

OVERREPRESENTED YET OVERLOOKED:
LGBTQ SURVIVORS OF TRAFFICKING AND
THE IMPERATIVE FOR THE NORDIC
APPROACH TO SEX TRAFFICKING LAWS IN
THE UNITED STATES

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I. INTRODUCTION	262
A. <i>Francis’s Story</i>	262
B. <i>The Imperative to Address the Needs of Lesbian, Gay, Bisexual, Transgender, and Queer or Questioning Survivors of Human Trafficking</i>	263
C. <i>Approaches to Regulating Prostitution and Trafficking</i>	267
II. REGULATING PROSTITUTION AND TRAFFICKING: THE US, NORDIC, AND DUTCH APPROACHES	269
A. <i>The U.S. Approach</i>	269
B. <i>The Dutch Model</i>	271
C. <i>The Nordic Model</i>	272
III. PROPOSAL FOR STATUTORY IMPLEMENTATION	273
A. <i>Legislative Proposal</i>	273
B. <i>Statutory Improvements to the Current U.S. Approach</i>	274
C. <i>Minimizing Community Gaslighting</i>	276
IV. PRACTICAL GUIDANCE	279
V. CONCLUSION	281

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I. INTRODUCTION

A. *Francis's Story*

Francis moved to New York City after graduating high school early to escape abuse and pursue his dreams of dancing professionally.¹ The club where he worked was an escape from the harassment he often experienced as a young gay Latino.² He says, "From there I met my husband. When you're 20 and someone tells you you're beautiful, you just believe it, you don't question it. Particularly if you're coming from a broken home, you don't realize you are broken, you think you are fixed."³

Looking back, Francis realizes that his life ". . . didn't start when I met him. It stopped."⁴ His now-husband, thirteen years Francis's elder, trapped him indoors for almost thirty years and forbade him from working or socializing.⁵ Francis says, "He cut off all my sources . . . society was progressing but I was kept inside of a home not knowing cars were progressing, new computers were coming out."⁶ Francis was stripped of his ethnicity, forced to change his name and the way he spoke; if he refused, he risked verbal and physical abuse.⁷

Francis's then-boyfriend became his trafficker; first insisting on threesomes, offering himself and Francis to strangers as a "two for one", and later forcing Francis to submit to "gangbangs".⁸ He says, "the first year, I just became numb to them . . . people would take turns doing what they wanted. When they finished, I would have physical pain, but then the emotional pain takes over."⁹ He says that his youth and naivete made him vulnerable to abuse from his trafficker, "and people like me get used to it because it becomes the norm of life."¹⁰

Francis became terminally ill with AIDS, and his trafficker used this to control him more.¹¹ Francis says that when he would get sick, his trafficker would nurse him back to health, "so he could be the hero," and use this against Francis.¹² Francis knew he could not survive if he fled; he was

¹ Interview with Francis (pseudonym), in New York, N.Y. (Nov. 14, 2019).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

2020] *OVERREPRESENTED YET OVERLOOKED* 263

isolated, had been unable to make or spend any money of his own, and his trafficker had all of his personal documents.¹³ He says he had “no other choice but to give in, like a gazelle to a lion.”¹⁴

Francis feared the police, and learned that they would not believe him if he sought their help.¹⁵ Once when he tried to call the police, his trafficker told the officers that arrived that he ran a large business, and Francis saw the officers’ expressions change.¹⁶ Officers handcuffed Francis and brought him outside, making him feel like a criminal even though he had called for their help.¹⁷ He believes that things would have been different if the police had been impartial and says, “if I’d had that trust in the police department, I feel that I would’ve not been chained to that same abuse” from his trafficker.¹⁸ In fact, he was unable to leave until concerned neighbors called Adult Protective Services.¹⁹ Adult Protective Services workers were the first ones to care for him instead of deferring to his trafficker; Francis says, “that’s how I was saved.”²⁰ Francis hopes his story will influence policymakers, because “I don’t want what happened to me to happen to someone else. I don’t want this to ever happen to anyone.”²¹

B. The Imperative to Address the Needs of Lesbian, Gay, Bisexual, Transgender, and Queer or Questioning Survivors of Human Trafficking

Lesbian, gay, bisexual, transgender, and queer or questioning (“LGBTQ”) individuals as a group face a higher incidence of risk factors for human trafficking.²² Such risk factors are the effects of long-standing discrimination against LGBTQ individuals and result in a higher likelihood of vulnerability to sexual exploitation.²³ “LGBT[Q] people experience higher rates of poverty than non-LGBT[Q] people ... [a] long line of research

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² POLARIS, SEX TRAFFICKING AND LGBTQ YOUTH (2016), <https://polarisproject.org/sites/default/files/LGBTQ-Sex-Trafficking.pdf>; SOON KYU CHOI ET AL., SERVING OUR YOUTH 2015: THE NEEDS AND EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH EXPERIENCING HOMELESSNESS (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Serving-Our-Youth-June-2015.pdf>; Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667 (2017).

²³ POLARIS, *supra* note 22; ; CHOI ET AL., *supra* note 22; Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667 (2017).

264 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 2

... shows that poverty is a risk factor for a range of criminal offending and victimization.”²⁴ LGBTQ youth, in particular, face “heightened risk factors that affect their economic stability, including a lack of parental emotional and financial support as well as discrimination on the job market.”²⁵ Homelessness is an especially significant risk factor for trafficking, and LGBTQ youth are overrepresented among homeless youth.²⁶ As many as 40% of homeless youth identify as LGBTQ.²⁷ Homeless LGBTQ youth face more barriers to securing stable housing and tend to remain homeless longer than their non-LGBTQ counterparts as well.²⁸ Due to these higher risks along with a lack of recognition by researchers and service providers, more research is needed to determine the number of LGBTQ survivors of human trafficking.²⁹

Many LGBTQ survivors of human trafficking become misidentified as criminal offenders, partly because the ways in which LGBTQ individuals come to be trafficked tend to diverge from stereotypes associated with human trafficking; this misidentification causes LGBTQ youth to be overlooked as victims, especially when legislation fails to address sexual exploitation in the absence of an individual easily identifiable as a trafficker.³⁰ While not all individuals who engage in the exchange of sex for money have been trafficked, there is notable overlap between the exploitation experienced by individuals identified as victims of trafficking and the experiences of those who identify themselves as “sex workers” or individuals engaged in “survival sex” i.e., exchanging sex for access to basic needs such as housing or meals.³¹

²⁴ Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 672–73 (2017).

²⁵ LAURA T. MURPHY, LABOR AND SEX TRAFFICKING AMONG HOMELESS YOUTH: A TEN-CITY STUDY 27 (2016), https://nspn.memberclicks.net/assets/docs/NSPN/labor_and_sex_trafficking_among_homeless_youth.pdf.

²⁶ CHOI ET AL., *supra* note 22.

²⁷ *Id.*; POLARIS, *supra* note 22.

²⁸ CHOI ET AL., *supra* note 22; Mudasar Khan et al., *Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475, 518–19 (2017).

²⁹ CHOI ET AL., *supra* note 22; Mudasar Khan et al., *Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475, 518–19 (2017); Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667 (2017).

