

DANGER AS DETERRENT

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Abstract: This Article explores instances in which the law makes crime more dangerous in order to reduce its prevalence. Defining “strategic endangerment” as an intentional exacerbation of preexisting danger designed to deter crime, the Article explores this approach in the context of criminal markets, where the multiplicity of people involved increases the law’s opportunities to exert indirect pressure on the criminal environment. The Article then offers a broader framework for thinking about the relationship between danger, harm, and agency in illicit vice markets.

INTRODUCTION

*“The . . . regulation . . . was intended to make industrial alcohol not twice as poisonous, but half as likely to be utilized for illicit purposes.”*¹

Congress passed the Volstead Act in 1919, enabling enforcement of the Eighteenth Amendment and prohibiting “intoxicating beverages” across the country.² But, recognizing that alcohol has many other uses—scientific, medicinal, and so forth—Congress made an exception for alcohol that had been rendered “unfit for use as an intoxicating beverage.”³ Alcohol was legal, in other words, as long as it was too toxic to drink.

In order to comply with the mandate, manufacturers of alcohol-based products, such as disinfectants and paint, began adding various poisons to their formulations: kerosine, gasoline, formaldehyde, chloroform, and carbolic acid, among others.⁴ Enterprising chemists, meanwhile, got to work figuring out ways to remove these additives so they could sell the alcohol on the black

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¹ Frederick Damrau, *The Truth About Poison Liquor*, POPULAR SCI. MONTHLY, Apr. 1927, at 17, 18, <https://books.google.com/books?id=licDAAAAMBAJ> [<https://perma.cc/KS4S-C2YN>].

² Volstead Act of 1919, Pub. L. No. 66-66, 41 Stat. 305, 305, *invalidated* by U.S. CONST. amend. XXI.

³ *Id.* at 320–21.

⁴ Deborah Blum, *The Chemist’s War*, SLATE (Feb. 19, 2010), <https://slate.com/technology/2010/02/the-little-told-story-of-how-the-u-s-government-poisoned-alcohol-during-prohibition.html> [<https://perma.cc/8755-87B2>].

market.⁵ The government turned alcohol toxic; the bootleggers sold it as an intoxicant.⁶

The underlying intuition is obvious: people do not want to drink poison. Moreover, their aversion to it is likely dose-dependent; that is, although some may be willing to risk imbibing a small amount of gasoline, fewer will chance it with a double dose of methanol.⁷ Poison, in other words, will deter drinking, and more poison will deter more drinking. Because abstinence is healthy, it follows that poison must be the key to health.

This did not turn out to be the case. The more poison the government required, the more people died from poisoning. After legislators abruptly doubled the amount of mandatory methanol in industrial alcohol on January 1, 1927, methanol consumption killed, by some estimates, upwards of fifty thousand people.⁸ The public response was mixed. Outraged dissenters called the government “the greatest worker ever known for undermining the health of its own people”⁹ and accused law enforcement officials of murder.¹⁰ Others disagreed, arguing that the excess deaths were “not due to [the law], but to open rebellion against the law,”¹¹ and pointing out that it was bootleggers—not government actors—who were distributing the poisoned intoxicants. The government, in any case, was “under no obligation to furnish the people with alcohol

⁵ Almost all alcohol sold on the black market contained residual poison. See, e.g., Jeff Nilsson, *Would the Government Deliberately Poison 10,000 Prohibition Violators?*, SATURDAY EVENING POST (May 6, 2019), <https://www.saturdayeveningpost.com/2019/05/did-the-government-purposely-poison-10000-prohibition-violators/> [<https://perma.cc/W85G-4TZ8>] (noting that “of 480,000 gallons of bootleg liquor seized in New York in 1926, 98 percent contained poisonous additives”).

⁶ See generally Blum, *supra* note 4 (discussing the role that the government played in “the poisoning of industrial alcohols”).

⁷ Also known as wood alcohol, methanol is, in the words of a Prohibition-era doctor, “the only known denaturant which bootleggers can’t ‘cook’ entirely away.” Damrau, *supra* note 1, at 18; see also *National Affairs: Poison*, TIME (Jan. 10, 1927), <https://content.time.com/time/subscriber/article/0,33009,881577,00.html> [<https://perma.cc/4XCY-8E79>] (describing a new formula requiring “4 parts methanol (wood alcohol), 2.25 parts pyridine bases, 0.5 parts benzene to 100 parts ethyl alcohol” and asserting that “[t]hree ordinary drinks of this may cause blindness”).

⁸ See EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 221 (2011) (noting that “[a]lthough no entirely accurate nationwide statistics are available, it is probable that by 1927 . . . deaths [from poisoned liquor] may have exceeded the 50,000 mark—to say nothing of hundreds of thousands more nonfatal cases resulting in blindness or paralysis”).

⁹ Dr. Norris’s *Poison Liquor Report*, LITERARY DIG., Feb. 26, 1927, at 14, 14, <https://babel.hathitrust.org/cgi/pt?id=uga1.32108057045588&seq=654> [<https://perma.cc/N4P2-MQLY?type=image>] (quoting EVENING WORLD (N.Y.)).

¹⁰ See DEBORAH BLUM, THE POISONER’S HANDBOOK: MURDER AND THE BIRTH OF FORENSIC MEDICINE IN JAZZ AGE NEW YORK 191 (2010) (providing an account of the public reaction against government use of “poisonous additives” in alcohol).

¹¹ Dr. Norris’s *Poison Liquor Report*, *supra* note 9, at 14 (quoting S.E. Nicholson, an affiliate of the Anti-Saloon League).

that is drinkable when the Constitution prohibits it.”¹² In short, no one disputed that drinkers were “dying off fast from poison ‘hooch,’”¹³ or, as one commentator put it, that the Eighteenth Amendment now “carrie[d] the death penalty.”¹⁴ Disagreement related to the merits of this strategy. Rightly or wrongly, drinking had become a capital crime, with a notable twist: criminals, rather than the state, were charged with carrying out executions.

One way to look at the poison mandate was as another form of legal deterrence—a negative repercussion, in this case the risk of being poisoned, designed to reduce the appeal of crime. The currency of the law is consequences. Although the most familiar consequences are physical restrictions and monetary fines, the law also has subtler levers at its disposal, including, as in this example, ways of heightening the risks associated with crime. Crime-adjacent actors can be incentivized to make crime itself more perilous (for instance, they can be forced to add poison to their products) or disincentivized from making it safer (for instance, needle exchanges may be banned).¹⁵ Just as the law might change the length of a prison sentence or the intensity of enforcement, it can also can titrate danger within criminal markets.

This Article begins by giving this approach a name: “strategic endangerment.” Strategic endangerment is an intentional exacerbation of danger, caused by law, designed to reduce crime. The premise, in short, is that increasing the subjective risks of committing a crime will lower that crime’s prevalence, and this, in turn, will cause *total* harm to fall.¹⁶ This approach is particularly well-suited to the context of criminal markets, where the multiplicity of people involved increases the law’s opportunities to exert indirect pressure on the criminal environment. Moreover, it offers a promising way to combat crime when criminals themselves are elusive.

But as the alcohol prohibition example shows, there are significant risks. Nothing officially limits the nature or scale of available punishments—death and blindness are fair game. Further, costs are unlikely to constrain operations because unlike standard law enforcement measures, danger is cheap and scales

¹² *National Affairs: Poison*, *supra* note 7 (quoting Wayne B. Wheeler, an advocate for the Anti-Saloon League).

¹³ *PROHIBITION: New Sponge*, TIME (Sept. 19, 1927), <http://content.time.com/time/subscriber/article/0,33009,723282-2,00.html> [<https://perma.cc/YVB7-SEF5>] (quoting Seymour M. Lowman, Assistant U.S. Secretary of the Treasury).

¹⁴ BLUM, *supra* note 10, at 159.

¹⁵ See Katie Zezima, *Justice Department Sues Philadelphia Over Supervised Injection Facility That Aims to Prevent Fatal Drug Overdoses*, WASH. POST (Feb. 6, 2019), <https://perma.cc/CU58-6GC3> (reporting on a lawsuit filed by the federal government to prevent Philadelphia from operating a center where people can engage in supervised drug use).

¹⁶ Eventually, this cycle creates the illusion that the crime is *inherently* dangerous, which not only deters its commission, but also makes the case for stronger laws against the crime itself.

well. There is no way to accommodate exigency or duress, as danger is not administered through a legal process. This means that people who remain undeterred by danger are automatically subjected to it, regardless of whether they actually have the power to change their behavior.

A century after frustrated lawmakers decided to flood black markets with poison, their successors have begun experimenting with danger-based strategies for fighting prostitution.¹⁷ This Article connects the dots between the poison mandate, modern approaches to commercial sex, and the evolution of the anti-trafficking movement. Part I explores the traditional relationship between black markets and danger, and establishes how criminalizing markets is often criminogenic.¹⁸ This Part then looks at the role that second-order violence plays in deterring participation in illicit commerce and considers how the law might *intentionally* manufacture danger in order to achieve the same effect. Part II dives further into the complex relationship between vice, agency, and danger.¹⁹ It notes the broad tension between pointing to danger as a reason to deter vice and exacerbating danger in order to effectuate deterrence. Next, this Part investigates this contradiction in the context of criminalized sex markets. Part III turns to two current examples of laws that seek to make vice crimes—specifically, commercial sex—more dangerous.²⁰ It establishes that both the “end demand” approach to prostitution and efforts to increase liability for online intermediaries are forms of strategic endangerment, notwithstanding their alleged shared purpose of protecting vulnerable actors *from* danger. Part IV concludes by offering a general framework for evaluating the merits of stra-

¹⁷ I use the terms “prostitution” and “prostitute” with considerable reservation. There are no neutral terms for talking about sexual commerce. The use of “sex worker,” “client,” and “intermediary” generally signals that the speaker considers commercial sex to be a form of labor and ought to be decriminalized. At the other end of the spectrum, “prostituted person,” “buyer,” and “pimp” are commonly used by abolitionists who view the industry as inherently exploitative. Because that debate is, for the most part, outside the scope of this Article, I aim to distance myself from all sides. Ultimately, I have settled on “prostitution” and “prostitute” for two reasons: first, because laws prohibiting the exchange of sex for money tend to use these terms, and second, because no one on any side of the ideological debate seems to really like them.

Other scholars, also wishing to distance themselves from the ideologies associated with various terms, have taken different approaches, such as employing terms interchangeably. *See, e.g.,* Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1730 n.3 (2010) (“If ‘prostituted people’ is thought by nonabolitionists to suggest too little autonomy, and if ‘people who sell sex’ is thought by abolitionists to suggest too much, then perhaps employing both terms interchangeably will achieve a virtuous mean.”). Others embrace the distinction. *See generally, e.g.,* Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271 (2011) (describing the different uses of “sex worker” and “prostitution”). For further discussion on the terminology regarding sexual commerce, see Scott R. Peppet, *Prostitution 3.0?*, 98 IOWA L. REV. 1989, 1998–99 & nn.36–39 (2013).

¹⁸ *See infra* notes 22–56 and accompanying text.

¹⁹ *See infra* notes 57–125 and accompanying text.

²⁰ *See infra* notes 126–160 and accompanying text.

tegic endangerment in different contexts and warns against its use as a way to fight human trafficking.²¹

I. DANGER IN BLACK MARKETS

Section A of this Part explores reasons for banning certain markets and identifies ways in which forcing markets to operate outside of the law may increase crime.²² Section B of this Part distinguishes between first- and second-order crimes in black markets, noting that the latter are more concretely dangerous.²³ Section C of this Part lays out the concept of strategic endangerment and offers a general framework for evaluating its implications.²⁴

A. Market Criminalization and Criminogenesis

Illicit commerce describes a wide range of transactions. Classic examples include the distribution of contraband as well as the transfer of noncontraband to unauthorized users or outside of specified channels. Services likewise can be prohibited, either categorically, for just some people, or only under certain circumstances.

Some markets are outlawed because they proliferate harm—for instance, drug trafficking leads to drug use.²⁵ Others make harm profitable, like the stolen art trade that rewards art theft, or traffic in ivory that offers dividends to those who kill endangered animals.²⁶ The law may take aim at harm by prohibiting transactions that precede the harm, or it may prohibit transactions that follow.

Put more broadly, some monetary exchanges are criminalized due to the role they play in facilitating or rewarding distant harms, even though the exchanges, when isolated, are benign.²⁷ Opium flowers may not be sold in bou-

²¹ See *infra* notes 161–227 and accompanying text.

²² See *infra* notes 25–42 and accompanying text.

²³ See *infra* notes 43–45 and accompanying text.

²⁴ See *infra* notes 46–56 and accompanying text.

²⁵ See generally AMY CRADDOCK, JAMES J. COLLINS & ANITA TIMROTS, U.S. DEP'T OF JUST., FACT SHEET: DRUG-RELATED CRIME 1–3 (1994), <https://bjs.ojp.gov/content/pub/pdf/DRRC.PDF> [<https://perma.cc/PRD2-3GFF>] (summarizing the relationship between drug use and drug-related offenses).

²⁶ See Jane Perlez, *Ivory Trade Is Banned to Save the Elephant*, N.Y. TIMES (Oct. 17, 1989), <https://www.nytimes.com/1989/10/17/science/ivory-trade-is-banned-to-save-the-elephant.html> [<https://perma.cc/JQE9-U296>] (reporting that the Convention on International Trade in Endangered Species classified the African elephant as an endangered species “in an effort to halt poaching by ivory hunters, who have drastically reduced its numbers”).

²⁷ Punishing harm-adjacent commerce also may serve the purpose of incentivizing parties with greater access to information to ascertain whether a product is illegal or likely to be hazardous. See, e.g., *United States v. Balint*, 258 U.S. 250, 254 (1922) (“[The] manifest purpose [of the Narcotic Act]

quets, no matter how great the decorative appeal.²⁸ Likewise, even though re-selling ivory does not re-kill elephants, it may be wise to prohibit secondary markets because they make harvest more profitable and encourage further hunting.²⁹

Black markets in a third category involve exchanges that are allowed, and sometimes even encouraged, outside the commercial context. Here, the law focuses on the motivation for an exchange rather than either its effects or predicate harms. These markets tend to relate to the body, with sex and organs being common examples. In these instances, the exchange of money is criminalized because it is thought to *constitute* the harm, even though the underlying good or service is benign. Laws against prostitution do not seek to eliminate consensual sex, even at its most unwise or destructive; rather, they take aim at its monetization.

Outlawing a market means outlawing a series of transactions, including some that, as noted, may be multiple degrees removed from any actual harm. Put simply, to criminalize a market is to create direct legal consequences for participating in it. But prohibition³⁰ also deters illicit commerce by creating a legal vacuum.³¹ Laws tend to make markets stronger and safer: among other

is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him.”). The Court further noted that strict liability provisions appeared in “[m]any instances . . . where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se.” *Id.* at 252.

