt.nz/act/public/2003/0028/latest/DLM197899.html>.

80. The Committee explores how criminalization affected New Zealand sex workers' "health and well-being." N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 21-22.

81. *Id.* at 47.

82. See Directory of Countries, *supra* note 72.

83. GILLIAN ABEL, LISA FITZGERALD & CHERYL BRUNTON, THE IMPACT OF THE PROSTITUTION REFORM ACT ON THE HEALTH AND SAFETY PRACTICES OF SEX WORKERS, 131-32 (2007); Directory of Countries, *supra* note 72.

84. ABEL ET AL., *supra* note 83, at 135.

85. Directory of Countries, *supra* note 72.

86. N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 50.

criminalization led to an increase in trafficking into prostitution,⁸⁷ youth in the sex trade,⁸⁸ or the number of sex workers.⁸⁹

A. *Decriminalization and Violence Against Sex Workers*

Under criminalization, sex workers' criminal status robs them of the ability to enforce their rights, making them vulnerable to abuse and unable to demand justice when they are victims of violence.⁹⁰ In contrast, evidence from the effects of decriminalization in New Zealand proves that decriminalization improves sex worker-police relations and empowers sex workers to protect themselves from violence by refusing dangerous clients, negotiating safer sex practices, and seeking police assistance if they are the victims of crime.

When criminal penalties for sex work are removed, the relationship between police and sex workers transforms from one of "prosecutors to protectors,"⁹¹ as evidenced by the improvement of sex worker-police relations in New Zealand after decriminalization. Decriminalizing sex work in South Africa will also improve sex workers' relationships with the police and therefore their ability to rely on law enforcement for protection when they are the victims of or witnesses to violent crime.

In New Zealand, 77% of surveyed sex workers felt that police officers were concerned for their safety after decriminalization, and a majority felt that police attitudes had changed for the better since the PRA was enacted.⁹² In addition, 70% of respondents agreed that sex workers were more likely under decriminalization to report incidents of vio-

87. Chandre Gould, *The Need for Evidence to Assess Concerns About Human Trafficking During the 2010 World Cup*, INST. FOR SEC. STUDIES (Mar. 23, 2010), <http://www.issafrika.org/iss-today/the-need-for-evidence-to-assess-concerns-about-human-trafficking-during-the-2010-world-cup>.

88. N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 101-02.

89. N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 41.

90. Sex workers face an increased risk of being victims of domestic violence, and their criminalized status makes it difficult to report domestic violence due to fear of arrest or threats from their partner to turn them in to police. Interview with the SWEAT Outreach Staff including sex workers, *supra* note 15; Interview with Tshwaranang Legal Advocacy Centre Staff, *supra* note 13; WORLD HEALTH ORGANIZATION, *supra* note 8, at 1.

91. N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 121; Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9. Some sex workers expressed the belief that under decriminalization, the threat of legal penalties will deter clients from abusing sex workers.

92. ABEL ET AL., *supra* note 83, at 163. A combined total of 77% of sex workers reported that "most or some" police officers were concerned for their safety after decriminalization. Notably, street workers, who due to their visibility have more contact with the police than brothel-based sex workers, indicated the strongest sense of positive change.

lence to the police.⁹³ There was a general sense among sex workers that police would take their claims seriously.⁹⁴ A New Zealand sex worker commented: “For the last couple of years, the police have been really good, really onto it. So we’ve been having more patrol cars going down the street . . . Before they just didn’t care . . . But now that the law’s changed, it’s changed the whole thing.”⁹⁵

Increased police visibility in areas where sex workers operate in New Zealand further deters violence against sex workers as well as other criminal activity, and allows the police to respond more quickly if sex workers need assistance.⁹⁶ Sex workers in New Zealand report that the police now respond quickly to calls for help, with one woman commenting, “I must say when the law changed, it did turn, it did make it even easier because you could just ring the Police . . . and they’d be up there like a shot.”⁹⁷

The positive effects of decriminalization on protecting sex workers from client violence in New Zealand suggest that decriminalization would have a similar impact on violence against sex workers in South Africa. Under decriminalization, sex workers no longer need to fear arrest or hide from police. This allows them to enforce their rights, to report crimes against them, to take time to assess situations and reject unwanted clients, and to insist upon safer sex practices. South African sex workers believe that decriminalization would bring the same benefits to them, asserting that “decriminalization will give us power with clients” and “clients will be scared to abuse us because they’ll know we have the right to report it.”⁹⁸

Criminalizing sex work heightens the risk of client violence faced by sex workers in South Africa. Sex workers are vulnerable to client violence because they must engage and negotiate with clients under

93. Dr. Elaine Mossman & Pat Mayhew, *Key Informant Interviews Review of the Prostitution Reform Act 2003*, § 4, CRIME AND JUSTICE RESEARCH CENTRE, VICTORIA UNIVERSITY OF WELLINGTON (2007), available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/key-informant-interviews/4-welfare-health-and-safety#33>; N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 57.