³⁰ Christine M. Maino, *Criminalizing Buyers Under Child Sex-Trafficking Laws as a Critical Protection for Child Victims*, 52 WAKE FOREST L. REV. 435, 444 (2017); *see also* Brett M. Figlewski & Lee W. Brannon, *Trafficking and the Commercial Sexual Exploitation of Young Men and Boys*, in STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, SUPREME COURT OF THE STATE OF N.Y., APPELLATE DIVISION, FIRST DEP’T, LAWYERS MANUAL ON HUMAN TRAFFICKING (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2013) (ebook), http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/LMHT_0.pdf.

³¹ Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 MICH. J. INT’L L. 133, 134 (Fall 2011) (citing Sigma Huda (Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children), *Integration of the Human Rights of Women and a Gender Perspective*, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006)) (“It is rare that one finds a case in which the path to prostitution and/or a person’s experiences within

2020] *OVERREPRESENTED YET OVERLOOKED* 265

Regardless of what leads an individual to exchange sex for money, there are many safety concerns. Studies of women in the commercial sex industry indicate “mortality rates almost 200 times greater than their peers.”³² A recent study of LGBTQ youth identified as engaging in “survival sex” found that only “one in five reported beginning on their own initiative” and that many were compelled to do so by individuals they considered family or peers.³³ Youth engaged in “survival sex” experience physical violence, sexual assault, and other forms of coercion.³⁴ In addition, most LGBTQ individuals engaged in “survival sex” report that their decision to do so stems from dire economic need and a lack of alternatives.³⁵ Tellingly, nearly all individuals engaging in “survival sex” report a desire to stop having to do so.³⁶ Researchers have found that “despite the distinction in the law, the lines between survival sex and sex trafficking are somewhat fluid, as survival sex can lead to trafficking victimization ... exploiters seek out individuals with the requisite risk factors and those already engaging in survival sex.”³⁷

prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity and poverty. Put simply, the road to prostitution and life within “the life” is rarely one marked by empowerment or adequate options.”)

³² Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 21 (2017).

³³ URBAN INST., SURVIVING THE STREETS OF NEW YORK: EXPERIENCES OF LGBTQ YOUTH, YMSM, AND YWSW ENGAGED IN SURVIVAL SEX 17–21 (2015), <https://www.urban.org/sites/default/files/publication/42186/2000119-Surviving-the-Streets-of-New-York.pdf> (a combined 77% of respondents identified friends, peers, family, or a customer as their pathway to engagement in survival sex, 6% self-identify as victims of sexual exploitation, 3% say that they were first “given something” in exchange for sex, and 20% state that they began on their own initiative).

³⁴ *Id.* at 40.

³⁵ Brett M. Figlewski & Lee W. Brannon, *Trafficking and the Commercial Sexual Exploitation of Young Men and Boys*, in STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, SUPREME COURT OF THE STATE OF N.Y., APPELLATE DIVISION, FIRST DEP’T, LAWYERS MANUAL ON HUMAN TRAFFICKING (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2013) (ebook), http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/LMHT_0.pdf (“Despite the stereotype that young males are independent actors who engage in “survival sex” and related commercial sexual activity of their own volition, nascent research and testimonials from service providers indicate otherwise.”); see also URBAN INST., SURVIVING THE STREETS OF NEW YORK: EXPERIENCES OF LGBTQ YOUTH, YMSM, AND YWSW ENGAGED IN SURVIVAL SEX, 19 (2015), <https://www.urban.org/sites/default/files/publication/42186/2000119-Surviving-the-Streets-of-New-York.pdf>.

³⁶ See URBAN INST., SURVIVING THE STREETS OF NEW YORK: EXPERIENCES OF LGBTQ YOUTH, YMSM, AND YWSW ENGAGED IN SURVIVAL SEX 61 (2015), <https://www.urban.org/sites/default/files/publication/42186/2000119-Surviving-the-Streets-of-New-York.pdf>; Brendan M. Conner, *In Loco Aequitatis: The Dangers of “Safe Harbor” Laws for Youth in the Sex Trades*, 12 STAN. J.C.R. & C.L. 43, 59 (2016).

³⁷ COVENANT HOUSE, HOMELESSNESS, SURVIVAL SEX AND HUMAN TRAFFICKING: AS EXPERIENCED BY THE YOUTH OF COVENANT HOUSE NEW YORK 12–13 (May 2013), https://humantraffickinghotline.org/sites/default/files/Homelessness_Survival_Sex_and_Human_Trafficking_-_Covenant_House_NY.pdf.

266 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 2]

Regardless of the way in which a person came to be sexually exploited, survivors are too often improperly treated as criminals.

LGBTQ survivors of human trafficking are less likely to get assistance than non-LGTBQ survivors of human trafficking, due in part to severe discrimination against LGBTQ individuals by law enforcement, and others in the criminal justice system, such as attorneys, judges, probation officers, and case planners.³⁸ As a result, “LGBT[Q] sex trafficking is commonly overlooked and rarely reported ... [d]ue to the hidden nature of same-sex prostitution and the stigma associated with being LGBT.”³⁹

The U.S. legal system disproportionately targets LGBTQ individuals.⁴⁰ Law enforcement in the United States selectively enforces prostitution laws against LGBTQ individuals.⁴¹ For example, transgender individuals are disproportionately targeted for arrests for prostitution or loitering, regardless of whether they have engaged in consensually exchanging sex for money or any criminalized acts at all.⁴² As a result of selective enforcement, “LGBTQ youth are overrepresented in detention for prostitution-related offenses and report higher levels of police misconduct than their straight peers.”⁴³ LGBTQ survivors of human trafficking convicted of prostitution often remain characterized as perpetrators, unrecognized as victims of a crime, and are further marginalized by criminal convictions while meriting more legal support and dignity than they are afforded.⁴⁴

LGBTQ survivors of human trafficking experience unequal treatment under law; they are too often overlooked as having exchanged sex for money as the result of coercion or exploitation and are subjected to a pattern of targeted arrests and selective prosecution. The United States has an

³⁸ KATAYOON MAJD ET AL., THE EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN JUVENILE COURTS 72 (Fall 2009), https://www.hivlawandpolicy.org/sites/default/files/hidden_injustice.pdf; POLARIS, *supra* note 22; Mudasar Khan et al., *Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475, 518–519 (2017); Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 721 (2017);.

³⁹ Dr. Omar Martinez & Guadalupe Kelle, *Sex Trafficking of LGBT Individuals: A Call for Service Provision, Research, and Action*, 42 INT’L L. NEWS, no. 4, Fall 2013, at 21.

⁴⁰ KATAYOON MAJD ET AL., THE EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN JUVENILE COURTS 72 (Fall 2009), https://www.hivlawandpolicy.org/sites/default/files/hidden_injustice.pdf; Leonore F. Carpenter et al., *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5 (2017); Mudasar Khan et al., *Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475, 518–19 (2017); Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 721 (2017).

⁴¹ Leonore F. Carpenter et al., *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5 (2017).

⁴² *Id.*

⁴³ POLARIS, *supra* note 22.

⁴⁴ See Dr. Omar Martinez & Guadalupe Kelle, *Sex Trafficking of LGBT Individuals: A Call for Service Provision, Research, and Action*, 42 INT’L L. NEWS, no. 4, Fall 2013, at 21.