²⁸ 21 U.S.C. § 812(c), sched. II(a)(3); *see also* *Stutz v. Bureau of Narcotics*, 56 F. Supp. 810, 813 (N.D. Cal. 1944) (“The provisions of the Opium Poppy Control Act express the determination of Congress that effective control of opium production and distribution necessitates legislation limiting the proximate source of yield of the raw opium—the opium poppy—whatever the purpose for which its cultivation is undertaken.”).

²⁹ *See* Jada F. Smith, *U.S. Bans Commercial Trade of African Elephant Ivory*, N.Y. TIMES (June 2, 2016), <https://www.nytimes.com/2016/06/03/world/africa/elephant-ivory-ban.html> [<https://perma.cc/B79F-XB3E>] (explaining that the intention behind the U.S. ban on the ivory trade is to curb the market for ivory and reduce killings of African elephants). Some markets in endangered species products have features that complicate “the standard argument that legalization necessarily depresses black market prices.” Solomon Hsiang & Nitin Sekar, *Does Legalization Reduce Black Market Activity? Evidence from a Global Ivory Experiment and Elephant Poaching Data 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 22314, 2016), <https://doi.org/10.3386/w22314> [<https://perma.cc/FDF5-45MA>]. The existence of a legal trade reduces stigma, which increases demand and in turn results in more illegal goods. *See, e.g.*, Carolyn Fischer, *The Complex Interactions of Markets for Endangered Species Products*, 48 J. ENV’T ECON. & MGMT. 926, 926–53 (2004) (discussing “stigma” and “outrage”); R.T. Naylor, *The Underworld of Ivory*, 42 CRIME, L. & SOC. CHANGE 261, 291 (2005) (noting that the “the side-by-side existence of legal and illegal markets [for endangered species products] enable the products of the second to be laundered through the first”).

³⁰ Here and elsewhere, I use the term “prohibition” to refer to the criminalization of an entire market.

³¹ Another way that withholding legal recourses might work against black markets is by allowing monopolies to form. *See, e.g.*, Shawn Bushway & Peter Reuter, *Economists’ Contribution to the Study*

things, they may punish fraud, establish quality standards, and give people recourse to enforce their rights. By *withdrawing* the rule of law, prohibition introduces a whole host of risks that may, in turn, reduce the appeal of crime.³² It raises the cost of illicit commerce in two ways: by punishing involvement, and by *not* punishing bad behavior—including violent crime—that takes place *within* the market.

Prohibition generally precludes regulation.³³ As a result, black markets are not only *illegal*, but also *lawless*. Drug dealers have little reason to fear getting sued for, say, misrepresenting the purity of their products.³⁴ Prohibition also interferes with marginal deterrence of more violent crimes. For example, as the projected consequences for buying sex grow, they begin to dwarf the projected consequences of assaulting a prostitute.³⁵ Black markets, in this sense, offer safe havens to the most violent offenders.

of Crime and the Criminal Justice System, 37 CRIME & JUST. 389, 427 (2008) (“[I]n legal markets there is a well-established doctrine that monopoly control or any suppression of competition hurts society However, the state may actually find itself allied with cartel organizers in illegal markets, if that will result in higher prices and thus reduce the production of ‘bads.’”); James M. Buchanan, *A Defense of Organized Crime?* (“If monopoly in the supply of ‘goods’ is socially undesirable, monopoly in the supply of ‘bads’ should be socially desirable, precisely because of the output restriction.”), in *THE ECONOMICS OF CRIME AND PUNISHMENT* 119, 119 (Simon Rottenberg ed., 1973).

³² See, e.g., David Michael Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947, 1988 (2012) (arguing that “[t]he inability to use the legal system to resolve disputes is an important economic cost that may make criminal activity less attractive to profit-seeking actors”); see also PETER REUTER, *DISORGANIZED CRIME: THE ECONOMICS OF THE VISIBLE HAND* 109–31 (1983) (describing economic costs associated with running illegal businesses); Jens Beckert & Frank Wehinger, *In the Shadow: Illegal Markets and Economic Sociology*, 11 SOCIO-ECON. REV. 5, 17 (2013) (describing the ways that illegal markets are negatively impacted by the absence of “the protection of contracts by the state, which is the crucial protector of property rights on legal markets . . .”).

³³ See ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES* 155 (2001) (explaining the argument that “there can be no regulation when there is prohibition; enforcement cannot be refined to the subtle requirements of regulation but must be a blunter instrument”).

³⁴ The 2018 revisions to the U.S. Sentencing Guidelines notably tackle this issue by increasing the penalty by four levels “[i]f the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl.” U.S. SENT’G GUIDELINES MANUAL § 2D1.1(b)(13) (U.S. SENT’G COMM’N 2007). In rare cases, drug dealers have been held accountable for drug users’ deaths, though these deaths may or may not have been caused by impure, rather than pure, products. See generally, e.g., LINDSAY LASALLE, *DRUG POL’Y ALL., AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE* (2017), <https://perma.cc/3B4A-RZ2H> (describing cases in which dealers were charged with homicide after adulterating their products); R. TOM NAYLOR, CANADA DEP’T OF JUST., *A TYPOLOGY OF PROFIT-DRIVEN CRIMES* 9 (2002), https://www.justice.gc.ca/eng/rp-pr/csj-sjc/crime/rr02_3/rr02_3.pdf [<https://perma.cc/9F4V-YK9N>] (noting that “if a banned product like cocaine is cut with rat poison, unless the consumer actually dies, there is unlikely to be much law enforcement interest”).

³⁵ See, e.g., Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2394 (1997) (noting that when the penalty for rape is extremely high, a rapist “may first rape the [victim], then kill her, and finally assault unrelated others, because the cost of future criminal activity is negligible. If . . . the penalty for rape is not high, the marginal cost of additional criminal activity may be much higher”).

Moreover, black markets do not just tolerate violence; they often encourage and reward it.³⁶ Operating in legal vacuums, participants commonly rely on clandestine organizations to enforce rules using physical force.³⁷ More crimes will follow; if illicit trade depends on violence, violence in turn depends on the commission of yet more crimes, such as the purchase and use of illegal guns.³⁸ In sum, illegal markets are criminogenic.³⁹ Prohibiting commerce defines first-order crimes—in other words, it criminalizes certain forms of market participation—and it also generates second-order crimes by lowering the cost of in-market abuses (for example, adulterating drugs, assaulting prosti-

³⁶ There is some dispute as to whether violence is actually inherent to black markets. See, e.g., Paul J. Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 39 J. DRUG ISSUES 493, 497 (1985) (noting that, in the offline context, “violence is intrinsic to involvement with any illicit substance”). But see R.T. Naylor, *Violence and Illegal Economic Activity: A Deconstruction*, 52 CRIME, L. & SOC. CHANGE 231, 241 (2009) (“There is little or nothing in the inherent logic of illegal markets to lead to the expectation of violence in their conduct. To the extent violence does occur, the best place to look for its explanation is in the societal and political context.”).

³⁷ To be sure, not all black markets actually *are* violent, but “the latent threat of violence” nevertheless disciplines market actors and possible defectors. Beckett & Wehinger, *supra* note 32, at 19.

³⁸ See Jaros, *supra* note 32, at 1969–70 (discussing second-order crimes influencing criminal markets).

³⁹ Some scholars have argued that criminalization is also criminogenic insofar as it makes selling more lucrative because “the criminal law operates as a ‘crime tariff’ which makes the supply of such goods and services profitable for the criminal by driving up prices and at the same time discourages competition by those who might enter the market were it legal.” NORVAL MORRIS & GORDON HAWKINS, *THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL* 5 (1970). But others correctly note that restricting the supply of illicit goods and services by means of criminalization will only drive up prices if the criminalization does not also drive down demand. See John M. Junker, *Criminalization and Criminogenesis*, 19 UCLA L. REV. 697, 708 (1972) (discussing how decriminalizing goods could affect demand and price). Moreover, the crime tariff is presumably not pure profit, but rather compensation for increased risk of imprisonment. See Bushway & Reuter, *supra* note 31, at 431 (“[I]t is the combination of illegality and tough enforcement that makes the drugs expensive.”).

Criminalization of goods for which demand is inelastic may have another criminogenic effect: raising prices on addictive goods may cause people to commit crimes out of desperation to earn money and purchase the goods to which they are addicted. See MORRIS & HAWKINS, *supra*, at 5 (“The high prices which criminal prohibition and law enforcement help to maintain have a secondary criminogenic effect in cases where demand is inelastic, as for narcotics, by causing persons to resort to crime in order to obtain the money to pay those prices.”). Generally speaking, criminalization tends to be more criminogenic when preferences are inelastic; when people have no choice but to do something, they are more likely to do it even when it is against the law. Junker, *supra*, at 708.

Beyond the context of black markets, there is extensive literature detailing the criminogenic effects of prison sentences, which are also, of course, the result of criminalization. See, e.g., Bushway & Reuter, *supra* note 31, at 421–22 (“The recent focus on the costs of incarceration on families and communities, often the product of interdisciplinary collaboration between economists, sociologists, and criminologists, is also part of this larger awareness about the societal effects of crime and crime control efforts.”).

Finally, one scholar has argued that the criminalization of vice (or more specifically, the enforcement of anti-vice laws) may increase crime insofar as it weakens intrinsic moral guards that ordinarily deter crime. Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 455–56 (2002).

tutes) and by creating demand for clandestine policing.⁴⁰ First- and second-order crimes are different in kind. The former are often many steps removed from any harm, whereas the latter tend to be acutely dangerous⁴¹—and more specifically, dangerous to people committing first-order crimes.⁴²

B. First- and Second-Order Crimes in Black Markets

One reason for outlawing markets is that they facilitate access to something perceived to be socially toxic. The harm can be nebulous, even abstract; when it comes to vice, there can even be disagreement as to who (if anyone) can be called a victim. Indeed, there is no single term for what the law is guarding, or guarding against, when it targets commercialized vice. What one era characterizes as a moral issue may later be restated in sociological terms, then rebranded, perhaps repeatedly, as a symptom of the present moment's most urgent concern, whatever that happens to be. First-order prohibitions exist, in short, to protect society at large.

Second-order crimes are different. As discussed, black markets often tolerate or rely on violence. This violence tends to be straightforward and brutal, with specific, identifiable victims in its crosshairs. Unlike first-order crimes, which some argue should not be crimes at all, second-order crimes are unequivocally repugnant.⁴³

This repugnancy, however, serves a purpose: second-order crimes deter first-order crimes. Indeed, by virtue of their violence, second-order crimes make illicit commerce less appealing. This suggests an inverse relationship between first- and second-order crimes in black markets: as second-order crimes become more violent and visible, they increasingly deter first-order crimes.⁴⁴

Prohibition thus *redistributes* harm: it protects society from one kind of harm (the disruption caused by first-order crimes) by exposing individuals to a

⁴⁰ See Jaros, *supra* note 32, at 1949 n.4 (explaining that a first-order crime is “the criminalization of a primary . . . activity,” as compared to a second-order crime which refers to the “antisocial” opportunities that arise out of the criminalization of the primary activity). This follows from the fact that participants have limited recourse to the law by virtue of their own criminal behavior.

⁴¹ For example, product adulteration in drug markets risks the lives of customers; assault speaks for itself, as does vigilante enforcement.

⁴² See Junker, *supra* note 39, at 708–09 (discussing the effects of the crime tariff).

⁴³ *But see* Jaros, *supra* note 32, at 1958–59 (“[R]egardless of their origin, many second-order crimes impose costs on society that are wholly independent of their impact on the incidence of the original crime.”).

⁴⁴ The reverse is also true: when second-order crimes drop, first-order crimes may rise. *See id.* at 1949 (“[L]awmakers fail to recognize . . . that the criminalization of [dangerous] ‘second-order’ activities, while perhaps protecting society from significant harm, also corrects inefficiencies in the criminal markets . . .”).

different kind of harm (the injuries inflicted by third parties in the commission of second-order crimes). Individual safety and social welfare thus stand in tension.⁴⁵

C. Strategic Endangerment

Deterrence is optimized by minimizing the sum of the prices of crime and enforcement.⁴⁶ Two regulatory levers are at play: the intensity of enforcement that determines the frequency that outlaws are apprehended, and the severity of punishment.⁴⁷ The law raises crime's costs by threatening and administering various consequences, such as jail time and fines. Rational people break the law when they expect crime's rewards to exceed those costs. In this framing, crime and punishment are negotiated by two actors: the law and the outlaw.

⁴⁵ It is worth noting that the criminogenic and danger-increasing effects of vice criminalization do not necessarily mean that criminalization is the wrong strategy. Rather, they simply stand on the other side of the ledger. This Article seeks to reframe the analysis and highlight overlooked factors; it does not make an argument for or against any particular policy choice. Broader arguments for and against criminalization are beyond its scope. Arguments *against* decriminalization are manifold; concerns about the optics of "government complicity" in the propagation of vice play a large role. See MAC-COUN & REUTER, *supra* note 33, at 154 ("[By] permitting legal operation, [the government] condones immoral behavior; regulation indeed involves government complicity. The degrading of government is itself an argument against removing criminal prohibitions, even if reform would reduce the harms from prostitution."). For an overview and further analysis on the intersection of morality and criminal law, see generally JOHN STUART MILL, *ON LIBERTY: WITH RELATED DOCUMENTS* (Alan S. Kahan ed., Bedford/St. Martin's 2008) (1859) (presenting a system of ethics regarding liberty and authority); H.L.A. HART, *THE CONCEPT OF LAW* (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012) (explaining a theory of legal positivism); H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963) (discussing the interaction of criminal law and morality); PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965) (discussing morality and practicality as two sources of laws). For a discussion of how not to debate criminalization through arguments that "are parasites in search of a host" and lean on "the unstated and unproved proposition that private behavior ought not to be prohibited by the criminal law," see Junker, *supra* note 39, at 700.

⁴⁶ See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) [hereinafter Becker, *Crime and Punishment*] (discussing optimization of punishment where the cost of combatting offenses is nonzero); Gary S. Becker, Kevin M. Murphy & Michael Grossman, *The Market for Illegal Goods: The Case of Drugs*, 114 J. POL. ECON. 38, 39 (2006) [hereinafter Becker et al., *The Market*] (deriving optimal expenditure on legal enforcement against drug suppliers by taking "account of differences between the social and private values of consumption of the goods made illegal"). Optimal policies may be defined as those that minimize "the sum of damages, costs of apprehension and conviction, and costs of carrying out the punishments imposed" Becker, *Crime and Punishment*, *supra*, at 207.