94. Mossman & Mayhew, *supra* note 93, § 4.4; N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 122; SUSAN COPPEDGE, PEOPLE TRAFFICKING: AN INTERNATIONAL CRISIS FOUGHT AT THE LOCAL LEVEL 38 (2006), available at http://www.fulbright.org.nz/wp-content/uploads/2011/12/axford2006_coppedge.pdf.

95. ABEL ET AL., *supra* note 83, at 165.

96. Barnett and Meji interview, *supra* note 23; ABEL ET AL., *supra* note 83, at 163-64.

97. ABEL ET AL., *supra* note 83, at 165.

98. Interview with Tshwaranang Legal Advocacy Centre Staff, *supra* note 13; Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9.

the constant fear that a passing police officer will see them and arrest them. Therefore, they have a strong incentive to accept a client quickly in order to avoid police detection, even if they have not had time to fully assess the risks and reject clients who may pose threats.⁹⁹ The threat of arrest compels sex workers to go to isolated areas with clients, leaving them alone and unprotected if disputes arise over condom use, services, or payment.¹⁰⁰

After decriminalization, New Zealand sex workers stated that they were more likely to report any violence they experienced to the police.¹⁰¹ The New Zealand Prostitutes Collective confirms that more sex workers are going to the police to report violence.¹⁰² A significant minority of sex workers, brothel owners, and NGOs surveyed in New Zealand felt that violence had decreased after decriminalization.¹⁰³ Decriminalization transforms the relationship between police and sex workers, allowing for a gradual building of trust and increased reporting of violence against sex workers. This is a crucial step towards reducing violence against sex workers. Clients have a strong incentive to treat sex workers with dignity when they know that sex workers can and will report crimes to the police.¹⁰⁴

A strong majority (64.8%) of street- and brothel-based sex workers in New Zealand felt that decriminalization made it easier for them to refuse unwanted clients, thus further shielding them from potential violence.¹⁰⁵ A New Zealand sex worker noted that after decriminalization she was “not at all expected in any shape or form whatsoever to put myself and my health at risk. And it’s just made it a lot easier.”¹⁰⁶ Sex

99. *Sex, Work, Rights: Reforming Canadian Criminal Laws on Prostitution*, INFORMATION SHEET 4, (Canadian HIV/AIDS Legal Network, Toronto, Ontario), Nov. 1, 2005, at 1-3, available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=199>; INTERNATIONAL HIV/AIDS ALLIANCE & FRONTIERS PREVENTION PROJECT, *SEX WORK, VIOLENCE, AND HIV 8* (2008), available at http://www.aidsalliance.org/includes/Publication/Sex_%20work_violence_and_HIV.pdf.

100. Interview with Kyomya Macklean, African Sex Worker Alliance Coordinator, in Cape Town, S. Afr. (Nov. 10, 2011); Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9.

101. N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 57; Mossman & Mayhew, *supra* note 93, § 4.

102. Barnett and Meji interview, *supra* note 23; Comment from Dr. Calum Bennachie, New Zealand Prostitutes Collective, (Dec. 18, 2011).

103. N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 57.

104. *Id.* at 58.

105. *Id.* at 46; Gillian Abel et al., *DECriminalization of Sex Work in New Zealand*, Slide 27, 28; Table 6.2, 6.3, *on file with author*. In the city of Christchurch, only 37% of private sex workers surveyed prior to decriminalization felt they could refuse a client, compared to 62% reporting that they felt they could refuse a client after decriminalization. *Id.* at Table 6.3.

106. N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 46.

workers in New Zealand also report that they feel more comfortable insisting on condom use with their clients, and can point to the PRA as their reason for doing so.¹⁰⁷

B. *Decriminalization, Trafficking, and Youth in the Sex Trade*

Decriminalization of sex work in South Africa will not affect South Africa's laws against forced labor and the commercial sexual exploitation of children.¹⁰⁸ Evidence from New Zealand suggests that there is no reason to fear that decriminalization will lead to an increase in trafficking or youth in the sex trade. Instead, decriminalization can ensure that sex workers are allies in the fight against exploitation. Finally, any discussion of decriminalization's potential effects on trafficking into prostitution should address the problem of reliably measuring such effects in South Africa. Studies and statistics often conflate trafficking with sex work, thus making it difficult to rely on figures that purport to show the extent of trafficking into prostitution in a given country.

Evidence from New Zealand indicates that decriminalizing sex work has no impact on the number of youth in the sex trade or on the prevalence of trafficking into forced prostitution.¹⁰⁹ In fact, five years after decriminalization, the Committee could find no credible claims of trafficking into forced prostitution in New Zealand.¹¹⁰ After decriminalization in New Zealand, several brothel owners and clients have been prosecuted for hiring underage sex workers.¹¹¹ And sex workers can now challenge in court debt bondage contracts in which a brothel owner or pimp economically exploits a sex worker.¹¹²

107. Mossman & Mayhew, *supra* note 93, § 4.1. The law requires that "all reasonable steps to ensure" safer sex be taken. This promotes safer sex while protecting sex workers by ensuring that if they have been unable to use a condom, due to pressure from their employer or a client, or any other reason, they can talk to someone about it without fear of prosecution for not using a condom. E-mail from Dr. Calum Bennachie, New Zealand Prostitutes Collective, (Dec. 18, 2011) (on file with author).