2020] *OVERREPRESENTED YET OVERLOOKED* 267

obligation to shift focus and resources from over-prosecuting LGBTQ individuals to an emphasis on investigating and addressing exploitation. International human rights law requires the United States to address the disparate treatment of LGBTQ survivors of human trafficking in the U.S. legal system.⁴⁵ The Office of the United Nations High Commissioner for Human Rights has asserted that, in accordance with international human rights law and the principle of equal treatment under law, governments are obligated to ensure equal legal treatment of LGBTQ individuals.⁴⁶ Articles 2(1) and 26 of the International Covenant on Civil and Political Rights prohibit government discrimination—including unequal legal outcomes—against individuals based on their sexuality or gender identity.⁴⁷ In addition, the United States has ratified the Palermo Protocol, meaning that “sex trafficking should be understood to extend beyond cases involving the use of ‘force, fraud or coercion’ and encompass cases involving an ‘abuse of power or a position of vulnerability.’”⁴⁸ Despite having signed the Protocol mandating inclusion of cases falling within the broader definition, the United States has maintained a more narrow definition: trafficking cases in which prosecutors cannot prove “force, fraud or coercion” but which involve “abuse of power or a position of vulnerability” are not considered trafficking in the US.⁴⁹ Thus, there is an international human rights law requirement for the United States to correct this legislative oversight.⁵⁰

C. *Approaches to Regulating Prostitution and Trafficking*

Proponents of decriminalization and regulation of prostitution as a formal commercial sex industry advocate for an approach known as the “Dutch Model.”⁵¹ The Dutch Model, however, would only worsen the issue.

⁴⁵ See U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, U.N. Doc HR/PUB/12/06 at 10, 38–40 (2012), <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207, 214 (2015).

⁴⁹ *Id.*

⁵⁰ See Dr. Omar Martinez & Guadalupe Kelle, *Sex Trafficking of LGBT Individuals: A Call for Service Provision, Research, and Action*, 42 INT’L L. NEWS, no. 4, Fall 2013, at 21; see also U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, U.N. Doc HR/PUB/12/06 at 10, 38–40 (2012), <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>.

⁵¹ See, e.g., Stephanie Farnsworth, *Why LGBT and Sex Workers Rights Go Hand-in-Hand*, THE HUFFINGTON POST (Apr. 14, 2016, 02:35 PM), https://www.huffingtonpost.com/stephanie-farnsworth/why-lgbt-and-sex-worker-rights-go-hand-in-hand_b_9367888.html; *LGBT Rights Organizations Join Amnesty International in Call to Decriminalize Exchanging sex for money*, LAMBDA LEGAL (Aug. 20, 2015), https://www.lambdalegal.org/blog/20150820_decriminalize-sex-work (co-signed statement with the Transgender Law Center, GLAD, National Center for Lesbian Rights, and

268 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 2]

Urging LGBTQ advocates to adopt the Dutch Model is a form of “community gaslighting,” in that it erases the all-too-common yet under-the-radar experiences of LGBTQ survivors and attempts to add a guise of legitimacy to individuals who exploit and coerce at-risk LGBTQ individuals.⁵²

Instead, the United States should implement a version of the “Nordic Model,” an approach which criminalizes the purchase, but not sale, of sex and is specifically designed to hold exploitative individuals accountable without penalizing victims.⁵³ Along with statutory reform to the penal code, the Nordic Model involves programs to increase public awareness of the risks and implications of sexual exploitation.⁵⁴ The Nordic Model also involves optional job training and resources for individuals who seek alternatives to exchanging sex for money.⁵⁵ The Nordic Model could likewise include measures to reduce bias against LGBTQ individuals in the criminal justice system.

Implementing the Nordic Model in the United States would involve state and federal (1) decriminalization of the sale of sex, and (2) with the consent of the survivor as complainant, holding exploitative individuals accountable for “patronizing” under 18 U.S.C. § 1591, along with (3) increased cultural competence initiatives amongst law enforcement and legal service providers.

In this Note, I will explain and justify the need to adopt the Nordic Model in the United States to better meet the needs of LGBTQ survivors of human trafficking. In Part II, I will provide background on the US, Nordic, and Dutch Approaches. In Part III, I will give more detail on my proposed statutory approach to implementing the Nordic Model in the United States and the foreseeable benefits of its implementation. In Part IV, I will discuss measures for service providers and law enforcement in the United States to implement, before concluding in Part V.

National Center for Transgender Equality calling for implementation of the Dutch Model, with the stated goal of seeking policies to advance the needs of those exchanging sex for money).

⁵² See Dempsey, *supra* note 48 (explaining how the Dutch Model has been shown to increase human trafficking); see also Chariene K. Forrey, *America’s “Disneyland of Sex”: Exploring the Problem of Sex Trafficking in Las Vegas and Nevada’s Response*, 14 NEV. L.J. 970 (2014) (explaining how legalized prostitution has made trafficking more concealed and widespread); Huisman & Kleemans, *supra* note 52 (describing the difficulties of addressing human trafficking in the Netherlands because of the legalized sex industry there).

⁵³ Mary Graw Leary, *Dear John, You Are a Human Trafficker*, 68 S.C. L. REV. 415, 426 (2017).

⁵⁴ See Ane Mathieson et al., *A Faceless Movement: Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. SOC. JUST. 367 (2015).

⁵⁵ *Id.*

II. REGULATING PROSTITUTION AND TRAFFICKING: THE US, NORDIC, AND DUTCH APPROACHES

A. *The U.S. Approach*

The United States almost universally criminalizes the sale of sex, though approaches vary by state and county. States typically prohibit intentionally receiving compensation in exchange for sex.⁵⁶ Some states also criminalize “pandering” or “procuring” (known as “pimping”), or inducing someone to engage in prostitution.⁵⁷ Also, some states criminalize solicitation, i.e., offering to pay or paying for sex, but these rules are unevenly enforced; even in states where these rules exist, people who exchange sex for money are arrested and convicted far more often than those who purchase sex, with or without overt exploitation.⁵⁸

Federal law has long prohibited trafficking, initially defined as knowingly transporting individuals in interstate or foreign commerce with intent for them to engage in prostitution.⁵⁹ The U.S. government first prohibited bringing women into the country for the purpose of prostitution in an Act of Congress in 1875, section 3.⁶⁰ In 1908, the Supreme Court decided a case in favor of this statute and reasoned that prostitution is adverse to the traditional family.⁶¹ In 1910, Congress passed the Mann Act, which made it a federal crime to transport a woman or girl for “immoral” purposes, though this Act, also known as the White Slave Traffic Act, was commonly applied in racist prosecutions of consensual relationships.⁶² The Act was later revised to focus on interstate transportation with the intent to have the transported individual participate in any sexual offense.⁶³ More recently, in 2000, the Trafficking Victims Prevention Act (“TVPA”) was passed to provide harsher punishment for both sex and labor traffickers.⁶⁴

⁵⁶ Natalia Benitez et al., *Prostitution and Exchanging sex for money*, 19 GEO. J. GENDER & L. 331, 336 (2018).

⁵⁷ *Id.* at 340–41.

⁵⁸ *Id.* at 339–40.

⁵⁹ 18 U.S.C.A. §§ 2421–23 (Westlaw through Pub. L. No. 115-223); Natalia Benitez et al., *Prostitution and Exchanging sex for money*, 19 GEO. J. GENDER & L. 331 (2018).