⁴⁷ To be sure, the law also affects the prevalence of crime indirectly—for instance, by enacting policies that increase lawful employment opportunities, access to education, or any number of public services. Criminal deterrence is obviously not the law's only weapon against crime. Crime and crime-adjacent behaviors are likewise inflected by a panoply of extralegal rules. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (writing on how individuals self-govern outside the legal system). Nevertheless, those influences lie outside the scope of this Article.

This Article highlights certain instances when the law invites additional parties to the table.⁴⁸ More specifically, it identifies and analyzes laws that deputize third parties to serve as enforcers by making crime more dangerous. As previously discussed, danger is a natural externality of black markets. But danger can also arise by design. Laws, after all, do not have to target bad behavior directly; they instead can make it more hazardous or difficult. In the context of markets, they can take aim at adjacent actors or intermediaries.⁴⁹

“Strategic endangerment” describes a legal approach that leverages danger as a form of deterrence.⁵⁰ Instead of, or in addition to, directly penalizing the commission of a crime, the law incentivizes crime-adjacent actors to raise the costs of lawbreaking.⁵¹ The goal is to get third parties to make crime more dangerous. The law can mandate it, as it did when it required licit producers of

⁴⁸ The arguments for and against strategic endangerment to some extent track with the arguments for and against criminalizing the underlying conduct. The difference is what penalties society is willing to impose, actively or passively, on lawbreakers, as well as to whom it delegates enforcement.

⁴⁹ This touches on the interplay between the law and ideas of self-sovereignty. *See, e.g.,* Peter de Marneffe, *Vice Laws and Self-Sovereignty*, 7 CRIM. L. & PHIL. 29, 36 (2013) (“There is an important difference between a law that prohibits us from doing something and a law that reduces our opportunities to do it.”).

⁵⁰ Strategic endangerment, as I define it, is distinct from the idea of increasing hazards to prompt people to act more cautiously. The latter involves danger that is augmented in order to prompt people to do something more carefully, whereas the goal of strategic endangerment is to get people to stop doing something altogether. Sam Peltzman has applied this thinking to traffic. *See generally* Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677 (1975) (discussing the non-regulatory impact of driver responses in reducing highway accident deaths). Hans Monderman articulated a vision of “shared space” where the absence of rules would encourage people to better protect themselves and thus increase safety organically. *See* Gary Toth, *Where the Sidewalk Doesn’t End: What Shared Space Has to Share*, PROJECT FOR PUB. SPACES (Aug. 16, 2009), <https://www.pps.org/article/shared-space> [<https://perma.cc/CMS7-YTYJ>] (discussing the concept of shared space as originated by Hans Monderman and how it relates to a city’s transportation system). “No-rescue zones” for hikers are another theoretical example; there, the idea is that people will be less likely to overestimate their competence to traverse dangerous terrain if they know they have to fend for themselves. Such zones do not actually exist. *See generally* Travis Coon, Comment, *Hike at Your Own Risk: In Support of No-Rescue Wilderness Designations*, 124 PENN ST. L. REV. 529 (2020) (presenting the argument for no-rescue zones).

⁵¹ Scholars have argued that analogizing crime to a market is useful insofar as it identifies similarities between the victim-offender relationship and the buyer-seller relationship. *See* Bushway & Reuter, *supra* note 31, at 402 (writing that the analogy to a market “has value in its identification of interacting parties (most prominently, potential offenders, and the criminal justice system and potential victims) who simultaneously affect each other’s behavior”). Bushway and Reuter also note that this analogy “has never become embedded in criminological thought.” *Id.* More specifically, “the interaction between potential offenders (responding to the net payoff to crime) and potential victims (taking actions to modify the payoff to crime in response to the crime threat) is akin to the interaction between buyers and sellers in a marketplace.” Philip J. Cook, *The Demand and Supply of Criminal Opportunities*, 7 CRIME & JUST. 1, 2 (1986). Strategic endangerment can be thought of as a means through which this quasi-market relationship is renegotiated.

industrial alcohol to add poison to their products, or it can simply allow it, by getting out of the way of bad actors who have their own motives for violence.

Strategic endangerment deters lawbreaking without contrived penalties or external enforcement by leaning into crime's natural consequences and amplifying preexisting risks rather than creating them from whole cloth. Crucially, strategic endangerment is self-executing because natural consequences arise automatically. There is no need to involve the cumbersome machinery of the law once it has been set into motion. Danger, in short, scales well.

However, strategic endangerment is not always a viable approach. It is only feasible for crimes that involve at least one crime-adjacent actor who has the power to ratchet up danger. Infractions committed at a distance—forgery, for instance, or malware attacks—thus always lie outside its reach, as do crimes that can be committed from a place of personal safety.

Strategic endangerment also has an expressive function and has long played a part in vice regulation.⁵² Put simply, vice is controversial, but danger is not. Strategic endangerment makes vice dangerous and, in so doing, turns an ideological question into an emergency. The Prohibition-era poison mandate strategically increased danger by requiring third parties to introduce toxins into their products in such a way as to raise the hazards of illicit drinking. Public health officials from the same era objected to treating venereal diseases on the grounds that promiscuous sex *should* be physically dangerous. Widespread bans on needle exchanges currently in effect strategically increase the danger of drug use.⁵³ And legislation that amplifies the dangers of illegal prostitution is gaining in popularity.⁵⁴

One way of looking at strategic endangerment is as the flip side of harm reduction. Laws routinely protect people from assumed risks in a variety of contexts, “including automobile and other product designs, traffic rules, insti-

⁵² Although this Article focuses on vice and black markets, strategic endangerment also arises as a deterrent against violent crime. The most notable example of this is “stand-your-ground” laws. These regimes make victims themselves more dangerous by giving them permission to use deadly force against their assailants. *Self-Defense and ‘Stand Your Ground,’* NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/civil-and-criminal-justice/self-defense-and-stand-your-ground> [<https://perma.cc/2LKS-MRJP>] (Mar. 1, 2023).

⁵³ See *Summary of Information on the Safety and Effectiveness of Syringe Services Programs (SSPs)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ssp/syringe-services-programs-summary.html> [<https://perma.cc/3ER2-K3KQ>] (Jan. 11, 2023) (“Nearly 30 years of research has shown that comprehensive SSPs are safe, effective, and cost-saving, do not increase illegal drug use or crime, and play an important role in reducing the transmission of viral hepatitis, HIV and other infections.”).

⁵⁴ See discussion *infra* Part III.

tutionalized sports, food inspection, [and] pharmaceutical packaging.”⁵⁵ But where vice is concerned, harm reduction is controversial insofar as it suggests that vice can be made safe.⁵⁶ Strategic endangerment communicates just the opposite: it links the vice with a concrete and vivid harm, thus strengthening the case against it.

How do we evaluate this approach? Assuming it successfully reduces the prevalence of vice—assuming poison deterred some amount of drinking, venereal disease decreased promiscuity, prohibitions on needle exchanges reduce drug use, and kicking commercial sex markets offline makes them shrink in size—when is it worth it? What are its costs?

Strategic endangerment works by making a trade: by causing, tolerating, or shifting harm to a subset of (often helpless) people, it mitigates harm’s prevalence across society. Although it may well reduce *overall* harm, it also causes *individual* harm to rise in proportion to a person’s powerlessness. Adding poison to alcohol reduces drinking and its attendant harms, but causes more suffering to people who are powerless to abstain. In short, strategic endangerment reduces the prevalence of harm by increasing its severity.

The merits of this approach ultimately depend on the goal: is the point to minimize crime’s prevalence or to minimize its most pernicious effects? These often go hand-in-hand—the whole point of criminalizing forgery, say, is to lessen its fallout—but prohibitions against vice sometimes work differently. Instead of crime reduction and harm reduction being symbiotic, they are at odds.

II. VICE MARKETS, HARM, AND PREVALENCE

Section A of this Part unpacks the complicated relationship between vice and agency.⁵⁷ Section B of this Part spells out the argument that vice is inherently dangerous and must be eradicated.⁵⁸ Section C of this Part summarizes an alternative view of vice as not inherently harmful, but as something that can and should be made less perilous.⁵⁹ Section D of this Part connects the dots between these views of vice with the anti-prostitution and anti-trafficking movements, respectively.⁶⁰

⁵⁵ Robert J. MacCoun, *Moral Outrage and Opposition to Harm Reduction*, 7 CRIM. L. & PHIL. 83, 85 (2013); see, e.g., MACCOUN & REUTER, *supra* note 33, at 388–89 (listing various settings, such as needle exchange programs and schools, in which protective laws strive for harm reduction).

⁵⁶ MacCoun, *supra* note 55, at 85.

⁵⁷ See *infra* notes 61–68 and accompanying text.

⁵⁸ See *infra* notes 69–111 and accompanying text.

⁵⁹ See *infra* notes 112–117 and accompanying text.

⁶⁰ See *infra* notes 118–125 and accompanying text.

A. Vice and Agency

Vice's traditional meaning—something most people find appealing but indulge in to their own detriment—suggests a conflict between people's present and future selves. Vice's upsides are immediate, whereas its downsides are projected to a later moment of reckoning, in this life or the next.⁶¹ Anti-vice laws are paternalistic; the ostensible purpose is to override immediate preferences in service of the individual's long-term wellbeing. Broadly speaking, paternalistic penalties stand in for future harms.⁶² The idea is to bring a distant risk into sharper focus by rebranding an abstract possibility as an urgent risk.⁶³ In short, the law seeks to make vice's drawbacks as compelling and urgent as its rewards.

But vice has a complex relationship to agency. Although a person may engage in vice as a result of having “ignore[d] a consequence of his or her own behavior for him- or herself,”⁶⁴ the reverse is also true: a person may ignore a consequence as a result of having engaged in vice. Addiction by hypothesis reshapes desires, driving a wedge between immediate urges and future wellbeing; as vice's harms increase, the difficulty of desisting or quitting becomes exponentially more severe.⁶⁵

⁶¹ This causes a conflict “between different time-selves of the same person.” See Eric Rasmusen, *Internalities and Paternalism: Applying the Compensation Criterion to Multiple Selves Across Time*, 38 SOC. CHOICE & WELFARE 601, 601 (2012) (noting that “[a] common justification for laws to discourage vice is that although the vice makes a person happy in the present, it will cause him even more unhappiness in the future”). As a general matter, “the direct ill effects of vice generally are borne by the person who engages in the vice.” JIM LEITZEL, *REGULATING VICE: MISGUIDED PROHIBITIONS AND REALISTIC CONTROLS* 4 (2007). That said, direct ill effects are not the only ones in the law's crosshairs.

⁶² See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1113 n.47 (1972) (noting that paternalism “implies looking after the interests of the coerced party”). Of course, subjective utility is hard to assess, and ultimately paternalism amounts to “society impos[ing] its own conception of [people's] best interests upon them by the use of coercion.” Gerald Dworkin, *Paternalism*, 56 THE MONIST 64, 69 (1972) (emphasis added).

⁶³ Paternalistic laws are, of course, not limited to the vice context. See generally Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 987 (1966) (exploring “the concept of a public morality”). Other examples include seatbelt laws, mandatory social security payments, and restrictions on certain investments.

⁶⁴ R.J. Herrnstein, George F. Loewenstein, Drazen Prelec & William Vaughan, Jr., *Utility Maximization and Melioration: Internalities in Individual Choice*, 6 J. BEHAV. DECISION MAKING 149, 150 (1993).

⁶⁵ See, e.g., Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1160 (1986) (“[A]n undesirable addiction [is one where] the subjective benefits of consumption decrease sharply over time. . . . [As] pleasure from use decreases . . . the addiction continues because the harm from withdrawal is so great.”). Undesirable addictions stand in contrast to things where “[t]he more one consumes, the greater the benefits to the consumer; use continues or increases not because of the pain of withdrawal but because of the pleasure of consumption.” See *id.* These traits

If vice blinds people to its own consequences, then the law, whose currency is consequences, would seem to be an unpromising fix. Why would a person undeterred by the inherent risks of vice—death, addiction, disease, damnation, poverty, and so forth—care about getting arrested?⁶⁶ By the transitive property, shouldn't the law be helpless to avert self-destruction? In a word, yes: laws speak only to people who have something to lose.⁶⁷

But even as addiction makes some people undeterrable, the synergetic threats of enforcement and punishment retain their usual influence over those who profit from it.⁶⁸ Outlawing a market can mean targeting any number of market participants, some of whom are many steps removed from vice and thus safe from any distortionary impact it could have on their choices. Focusing enforcement on these vice-*adjacent* actors might appear, at first blush, to be a promising strategy for reaching those who are impervious to the threat of direct legal consequences.

Ultimately, this approach also misses the mark. Punishing vice-adjacent actors invites a different constellation of problems; as previously discussed, criminalizing a market reorganizes its power structure, handing the reins from police to clandestine enforcers who ensure compliance by committing second-order crimes. In short, it makes things more dangerous, and although that may shrink the market as a whole, it cannot deter those already impervious to the threat of legal sanctions. The net effect is to impose costs on people who cannot opt out.

suggest addictive products may be “Giffen good[s],” or certain goods for which demand increases alongside price. *See* Jaros, *supra* note 32, at 1952 (describing Giffen goods and citing literature that posits heroin may be one example).

⁶⁶ *See, e.g.,* LEITZEL, *supra* note 61, at 27 (noting that “the basis for judging a vice amenable to prohibition—the irrationality of decisions—in part would also serve to undermine the rationale for any attempt to regulate consumption of the vice via the criminal law because the efficacy of regulations themselves is based on the ability of people by and large to respond appropriately to incentives”). Despite the irrationality in prohibiting vice to deter its use, this reasoning “would not be a reason to forgo regulations on manufacture or sale, as opposed to possession and use.” *See id.* at n.24.

⁶⁷ *See, e.g., id.* at 27 (“[O]nce decision makers are regarded as irrational, a whole host of problems arises. If people are irrational, what makes us think that they will respond as expected to the incentives created by regulations or by a prohibition? Why will the threat of jail deter such capricious beings?”).

⁶⁸ Arguably, the law’s power here exists along a spectrum, ranging from people who are willing to risk everything to indulge to those who act with their long-term interests in mind. These can be the same person at different points in time. It is the individual’s relationship with the vice (often determined by factors such as longevity of use and poverty) that makes the difference. A person addicted to heroin, for instance, may risk his or her life to acquire more of the drug as compared to someone merely curious about the drug, who is likely to respond to laws against it. At a certain point, a person’s apparent willingness to suffer dire consequences is evidence not of a choice, but rather of circumstances so dire that they preclude choice.

B. Vice as Inherently Harmful: The Case for Prevalence Reduction

One account of vice is that it is inherently bad, a moral menace distinct from, and more pervasive than, any subjective injuries experienced by individuals who partake. Vice resembles a kind of environmental pollutant, a “moral taint.”⁶⁹ Mere exposure causes damage, and more exposure causes more damage. In this telling, vice’s *ubiquity* determines the extent of its ill effects.