108. *See, e.g.*, S. Afr. Const., §§ 13, 22, 28, 1996; Children's Act 38 of 2005 (S. Afr.); Child Care 74 of 1983 (S. Afr.).

109. GOULD, *supra* note 87; N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 101-02. This section of the Ministry of Justice report also notes that media coverage may have led to "an exaggerated impression of the numbers involved" in underage sex work and that subjective estimates of the number of underage street-based sex workers may be overstated.

110. N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 167.

111. WORLD AIDS CAMPAIGN, *supra* note 46, at 8; *see, e.g.*, R v Booten, Christchurch High Court (2008), R v Gillanders, Christchurch District Court (2003); R v Horlor, Christchurch High Court (2010).

112. Interview with Tshwaranang Legal Advocacy Centre Staff, *supra* note 13.

Due to the hours and locations in which they work, sex workers would be in a unique position to identify suspected cases of trafficking and underage sex workers and to gather information about exploitative or abusive labor conditions.¹¹³ Therefore, decriminalization, by removing the fear of arrest, would allow sex workers to take advantage of their position and help identify situations of abuse without having to fear being arrested as a result.¹¹⁴ South African sex workers are opposed to both trafficking into prostitution and the involvement of minors in sex work. They already investigate suspicious situations on their own and approach individuals they suspect may have been trafficked in order to find out whether they need help.¹¹⁵ But they are reluctant to identify situations of abuse out of fear of harassment.¹¹⁶ In addition, under current prostitution laws in South Africa, victims of trafficking and youth in the sex trade can be arrested and prosecuted for prostitution.¹¹⁷ Decriminalization allows the state to focus resources on social services to help survivors of trafficking and youth in the sex trade.¹¹⁸

Although advocates of decriminalization are opposed to trafficking into prostitution,¹¹⁹ there is a growing body of research that suggests claims about the extent of trafficking into prostitution have been overstated.¹²⁰ Further, data on trafficking may conflate instances of traffick-

113. WORLD AIDS CAMPAIGN, *supra* note 46, at 8.

114. INST. FOR SEC. STUDIES AND SWEAT, REPORT TO THE SOUTH AFRICAN LAW REFORM COMMISSION 25 (2007); WORLD AIDS CAMPAIGN, *supra* note 46, at 8.

115. Interview with the SWEAT Outreach Staff including sex workers, *supra* note 15; Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9.

116. Interview with the SWEAT Outreach Staff including sex workers, *supra* note 15; Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9.

117. SA Law Commission Issue Paper 25 Trafficking in Persons 13 (Mar. 2004) (S. Afr.), available at http://www.justice.gov.za/salrc/ipapers/ip25_prj131_2004.pdf.

118. WORLD AIDS CAMPAIGN, *supra* note 46, at 8; N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 99, 110-12.

119. Interview with Tshwaranang Legal Advocacy Centre Staff, *supra* note 13; Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9; Interview with the SWEAT Outreach Staff including sex workers, *supra* note 15; Interview with Kyomya Macklean, *supra* note 100; *Child Sex Industry Booms in South Africa*, LABORNEWS, July 23, 1996, available at <http://www.hartford-hwp.com/archives/37a/029.html>.

120. See, e.g., Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 POLITICS AND SOCIETY 447, 467 (2007) (anti-trafficking has become a moral crusade through “promulgation of huge and unverified numbers of victims”). England’s largest investigation of human trafficking in sex work failed to identify even one person who had been forced into sex work. See Nick Davies, *Inquiry Fails to Find Single Trafficker Who Forced Anybody Into Prostitution*, THE GUARDIAN (Oct. 20, 2009), <http://www.guardian.co.uk/uk/2009/oct/20/government-trafficking-enquiry-fails>. The number of trafficking victims cited in the passage of the United States’ Trafficking Victims Protection Act of 2000 included “tens of thousands” more

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ing into prostitution with sex work.¹²¹ Failing to distinguish between the separate concepts of sex work and trafficking when compiling data leads to generalizations about the extent of trafficking that may not be supported by facts.

C. Decriminalization and Demand for Sex Work

Fears that decriminalization will lead to an increase in the number of clients or sex workers are unfounded. Evidence suggests that the legal status of sex work in a country has no bearing on the demand or supply for sex work. In New Zealand, neither the number of sex workers nor the number of brothels changed significantly after decriminalization, indicating that the passage of the law did not increase the demand for sex work.¹²² The Committee Report specifically refuted claims that decriminalization had led to an increase in the number of sex workers.¹²³ A cross-state study conducted in Australia, in which sex work is legalized in some states, decriminalized in one state, and criminalized in others, found that the legal status of sex work has “little or no impact on the size of the industry.”¹²⁴

victims than recent and reliable data indicates. In the first seven years of the law, the United States identified a total of 1,362 victims of human trafficking, far below the estimated 50,000 each year. See Johnny McGaha & Amanda Evans, *Where Are the Victims? The Credibility Gap in Human Trafficking Research*, 4 INTERCULTURAL HUM. RTS. L. REV. 239, 240 (2009). See also Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence: U.S. Estimates Thousands of Victims, But Efforts to Find Them Fall Short*, WASHINGTON POST, Sept. 23, 2007.