⁶⁰ Act of Mar. 3, 1875, ch. 141, § 3, 18 Stat. 477 (criminalizing importing or contracting to import women for prostitution); WILLIAM N. ESKRIDGE JR. ET AL., *SEXUALITY, GENDER, AND THE LAW* 253 (4th ed. 2017).

⁶¹ *Id.* at 253–254.

⁶² Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3016 (2006) (describing selective racist enforcement of the Mann Act).

⁶³ *Id.* at 254.

⁶⁴ 22 U.S.C.A. § 7101 (Westlaw through Pub. L. No. 115-223); Natalia Benitez et al., *Prostitution and Exchanging Sex for Money*, 19 GEO. J. GENDER & L. 331 (2018).

270 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 2]

The reauthorization of the TVPA in 2013 and the passage of the Justice for Victims of Trafficking Act in 2015 encouraged states to pass “safe harbor” laws to set a presumption that children charged with prostitution are victims of trafficking and should be directed to social services rather than convicted of prostitution.⁶⁵ The TVPA explicitly characterizes “victims” as women and girls.⁶⁶ This means that even the express language of the law focuses solely on women. Few states require law enforcement to undergo training to recognize the variety of forms of human trafficking.⁶⁷

The United States has also neglected to incorporate the more-inclusive international Palermo Protocol definition of human trafficking into its statutory scheme. According to this definition, “adults who are prostituted by means of an “abuse of power” or “abuse of a position of vulnerability” are victims; however, despite the fact that their experiences constitute sex trafficking under international law[,] they are treated as criminals throughout the United States.⁶⁸ This statutory reality necessarily results in the under-recognition of LGBTQ survivors.

While many states have passed safe harbor laws, these measures provide incomplete protection.⁶⁹ Some state safe harbor laws tend only to provide remedies to child survivors who were exploited by identifiable third-parties and then identified as victims at some stage of prosecution.⁷⁰ LGBTQ individuals can end up prosecuted and convicted, while their traffickers go unrecognized and unaccountable because they may seem to be peers or mentors but, in reality, use positions of privilege, power, or experience to exploit vulnerabilities such as homelessness, immigration status, or youth of at-risk LGBTQ individuals.⁷¹

⁶⁵ See Trafficking Victims Protection Reauthorization Act, H.R. 898, 113th Cong. (1st Sess. 2013), <https://www.congress.gov/bill/113th-congress/house-bill/898/text>; Justice for Victims of Trafficking Act, S. 178, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/178>; Brendan M. Conner, *In Loco Aequitatis: The Dangers of “Safe Harbor” Laws for Youth in the Sex Trades*, 12 STAN. J. C.R. & C.L. 47 (2016).

⁶⁶ 22 U.S.C.A. § 7101 (Westlaw through Pub. L. No. 115-223); Natalia Benitez et al., *Prostitution and Exchanging sex for money*, 19 GEO. J. GENDER & L. 331 (2018).

⁶⁷ Dempsey, *supra* note 48 at 212–213.

⁶⁸ *Id.* at 214.

⁶⁹ See Brendan M. Conner, *In Loco Aequitatis: The Dangers of “Safe Harbor” Laws for Youth in the Sex Trades*, 12 STAN. J.C.R. & C.L. 43 (2016); Dempsey, *supra* note 48, at 223.

⁷⁰ Brendan M. Conner, *In Loco Aequitatis: The Dangers of “Safe Harbor” Laws for Youth in the Sex Trades*, 12 STAN. J.C.R. & C.L. 43, 85 (2016) (noting that some state safe harbor laws only apply to minors who are the victims of enumerated offenses).

⁷¹ See Brett M. Figlewski & Lee W. Brannon, *Trafficking and the Commercial Sexual Exploitation of Young Men and Boys*, in STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, SUPREME COURT OF THE STATE OF N.Y., APPELLATE DIVISION, FIRST DEP’T, LAWYERS MANUAL ON HUMAN TRAFFICKING (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2013) (ebook), http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/LMHT_0.pdf.

2020] *OVERREPRESENTED YET OVERLOOKED* 271

Even the LGBTQ individuals who are recognized as victims face significant discrimination and difficulty accessing services.⁷² Eligibility for protection often involves arrest, which can be particularly traumatizing for LGBTQ individuals due to the incidence of harassment and violence during police encounters.⁷³ LGBTQ survivors are often re-victimized by their interactions with law enforcement, who, due to the inadequacy of the current U.S. statutory scheme, tend to arrest and prosecute survivors rather than their traffickers, a situation particularly harmful for LGBTQ individuals, who are disproportionately at-risk of human trafficking.⁷⁴

B. The Dutch Model

In 2000, the Netherlands fully legalized prostitution by permitting brothels to operate with licenses.⁷⁵ The Netherlands long criminalized human trafficking, though enforcement against traffickers has been lacking.⁷⁶ Since legalizing prostitution, the Dutch government has undertaken increased prevention and victim-support programs to address human trafficking, but the reach of these initiatives has been inadequate in stemming human trafficking concealed within the new legal sector of the commercial sex industry.⁷⁷ Despite this inadequacy, jurisdictions such as Germany, New Zealand, and some counties in Nevada have adopted the Dutch Model of decriminalizing the purchase of sex.⁷⁸

The Dutch Model increases human trafficking and heightens dangers to survivors of human trafficking by providing the shield of a legalized market

⁷² See KATAYOON MAJD ET AL., THE EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN JUVENILE COURTS (Fall 2009), https://www.hivlawandpolicy.org/sites/default/files/hidden_injustice.pdf.

⁷³ MEREDITH DANK ET AL., URBAN INST., LOCKED IN: INTERACTIONS WITH THE CRIMINAL JUSTICE AND CHILD WELFARE SYSTEMS FOR LGBTQ YOUTH, YMSM, YWSW WHO ENGAGE IN SURVIVAL SEX (2015), <https://www.urban.org/sites/default/files/publication/71446/2000424-Locked-In-Interactions-with-the-Criminal-Justice-and-Child-Welfare-Systems-for-LGBTQ-Youth-YMSM-and-YWSW-Who-Engage-in-Survival-Sex.pdf>; Brendan M. Conner, *In Loco Aequitatis: The Dangers of "Safe Harbor" Laws for Youth in the Sex Trades*, 12 STAN. J.C.R. & C.L. 43, 51 (2016).

⁷⁴ POLARIS, *supra* note 22; Leonore F. Carpenter et al., *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5 (2017);.

⁷⁵ Huisman & Kleemans, *supra* note 52.

⁷⁶ *Id.*

⁷⁷ *Id.*; C.E. DETTMEIJER-VERMEULEN, NATIONAL RAPPOORTEUR ON TRAFFICKING IN HUMAN BEINGS, *Human Trafficking: Ten Years of Independent Monitoring* (2010), https://www.nationaalrapporteur.nl/binaries/8e-rapportage-nrm-eng-web-tcm64-310472_tcm23-34822.pdf.

⁷⁸ Mary Graw Leary, *Dear John, You Are a Human Trafficker*, 68 S.C.L. REV. 415 (2017); Waltman, *supra* note 31, at 157.