The underlying premise is that vice *is* harmful; it doesn’t *cause* harm. This view animates what might be called the legacy war on vice. The legacy war on vice takes aim at a deep social dysfunction. “[E]fforts to control . . . illegal market[s] . . . to reduce the crime,” are in actuality battles against much larger evils: a cynical “revolution against self-control and decency,”⁷⁰ even an outright “denial of . . . humanity.”⁷¹ Social decay is a submerged crocodile; vice crimes are its protruding eyes.

In this telling, vice’s tangible hazards are a feature, not a bug: they lend credence to the idea that vice is *inherently* problematic. Anything that might make vice physically safer creates a risk that its true dangers will be overlooked. Vice’s dangers play a crucial role in the fight against it: they translate its abstract toxicity into the kind of urgent terms that move people to action.

The legacy war on vice, in this sense, is won by making vice’s downsides seem as urgent and lurid as its promises. Anti-vice activists around the turn of the nineteenth century took aim at “spectacle[s] . . . wounding to every pious heart, polluting to the minds and morals of the community, and destructive to the souls of the rising generation.”⁷² An “imperious call to awake, and to act” to oppose “evils” threatening “not only the piety and virtue of individuals, but the peace, the order and well being of communities”⁷³ prompted the founding of the Newburyport Society for the Suppression of Vice and Immorality alongside myriad “loyalist associations.”⁷⁴ This rallying cry further inspired “schemes for the overhaul of urban police forces and the judicial system, plans for the distribution of improving literature, and plans for the extended provision of formal schooling.”⁷⁵ Campaigns exhorting people to abstain from drug

⁶⁹ *Hamilton v. Whitridge*, 11 Md. 128, 147 (1857).

⁷⁰ GARY CROSS, *AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA* 199 (2002).

⁷¹ Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 13 (1993).

⁷² NEWBURYPORT SOC’Y FOR SUPPRESSION OF VICE & IMMORALITY, ARTICLES OF ASSOCIATION 9–10 (1813).

⁷³ *Id.* at 3, 8.

⁷⁴ M.J.D. Roberts, *The Society for the Suppression of Vice and Its Early Critics, 1802–1812*, 26 HIST. J. 159, 175 (1983).

⁷⁵ *Id.* An international counterpart was founded around the same time; other domestic organizations aiming to suppress vice soon followed.

use at risk of turning their brains into fried eggs reprised the same breathless tone a century later.⁷⁶ Nowadays, anti-prostitution activists claim that a child sex slave can be “repeatedly . . . ordered online as if she were a pizza.”⁷⁷

The war is as haphazard as it is sensationalistic. The aforementioned Newburyport Society decried “willfully blasphem[ing] . . . the HOLY GHOST”;⁷⁸ alcohol prohibitionists targeted saloons; modern vice squads storm massage parlors; a dramatic chorus of corporations, politicians, and clandestine activists warn of traffickers lurking on airplanes,⁷⁹ in parking lots,⁸⁰ and above all, on the internet.⁸¹ Vice is metaphysically dangerous—depending on the era, dangerous morally, spiritually, socially, to one’s prospects in the afterlife—and as malignantly transformative as a fairy-tale witch, turning brains into eggs and causing children to transubstantiate into dairy products.

The only way to make sense of vice is to recognize that it *is* the problem. There is no “causal mechanism of social harm,” no separate injury, and no way to get at the problem short of eradicating vice itself.⁸² Take drugs, for instance: prohibitionists in the early twentieth century claimed that drug use turned Chinese railroad workers violent, caused Mexicans to sexually assault white women, and made “Lower-Class Blacks” go insane.⁸³ Reformers at the end of the same century concocted a new species term for drug users, “crack babies” and “crack mothers.”⁸⁴ In 1991, the United States Supreme Court declared that “violent crime” is inherent to “drug culture or business” and pointed to “a di-

⁷⁶ The Partnership for a Drug-Free America, *'80s Anti-Drug Commercial—Your Brain on Drugs*, YOUTUBE (Sept. 16, 2008), <https://youtu.be/3FtNm9CgA6U> [<https://perma.cc/3PV2-NJY4>].

⁷⁷ Nicholas Kristof, Opinion, *Where Pimps Peddle Their Goods*, N.Y. TIMES (Mar. 17, 2012), <https://www.nytimes.com/2012/03/18/opinion/sunday/kristof-where-pimps-peddle-their-goods.html> [<https://perma.cc/D69M-VYGW>]. This analogy is particularly perplexing in light of the fact that a single pizza cannot be ordered repeatedly.

⁷⁸ NEWBURYPORT SOC’Y FOR SUPPRESSION OF VICE & IMMORALITY, *supra* note 72, at 18.

⁷⁹ *Stop Human Trafficking*, DELTA (2023), <https://www.delta.com/us/en/about-delta/stop-human-trafficking> [<https://perma.cc/3HKB-ZWRG>].

⁸⁰ Angelo Fichera, *TikTok Video Spreads Unsupported Claim of Human Trafficking Trap*, ASSOCIATED PRESS (Oct. 14, 2021), <https://apnews.com/article/fact-checking-741499781117> [<https://perma.cc/TC9X-ED3K>].

⁸¹ See A.F. Levy, *The Virtues of Unvirtuous Spaces*, 52 WAKE FOREST L. REV. 403, 418 (2017) (discussing the logical fallacy behind assumptions that the internet has caused an increase in sex trafficking).

⁸² Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 125 (1999) (referring to Patrick Devlin, *Morals and the Criminal Law*, in DEVLIN, *supra* note 45, at 1, 22).

⁸³ Stuart P. Green, *Vice Crimes and Preventive Justice*, 9 CRIM. L. & PHIL. 561, 564 (2015) (quoting Edward Huntington Williams, *Negro Cocaine “Fiends” Are a New Southern Menace*, N.Y. TIMES, Feb. 8, 1914, at 60 [<https://perma.cc/7DD5-HMCR>]).

⁸⁴ James Q. Wilson, *Against the Legalization of Drugs*, COMMENTARY, Feb. 1990, <http://www.commentarymagazine.com/article/against-the-legalization-of-drugs/> [<https://perma.cc/2XT9-ZDJ3>].

rect nexus between illegal drugs and crimes of violence” as a justification for imposing life sentences for nonviolent drug possession.⁸⁵

But evidence of this “nexus”—among other things, a study showing that a majority of (sampled) people arrested for homicide, assault, robbery, and weapons crimes in 1989 tested positive for illegal drugs—did not speak to “drug-induced changes in physiological functions,” nor, for that matter, to what might arise from “the drug business or culture.”⁸⁶ Yet the Court not only accepted that drugs somehow *caused* other crimes, but went so far as to treat drug possession—antecedent to use, at most adjacent to “culture”—as functionally *identical* to subsequent crimes for purposes of assessing punishment.⁸⁷

Anti-vice laws nowadays are “rarely justified in terms of mere immorality” but rather “in terms of their ability to prevent harms.”⁸⁸ The change is semantic. What were once called moral offenses, and prohibited because they were “debasing and degrading . . . [to] the moral and physical welfare of the inhabitants of [a] city”⁸⁹ are now called “quality-of-life offenses” and outlawed because they foster “a climate of disorder and lack of mutual respect.”⁹⁰ *Moral rehabilitation* is now called *neighborhood revitalization*; the sales pitch has been retrofitted with promises of harm prevention and social health. But the problem, however articulated, *is vice*, and the law’s job is to try to eliminate it whole cloth.

In this framing, the worst possible strategy is to mitigate vice’s most visible hazards without tackling vice itself. Harm reduction amounts to “a strategic retreat that allows its intrinsic harms to continue.”⁹¹ It follows that laws that do the opposite—that is, laws that indirectly aggravate those hazards—may help to abate those intrinsic harms. Strategic endangerment is thus more than just a tactic for scaring people away from vice: it is a technique for persuading people that the law ought to suppress it. It turns abstract problems into carnage—during the Prohibition Era, for instance, it turned a socially corrosive substance into literal poison—and then attributes that carnage to vice.

⁸⁵ *Harmelin v. Michigan*, 501 U.S. 957, 1002–03 (1991) (Kennedy, J., concurring) (citing Paul J. Goldstein, *Drugs and Violent Crime*, in *PATHWAYS TO CRIMINAL VIOLENCE* 16, 24–36 (Neil Alan Weiner & Marvin E. Wolfgang eds., 1989)).

⁸⁶ *Id.* at 1002.

⁸⁷ *Id.* at 1003.

⁸⁸ Green, *supra* note 83, at 562 (speaking on drug regulations); *see also* Franklin Liu, Note, *Sin Taxes: Have Governments Gone Too Far in Their Efforts to Monetize Morality?*, 59 B.C. L. REV. 763, 774–76 (2018) (discussing that the justification for “sin taxes” placed on alcohol and tobacco includes reducing the fiscal burden on the healthcare system and the number of drunk-driving accidents).

⁸⁹ VICE COMM’N OF CHI., *THE SOCIAL EVIL IN CHICAGO* 6 (1911), <https://wellcomecollection.org/works/yf2nbyqx/items?canvas=5> [<https://perma.cc/85NC-3QBZ>].

⁹⁰ Harcourt, *supra* note 82, at 110 (quoting Rudolph Giuliani, former Mayor of New York City).

⁹¹ MacKinnon, *supra* note 17, at 299.

Though local ordinances had long prohibited prostitution, the anti-vice movement of the early twentieth century eventually prompted Congress to take action.⁹² The Mann Act, passed in 1910, made it a federal crime to transport women across state lines for “prostitution or debauchery, or for any other immoral purpose.”⁹³ The public’s view of prostitution—along with its new alter-ego, “white slavery”⁹⁴—mutated from an unsavory practice to an existential threat to “all that is stable and noble in our civilization.”⁹⁵ Society regarded other vices and sexual practices similarly: contemporaneous federal legislation banned plural marriage, cohabitation, lotteries, and liquor.⁹⁶ The Mann Act itself was used to prosecute not just prostitution-adjacent acts but other forms of sexual nonconformity as well.⁹⁷

These were laws passed by a society that believed itself to be under moral siege, and they were designed to fend off what might, depending on one’s viewpoint, be called moral corruption or moral evolution—not, in any case, individual suffering. White slavery was “a master symbol, a code word” for the deep sociological changes lurking on the horizon.⁹⁸ Laws against it were, by

⁹² See Green, *supra* note 83, at 563 (“Laws regulating and often criminalizing vice-related conduct have existed in American law since the early colonial period, but they proliferated and gained particular prominence in the late 19th and early 20th centuries, in the wake of large-scale movements for social reform and a newly expansive assertion of federal criminal jurisdiction.”). The Mann Act was passed in a context in which “tolerance of prostitution had begun to wane. The economy was becoming increasingly industrialized, and young, single women were moving to the cities and entering the workforce.” *Id.* at 567.

⁹³ White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2422).

⁹⁴ See Mary Ann Irwin, “White Slavery” as Metaphor: Anatomy of a Moral Panic, 5 EX POST FACTO 1 (1996), <https://www.walnet.org/csis/papers/irwin-wslavery.html> [<https://perma.cc/TFQ4-ALXD>] (discussing the use of the white slavery metaphor for prostitution).

⁹⁵ *United States v. Bitty*, 208 U.S. 393, 401 (1908) (quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)).

⁹⁶ See Green, *supra* note 83, at 563 (noting that Congress passed the Mann Act during “a larger collection of reformist-inspired statutes that also includes the Morrill Act of 1862 (banning plural marriage), Edmunds Act of 1882 (prohibiting unlawful cohabitation), Anti-Lottery Act of 1890 (banning the use of the mails to transport lottery tickets), Immigration Act of 1907 (prohibiting importation of women into the United States for prostitution and other ‘immoral purposes’), and Volstead Act of 1919 (banning the production, sale, and transportation of ‘intoxicating liquors’),” as well as the Harrison Act of 1914 that prohibited opiate trafficking).

⁹⁷ See, e.g., *Athanasaw v. United States*, 227 U.S. 326, 330, 332 (1913) (upholding a conviction under the Mann Act for conduct that “would necessarily and naturally lead” a woman to “a condition of debauchery” but that fell short of “sexual actions”). See generally, e.g., Charles Rosenbleet & Barbara J. Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373 (1973) (discussing the prosecution of promiscuity); Erin Blakemore, *The ‘White Slavery’ Law That Brought Down Jack Johnson Is Still in Effect*, HISTORY, <https://www.history.com/news/white-slave-mann-act-jack-johnson-pardon> [<https://perma.cc/9L4M-Q5GC>] (May 23 2023) (arguing that the Mann Act provided cover for punishing Black men who married white women).

⁹⁸ MARK THOMAS CONNELLY, THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA 6 (1980).

extension, reactions to a social movement, expressions of resistance rather than efforts to eradicate a deviant practice.⁹⁹

The anti-vice movement conceived of vice as a problem that was abstract, complex, and thus a bad fit for the law, which relies on clear demarcations between good and bad, innocent and guilty. Prostitutes, for instance, were all of the above: a “class of unfortunates” forced into “a life of shame” that doubled as a “criminal class” presenting “a menace to the morals and social welfare of mankind.”¹⁰⁰ In the words of one flummoxed judge, prostitutes constituted “the most perplexing problem with which modern penology and social legislation are called upon to deal.”¹⁰¹ The prostitute was like “a sort of clearing house for the very worst forms of disease,”¹⁰² an innocent cog in the machinery of social corruption.

Disease was both a useful metaphor for prostitution’s alleged social effects and a concrete risk of the trade. Social reformers eagerly used the reality of physical disease to try to reach people unmoved by the moral stakes and metaphysical risks of vice.¹⁰³ The American Social Hygiene Association denounced “treatment [that] might free sexual contact from the dangers of disease,” insisting instead that the “repression of vice, sex education, and treatment of diseases were indissoluble.”¹⁰⁴ The optics of physical danger, in other words, played a key role in the war on prostitution. Mitigating these dangers would have been anathema to the true purpose of the law: to eradicate the practice, rather than its attendant harms. Strategic endangerment proved to be a preferable strategy.

The *lingua franca* of abolitionism has changed, with notions of social justice replacing moral obligation.¹⁰⁵ But feminist abolitionists, like their more

⁹⁹ See, e.g., *id.* (noting that “antiprostitution had at least as much to do with the anxieties produced by the transformation of American society . . . as with the actual existence of red-light districts”); Irwin, *supra* note 94 (noting that “the white slavery metaphor comprises an intriguing cluster of ideas concerning men and women, sex and society, rich and poor, villains and victims, corruption and exploitation”); DONNA J. GUY, SEX AND DANGER IN BUENOS AIRES: PROSTITUTION, FAMILY, AND NATION IN ARGENTINA 35 (1991) (noting that “[r]ather than reflecting a completely verifiable reality, white slavery was the construction of a set of discourses about family reform, the role of women’s work in modernizing societies, and the gendered construction of politics”).