Likewise, statistics on the existence of trafficking in South Africa are unreliable and greatly disputed. UNESCO reports tens of thousands of trafficking victims, but discrete studies of the sex work industry in South Africa suggest that there have been far fewer examples of bona fide human trafficking in sex work in the past 4 years. See U.N. Educ., Scientific and Cultural Org., *Human Trafficking in South Africa: Root Causes and Recommendations*, 7-11, Policy Paper No. 14.5 (E)UNESCO, (2007) (reporting high trafficking in South Africa); but compare GOULD, *supra* note 47, at 84 (in a study of Cape Town sex work, fewer than 10 cases potentially met the definition of trafficking); and Interview with the SWEAT Outreach Staff including sex workers, *supra* note 15 (recalling only two cases of trafficking in the past few years).

121. Interview with Tshwaranang Legal Advocacy Centre Staff, *supra* note 13; Weitzer, *supra* note 120, at 455; GOULD, *supra* note 47, at 149-55.

122. Glenn Laverack & Amanda Whipple, *The Sirens' Song of Empowerment: A Case Study of Health Promotion and the New Zealand Prostitutes Collective*, 17 GLOBAL HEALTH PROMOTION 37 (2010); see also Gillian Abel, Lisa Fitzgerald & Cheryl Brunton, *The Impact of Decriminalisation on the Number of Sex Workers in New Zealand*, 38 J. SOC. POL'Y. 515 (2009); N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 40-41.

123. N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 40.

124. Danny Rose, *Legal or not, sex industry powers on*, SYDNEY MORNING HERALD (Oct. 6, 2010), <http://www.smh.com.au/national/legal-or-not-sex-industry-powers-on-20101005-1669t.html>;

Countries that have launched efforts to reduce demand for sex work have not been successful. As explored in Part I, Sweden criminalized the purchase of sexual services in an attempt to reduce the number of clients of sex workers, but did not criminalize sex workers themselves.¹²⁵ While the number of street-based sex workers in some areas initially dropped, this decrease was attributed to sex workers choosing to move to less visible places in order to protect their client base from arrest.¹²⁶ Sweden's law appears to have done nothing more than force sex workers to operate in areas where they are less likely to be detected.¹²⁷ A study synthesizing the results of multiple assessments of the impact of Sweden's law found that not only had it failed to reduce demand for sex work, it also failed to impact the incidence of trafficking into prostitution, and it put sex workers at greater risk by increasing the stigma against them.¹²⁸ Similarly, the United Kingdom's attempt to deter clients through "kerb-crawling" legislation, which penalizes clients of street-based sex workers, has not been effective at reducing demand for sex work.¹²⁹

III. SOUTH AFRICA SHOULD DECRIMINALIZE SEX WORK IN ORDER TO PROTECT SEX WORKERS' RIGHTS

Only one model of legal reform, decriminalization of sex work, would benefit South African sex workers. Decriminalization of sex work removes all criminal penalties associated with sex work, and the government regulates it like other forms of employment. Thus sex workers, clients, and others involved in the sex industry would no longer be criminals under the law. As explored in Part II, decrimin-

BASIL DONOVAN, ET AL., *THE SEX INDUSTRY IN WESTERN AUSTRALIA: A REPORT TO THE WESTERN AUSTRALIA GOVERNMENT* 6 (2010).

125. WORLD AIDS CAMPAIGN, *supra* note 46, at 21.

126. *See* N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 20.

127. WORLD AIDS CAMPAIGN, *supra* note 46, at 11. Studies on the clients of sex workers further support the claim that criminalizing sex work does little to deter the clients of sex workers; *see* Alan Collins & Guy Judge, *Client Participation and the Regulatory Environment*, in *DEMANDING SEX: CRITICAL REFLECTIONS ON THE REGULATION OF PROSTITUTION* 137, 143 (Vanessa E. Munro & Marina Della Giusta eds., 2008). A survey of clients in Canada found that the large majority of men did not find the law to have a large deterrent effect—though over 56% said the law affects where they choose to go to locate sex workers, 85% of the men surveyed said that even if sex work was completely criminalised, they would still buy sex. *See* JOHN LOWMAN, CHRIS ATCHISON & LAURA FRASER, *MEN WHO BUY SEX, PHASE 2: THE CLIENT SURVEY* 50 (1997).

128. *See* DODILLET & ÖSTERGREN, *supra* note 54, at 3.

129. WORLD AIDS CAMPAIGN, *supra* note 46, at 10; N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 166.

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alization has exhibited promising results in protecting the rights of sex workers. This Section explores how decriminalization is the only legal approach that would address the rights abuses sex workers face under criminalization, including police abuse, health services stigma, and lack of labor rights.