272 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 2]

for the purchase of sex.⁷⁹ For example, in the entirely legalized exchange of sex for money, sexual assault has the legal status of a mere “renegotiation” or transaction dispute.⁸⁰ The power and prevalence of traffickers increases when their exploitative practices claim the guise of operation within a licensed sector.⁸¹ According to multiple studies, the Dutch Model “has not resulted in uniformly safer conditions Moreover, countries where commercial sex is not criminal appear to experience higher trafficking inflows.”⁸² Purchasers at times maintain an impression that people purchased for sex are wealthy, privileged, and well-protected, when, in fact, exploitation is severe and rampant, operating in disguise.⁸³

C. *The Nordic Model*

In 1999, Sweden pioneered what is now referred to as the “Nordic Model,” with laws that impose no criminal liability upon individuals who have sold sex or been trafficked and, instead, potentially criminalize purchasing sex, promoting prostitution, or otherwise facilitating sexual exploitation for money.⁸⁴ The Nordic Model also provides comprehensive social services for any individual seeking assistance with leaving the commercial sex trade.⁸⁵ For example, in Sweden, social work units have conducted outreach offering psychosocial support, financial counseling, housing, and access to education and job opportunities.⁸⁶ The Nordic Model reduces human trafficking, and multiple studies by scholars, NGOs, and government agencies in Sweden and Norway show that the Nordic Model significantly decreases prostitution and deters trafficking, rather than just

⁷⁹ Dempsey, *supra* note 48; Simon Hedlin, *Can Prostitution Law Reform Curb Sex Trafficking? Theory and Evidence on Scale, Substitution, and Replacement Effects*, 50 U. MICH. J. L. REFORM 329 (2017); Mary Graw Leary, *Dear John, You Are a Human Trafficker*, 68 S.C. L. REV. 415 (2017); Janice G. Raymond, PhD, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 J. TRAUMA PRAC. 315, 317–18 (2004); Waltman, *supra* note 31.

⁸⁰ WILLIAM N. ESKRIDGE JR. ET AL., *SEXUALITY, GENDER, AND THE LAW* 266 (4th ed. 2017).

⁸¹ See Chariane K. Forrey, *America’s “Disneyland of Sex”: Exploring the Problem of Sex Trafficking in Las Vegas and Nevada’s Response*, 14 NEV. L.J. 970 (2014); Huisman & Kleemans, *supra* note 52.

⁸² Emily F. Rothman, ScD, *Should U.S. Physicians Support the Decriminalization of Commercial Sex?*, 19 AMA J. ETHICS 110 (Jan. 2017), <http://journalofethics.ama-assn.org/2017/01/sect1-1701.html>.

⁸³ Chariane K. Forrey, *America’s “Disneyland of Sex”: Exploring the Problem of Sex Trafficking in Las Vegas and Nevada’s Response*, 14 NEV. L.J. 970 (2014); Huisman & Kleemans, *supra* note 52.

⁸⁴ See MADDY COY ET AL., NORDIC MODEL INFORMATION NETWORK, *The Swedish Sex Purchase Law: Evidence of Its Impact* (July 2016), https://www.catwa.org.au/wp-content/uploads/2016/12/NMIN_briefing_on_Sweden_July_16.pdf *citing* Brottsbalken [BrB] [Criminal Code] 6:11 (Swed.); *see also* Waltman, *supra* note 31.

⁸⁵ Dempsey, *supra* note 48, at 227; Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Workers*, 23 WM. & MARY J. WOMEN & L. 47 (2016).

⁸⁶ Ane Mathieson et al., *A Faceless Movement: Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. SOC. JUST. 367, 399–400 (2015).

2020] *OVERREPRESENTED YET OVERLOOKED* 273

obscuring it.⁸⁷ The focus on social services and decriminalization of victims makes the Nordic Model the best approach to address the needs of survivors of human trafficking.

Some advocates for individuals exchanging sex for money contend that the Nordic Model is riskier because criminalizing the purchase of sex and increasing public awareness of exploitation associated with prostitution heightens the stigma against those who choose to exchange sex for money of their own volition, and this stigma reduces the number of less coercive individuals who purchase sex.⁸⁸ However, this concern is far outweighed by addressing the critical goals of increasing safety and reducing human trafficking.⁸⁹ Other critiques of the Nordic Model have included the contention that it is a system which frames all those who engage in commercial sex as victims.⁹⁰ But this is not the case; for example, in Sweden, social workers offering counseling and financial resources as part of Nordic Model initiatives do this outreach to those who exchange sex for money, whatever the circumstances.⁹¹

III. PROPOSAL FOR STATUTORY IMPLEMENTATION

A. Legislative Proposal

Congress should pass legislation to implement—and incentivize states to adopt—the Nordic Model. In the United States, this could include state and federal (i) repeal of prohibitions on the sale of sex while increasing criminal penalties for its purchase, (ii) inclusion of “abuse of power or a position of vulnerability” in the definition of human trafficking, and (iii) use “cooperative prosecution” to include survivors as complainants, when willing, against traffickers or other abusive persons who have purchased sex.

⁸⁷ MADDY COY ET AL., NORDIC MODEL INFORMATION NETWORK, *The Swedish Sex Purchase Law: Evidence of Its Impact* (July 2016), https://www.catwa.org.au/wp-content/uploads/2016/12/NMIN_briefing_on_Sweden_July_16.pdf; Emily F. Rothman, ScD, *Should U.S. Physicians Support the Decriminalization of Commercial Sex?*, 19 *AMA J. ETHICS* 110 (Jan. 2017), <http://journalofethics.ama-assn.org/2017/01/sect1-1701.html>; Waltman, *supra* note 31, at 136–49.

⁸⁸ AMNESTY INT’L, EXPLANATORY NOTE ON AMNESTY INTERNATIONAL’S POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS, 16 (May 2016), <https://www.amnesty.org/download/Documents/pol3040632016english.pdf>.

⁸⁹ MADDY COY ET AL., NORDIC MODEL INFORMATION NETWORK, *The Swedish Sex Purchase Law: Evidence of Its Impact* (July 2016), https://www.catwa.org.au/wp-content/uploads/2016/12/NMIN_briefing_on_Sweden_July_16.pdf.

⁹⁰ See e.g. WILLIAM N. ESKRIDGE JR. ET AL., *SEXUALITY, GENDER, AND THE LAW* 253 (4th ed. 2017).

⁹¹ Ane Mathieson et al., *A Faceless Movement: Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 *SEATTLE J. SOC. JUST.* 367, 403–405 (2015).

B. Statutory Improvements to the Current U.S. Approach

The United States could implement the Nordic Model approach to criminalizing the purchase of sex and the decriminalization of its sale by repealing state and federal prohibitions on the sale of sex while adding criminal penalties and liability for its purchase. By decriminalizing the sale of sex, survivors of human trafficking and those who exchange sex for money would not be subject to arrest or prosecution for prostitution. Law enforcement sometimes intentionally arrest young survivors of human trafficking who they know are eligible for legal protection, claiming that they “feel that incarceration is their only recourse to protect children from further exploitation,” but these baseless arrests of survivors of human trafficking have a revictimizing effect which exacerbates issues of alienation from law enforcement and society overall.⁹² Making only the purchase of sex illegal would inhibit this practice by removing the charge of selling sex as a basis for arresting survivors.