¹⁰⁰ *Ex parte Carey*, 207 P. 271, 274 (Cal. Ct. App. 1922).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Barbara Gutmann Rosenkrantz, *Damaged Goods: Dilemmas of Responsibility for Risk*, 57 MILBANK MEM’L FUND Q. HEALTH & SOC’Y 1, 3 (1979) (“Medical care of the venereally infected placed effective responsibility in a context that necessarily implicated the carrier of the disease.”).

¹⁰⁴ *Id.* at 19, 22. In contrast, medical professions advocated for the position that doctors treat the infected individual “as a victim of vice [rather] than the purveyor of it.” J.W. Kerr, *Venereal Diseases Among Seamen of the Merchant Marine*, 1 J. AM. PUB. HEALTH ASS’N 192, 195 (1911).

¹⁰⁵ The moral argument has not been abandoned; Christian evangelicals continue to voice it. Though their underlying values may be at odds, especially with respect to traditional family struc-

traditional forebears, identify prostitution as first and foremost a social pathology.¹⁰⁶ Rather than framing it as a threat to the traditional family, however, they denounce it as an affront to women and an impediment to equality. The general conclusion is the same—prostitution *itself* is the harm—but prostitutes' experiences play a superficially different role.

Traditional abolitionism is openly indifferent to prostitutes' agency (or lack thereof). Consent is not the point because prostitution harms society regardless of the prostitutes' subjective experiences. Even prostitutes' criminal liability is decoupled from their volition: the same court that declared prostitution to be "the most perplexing problem," for instance, upheld a prostitute's conviction on grounds that the crime took place "with her co-operation—willing or unwilling."¹⁰⁷ For purposes of assessing blame, "[t]he victim of force or fraud, or of adverse social and economic conditions, soon reaches a point where she is indistinguishable from the congenital pervert."¹⁰⁸ Prostitutes, in this telling, are victim-perpetrator chimeras.

At first glance, feminist abolitionism appears to take a different view, centering prostitutes' suffering in its call to action. But the difference is not as large as it might seem: although prostitutes' suffering does matter, experiences other than suffering do not. Feminist abolitionists offer a range of responses to the notion of the agentic prostitute. By one account, "*all* prostitution is forced prostitution."¹⁰⁹ An alternative feminist abolitionist approach is to respect the decision of a "woman who freely chooses to sell sex" while maintaining that this choice "does not justify the risk of harm posed to other prostituted people

tures, traditional and feminist abolitionists have joined forces in service of their common goal. *See, e.g.,* Dempsey, *supra* note 17, at 1743–44, 1744 n.43 (2010) (outlining the argument "that feminist abolitionists actually *agree* with conservatives on fundamental ideological issues").

¹⁰⁶ There are, of course, plenty of other arguments against prostitution, ranging from philosophical (commodification is wrong) to practical (it may impose financial hardship on clients' families). *See, e.g.,* Peppet, *supra* note 17, at 2006 (laying out the argument that certain markets ought to be prohibited due to their impact on social values); Debra Satz, *Markets in Women's Sexual Labor*, 106 ETHICS 63, 68 (1995) (stating that prostitution "has costs to third parties: a man who frequents a prostitute dissipates financial resources which might otherwise be directed to his family; in a society which values intimate marriage, infidelity costs a man's wife or companion in terms of mistrust and suffering"). *See generally* MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996) (discussing commodification).

¹⁰⁷ Carey, 207 P. at 274.

¹⁰⁸ COMM. OF FIFTEEN, *THE SOCIAL EVIL: WITH SPECIAL REFERENCE TO CONDITIONS EXISTING IN THE CITY OF NEW YORK* 7 (1902).

¹⁰⁹ MacKinnon, *supra* note 71, at 26 (quoting *Activities for the Advancement of Women: Equality, Development and Peace*, U.N. ESCOR, 1st Sess., Provisional Agenda Item 12 at 8, U.N. Doc. E/1983/7 (Mar. 17, 1983)).

who *are* sold against their will.”¹¹⁰ Either way, consent is not the point. Traditional and feminist abolitionism converge on the view that prostitution harms society regardless of the prostitutes’ subjective experiences. This points to only one real solution: prostitution must be eradicated in all its forms.¹¹¹ The surest way to make that happen is to make its harms as concrete and vivid as possible.

C. Vice as Risky: The Case for Harm Reduction

An alternative take on vice law sees the law’s purpose as reducing vice’s harms, which are not isomorphic with vice itself. If vice is often dangerous, it is not because vice *itself* is problematic; it is because it happens to involve subjectively risky activities. Vice’s victims, if it is even fair to call them that, are a subset of participants, and perhaps some people close to them.

Liquor, from this perspective, is a hepatic menace rather than a moral one, and the role of the law is to distance people from the risks attendant to drinking. What matters is not only the tally of drinks, but also what happens to those who drink. Accepting that some people will engage in vice activities at all costs,¹¹² the law should focus not just on reducing prevalence, but also on mitigating the *magnitude of harms* vice causes to those whom it ensnares.

These two approaches—prevalence reduction and harm reduction—are ideologically in tension,¹¹³ with “moral outrage mediat[ing] the general preference for prevalence reduction over harm reduction.”¹¹⁴ These approaches also point in opposite directions strategically:¹¹⁵ to the extent that “reduc[ing] the

¹¹⁰ See Dempsey, *supra* note 17, at 1746, 1769 (noting that “that some people view selling sex as a genuinely valuable option, and that . . . these people are not necessarily mistaken, misguided, deluded, or suffering from some form of false consciousness”).

¹¹¹ See, e.g., MacKinnon, *supra* note 17, at 272 (arguing that distinguishing “[a]dult . . . from child prostitution, indoor from outdoor, legal from illegal, voluntary from forced, and prostitution from trafficking” ultimately points to differences that are “largely illusory, occupying instead points of emphasis on common continua with convergence and overlap among the dimensions”).

¹¹² When this is the case, these actors’ price elasticity is zero. See *infra* notes 130–133 and accompanying text (explaining the concept of price elasticity).

¹¹³ Among other things, proponents of prevalence reduction are sometimes motivated by the belief that crime is wrong and thus should not be made safer. Jaros advances this argument and notes that the criminogenic effects of criminalization should put both kinds of crime on equal footing. See Jaros, *supra* note 32, at 1949 (“Moreover, recognition that criminal law can facilitate crime may change how society perceives alternatives to criminalization. Critics often disparage harm-reduction strategies such as needle-exchange programs because they theoretically encourage illegal activity. But if criminal laws similarly foster illegal behavior, then neither criminalization nor its alternatives should occupy the moral high ground.”).

¹¹⁴ See MacCoun, *supra* note 55, at 93 (discussing this phenomenon in the context of female circumcision).

¹¹⁵ See *id.* at 84 (noting that “the strategies are potentially in tension, particularly if efforts to reduce prevalence increase harm (as argued by many drug policy reformers), efforts to reduce quantity discourage abstinence (as argued by opponents of ‘controlled drinking’), or efforts to reduce average

harmful consequences of a risky behavior” averts injury, it also “enabl[es] the behavior” by diminishing its perils.¹¹⁶

One scholar discusses this opposition in the context of direct regulations:

The trade-off between prevalence and harm exists because stricter control of a vice typically has two effects: it reduces the amount of the vice produced and consumed and, simultaneously, raises the average social cost of that vicious activity that manages to take place anyway, despite the stricter regime. Whether total social costs rise or fall depends on which of the effects dominates, the lower level of activity or the higher cost per vicious incident.¹¹⁷

Strategic endangerment is, in short, a form of harm *enhancement*—a more muscular version of prevalence reduction. Which approach is right depends on what the problem is: the action itself, or the consequences that follow. Returning to the example of alcohol prohibition, the merits of the poison mandate depend on what problem it—and prohibition in general—was trying to solve. If the idea was to reduce the amount of drinking, the strategy was reasonable (if ultimately fruitless). But if the relevant metric was the amount of suffering, it was a disaster.

In a more general sense, the law can either minimize the prevalence of vice or minimize its harms. Danger can be an *input* into the law—that is, something the law uses to deter crime—or it can be an *output*—that is, the thing the law seeks to minimize—but it cannot be both at once.

D. The Competing Interests of Anti-Trafficking and Anti-Prostitution Efforts

This conflict between prevalence- and harm-reduction approaches plays out in the competing strategies and goals of the anti-prostitution movement and efforts to reduce sex trafficking.

The quantitative relationship between prostitution and trafficking is nearly impossible to quantify, in large part because both are clandestine.¹¹⁸ Anti-

harm encourage the prevalence or quantity of the behavior (e.g., the argument that harm reduction ‘sends the wrong message’)).

¹¹⁶ *Id.*

¹¹⁷ LEITZEL, *supra* note 61, at 13 & n.16 (noting that *Drug War Heresies* was the first to stress the centrality for vice policy of the trade-off between the number of vice incidents and the average harm per incident).

¹¹⁸ I use “prostitution” to refer to commercial sex or sex exchanged for consideration. *See, e.g.*, 720 ILL. COMP. STAT. 5/11-14(a) (2023) (“Any person who knowingly performs, offers or agrees to perform any act of sexual penetration . . . for anything of value, or any touching or fondling of the sex organs of one person by another person, for anything of value, for the purpose of sexual arousal or

prostitution advocates and legislators tend to highlight alleged correlations between prostitution and trafficking,¹¹⁹ but studies making this case are notoriously flawed.¹²⁰

Without reliable data, theory is instructive and makes the case that consensual prostitution and trafficking should be inversely correlated: where consensual commercial sex is available at lower risk to purchasers, purchasers should prefer it to trafficked sex.¹²¹

Passed in 2000, the Trafficking Victims Protection Act (TVPA) criminalized sex trafficking.¹²² It is easy to read this as a victory for feminist abolitionism; after all, a “primary goal of the TVPA sponsors was to change the perception of prostitutes as criminals to victims.”¹²³ These laws reflected a shift from a prohibitionist perspective that viewed prostitutes as criminal and immoral to an abolitionist perspective that places prostitutes in the role of exploited victims.¹²⁴

Another view is that the TVPA did the opposite: by defining sex trafficking as an exploitative form of commercial sex, it implicitly acknowledged that commercial sex could exist in more benign forms. The law promises trafficking victims criminal restitution in the amount of “the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guar-

gratification commits an act of prostitution.”). I use “trafficking” to mean commercial sex obtained by coercion or fraud, or from someone under eighteen, as defined under 18 U.S.C. § 1591(a).

¹¹⁹ See, e.g., H.R. REP. NO. 115-572, pt. 1, at 5 (2018) (claiming that “where prostitution is legalized or tolerated, there is . . . nearly always an increase in the number of women and children trafficked into commercial sex slavery”).

¹²⁰ See, e.g., Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 POL. & SOC’Y 447, 455 (2007) (noting that “[b]oth empirically and conceptually, it is inappropriate to fuse prostitution and trafficking”). The authors of an article frequently cited as evidence that decriminalizing prostitution does increase trafficking concede that “the clandestine nature of both the prostitution and trafficking markets[] mak[es] it difficult, perhaps impossible, to find hard evidence establishing this relationship.” Seo-Young Cho, Axel Dreher & Eric Neumayer, *Does Legalized Prostitution Increase Human Trafficking?*, 41 WORLD DEV. 67, 76 (2013).

¹²¹ Assuming these are perfect substitutes, the greater the disparity between expected criminal penalties for patronizing a prostitute and a trafficking victim, the more buyers will prefer the former. See Becker, *Crime and Punishment*, *supra* note 46, at 177 (noting that “there is a function relating the number of offenses by any person to his probability of conviction, to his punishment if convicted, and to other variables”). For example, the price an individual is willing to pay to commit a crime relates to both the frequency of enforcement and severity of punishment. Additionally, an aversion to committing rape may lower the value of trafficked sex. See *id.*

¹²² Trafficking Victims Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended 18 U.S.C. § 1591).

¹²³ See Amy Farrell & Shea Cronin, *Policing Prostitution in an Era of Human Trafficking Enforcement*, 64 CRIME, L. & SOC. CHANGE 211, 214, 223 (2015) (“[Anti-trafficking law] aimed to shift U.S. responses to prostitution from a *prohibitionist stance* where prostitution is seen as both immoral and criminal, and where prostitutes and customers are punishable by law, to an *abolitionist stance* where prostitutes are seen as victims of exploitation . . .”).

¹²⁴ *Id.* at 223.

antees of the Fair Labor Standards Act,” suggesting that trafficking is a form of stolen labor, and that consensual commercial sex is, by extension, labor.¹²⁵

Tactically speaking, the fight against human trafficking and the war on prostitution are at odds: the former seeks to widen the gap between sexual commerce and danger (so as to reduce its harm), whereas the latter seeks to close that same gap (so as to reduce its prevalence). This is similar to the collision that occurred during alcohol prohibition between reducing the prevalence of drinking (plausibly achieved through increasing danger) and reducing its harms. More broadly, it tracks the competing and incompatible goals of prevalence- versus harm-reduction advocates, who respectively lean into danger and seek to root it out.

III. STRATEGIC ENDANGERMENT AND PROSTITUTION

This Part looks at examples of laws that make commercial sex more dangerous by imposing legal liability on market participants. Section A discusses the “end demand” model that punishes sex buyers, and then uses an analogy to taxation to establish why prostitutes with less agency ultimately bear the brunt of regulations following this model.¹²⁶ Section B looks at efforts to make online intermediaries accountable for speech posted by users, and lays out why this, too, ends up harming prostitutes most at risk of exploitation.¹²⁷

A. “End Demand”

The “end demand” (or “Nordic”) model imposes legal liability solely on sex buyers and has gained traction in recent decades.¹²⁸ The premise is that prostitutes are victims of their circumstances generally and of their clients specifically. That punishing prostitutes is incompatible with reducing their harm

¹²⁵ 18 U.S.C. § 1593(b)(3).

¹²⁶ See *infra* notes 128–138 and accompanying text.

¹²⁷ See *infra* notes 139–160 and accompanying text.

¹²⁸ See, e.g., Ronald Weitzer, *The Movement to Criminalize Sex Work in the United States*, 37 J.L. & SOC’Y 61, 73 (2010) (“[T]here has been a crackdown on ‘demand’. The 2005 Trafficking Victims Prevention Reauthorization Act (TVPR) authorized \$25 million per year to be distributed to police departments for expanded arrests of those who ‘purchase commercial sex acts’ and other efforts against clients, such as funding the creation of john schools, which are day-long rehabilitation programmes for clients, designed to educate arrested customers about the harms of prostitution and deter future offending. As of 2008, forty American cities had created such schools, which have also been introduced in Britain and Canada. In just one city, San Francisco, more than 5,700 arrested clients passed through its john school between 1995 and early 2008.”).