Decriminalization would remove the indignity of police abuse of sex workers and increase their access to justice when they are victims of crimes. Under decriminalization, sex workers will no longer be criminals in conflict with the law. Thus, decriminalization would help eliminate the opportunity for police to take advantage of sex workers.¹³⁰ Police would no longer have an excuse to perpetuate economic, sexual, and physical abuse of sex workers. Decriminalization can and should include a strong policy preventing police from using municipal bylaws to harass sex workers and local councils from making rules that unfairly target sex workers. Decriminalization would also improve sex workers' access to justice because it would encourage sex workers to report violations against them without fear of indifference or retaliation by police.¹³¹

Decriminalization would also help eradicate the corruption and government hypocrisy endemic in the policing of sex work. In the late 1970s, the Australian state of New South Wales began the process of decriminalizing sex work, with legislation passed in 1995, and subsequent reports analyzing its effects.¹³² Research from New South Wales found that decriminalization achieved the desired result of reducing police corruption.¹³³ Thus, the goal would be that under decriminalization, no longer would the government supply condoms to sex workers only to have police confiscate them and use them as evidence to arrest sex workers. Likewise, no longer would the government maintain that sex work is illegal while turning a blind eye to state agents who profit off sex workers' earnings by extorting money from them.

Decriminalization would aid in the fight against HIV/AIDS because good public health practice regarding HIV and AIDS prevention, treatment, care, and support requires a decriminalized en-

130. Sex workers in New Zealand reported improved relations with police after decriminalization. ABEL ET AL., *supra* note 83, at 163.

131. Sex workers in New Zealand reported they were more likely to report instances of abuse to the police after decriminalization. Mossman & Mayhew, *supra* note 93, § 4.4; N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 57.

132. See SANDRA EGGER & CHRISTINE HARCOURT, PROSTITUTION IN NEW SOUTH WALES: THE IMPACT OF DEREGULATION (1991).

133. *Id.* at 120.

vironment.¹³⁴ Decriminalization would promote the free flow of health information, condoms, HIV and STI testing, and treatment to sex workers by encouraging them to seek out health services without fear of experiencing stigma and discrimination.¹³⁵ Ideally, decriminalization would also, in time, lessen the isolated and covert nature of sex work, and therefore sex workers would be within easier reach of NGOs and health workers. Under decriminalization, occupational health and safety laws should apply to sex work, creating a regulatory incentive for brothel owners to promote safe sex and giving sex workers increased power to negotiate condom use with clients.¹³⁶ Additionally, decriminalization would hopefully increase sex worker involvement in the formulation of health policy decisions that affect them, ensuring the necessary creation of specialized government responses to sex workers' health needs.¹³⁷

Under criminalization sex workers often have little influence over their earnings, work hours, or leave time.¹³⁸ Decriminalization should allow sex workers access to existing workplace laws¹³⁹ and empower them to engage in individual or collective bargaining to demand better working conditions.¹⁴⁰

IV. DECRIMINALIZATION OF SEX WORK FULFILLS SOUTH AFRICA'S CONSTITUTIONAL AND HUMAN RIGHTS COMMITMENTS

By embracing the legal framework of decriminalization of sex work, South Africa would also be fulfilling its constitutional and human rights commitments by promoting sex workers' rights to free choice of work, association, access to health care, security of the person, and human dignity.

134. Special Rapporteur on the right to health, *supra* note 33, at 15.

135. Studies from New Zealand point to increased access to health services following decriminalization. ABEL ET AL., *supra* note 83, at 131-32.

136. Sex workers in New Zealand report feeling more confident in insisting upon condom use with clients following decriminalization. Mossman & Mayhew, *supra* note 93, § 4.1; e-mail from Dr. Calum Bennachie, New Zealand Prostitutes Collective, (Dec. 18, 2011) (on file with author).

137. It was a positive sign that the Committee charged with reviewing the effect of the PRA included sex workers. N.Z. MINISTRY OF JUSTICE, *supra* note 77, at 47.

138. GOULD, *supra* note 47, at 40-48.

139. The New Zealand Department of Labor includes sex workers within its framework. *Barred by U.S. Restrictions, Sex Workers Hold Alternative AIDS Summit in Kolkata, India*, DEMOCRACY NOW (July 25, 2012), http://www.democracynow.org/2012/7/25/barred_by_us_restrictions_sex_workers.

140. *See id.*

DECRIMINALIZATION OF SEX WORK IN SOUTH AFRICA

A. *Free Choice of Work*

South Africa is required under its constitutional and international legal commitments to fulfill sex workers' right to free choice of work. Criminalization of sex work violates this right by making sex work illegal, thus denying sex workers their right to make an autonomous decision to work in the sex work industry. If South Africa decriminalizes sex work, it will fulfill its obligations under constitutional and international law by recognizing sex work as a legitimate form of labor and acknowledging sex workers' choice to earn their living through sex work.