This approach would also be fairer than the current U.S. approach to cases of individuals engaged in “survival sex” who also experience exploitation, “where reasonable minds may differ as to characterizing a particular case as trafficking—it is rarely, if ever, the case that the conduct of the prostituted-person is sufficiently blameworthy to merit criminalization.”⁹³ The Nordic Model provides an opportunity for survivors to access assistance without a criminal charge or narrow victim designation to compel it. The Nordic Model does not prevent tipsters from reporting human trafficking; in fact, law enforcement in Sweden report that individuals illegally purchasing sex under Sweden’s laws have made anonymous tips to report suspected human trafficking.⁹⁴

One potential issue with implementation of the Nordic Model in the United States is under-enforcement. Under-enforcement has been an issue in Sweden, where law enforcement officers and prosecutors have admitted to de-prioritizing enforcement in cases of sexual exploitation, citing low penalties and uncertainty about whether traffickers will be convicted as demotivational factors.⁹⁵ This is also a risk in the United States; even in

⁹² Amanda Shapiro, *Buyer Beware: Why Johns Should be Charged with Statutory Rape for Buying Sex from a Child*, 23 J. L. & POL’Y 449, 474 (2014); see also Dempsey, *supra* note 48, at n.3 (quoting Kate Mogulescu, *The Public Defender as Anti-Trafficking Advocate, An Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 474 (2012)).

⁹³ Dempsey, *supra* note 48, at 221.

⁹⁴ Waltman, *supra* note 31, at 134.

⁹⁵ *Id.* at 153.

2020] *OVERREPRESENTED YET OVERLOOKED* 275

jurisdictions where both the purchase and sale of sex are illegal, the purchase of sex is rarely enforced as a crime.⁹⁶

Including “abuse of power or a position of vulnerability” in the definition of human trafficking would align the U.S. approach with our commitments in international human rights law and better meet the needs of LGBTQ survivors of human trafficking. The current U.S. federal law limiting the definition of trafficking to “proof of ‘force, fraud or coercion’ does not capture the continuum of exploitation experienced by many adult sex-trafficking victims,” making the current language insufficient to address the realities of trafficking.⁹⁷ The United States has signed and ratified the Palermo Protocol, which requires that trafficking include someone coerced due to an “abuse of power or a position of vulnerability,” but domestic U.S. definitions include narrower criteria, essentially criminalizing a narrower scope of coercive acts which are internationally recognized as being human trafficking.⁹⁸ As a result, “adults who are prostituted by means of an “abuse of power” or “abuse of a position of vulnerability” continue to be treated as criminals throughout the United States, despite the fact that their experience constitutes sex trafficking under international law” because the type of coercion they experienced is not considered human trafficking in U.S. law.⁹⁹ Including “abuse of power or a position of vulnerability” in the definition of human trafficking could resolve this issue and allow for a more accurate scope of criminalization for trafficking, making more individuals qualify as survivors under law rather than being mischaracterized as criminals for engaging in prostitution, despite having been forced to do so by an abuse of power or an abuse of a position of vulnerability.

Bringing the U.S. laws against trafficking in compliance with the Palermo Protocol would particularly impact LGBTQ survivors, who are already less likely to be recognized as survivors, and more likely to be disproportionately targeted by law enforcement and assumed to be perpetrators, rather than victims, of crimes.¹⁰⁰ This disparate treatment is in contravention of Articles 2(1) and 26 of the International Covenant on Civil

⁹⁶ Natalia Benitez et al., *Prostitution and Exchanging sex for money*, 19 GEO. J. GENDER & L. 331, 339-40 (2018).

⁹⁷ Christine M. Maino, *Criminalizing Buyers Under Child Sex-Trafficking Laws as a Critical Protection for Child Victims*, 52 WAKE FOREST L. REV. 435, 440 (2017).

⁹⁸ See 18 U.S.C. § 1591 (sex trafficking only where a person is “caused to engage in a commercial sex act” through “force, threats of force, fraud, [or] coercion,” with coercion defined as threats of harm, restraint, or “abuse or threatened abuse of law or legal process”); see also Dempsey, *supra* note 48, at 221.

⁹⁹ Dempsey, *supra* note 48, at 214.

¹⁰⁰ Brendan M. Conner, *In Loco Aequitatis: The Dangers of “Safe Harbor” Laws for Youth in the Sex Trades*, 12 STAN. J.C.R. & C.L. 43, 66-67 (2016); Dr. Omar Martinez & Guadalupe Kelle, *Sex Trafficking of LGBT Individuals: A Call for Service Provision, Research, and Action*, 42 INT’L L. NEWS, no. 4, Fall 2013, at 21.

and Political Rights, which prohibit unequal legal outcomes against individuals based on their sexuality or gender identity.¹⁰¹ This would be mitigated with a definition of human trafficking which includes not just the more-difficult-to-prove present standard requiring “force, fraud, or coercion,” but also individuals subjected to “abuse of power or a position of vulnerability,” because a broader group of situations would be legally-recognizable. By broadening the class of individuals recognized as survivors, more individuals would be able to obtain an appropriate response from law enforcement—that is, focusing on investigation and arrest of traffickers, rather than arresting survivors for acts they were forced to commit.

Cooperative prosecution can involve and empower survivors while avoiding over-prosecution. Cooperation with survivors willing to provide prosecutors with information and testimony increases success in cases against traffickers.¹⁰² Cooperation between law enforcement and survivors improves survivor experiences with law enforcement and access to social services, and is linked to long-term positive impacts on the well-being of survivors.¹⁰³ In addition, implementation should include training for law enforcement and other important actors in the criminal justice system. Taken together, this would bolster certainty and accuracy at targeting only those individuals engaging in exploitative behavior, rather than individuals whom law enforcement would otherwise target due to homophobia.

C. *Minimizing Community Gaslighting*

Experience shows that the Dutch Model in the United States would be highly damaging to individuals, including LGBTQ individuals, who already face a heightened risk of exploitation.¹⁰⁴ The effects of legalization and regulation in Nevada exemplify the dangers of adopting the Dutch Model in the United States for survivors of human trafficking, and especially survivors or at-risk individuals who are LGBTQ.¹⁰⁵ If adopted throughout the US, the

¹⁰¹ U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, U.N. Doc HR/PUB/12/06 at 10, 38–40 (2012), <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>.

¹⁰² Jennifer A.L. Sheldon-Sherman, *Article: The Missing “P”: Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 489 (2012).

¹⁰³ *Id.* at 481.

¹⁰⁴ Chariane K. Forrey, *America’s “Disneyland of Sex”: Exploring the Problem of Sex Trafficking in Las Vegas and Nevada’s Response*, 14 NEV. L.J. 970 (2014).

¹⁰⁵ Compare Nev. Rev. Stat. Ann. § 201.291–.440 (LEXIS through all 608 Chapters of the Seventy-Ninth Regular Session (2017) (prohibiting inducement to engage in prostitution and taking from the proceeds of any prostitute without consideration, permitting prostitution in licensed brothels, and prohibiting individuals who have tested positive for HIV from engaging in prostitution) with Huisman & Kleemans, *supra* note 52 (law in the Netherlands characterized by Dutch scholars as allowing licensed brothels while attempting to reduce trafficking through regulation); see also Chariane K. Forrey, *America’s “Disneyland of Sex”: Exploring the Problem of Sex Trafficking in Las Vegas and Nevada’s*

2020] *OVERREPRESENTED YET OVERLOOKED* 277

Dutch Model would compound the challenges faced by LGBTQ survivors of human trafficking. Even with the licensure and regulation requirements prescribed by the Dutch Model, work in licensed brothels remains highly exploitative and dangerous.¹⁰⁶ With the implementation of the Dutch Model, traffickers who are already too often mistaken for mere peers or customers of trafficked individuals can evade scrutiny by posing as participants in a legal sex industry.¹⁰⁷ In addition, a legal market for sex increases profits—and incentives—for traffickers, because where the purchase of sex is legal, “there are more people willing to purchase sex than those willing to sell it consensually.”¹⁰⁸ For these reasons, traffickers stand to benefit from the Dutch Model with an expanded de facto scope of impunity and increased profits, and this would especially heighten risks for the already undercounted LGBTQ survivors of human trafficking.