John Stuart Mill raised a philosophical objection and expressed discomfort with “the moral anomaly of punishing the accessory when the principal is (and must be) allowed to go free; of fining or imprisoning the procurer, but not the fornicator.” JOHN STUART MILL, ON LIBERTY 99 (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859).

seems obvious enough (even as some of these measures gesture at rehabilitation).¹²⁹ But criminalizing their clients is also at odds with reducing their harm because markets operate as a whole, and eliminating an opportunity does not create a new one.

In short, prostitutes—and especially those at risk of exploitation—do not benefit from market failures; to the contrary, they may be worse off in a crippled market than they would be in a robust one. “End demand” is nothing other than a form of strategic endangerment: it takes indirect aim at prostitution by causing clients to behave in ways that make the vice more dangerous.

1. (In)Elasticity and “Effective Price”: Why “End Demand” Likely Suppresses Prostitutes’ Earnings

Sticker prices rarely tell the whole story. An item’s (or service’s) true cost—or “effective price”—also encompasses search, uncertainty, reliability, and many other things.¹³⁰ These additional costs tend to be higher in criminalized markets, where open advertising is risky and negotiations are by necessity conducted in the shadows.¹³¹

Put differently, black markets are subject to a kind of tax—and like all taxes, this black market tax will most affect market participants who have the fewest exit options. The burden of a tax does not necessarily fall on the party on whom the tax is levied, whether that be the buyer, seller, or intermediary. Instead, tax incidence is determined by the seller’s and buyer’s sensitivities to changes in price, also known as their relative elasticities. A buyer with high elasticity will respond to even a very small movement: when prices rise, this buyer will quickly opt to forego the purchase (or perhaps purchase a substitute product). In the other direction, a buyer with low elasticity will be slow to react to price changes, choosing to spend more rather than go without (or substitute something else). Likewise with suppliers: those with high elasticity will opt to make a different product (or offer a different service) rather than take even a small price hit, whereas those with low elasticity will remain in the business even in the face of significantly decreased earnings.

¹²⁹ See, e.g., *Ex parte Carey*, 207 P. 271, 274 (Cal. Ct. App. 1922) (“The state . . . has undertaken to take forcible charge of [prostitutes] and extend to them a home, education, assistance, and encouragement in an effort, otherwise hopeless, to restore them to lives of usefulness.”).

¹³⁰ See Mark H. Moore, *Policies to Achieve Discrimination on the Effective Price of Heroin*, 63 AM. ECON. REV. 270, 270 (1973) (describing criminalized markets as ones in which all parties face “threats of victimization and arrest”).

¹³¹ *Id.*; see Bushway & Reuter, *supra* note 31, at 430 (explaining how buyers in criminalized markets face “the inconvenience of finding a seller when the state prevents open advertising and the risks incurred of being sanctioned by the criminal justice system”).

In an extreme situation where one party is totally elastic and the other is inelastic, the inelastic party will pay the entire amount of the tax. Here, the elastic party will immediately opt out if forced to pay higher costs, and the inelastic party will absorb the loss rather than go without. In the more likely scenario where buyers and sellers are each moderately elastic, the burden of the new regulation can be calculated using the pass-through fraction.¹³² The pass-through fraction is a function of the parties' relative elasticities, and its burden will always be greater on the less elastic party. The black market tax works like other taxes: it does not matter who, as between buyers and sellers, faces the most immediate legal consequences. What matters is who is more elastic.

Imagine, for example, that buyers of drug X are highly inelastic. Sellers, on the other hand, are completely elastic—if prices drop at all, they will manufacture a different drug, or no drug at all. Now imagine that lawmakers decide to criminalize drug X and are weighing two different strategies for doing so. Plan A would prohibit the purchase of drug X. Under Plan A, buying drug X would carry a \$100 fine, and enforcement efforts would apprehend buyers in 10% of transactions. Plan A would not impose any penalties on sellers.

Previously, the price of buying drug X was simply the equilibrium price of, say, \$50. Plan A, however, raises this price by \$10 (a 10% chance of paying a \$100 fine). Because the seller is completely elastic, the buyer will be forced to pay \$60: \$50 to the seller, and \$10 in the form of expected penalty. The buyer cannot offload any of the increased cost onto the seller because the seller will change jobs rather than accept a lower price.

Plan B, on the other hand, would prohibit the sale of drug X, but would not punish buyers. Like Plan A, Plan B imposes a \$100 fine on offenders (in this case, sellers) and expects to catch 10% of transactions. This causes the seller's expected earnings to drop by \$10, to \$40. Because the seller is completely elastic, they will not sell for \$40: indeed, they will continue to sell only if they can increase their prices to cover the full costs of the penalty. The inelastic buyer will pay this higher price, so, just like Plan A, Plan B will result in the buyer paying \$60, with \$50 going to the seller.

Because the burden of the criminal penalty will be "passed through," Plans A and B have the same expected result: a higher price for drug X. The price of the product will rise regardless of whom the criminal penalties target. This will cause more elastic participants to opt out, which will, in turn, shrink the market.

¹³² See *The Impact of a Tax or Subsidy*, HAYDEN ECON., <https://www.rhayden.us/marginal-revenue/the-impact-of-a-tax-or-subsidy.html> [<https://perma.cc/YX9P-K8QM>] (Nov. 8, 2023) (explaining the calculation of the pass-through formula and that "when demand is totally elastic, the pass-through fraction is zero, and producers bear all the tax").

In the context of prostitution, “end demand” increases the black market tax (that is, the difference between the effective price and the dollar price). Whether the prostitute or client pays this tax will depend in large part on the prostitute’s elasticity—in other words, whether they have the ability to leave the market.

Proponents of “end demand” generally argue that prostitution is rarely if ever voluntary, which is to say that prostitutes are relatively *inelastic*. To the extent that this is correct, raising the “effective price” for customers (through increased penalties) suppresses prostitutes’ earnings, because as the less elastic parties, they will bear the greater burden of the tax. Even if this prompts some prostitutes to opt out, it does nothing to create an exit option for those who never opted in. Those with the fewest options have to stay in the market, even as their earnings drop and circumstances deteriorate.¹³³

2. The Effects of “End Demand” on the Market That Remains

In addition to suppressing earnings, “end demand” makes prostitution more dangerous. It does so in three ways: it causes the pool of potential clients to become smaller and more dangerous; it eliminates marginal deterrence for violence; and it reduces prostitutes’ bargaining power and ability to screen clients.

The threat of arrest is likely to disproportionately scare off prospective buyers with no criminal records. This is because a first infraction is far more costly than subsequent ones: the mere fact of having a criminal record can significantly affect one’s job prospects in contrast to a sixth infraction that is unlikely to move the needle. Thus, increasing criminal penalties for solicitation not only shrinks the pool of potential clients, but it will likely raise the proportion of potential clients who have criminal histories. More educated and richer clients, who tend to be less violent, are likely to exit quickly because for them the potential ramifications of arrest and conviction are greater.¹³⁴

Criminalizing demand also reduces marginal deterrence of worse abuses by lowering their expected cost to offenders relative to the expected cost of the

¹³³ Perhaps the pithiest account of this approach’s incoherence is a quote, attributed to an anonymous prostitute, trotted out by advocates of the Nordic model: “The Swedish law is bad for business but good for my safety.” PowerPoint Discussion of Nordic Model, NORDIC MODEL NOW!, <https://docplayer.net/140323472-Prostitution-has-this-way-of-stealing-all-the-dreams-goals-and-beautifull-essence-out-of-a-woman-during-my-years-in-it-i-didn-t-meet-one-woman-who.html> [<https://perma.cc/5F63-QF44>]. The option to trade earnings for safety exists—or does not—independent of whether the law forces such a trade.

¹³⁴ See, e.g., Bushway & Reuter, *supra* note 31, at 430 (discussing that in the illegal drug market “enforcement against buyers may reduce demand among highly educated groups more than among the less educated because the stigma and potential earnings losses associated with arrest may be higher”).

first-order crime.¹³⁵ Perpetrators can also expect to get away with worse behavior because they know that prostitutes will be unlikely to report them, as they are also breaking the law.

Finally, demand-side prohibitions affect the location and pace of negotiations in a way that disadvantages prostitutes. Prostitutes report diminished “choice of client and bargaining power” because their clients do not fear being arrested, which leads to “riskier behaviors among some sex workers.”¹³⁶ Prospective clients are also less likely to submit to screening, which further compromises prostitutes’ ability to avoid dangerous clients.¹³⁷ Prostitutes themselves have denounced the “end demand” approach.¹³⁸

B. Intermediary Liability

Subsection 1 of this Section outlines how illicit commerce operates on the internet and the enforcement challenges it presents.¹³⁹ Subsection 2 of this Section explains mechanisms that enable black markets to thrive online and avoid lemons. ¹⁴⁰ Subsection 3 of this Section describes multi-sided platforms and how they function in the virtual world.¹⁴¹

¹³⁵ See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1207–08 (1985) (noting that “one cost of making the punishment of a crime more severe is that it reduces the criminal’s incentive to substitute that crime for a more serious one”).

¹³⁶ Jay Levy & Pye Jakobsson, *Sweden’s Abolitionist Discourse and Law: Effects on the Dynamics of Swedish Sex Work and on the Lives of Sweden’s Sex Workers*, 14 CRIMINOLOGY & CRIM. JUST. 593, 599 (2014).

¹³⁷ See, e.g., *id.* (explaining that prospective clients are less likely to provide their contact information for fear of prosecution).

¹³⁸ For a fieldwork-based account of end demand’s failures, see ELIZABETH BERNSTEIN, *TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX* 148–54 (2007). Scholars also have pointed to problems with implementation. See Sarah Kingston & Terry Thomas, *No Model in Practice: A ‘Nordic Model’ to Respond to Prostitution?*, 71 CRIME, L. & SOC. CHANGE 423, 423–24 (2019) (arguing that “naïve adoption of this so-called model . . . can lead to uninformed, inappropriate and incomplete transfer of the Nordic model, which then becomes a policy irritant, further exacerbating the very problems it seeks to address”). Others have highlighted the absence of metrics of evaluation. See John Coté, *Audit Faults S.F. D.A.’s Prostitution Program*, SFGATE (Sept. 20, 2009), <https://www.sfgate.com/bayarea/article/Audit-faults-S-F-D-A-s-prostitution-program-3217198.php> [<https://perma.cc/MJ4W-Z479>] (discussing the lack of measurable goals or other metrics to test effectiveness for its rehabilitation program aimed at first-time offenders of soliciting prostitution). But see Miyoko Ohtake, *Curbing Prostitution One John at a Time*, NEWSWEEK (July 23, 2008), <https://www.newsweek.com/curbing-prostitution-one-john-time-92939> [<https://perma.cc/S56Q-FHEU>] (claiming that john programs increased empathy for prostitutes).

¹³⁹ See *infra* notes 142–143 and accompanying text.

¹⁴⁰ See *infra* notes 144–156 and accompanying text.

¹⁴¹ See *infra* notes 157–160 and accompanying text.

1. Illicit Commerce on the Internet

The internet has made it easier for black market participants to evade law enforcement. Traditional techniques for catching criminals do not necessarily work online. Transactions that once took place in plain view now occur without any spontaneous physical contact between parties. Instead of dealing drugs on the street, sellers can now ship products to buyers' homes or post office boxes. And the same mechanisms that prostitutes use to avoid violent clients allow them to screen out law enforcement engaged in sting operations.

Criminal deterrence, as noted earlier, takes account of both the cost of the crime and the cost of fighting it.¹⁴² This suggests that penalties should be higher for crimes that are harder or more costly to detect. Accordingly, the answer to criminal impunity on the internet might simply be to increase penalties for internet-based crimes. But this approach is limited in practice: when penalties get very high, people (police, prosecutors, jurors) may be reluctant to enforce the law because it appears too severe.¹⁴³ Enforcement and penalties are only substitutes to an extent, beyond which the returns on higher penalties may be low or even negative.

Higher sentences are particularly unpopular in the context of drugs and sex. Sentencing reform initiatives overwhelmingly target drug crimes, and the shifting belief that prostitutes are victims has increased the aversion to penalizing them. This makes raising penalties to compensate for difficulty apprehending criminals on the internet an unpromising solution.

Online black markets' apparent imperviousness to ordinary enforcement mechanisms echoes the regulatory morass of alcohol prohibition. The current trend towards strategic endangerment is a predictable result. Recent regulatory efforts take aim at third parties, reshaping the environment in which crime takes place. Both the law and its effects are reminiscent of the poison mandate.

¹⁴² See Becker, *Crime and Punishment*, *supra* note 46, at 207 (discussing optimization of punishment where the cost of combatting offenses is nonzero and defining optimal policies as those that minimize "the sum of damages, costs of apprehension and conviction, and costs of carrying out the punishments imposed"); Becker et al., *The Market*, *supra* note 46, at 39 (deriving optimal expenditure on legal enforcement against drug suppliers by taking "account of differences between the social and private values of consumption of the goods made illegal").

¹⁴³ See Katyal, *supra* note 35, at 2450–51 ("High penalties, instead of increasing conviction rates, may decrease them. As penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught. . . . When the penalties are high, for example, the public may not be willing to turn lawbreakers in, police and prosecutors may not want to prosecute, and jurors may not vote to convict."). Other problems associated with simply increasing criminal penalties include the probability that minorities will be disproportionately impacted by the penalties and increased incarceration costs for the state. See Jessica Berch, *Reefer Madness: How Non-Legalizing States Can Revamp Dram Shop Laws to Protect Themselves from Marijuana Spillover from Their Legalizing Neighbors*, 58 B.C. L. REV. 863, 877 (2017) (discussing the drawbacks of increasing criminal penalties to curb marijuana usage in states that have not yet legalized the drug).

2. Trust Without Law, Social Accountability, or Violence: What Keeps Online Black Markets from Lemonizing?

The internet teems with vice and illicit commerce: commerce involving contraband (illegal drugs), commerce conducted on unlawful terms (prescription drugs to someone without a prescription), and commerce that is illegal only because it is commerce (commercial sex). Sketchy exchanges date back to the earliest days of network computing, when, in the first known act of e-commerce, computer science students orchestrated a drug deal.¹⁴⁴ A panoply of other illicit markets followed,¹⁴⁵ featuring yet more drugs, stolen goods, wildlife products, hacking spoils, and, by the 1980s, commercial sex.¹⁴⁶ If petty criminals saw promise in the primordial digital world of the 1970s, today's internet has delivered, as scholars estimate, that illicit online markets generate roughly a trillion dollars per year.¹⁴⁷

That crime would thrive on the internet seems, at first glance, obvious. The online environment enables anonymity, making it easier to commit crimes without getting caught. It also makes crime safer: physical violence, which looms large over offline black markets,¹⁴⁸ diminishes as special browsers replace the fabled "bad neighborhoods." The internet thus mitigates two risks normally present in illicit markets. It reduces the chances of repercussion from law enforcement (by allowing anonymity), and it lowers the risk of physical reprisal by outlaws (by allowing virtual transactions). In short, it appears to be an aspiring outlaw's dream.