South Africa's Constitution guarantees all citizens, including sex workers, the right to freedom of trade, occupation, and profession.¹⁴¹ South Africa is a party to international and African regional human rights treaties, which recognize the right to free choice of work, including the African Charter on Human and People's Rights (African Charter) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁴² The International Labour Organization (ILO) recognizes sex work as a form of industry, and encourages governments to focus on improving labor and working conditions for voluntary adult sex workers.¹⁴³

Sex work is fundamentally a labor issue. Specifically, it is a form of service work that should enjoy the same protections that any other type of service work entails.¹⁴⁴ As one South African sex worker stated, "Not everyone can do the same work. I chose this in particular and all I am asking is to have my choice respected."¹⁴⁵ A legal regime where sex work is decriminalized will allow sex workers to freely choose

141. S. AFR. CONST. § 22, 1996, *available at* <http://www.info.gov.za/documents/constitution/1996/index.htm>.

142. International Covenant on Economic, Social and Cultural Rights, art. 6(1), Dec. 16, 1966, 993 U.N.T.S. 9 [hereinafter ICESCR]. South Africa became a signatory to the ICESCR in 1994, but has not ratified this treaty. *See* STATUS OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, <http://treaties.un.org/pages/> (last visited July 4, 2013); African Charter on Human and Peoples' Rights art. 15, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter African Charter]; Convention on the Elimination of All Forms of Discrimination Against Women, art. 11(1)(a), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

143. THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA 212 (Lin Lean Lim, ed., 1998).

144. Gillian Abel, *Decriminalization: A Harm Minimisation and Human Rights Approach to Regulating Sex Work*, at 34 (June 2010) (unpublished Ph.D. thesis, University of Otago).

145. Barnett and Meji interview, *supra* note 23.

their occupation, and in doing so to provide for their families.¹⁴⁶ Sex workers choose to do sex work for a variety of reasons. Some enter the industry out of economic necessity.¹⁴⁷ As one South African sex worker explains, “Sex work is our job—we work to put food on the table for our children.”¹⁴⁸ Others enjoy the income and freedom that sex work provides them. One South African sex worker explained that she freely chose sex work over cleaning laundry or making clothing, and stated, “I’m not asking for rescue, I’m asking for recognition in front of the law as a woman and in South Africa.”¹⁴⁹ Decriminalizing sex work will recognize the constitutional and human right of sex workers to engage in the type of labor of their choice.

B. *Freedom of Association*

The South African government is required by its Constitution and international human rights obligations to fulfill sex workers’ right to freedom of association. South Africa’s criminalization of sex work denies this right because sex workers are unable to engage in meaningful unionization activities or collective bargaining when sex work is itself illegal. Decriminalization of sex work will fulfill South Africa’s legal obligation to sex workers by allowing them to form professional organizations, to access the protections afforded by South Africa’s employment laws, and to challenge unfair labor conditions in court.

The South African Constitution guarantees South African sex workers the rights to freedom of association and fair labor practices.¹⁵⁰ These rights encompass the right to organize into a union and engage

146. Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9. Many sex workers who entered the profession due to economic need emphasized the economic freedom that would come with decriminalization. One sex worker said, “Decriminalization will help poverty, because it will open more options. Women will be able to earn money more easily, and won’t have to rely on their husbands for limited funds.”

147. Interview with Sally Shackleton, *supra* note 44. “Many people only do sex work because of the economic imperative. Their only other options are cleaning and domestic work, which don’t offer as much money—they do not have economic opportunities. The other side of this is that many sex workers in SA are also fiercely independent. They work when they want, they like their own hours, no one tells them how to make money.”

148. Interview with Sex Workers attending Creative Space session at SWEAT, *supra* note 9.

149. Barnett and Meji interview, *supra* note 23 (“I didn’t do this because of economic status. I am the daughter of a chief. I started doing this because I didn’t want a Nokia 360 phone, I wanted a Nokia 620i . . . I could have been a cleaner, but I didn’t want to spend my time washing another woman’s underwear. There’s a lot of things I could have done. I had choices at my disposal. Maybe not the same or as many [choices] as a high class woman, but I had choices.”).

150. S. AFR. CONST. § 18, 1996.

in collective bargaining.¹⁵¹ South Africa is also bound by international and African regional human rights treaties that protect labor-related association rights, including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter.¹⁵² South Africa is also party to two ILO conventions, No. 87 (1948) concerning the Right to Organise, and No. 98 (1949) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.¹⁵³ Furthermore, the Congress of South African Trade Unions (COSATU) has called for the decriminalization of sex work, and supports the inclusion of sex work in South Africa's job creation strategy. COSATU has encouraged affiliates in the labor movement to raise awareness about sex work and reduce stigma associated with the industry.¹⁵⁴

While the South African Labour Appeals Court has stated that constitutional labor rights, including the rights to association and fair working conditions, can apply to sex workers, the fact that contracts for sex work are unenforceable under South Africa's current laws makes it impossible for sex workers to enforce their right to fair working conditions or to access the protections of South Africa's employment laws.¹⁵⁵

If South Africa decriminalizes sex work, sex workers will be empowered to join together to challenge exploitative working conditions and unfair labor practices. Sex workers will be able to access existing workplace laws, collectively bargain for improved work conditions, and enforce contracts against employers or clients.¹⁵⁶ Collective action is especially important for sex workers because they lack community

151. *Id.* § 23.

152. International Covenant on Civil and Political Rights, art. 22, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; African Charter, *supra* note 145, art. 10.

153. Convention concerning Freedom of Association and Protection of the Right to Organise (ILO No. 87), July 4, 1950, 68 U.N.T.S. 17; Right to Organise and Collective Bargaining Convention (ILO No. 98), July 18, 1951, 96 U.N.T.S. 257; *see also* Press release, Int'l Labour Org. South Africa Ratifies Conventions on Freedom of Association and Collective Bargaining (Feb. 20, 1996), available at http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS_008060/lang-en/index.htm.