The Dutch Model approach to prostitution regulations is particularly unfit for the already-overlooked needs LGBTQ survivors of human trafficking in the US, where LGBTQ individuals—including those exchanging sex for money—already frequently experience and expect discrimination from law enforcement and are reluctant to report crimes committed against them.¹⁰⁹ While advocates for the Dutch Model claim that by criminalizing the purchase of sex, the Nordic model somehow invents a pathway for exploitation which would otherwise not exist, this ignores the reality that stigma and harassment against exchanging sex for money persists in countries which have implemented the Dutch Model, and, crucially, that the Dutch Model is “positively correlated to increases in human trafficking” where it is implemented.¹¹⁰ In addition, this argument encourages neglect for the serious issue of human trafficking, which is especially likely to remain unaddressed where trafficking is more easily disguised within a legalized market for sex, and where victims are especially hesitant to engage with law enforcement, because perpetrators are presumptively not engaging in anything illegal.¹¹¹ Advocates for the Dutch Model claim that the Nordic

Response, 14 NEV. L.J. 970 (2014); Mary Graw Leary, *Dear John, You Are a Human Trafficker*, 68 S.C. L. REV. 415 (2017).

¹⁰⁶ Janice G. Raymond, PhD, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 J. TRAUMA PRAC. 315, 320 (2004).

¹⁰⁷ See Huisman & Kleemans, *supra* note 52.

¹⁰⁸ COVENANT HOUSE, HOMELESSNESS, SURVIVAL SEX AND HUMAN TRAFFICKING: AS EXPERIENCED BY THE YOUTH OF COVENANT HOUSE NEW YORK, 20 (May 2013), https://humantraffickinghotline.org/sites/default/files/Homelessness_Survival_Sex_and_Human_Trafficking_-_Covenant_House_NY.pdf.

¹⁰⁹ Leonore F. Carpenter et al., *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5 (2017).

¹¹⁰ Simon Hedlin, *Can Prostitution Law Reform Curb Sex Trafficking? Theory and Evidence on Scale, Substitution, and Replacement Effects*, 50 U. MICH. J. L. REFORM 329, 341–43 (2017).

¹¹¹ Huisman & Kleemans, *supra* note 52.

278 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 2

Model is worse for the LGBTQ community, because it decreases the bargaining power of those exchanging sex for money—but this argument incorrectly attributes pre-existing power imbalances to the Nordic Model, where in fact heightened risks for exploitation precede it.¹¹²

Proponents of the Dutch Model insist that because choosing to engage in exchanging sex for money incurs stigma and LGBTQ individuals face discrimination, the LGBTQ community should as a whole turn attention away from the prevalence and underreporting of the sexual exploitation of LGBTQ individuals and rally behind an approach which would worsen this issue and benefit mainly traffickers and non-LGBTQ individuals who have chosen to engage in exchanging sex for money.¹¹³ Advocates for the Dutch Model thus call for the LGBTQ community to deprioritize the serious issues affecting the disproportionate number of LGBTQ survivors of human trafficking; pressure from peers, customers, and economic discrimination which frequently lead LGBTQ individuals to engage in “survival sex.”¹¹⁴ While claiming advocacy, this stance urges the LGBTQ community to forget the realities of human trafficking and the heightened risks to community members, and instead advocate for a wide range of individuals benefiting from exchanging sex for money, largely individuals who already exploit positions of privilege and power.

Despite the claims of those who would benefit most from its adoption, the Dutch Model would ultimately be problematic to those most harmed by

¹¹² Alexandre Leal de Freitas, *Red Light at the Intersection: The Stigma of Exchanging sex for money and the Double Oppression Inflicted Upon Trans Sex Workers* 52–53 (2016) (awarded thesis, Global Campus Europe) (on file with Global Campus Open Knowledge Repository), <https://doi.org/20.500.11825/251> (claims that the Nordic Model decreases the bargaining power of a person exchanging sex for money whereas the Dutch Model empowers people exchanging sex for money to report violence or abuse, while acknowledging that any “inferiority” of a person exchanging sex for money to their client is not just a function of legal status, but also the product of underlying economic and social issues).

¹¹³ See e.g. AMNESTY INT’L, EXPLANATORY NOTE ON AMNESTY INTERNATIONAL’S POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS, (May 2016), <https://www.amnesty.org/download/Documents/POL3040632016ENGLISH.PDF> (argues that the stigma against people exchanging sex for money is “enmeshed” with oppression against LGBTQ individuals, but then argues for decriminalization without further attention to the disproportionate degree of exploitation of LGBTQ individuals); INT’L COMMITTEE ON THE RIGHTS OF SEX WORKERS IN EUROPE, *Underserved. Overpoliced. Invisibilised. LGBT Sex Workers Do Matter* (Oct. 2015), [http://www.nswp.org/sites/nswp.org/files/Underserved.Overpoliced.Invisibilised.LGBT Sex Workers Do Matter, ICRSE - 2015.pdf](http://www.nswp.org/sites/nswp.org/files/Underserved.Overpoliced.Invisibilised.LGBT_Sex_Workers_Do_Matter_ICRSE_-_2015.pdf) (calls for the LGBTQ community to advocate for the Dutch Model because some people exchanging sex for money participated in the LGBTQ rights movement, and because many LGBTQ individuals engage in survival sex due to a lack of other options and then experience severe exploitation, violence, and heightened discrimination).

¹¹⁴ See URBAN INST., SURVIVING THE STREETS OF NEW YORK: EXPERIENCES OF LGBTQ YOUTH, YMSM, AND YWSW ENGAGED IN SURVIVAL SEX, 17–18 (2015), <https://www.urban.org/sites/default/files/publication/42186/2000119-Surviving-the-Streets-of-New-York.pdf>.