Except that this account is nonsense. The internet destroys the building blocks of a successful market, namely means through which participants can hold one another accountable. A mutual awareness that cheating will be pun-

¹⁴⁴ See JOHN MARKOFF, WHAT THE DORMOUSE SAID . . . HOW THE 60S COUNTERCULTURE SHAPED THE PERSONAL COMPUTER INDUSTRY 109 (2005) (citing Les Earnest's comments during a seminar at the Hackers Conference in November 2001).

¹⁴⁵ See, e.g., JAMES MARTIN, JACK CUNLIFFE & RASMUS MUNKSGAARD, CRYPTOMARKETS: A RESEARCH COMPANION 8 (2019) (noting that "the sale of unregulated or illegal goods sale [sic] been a staple of the internet dating back to the 1960s" and describing a wide range of online markets, including drugs, stolen goods, wildlife products, products around credit card fraud, and hacking).

¹⁴⁶ See Levy, *supra* note 81, at 408 (explaining the emergence of the commercial sex industry on the internet in the 1980s (citing Scott Cunningham & Todd D. Kendall, *Prostitution 2.0: The Changing Face of Sex Work*, 69 J. URB. ECON. 273, 273 (2011))).

¹⁴⁷ Scholars have estimated that online contraband markets generate \$860 billion per year, not counting stolen data or crimeware, which add up to another \$160 billion. MICHAEL MCGUIRE, INTO THE WEB OF PROFIT: UNDERSTANDING THE GROWTH OF THE CYBERCRIME ECONOMY 131 (2018). Illicit drug markets have been assessed in the range of \$426 to \$652 billion per year. *Id.* at 47.

¹⁴⁸ See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 7.10 (9th ed. 2014) (defining organized crime as "criminals . . . organized into illegal firms . . . operating in such criminal fields as loan-sharking, prostitution, gambling, and narcotics but also in legitimate fields as well, and employing threats of violence and the corruption of police as key business methods").

ished, whether through legal repercussions or violence, is key to commerce among strangers. Insofar as the internet protects people from both the law and violence, it deprives them of the means necessary to establish trust—which, in turn, should make it impossible to negotiate and transact. In short, markets fail without accountability. And yet illicit commerce thrives on the internet. Why?

The answer lies in the commercial environment created by online platforms, or websites that primarily curate and publish user-generated content (as opposed to original material).¹⁴⁹ Online platforms include social media, dating apps, hobby boards, and many shopping sites—anywhere third parties find one another.¹⁵⁰ Unlike their counterparts in the physical world, online platforms let people communicate across any distance and without any delay. This has particularly profound implications for commerce, where widespread access to trustworthy information reduces the need for top-down regulation and enforcement. And although this structure provides efficiency gains across the board, illicit markets, long hobbled by information asymmetries and poor quality control, are perhaps its greatest beneficiaries.

Lemon markets are markets in which asymmetric information between buyers and sellers leads to adverse selection and, in some cases, market collapse.¹⁵¹ When buyers have no reliable way to determine the quality of goods on offer, they will factor the risk of receiving “lemons” into how much they are willing to pay.¹⁵² Sellers will respond to depressed prices by offering lower-quality products.¹⁵³ Uncertainty, in other words, drives down what buyers will spend, which then drives down the quality of what they can buy. Eventually, only low-quality products will remain on the market.

¹⁴⁹ See, e.g., ORG. FOR ECON. COOP. & DEV., AN INTRODUCTION TO ONLINE PLATFORMS AND THE ROLE IN DIGITAL TRANSFORMATION 20 (2019), <https://www.oecd-ilibrary.org/docserver/53e5f593-en.pdf?expires=1695305982&id=id&accname=ocid195113&checksum=EF01F1593980F32BE0FB9A83876BB174> [<https://perma.cc/2CFP-BYU6>] (“[A]n online platform is defined as a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet.”). Familiar examples include social media, discussion forums, dating sites, and marketplaces that connect multiple sellers and buyers, such as eBay or Amazon.

¹⁵⁰ For a general discussion of how online platforms are structured, see generally Ahmad Asadullah, Isam Faik & Atreyi Kankanhalli, *Digital Platforms: A Review and Future Directions*, PAC. ASIA CONF. ON INFO. SYS. (2018), <https://perma.cc/Y65L-E9P7>.

¹⁵¹ See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 490 (1970) (discussing asymmetric information using the automobile market as an example).

¹⁵² Cormac Herley & Dinei Florêncio, *Nobody Sells Gold for the Price of Silver: Dishonesty, Uncertainty and the Underground Economy*, in *ECONOMICS OF INFORMATION SECURITY AND PRIVACY* 33, 38 (Tyler Moore, David J. Pym & Christos Ioannidis eds., 2010).

¹⁵³ This is true for sellers whose inventories include both high- and low-quality items. If high- and low-quality versions are sold by different sellers, then high-quality sellers will exit the market.

Markets can avoid lemonization by ensuring that sellers can *credibly* signal their product's quality to potential buyers, or by equipping buyers with a way of independently assessing the product's quality. The law facilitates both. Buyers are better able to trust sellers if they know that sellers will face legal liability for misrepresenting their products.¹⁵⁴ Brand name protections allow sellers to build reputations, and occupational licensing requirements and similar regulations give buyers reliable information about a product's quality.¹⁵⁵

But lawless markets are bereft of legally enforceable guarantees, brand name protections, and regulatory oversight. Black markets' longstanding bulwarks against lemonization are violence (used to punish sellers for lying) and trusted personal connections (through which buyers can get reliable information). Neither of these tools is well-adapted to the internet. This leaves open the question of why online black markets thrive.

Awareness of the risk of lemonization pushes market participants to devise ways to avoid the problem.¹⁵⁶ Platforms counteract lemonization in two ways: first, by developing reliable feedback systems, and second, by equipping parties with independent ways of verifying quality that do not involve other parties to the transaction.

3. Multi-Sided Platforms

Most online commerce takes place in multi-sided markets, where numerous sellers compete for buyers.¹⁵⁷ Multi-sided platforms (MSPs) serve as virtual connection points between parties.¹⁵⁸ Though MSPs may collect commissions from sales, they generally let parties set the terms, such as prices, of their

¹⁵⁴ This may come in the form of criminal liability for fraud or civil liability (i.e., buyers have legal recourse).

¹⁵⁵ See Akerlof, *supra* note 151, at 500 (discussing the importance of both brand-name recognition in chains and professional licensing in reducing uncertainty).

¹⁵⁶ See Scott Cunningham & Todd D. Kendall, Commentary, *Prostitution 3.0: A Comment*, 98 IOWA L. REV. BULL. 131, 135 (2013) ("[T]he value in the Akerlof lemons story [is] not so much [in] providing a parable about how markets can fail, but instead [in] directing attention to the many unique and creative ways that entrepreneurs solve the lemons problem.").

¹⁵⁷ See, e.g., Martin Boss, *Running an Online Store vs. Running a Marketplace*, SHIFT4SHOP, <https://blog.shift4shop.com/online-store-vs-marketplace> [<https://perma.cc/6SSA-62EZ>] (describing differences between platforms and stores, including products, payment, and shipping). Roughly half of online commerce occurs on sites that primarily post UniFi Security Gateway (USG). SALESFORCE RSCH., CONNECTED SHOPPERS REPORT 6 (2019), <https://perma.cc/2RSS-J6P9> (estimating that 47% of online shopping occurs on online platforms). The survey questions are not listed, but presumably, respondents were asked about legal purchases, and online stores akin to boutique stores also played a role. *Id.* at 2.

¹⁵⁸ Andrei Hagiu & Julian Wright, *Multi-Sided Platforms*, 43 INT'L J. INDUS. ORG. 162, 163 (2015).

own transactions.¹⁵⁹ The extent and nature of the platforms' involvement vary. Some platforms serve a quasi-regulatory role, vetting and endorsing sellers; they may also resolve disputes or guarantee payment through escrow, or establish and enforce ground rules about what products are allowed.¹⁶⁰

Like their brick-and-mortar counterparts, virtual black markets are diverse, and buyers and sellers relate to one another differently depending on what is being traded. The possibility of repeat business creates an incentive for sellers (and to some extent buyers) to invest in their reputations. Drug dealers, for instance, benefit from loyal customers who recommend them to others. Similarly, drug buyers likewise will prefer to transact repeatedly with the same sellers because they can rely on past experiences to gauge drug quality. In contrast, people who engage in illicit one-off transactions may hope to be forgotten as soon as possible. Different kinds of MSPs cater to these different needs.

IV. BLACK MARKETS ON THE INTERNET

Section A of this Part discusses the role MSPs play in strengthening black markets, by enabling peer accountability and enforcing social norms.¹⁶¹ Section B dives deeper into how MSPs reduce information asymmetries, specifically in prostitution markets.¹⁶² Section C ties in Section 230 of the Communications Decency Act and examines its role in making black markets less dangerous.¹⁶³ Section D discusses the Allow Victims to Fight Online Sex Trafficking Act (FOSTA).¹⁶⁴

¹⁵⁹ See *id.* (“[T]wo or more distinct sides retain control over the key terms of the interaction . . .”). A classic example is eBay.com, which charges a commission to buyers and sellers, but does not itself engage in transactions.

¹⁶⁰ See, e.g., Anthony Cuthbertson, *Coronavirus: Dark Web Market Bans Drug Dealers Selling Fake Covid-19 Vaccines*, THE INDEPENDENT (Apr. 3, 2020), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/coronavirus-vaccine-cure-dark-web-drugs-market-covid-19-a9442671.html> [<https://perma.cc/UE8W-KH7E>] (explaining how the online drug market Monopoly Market banned the sale of fake COVID vaccines); see also Mark Townsend, *Dark Web Dealers Voluntarily Ban Deadly Fentanyl*, THE GUARDIAN (Dec. 1, 2018), <https://www.theguardian.com/society/2018/dec/01/dark-web-dealers-voluntary-ban-deadly-fentanyl> [<https://perma.cc/B4XW-6K53>] (describing how vendors “appeared to have made a commercial decision” to voluntarily ban fentanyl “because it is too dangerous . . . [and] more likely to prompt attention from police”).

¹⁶¹ See *infra* notes 165–182 and accompanying text.

¹⁶² See *infra* notes 183–206 and accompanying text.

¹⁶³ See *infra* notes 207–216 and accompanying text.

¹⁶⁴ See *infra* notes 217–222 and accompanying text.

*A. Countering Lemonization Through Feedback Systems:
Cryptomarkets and Dedicated-Seller MSPs*

When MSPs involve repeat vendors, public feedback plays a central role.¹⁶⁵ The fact that buyers can easily access information about sellers' past behavior motivates sellers to develop and maintain good reputations.¹⁶⁶ In these markets, platforms serve as reaction turbines, converting individual pieces of feedback into legible information about sellers and their products.¹⁶⁷ Dedicated-seller MSPs enable peer accountability at scale. They set the stage for markets of theoretically infinite size to function without top-down intervention or clandestine violence, by giving buyers and sellers the ability to impose immediate consequences for both good and bad behavior.

Multi-sided platforms on the dark web are known as cryptomarkets.¹⁶⁸ Most postings are for drugs or adjacent products.¹⁶⁹ Cryptomarkets are charac-

¹⁶⁵ See Hagiu & Wright, *supra* note 158, at 171 (identifying "a feedback system that helps pool users' experience" as MSPs' primary solution to the problem of asymmetric information).

¹⁶⁶ See, e.g., Eileen Ormsby, *Silk Road: Insights from Interviews with Users and Vendors* ("The user feedback model that works so well on sites such as eBay was just as effective on the black market. Sellers had the incentive of repeat business to ensure their product was as described."), in *THE INTERNET AND DRUG MARKETS* 61, 65 (Jane Mounteney, Alessandra Bo & Alberto Oteo eds., 2016).

¹⁶⁷ See, e.g., Gary E. Bolton & Axel Ockenfels, *The Limits of Trust in Economic Transactions: Investigations of Perfect Reputation Systems* 11 (CESifo, Working Paper No. 2216, 2008), https://www.cesifo.org/DocDL/cesifo1_wp2216.pdf [<https://perma.cc/JMX8-84U3>] ("[I]ntroducing a perfect reputation system in a market with strangers has a strongly positive impact on trust, trustworthiness and trading efficiency. Both buyers and sellers respond strategically to the information provided.").

¹⁶⁸ See KRISTY KRUTHOF ET AL., RAND EUR., *INTERNET-FACILITATED DRUGS TRADE*, at xxxiii (2016) (defining a cryptomarket as an "[o]nline marketplace on the hidden part of the web that has been intentionally hidden and is inaccessible through standard web browsers. It sells illegal drugs and other goods and services and customers can search and compare products and prices across multiple vendors"). Though single-vendor websites do exist on the dark web, they function within the ecosystem of MSPs. Some vendors break off after establishing a loyal customer base, and many maintain a presence on cryptomarkets while also selling to select customers directly. *Id.* at 28.

A key appeal to buyers of transacting directly with vendors (as opposed to through intermediaries) is the comparatively lower risk of being ripped off in an "exit scam," which is when platforms shut down and abscond with money kept in escrow. See, e.g., Meropi Tzanetakis, Gerrit Kamphausen, Bernd Werse & Roger von Laufenberg, *The Transparency Paradox. Building Trust, Resolving Disputes and Optimising Logistics on Conventional and Online Drug Markets*, 35 INT'L J. DRUG POL'Y 58, 65 (2016) (describing the Evolution Market exit scam and fallout). Of course, a single vendor could do the same thing, but buyers may perceive a lower risk of this among vendors with whom they have built trust over many repeat transactions. Additionally, parties can avoid paying commission to intermediaries.