154. Carien du Plessis, *Decriminalize Prostitution, Urges COSATU*, IOL NEWS, Sept. 14, 2009, available at <http://www.iol.co.za/news/south-africa/decriminalize-prostitution-urges-cosatu-1.458398>.

155. *Kylie v. CCMA*, 2011 (4) SA 383 (S. Afr.); *see also* *Dhlamini v. Protea Assurance Co.*, 1974 (4) SA 906 (A) at 915 (S. Afr.); *Booyesen v. Shield Insurance Co.*, 1980 (3) SA 1211 (S. Afr.).

156. *See, e.g.*, Occupational Health and Safety Act 85 of 1993 (S. Afr.).

support due to their stigmatized status.¹⁵⁷ When sex workers work together to address the discrimination and human rights abuses they suffer at the hands of police, health workers, and government agents, they are able to fight for their rights.¹⁵⁸ Decriminalization will enable this collectivized action.

C. *Right to the Highest Attainable Standard of Health*

The South African government is bound by its constitutional and international human rights commitments to fulfill sex workers' right to health. South Africa currently violates sex workers' right to health because criminalization fuels stigma against sex workers in health services. Decriminalizing sex work will help South Africa fulfill its legal obligations by facilitating sex workers' access to health care, lowering their susceptibility to HIV/AIDS, and reducing their risk of violence. The South African Constitution guarantees all South Africans, including sex workers, the right to access health care services, including reproductive health care.¹⁵⁹ South Africa is also bound by regional and international human rights treaties that recognize the right to health, including CEDAW, the African Charter, and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol).¹⁶⁰ The United Nations Special Rapporteur on the Right to Health has taken particular notice of sex workers' right to health. The Special Rapporteur maintains that criminalization of sex work violates sex workers' right to health in numerous ways, and notes that "Decriminalization,

157. Oliver J. McKinstry, Comment, *We'd Better Treat Them Right: A Proposal for Occupational Cooperative Bargaining Associations of Sex Workers*, 9 U. PA. J. LAB. & EMP. L. 679, 684-85 (2007).

158. CENTER FOR ADVOCACY ON STIGMA AND MARGINALISATION, *Rights-Based Sex Work Empowerment Guidelines* 9, July 2008, available at <http://sangram.org/Download/D3.pdf> [hereinafter CASAM].

159. S. Afr. Const. § 27, 1996.

160. ICESCR, *supra* note 145, art. 12; CEDAW, *supra* note 145, arts. 11(1), 12; African Charter, *supra* note 145, art. 16; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 14, Sept. 13, 2000, CAB/LEG/66.6 [hereinafter African Women's Protocol] ("States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. . . States Parties shall take all appropriate measures to . . . provide adequate, affordable and accessible health services, including information, education and communication programmes to women." See also U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, Aug. 11, 2000, U.N. Doc. E/C.12/2000/4, available at <http://www.unhcr.org/refworld/docid/4538838d0.html>.

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along with the institution of appropriate occupational health and safety regulations, safeguards the rights of sex workers.”¹⁶¹

If South Africa decriminalizes sex work, sex workers will realize their right to health because they will be empowered to access health services, including HIV prevention strategies. Their vulnerability to violence from police and clients will decrease because they will be able to report crimes and hold their attackers accountable. Sex workers will also be in a better position to insist on safer sex with clients. Once sex workers are no longer criminalized, the government will be able to improve the effectiveness of its health policies by designing interventions targeted at sex workers and training health professionals on the particular needs of sex workers.¹⁶² Decriminalizing sex work in South Africa will allow the government to offer sex workers a seat at the table when discussing relevant health policy issues.¹⁶³ Sex workers can offer policymakers unique insights into HIV and STI prevention strategies. As industry insiders, sex workers are well placed to promote health programs among other sex workers.¹⁶⁴

D. *Right to Freedom and Security of the Person*

The South African government is bound by its constitutional and international human rights commitments to uphold and defend sex workers' rights to freedom and security of the person. However, South Africa violates these fundamental rights because criminalization results in abuse of sex workers, in the form of arbitrary arrests and detention and physical and sexual violence. In fact, sex workers' vulnerability to violence is so severe that the murder rate among female sex workers has been as high as six times the rate for women in the general population.¹⁶⁵ If South Africa decriminalizes sex work, it will fulfill its legal obligations by removing the indignity of police abuse of sex workers and increasing sex workers' access to justice when they are victims of violence.

The South African Constitution guarantees all South Africans, includ-

161. U.N. Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, para. 46, Apr. 27, 2010, U.N. Doc. A/HRC/14/20, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>.

162. *See id.* ¶¶ 46-50.