2020] *OVERREPRESENTED YET OVERLOOKED* 279

the regulatory schemes at issue and could put more individuals at more risk for exploitation who would otherwise have access to benefits and a non-criminalized status by adoption of the Nordic Model. Criminalizing the purchase of sex rather than trafficking alone is essential because prosecutors are less likely to be able to charge traffickers with trafficking, rape, and assault charges they are to be able to charge them with the purchase of sex, a charge only available to prosecutors under the Nordic Model; for example, in Sweden, traffickers are commonly prosecuted for prostitution charges, rather than charges for trafficking, rape, or assault.¹¹⁵ Decriminalizing prostitution in the US, while potentially more profitable and safer for individuals benefiting from the sale of sex, would provide additional opportunities for individuals benefiting from exploitation existing under the guise of consensual exchanging sex for money to continue with impunity, and increases the risk of human trafficking, a risk which already disproportionately affects LGBTQ individuals.¹¹⁶

IV. PRACTICAL GUIDANCE

Alongside these statutory changes, service providers should coordinate with survivors and advocacy groups to develop initiatives with law enforcement, court personnel, and legal and mental health care service providers to better understand and more productively engage with LGBTQ survivors of human trafficking. Community education and survivor access to social services are critical elements of the Nordic Model.¹¹⁷ Regardless of whether the statutory changes discussed above are made, law enforcement and court personnel should undergo training to reduce discrimination and targeting of LGBTQ youth, and adult professionals, including members of the LGBTQ community and LGBTQ advocates, should expand mentorship and housing initiatives for at-risk and especially homeless, LGBTQ youth.¹¹⁸

¹¹⁵ Waltman, *supra* note 31, at 143 (“[M]any Swedish cases involving pimps never result in formal charges or convictions under trafficking, rape, assault or unlawful deprivation of liberty laws, even where such crimes have been committed de facto; rather, these crimes are pursued under the less stringent procuring provisions . . .”).

¹¹⁶ Chariane K. Forrey, *America’s “Disneyland of Sex”: Exploring the Problem of Sex Trafficking in Las Vegas and Nevada’s Response*, 14 NEV. L.J. 970 (2014); Emily F. Rothman, ScD, *Should U.S. Physicians Support the Decriminalization of Commercial Sex?*, 19 AMA J. ETHICS 110 (Jan. 2017), <http://journalofethics.ama-assn.org/2017/01/sect1-1701.html>.

¹¹⁷ Ane Mathieson et al., *A Faceless Movement: Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. SOC. JUST. 367, 398 (Fall 2015).

¹¹⁸ KATAYOON MAJD ET AL., *THE EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN JUVENILE COURTS* 137–38 (Fall 2009), https://www.hivlawandpolicy.org/sites/default/files/hidden_injustice.pdf; POLARIS, *supra* note 22; Richard A. Hooks Wayman, *Homeless Queer Youth: National Perspectives on Research, Best Practices, and Evidence-Based Interventions*, 7 SEATTLE J. SOC. JUST. 587 (2009); see also CHOI ET AL., *supra* note 22 (“After housing needs, acceptance of sexual identity and emotional support was the second most cited

280 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 2]

Service providers in Sweden working with survivors of human trafficking have found that a supportive approach to work with survivors of human trafficking involves “utter patience.”¹¹⁹ This is particularly relevant with male LGBTQ survivors who may not initially identify as such.

Those who identify as gay or bisexual may fear retribution or discrimination if their sexual identity becomes known, or they may come to believe that their sexual orientation led them into commercial sexual exploitation. Lawyers and other service providers should be aware that their trafficked male clients may initially provide inconsistent stories about their customers and may reveal more accurate information over time.¹²⁰

LGBTQ survivors have told researchers that “if only someone had taken the time to care, if only there had been someone to listen, the sex trafficking and survival sex experiences might have never happened.”¹²¹ This consequence underscores the need for supportive personal and professional connections with at-risk LGBTQ individuals.

Once identified, survivors require support initiatives; such measures are an integral part of the Nordic model and their success is dependent upon interagency cooperation.¹²² Support initiatives for homeless youth or other at-risk individuals should include LGBTQ-inclusive prevention information, with discussions about identifying healthy and unhealthy relationships in non-heteronormative language, and referral options including and indicating other LGBTQ-friendly service providers.¹²³ State and local jurisdictions can establish such initiatives and in doing so develop “useful collaboration between law enforcement, service providers, the child welfare system, and victim advocates” by creating “response plans” for individuals identified as survivors, which can involve “moving victims of trafficking to a place of

need for LGBQ youth experiencing homelessness. Whereas, transition services (access to healthcare specific to transgender youth, access to hormones, emotional support during transition, and legal support) was the second most cited need for transgender youth experiencing homelessness.”)

¹¹⁹ Ane Mathieson et al., *A Faceless Movement: Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. SOC. JUST. 367, 405 (Fall 2015).

¹²⁰ Brett M. Figlewski & Lee W. Brannon, *Trafficking and the Commercial Sexual Exploitation of Young Men and Boys*, in STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, SUPREME COURT OF THE STATE OF N.Y., APPELLATE DIVISION, FIRST DEP’T, LAWYERS MANUAL ON HUMAN TRAFFICKING (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2013) (ebook), http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/LMHT_0.pdf.

¹²¹ COVENANT HOUSE, HOMELESSNESS, SURVIVAL SEX AND HUMAN TRAFFICKING: AS EXPERIENCED BY THE YOUTH OF COVENANT HOUSE NEW YORK, 19 (May 2013), https://humantraffickinghotline.org/sites/default/files/Homelessness_Survival_Sex_and_Human_Trafficking_-_Covenant_House_NY.pdf.

¹²² See Ane Mathieson et al., *A Faceless Movement: Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. SOC. JUST. 367, 411 (2015) (emphasizing that many of the service providers and law enforcement officials in Sweden who were interviewed for the article “stressed that the success of the Nordic model is dependent upon good interagency cooperation”).

¹²³ Jennifer S. Middleton et al., *Youth Experiences Survey (YES): Exploring the Scope and Complexity of Sex Trafficking in a Sample of Youth Experiencing Homelessness*, 44 J. SOC. SERV. RES., 141, 154–55 (2018).

2020] *OVERREPRESENTED YET OVERLOOKED* 281

safety, attending to the immediate medical and emotional needs of survivors, assessing whether survivors are under risk for harm, retaliation, or intimidation, and directly connecting survivors with victim advocates, housing,” and other services.¹²⁴

Service providers and law enforcement should take care to treat LGBTQ youth as individuals meriting respect by “prohibiting any attempts to ridicule or change a youth’s sexual orientation or gender identity” with explicitly established and enforced policies and trainings to ensure that all staff respect the expressions and needs of LGBTQ youth as individuals.¹²⁵

V. CONCLUSION

LGBTQ individuals are at especially high risk for human trafficking due to longstanding systemic disadvantage and are disproportionately represented among survivors of human trafficking. Law enforcement, courts, and service providers in the United States are often discriminatory or even violent towards LGBTQ individuals, making current U.S. legal remedies inadequate for LGBTQ survivor.

Some advocates for the Dutch Model engage in a type of community gaslighting and claim that the LGBTQ community is best served by adoption of the Dutch Model of decriminalizing prostitution while regulating the sale of sex, despite the fact that the Dutch Model would increase exploitation of LGBTQ individuals already at-risk, while worsening the issue of invisibility and lack of access to remedies for LGBTQ survivors of human trafficking.

Service providers and survivors themselves advocate for the Nordic Model and for special attention to the needs of LGBTQ survivors. The Nordic Model and increased implementation of cultural competency measures would best serve this large population of trafficking survivors whose needs have largely been unmet by the U.S. system and help address the country’s failure to meet its human rights obligations to LGBTQ individuals who are disproportionately affected and too-often unseen.

¹²⁴ Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 97 (2017) (quoting Encouraging States to uphold the rights and dignity of human trafficking survivors, H.R. Res. 919, 114th Cong. (2016)).

¹²⁵ KATAYOON MAJD ET AL., THE EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN JUVENILE COURTS 137–38 (Fall 2009), https://www.hivlawandpolicy.org/sites/default/files/hidden_injustice.pdf.