163. Interview with David Scamell, *supra* note 40.

164. CASAM, *supra* note 161, at 4.

165. WOMEN'S LEGAL CENTRE, *supra* note 6, at 26.

ing sex workers, the right to freedom and security of the person, which includes the right to be free from arbitrary arrest and detention;¹⁶⁶ the right to be free from violence from public or private sources;¹⁶⁷ the right to be free from torture and other cruel, inhuman or degrading treatment;¹⁶⁸ and the right to bodily and psychological integrity.¹⁶⁹ South Africa is also bound by international and African regional human rights treaties that uphold these rights, including the ICCPR, the African Charter, the African Women's Protocol, and CEDAW. Specifically, the ICCPR guarantees the right to life, liberty, and security of the person,¹⁷⁰ and mandates that "no one shall be subjected to arbitrary arrest or detention."¹⁷¹ The right to security of the person is also enumerated in Articles 4 and 6 of the African Charter¹⁷² and Article 4 of the African Women's Protocol.¹⁷³

In regard to the right to be free from violence, the African Women's Protocol requires state parties to take "appropriate and effective measures to . . . prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public," and to punish perpetrators of violence.¹⁷⁴ In General Recommendation 19 of CEDAW, the CEDAW Committee underscores the link between criminalization of sex work and violence against women, stating that "[p]rostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalise them. They need the equal protection of laws against rape and other forms of violence."¹⁷⁵ Some of these abuses may even rise to the level of torture

166. S. Afr. Const. § 12(1), 1996.

167. *Id.*

168. *Id.*

169. *Id.* § 12(2).

170. ICCPR, *supra* note 155, arts. 6, 9.

171. *Id.* art. 9.

172. African Charter, *supra* note 145, art. 4 ("Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."); *id.* art. 6 ("Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.").

173. African Women's Protocol, *supra* note 163, art. 4 ("Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.").

174. *Id.*

175. CEDAW General Recommendation No. 19, ¶ 6, U.N. Doc A/47/38 (Jan. 29, 1992), available at <http://www.unhchr.ch/tbs/doc.nsf/0/300395546e0dec52c12563ee0063dc9d?Opendocument>. See also G.A. Res. 48/104, U.N. Doc A/RES/48/104 (Dec. 20, 1993), available at

and cruel, inhuman, or degrading treatment, violating both the South African Constitution and the Policy on the Prevention of Torture and Treatment of Persons in Custody of the South African Police.¹⁷⁶

Under criminalization, South Africa routinely violates sex workers' right to be free from arbitrary arrest and detention as guaranteed by the South African Constitution and South Africa's international human rights commitments. These violations of sex workers' rights also often breach other associated constitutional guarantees for individuals who are arrested, detained, and accused, such as the right to conditions of detention that are consistent with human dignity, including adequate accommodation, nutrition, and medical treatment.¹⁷⁷

Decriminalization will uphold sex workers' rights to be free from arbitrary arrest and detention. It will create a new and positive relationship between police and sex workers. Because sex workers will no longer be subject to arrest, their abusive interactions with police will diminish. Police will no longer be able to use criminal laws, municipal by-laws, or the threat of arrest to harass sex workers. Decriminalization will also improve sex workers' access to justice because it will encourage sex workers to report violations against them without fear of indifference or retaliation by state authorities.

E. *Right to Dignity*

The South African Constitution states that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”¹⁷⁸ The right to dignity is also a foundational human right guaranteed by the ICCPR,¹⁷⁹ CEDAW,¹⁸⁰ the African Charter,¹⁸¹ and the African Women's Protocol.¹⁸² Thus, South Africa is bound by its

<http://www.un.org/documents/ga/res/48/a48r104.htm>. The Declaration on the Elimination of Violence against Women defines violence against women as “any act of gender-based violence that results in . . . physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” The Declaration also mandates that Parties ensure the implementation of policies to prevent, investigate and punish violence against women.

176. WOMEN'S LEGAL CENTRE, *supra* note 6, at 40; *Policy on the Prevention of Torture and Treatment of Persons in Custody of the South African Police*, S. Afr. POLICE SERV., http://www.saps.gov.za/docs_pubs/legislation/policies/torture.htm (last visited July 4, 2013).

177. S. Afr. Const. § 35, 1996.

178. S. Afr. Const. § 10, 1996.

179. ICCPR, *supra* note 155, preamble.

180. CEDAW, *supra* note 145, preamble.

181. African Charter, *supra* note 145, art. 5.

182. African Women's Protocol, *supra* note 163, art. 3.

constitutional and international legal commitments to preserve and protect sex workers' right to dignity. But, as has been explored in this Article, under criminalization sex workers suffer the indignity of discrimination, police abuse, health services stigma, and other violations. If South Africa decriminalizes sex work, it will fulfill its legal obligations to preserve sex workers' fundamental right to human dignity.

V. CONCLUSION

Decriminalization will protect South African sex workers from police abuse, the multifarious impacts of stigma, and other associated abuses. The only people who will lose under decriminalization are individuals who are shielded by a criminalization regime that exploits sex workers, including police officers who abuse sex workers, hotel or brothel owners who force sex workers into unsafe working conditions, and criminals who take advantage of sex workers' fears of arrest, stigma, and discrimination. Finally, South Africa will uphold its constitutional and international legal obligations by rejecting the failed experiment of criminalization and embracing decriminalization, the only legal regime that promotes sex workers' rights.