¹⁶⁹ See KRUTHOF ET AL., *supra* note 168, at 37 (summarizing studies of goods available on dark net marketplaces). As of 2016, experts posited that roughly fifty cryptomarkets and single-vendor shops existed on the dark net, with 57% of listings offering drugs and a substantial number offering drug-adjacent items, such as shipping materials. *Id.* at 35, 38. Nonetheless, experts note that the dark web's commercial landscape evolves rapidly and is (by design) difficult to track. See *id.* at 35 (explaining that the numbers used for cryptomarkets and listings may not be capturing a trend towards markets localized around a particular geography).

terized by strong norms surrounding anonymity, a sense of community, and intermediaries that enable dispute resolution, payment escrow, and reputation feedback.¹⁷⁰ Buyers and sellers rely on intermediaries to establish reputations, negotiate disputes, secure payment, and punish bad actors.¹⁷¹

Dark web intermediaries often provide feedback systems akin to those used on eBay and Amazon that reward trustworthiness. They can authenticate the feedback system by rewarding sellers with a “verified status” (that may carry across sites). They also can punish malicious actors by banning or threatening to dox them. Lastly, they can provide dispute resolution and escrow services.¹⁷²

Cryptomarkets often have strict rules against selling certain products, including, most commonly, child sex abuse material (commonly referred to as “child pornography”).¹⁷³ Moreover, vendors compete on the basis of reputations for reliable shipping and consistent products. Although a power imbalance skews towards sellers in street markets, cryptomarkets give drug buyers the ability to evaluate vendors’ claims.¹⁷⁴ Access to reliable information is paramount to the safety of drug users.¹⁷⁵

¹⁷⁰ Intermediaries may also serve as custodians of users’ personal information. This capability theoretically gives them the power to “dox” people in retaliation for bad behavior, though instances of such threats being carried out are rare. See Kim Moeller, Rasmus Munksgaard & Jakob Demant, *Flow My FE the Vendor Said: Exploring Violent and Fraudulent Resource Exchanges on Cryptomarkets for Illicit Drugs*, 61 AM. BEHAV. SCIENTIST 1427, 1432 (2017) (noting that “[d]oxing is controversial because it breaches the fundamental premise of anonymity that the entire cryptomarket community is based on”).

¹⁷¹ See, e.g., Carlo Morselli, David Décary-Hétu, Masarah Paquet-Clouston & Judith Aldridge, *Conflict Management in Illicit Drug Cryptomarkets*, 27 INT’L CRIM. JUST. REV. 237, 237, 245–47 (2017) (listing “tolerance, avoidance, ostracism, third-party intervention, negotiation, and threats” as primary tools that cryptomarket participants use for conflict resolution).

¹⁷² See Moeller et al., *supra* note 170, at 1431–32 (describing the process of social control that administrators of cryptomarkets use).

¹⁷³ See, e.g., Townsend, *supra* note 160 (explaining why suppliers of drugs on the dark web have banned sales of fentanyl). Early in the COVID-19 pandemic, a large cryptomarket established a ban on selling fake COVID vaccines, posting that, “You do not, under any circumstances use Covid-19 as a marketing tool. . . . No magical cures, no silly f***ing mask selling, toilet paper selling. None of that b*****. We have class here.” See Cuthbertson, *supra* note 160 (quoting Monopoly Market, a dark web marketplace for drugs).

¹⁷⁴ See Angus Bancroft & Peter Scott Reid, *Concepts of Illicit Drug Quality Among Darknet Market Users: Purity, Embodied Experience, Craft and Chemical Knowledge*, 35 INT’L J. DRUG POL’Y 42, 48 (2016) (“Vendors are pushed to make and justify quality claims. This indicates a shift in user comportment and power.”).

¹⁷⁵ Among other reasons, the proxies that users turn to in the absence of good information may be catastrophic: one study examining how users evaluated drug quality revealed that they considered overdose deaths to demonstrate potency. As a result, reports of overdoses served as advertisements to heroin users without intermediaries. See Sarah G. Mars et al., *Heroin-Related Overdose: The Unexplored Influences of Markets, Marketing and Source-Types in the United States*, 140 SOC. SCI. & MED. 44, 49 (2015) (“[A] 38 year old Philadelphia man using for 18 years described reports of overdoses as ‘like an advertisement to us.’”).

Because dark web transactions rely so heavily on reputation, the products that tend to be available are those in which there is a strong likelihood of repeat transactions and thus a payoff to reliable service. Illicit drugs fit that description, as do various forms of stolen information and counterfeit products that can be laundered onto the clear web. On the other hand, one-time transactions are rare: weapons, for instance, are rarely traded on the dark web, and service contracts are virtually unheard of, likely because there is no way to ensure performance.¹⁷⁶ (The only known instance of someone being hired over the internet to commit crimes involved a defendant who was paid to issue bomb threats to synagogues.¹⁷⁷)

MSPs on the dark web often serve as community centers, combining their commercial offerings with forums for conversations about drug use, combating addiction, and improving safety. Put differently, black markets on the internet commonly share nervous systems with social communities.¹⁷⁸ They pro-

¹⁷⁶ See generally, e.g., GIACOMO PERSI PAOLI, JUDITH ALDRIDGE, NATHAN RYAN & RICHARD WARNES, *BEHIND THE CURTAIN: THE ILLICIT TRADE OF FIREARMS, EXPLOSIVES AND AMMUNITION ON THE DARK WEB* (2017) (describing how the dark web encourages firearm sales). Contrary to lore, there is no evidence to support claims that sex slaves or murder-for-hire services are available on the dark web, though it does appear that at least one person has made money scamming people looking to hire assassins. See Brian Merchant, *The Alleged Scammers Behind the Most Notorious Murder-for-Hire Site Have Been Arrested*, VICE (Apr. 7, 2022), <https://www.vice.com/en/article/v7d8j3/the-alleged-scammers-behind-the-most-notorious-murder-for-hire-site-have-been-arrested> [<https://perma.cc/GL3V-QF4L>] (describing the arrest of the operators of a “murder-for-hire site” in Romania). A high-profile case alleging trafficking on the dark web has been cast into doubt. Joseph Cox, *My Brief Encounter with a Dark Web ‘Human Trafficking’ Site*, VICE, <https://www.vice.com/en/article/vvbazy/my-brief-encounter-with-a-dark-web-human-trafficking-site> [<https://perma.cc/2XQX-NUKA>] (July 28, 2015).

¹⁷⁷ See Sadie Gurman, *Docs: Bomb Threats Suspect Offered Services on Dark Net*, AP NEWS, <https://apnews.com/article/5ef71ebdb5244b99ae4ce405f9d0ab3f> [<https://perma.cc/4BE4-NLR6>] (Aug. 8, 2017) (reporting on the case of Michael Kadar who was arrested for “threatening to bomb Jewish community centers and schools across the United States” and quoting David Décary-Héту’s statement that he does not know of any other case proven that criminal services had been sold online). Kadar is serving time in an Israeli prison and has indictments against him in three jurisdictions. *Id.*; see also Press Release, Office of Public Affairs, U.S./Israeli Man Charged in Connection with Threats to Jewish Community Centers, Conveying False Information, and Cyberstalking, <https://www.justice.gov/opa/pr/usisraeli-man-charged-connection-threats-jewish-community-centers-conveying-false-information> [<https://perma.cc/6LCD-Q6F5>] (Apr. 25, 2017) (discussing the Kadar case); Motion to Unseal Search Warrant and Related Documents at 1, *In re* Information on Multiple Accounts, No. 17-mj-00208 (D.D.C. June 12, 2017) (discussing the investigation into the suspect who ordered bomb threats through Kadar).

¹⁷⁸ Black markets arguably owe their existence to the communities. See, e.g., Penissmith, *OP-ED: Penissmith’s State of the Darknet*, DEEP.DOT.WEB (Dec. 30, 2017), <https://archive.is/omSew> [<https://perma.cc/UAM8-RRFS>] (“[Y]ou can’t have successful marketplaces without a community built around them. . . . The only way to fix this would be to bring the community back to the darknet first, and then build a marketplace around that community.”); Nuria Lorenzo-Dus & Matteo Di Cristofaro, *I Know This Whole Market Is Based on the Trust You Put in Me and I Don’t Take That Lightly’: Trust, Community and Discourse in Crypto-Drug Markets*, 12 DISCOURSE & COMMUN 608, 612 (2018) (noting that “[t]he Silk Road forums were a key discursive space in which this mission was

vide buyers the opportunity to warn each other about scams or vendors who sell adulterated drugs, and to endorse reliable sellers. Intermediaries also host websites that are crime-adjacent—on which drugs or prostitution, for instance, are discussed but not directly solicited or sourced.¹⁷⁹ These websites allow communities to build and share resources.¹⁸⁰ Predictably, they also sometimes serve as gateways to criminal behavior.¹⁸¹

Some websites provide access to testing kits that allow users to verify the contents of illicitly obtained pills. More generally, many online black markets are part and parcel of social communities governed by strong social norms and strictly enforced ethical codes. Whereas offline black markets are notoriously ruled by violence, their online counterparts are often governed by social pressures that reward honesty and encourage trust.¹⁸²

B. Countering Lemonization by Allowing Parties to Independently Investigate: Clearinghouse MSPs

Other MSPs are more akin to bazaars or clearinghouses, serving as connection points between buyers and sellers who do not expect to meet again. These markets are at risk of lemonization because transactions here generally lack regulatory oversight, and parties have no reputational incentive to behave well. One way they avert lemonization is simply by giving parties the opportunity to gather information and independently investigate quality.

Markets lemonize due to information asymmetry. This asymmetry tends to favor sellers, who are generally more familiar with (and thus in a better position to evaluate the quality of) what they are offering than buyers. The extent of sellers' information advantage varies, in part according to how easy it is for

promoted, with forum discussion threads about harm-reduction and libertarian commerce principles being commonplace and Ulbricht himself hosting a libertarian book club within one of them").

¹⁷⁹ Marie Claire Van Hout & Tim Bingham, *'Surfing the Silk Road': A Study of Users' Experiences*, 24 INT'L J. DRUG POL'Y 524, 526 (2013) ("Several drug sites were described as popular resources for 'Silk Road' members and included 'Erowid', 'Bluelight' 'Shroomery', *Pillreports*, *Pharmacy Reviewer*, *Gwern* and *OVDBer*'. These sites along with the 'Silk Road' forums were observed as useful (despite some comments that product reviews were dated) in providing informative 'trip reports' and assisting individuals with questions around optimum dosage, lab testing and harm reduction practicalities."). Of course, these websites are also available to people who buy drugs and sex offline, but their cross-pollination with MSPs enhances their value in the context of online transactions.

¹⁸⁰ See KRUTHOF ET AL., *supra* note 168, at 31 (discussing the role of social media and apps in facilitating communications about drugs and drug use). Examples of such websites include bluelight.com, erowid.com, and reddit.com, among others. Van Hout & Bingham, *supra* note 179, at 526.

¹⁸¹ See Sarah N. Gatson, *Assessing the Likelihood of Internet Information-Seeking Leading to Offline Drug Use by Youth*, in REAL DRUGS IN A VIRTUAL WORLD 99, 100–01 (Edward Murguía, Melissa Tackett-Gibson & Ann Lessem eds., 2007).

¹⁸² See, e.g., Goldstein, *supra* note 36, at 497 (noting that violence cannot be disentangled from involvement in illicit substances).

the buyer to conduct an independent inspection. If used cars lie at one end of the spectrum—their quality is all but impossible to assess at a distance—items with purely aesthetic value are at the opposite end. In those cases, buyers are not just able to easily assess quality; they also subjectively define it.

This emphasis on aesthetics in online prostitution markets is what distinguishes prostitution from conventional lemon markets, in which parties have no choice but to rely on one another's representations of value. To the extent appearance determines quality, it is readily ascertainable: providers are able to credibly convey relevant information about themselves and their services to potential clients simply by posting pictures.¹⁸³ Misleading pictures are a non-starter because the lie would become apparent before money changed hands. Put simply, the information asymmetry that plagues many black markets is somewhat neutralized in this context, as buyers have a way of assessing quality without relying on sellers' representations.¹⁸⁴

Commercial sex markets nevertheless degrade under the pressure of a different, more unusual information asymmetry—one that favors buyers instead of sellers. Across markets, sellers are typically assumed to be indifferent as among buyers offering the same price.¹⁸⁵ But prostitution markets operate differently: sex buyers' willingness to pay is not prostitutes' only concern. Echoing the supply-side stratification in Akerlof's used car example, would-be clients of prostitutes can be sorted into two categories: safe (high quality) and dangerous (lemons).¹⁸⁶ Clients, like used car salespeople, know whether they are high- or low-quality, but unless they can credibly communicate their status to prostitutes, prostitutes have to factor in the risk of encountering proverbial lemons.

¹⁸³ See, e.g., Rosie Campbell et al., *Risking Safety and Rights: Online Sex Work, Crimes and 'Blended Safety Repertoires,'* 70 BRIT. J. SOCIO. 1539, 1552 (2018) (arguing that the availability of pictures on the internet reduces unpredictability in initial encounters); Kristofor Oscar Burghart, *What's on Sale? A Discourse Analysis of Four Distinctive Online Escort Advertisement Websites*, 22 SEXUALITY & CULTURE 316, 325 (2018) (noting that nudity and depiction of genitals are common features in sampled escort advertisements online).

¹⁸⁴ To be sure, appearance is not the only consideration, and providers do have an information advantage when it comes to potentially relevant characteristics, including venereal disease status. See Peppet, *supra* note 17, at 2001–02 (suggesting that prostitution markets are lemon markets because healthy, better-educated sex workers cannot credibly differentiate themselves from “lower-quality competitors”); Cunningham & Kendall, *supra* note 156, at 135 (noting that “one translation of [Akerlof's] logic into the prostitution market” positions sex workers with venereal diseases as lemons).

¹⁸⁵ This hypothesis stands because money is fungible. This further explains why information asymmetries tend to favor sellers—the only information sellers typically need is how much a buyer is offering.

¹⁸⁶ The same person can belong to different categories at different times, insofar as they can choose to act violently or not.

This leads to a variation on adverse selection, wherein prostitutes who are unwilling to assume an increased risk of violence (i.e., higher chances of encountering low-quality clients) exit the market. Those who remain have an alarming feature in common: namely, an apparent tolerance for abuse, assault, rape, and other forms of injury. In short, the lemonization of commercial sex markets selects for providers whose very participation suggests desperation, if not outright coercion.

Prostitutes and their clients began finding one another online as early as the 1980s.¹⁸⁷ In 1997, the website www.eros.com broke ground as the first nationwide marketplace for sexual services.¹⁸⁸ Craigslist, which originated as a private email distribution list, was, by the mid-2000s, a forum for all kinds of commerce, both licit and illicit.¹⁸⁹ Along with Backpage, a similarly structured website launched in 2004,¹⁹⁰ Craigslist provided something unheard of in the offline world: sexual commerce fully integrated with nonsexual commerce.¹⁹¹ One could no longer search for puppies without encountering prostitution ads.¹⁹²

Prostitution has long been relegated to red light districts, which are historically regarded as detrimental to the environment at large and property values specifically.¹⁹³ The integration of sexual and nonsexual commerce online brought sexual commerce onto the radar of people who were not looking for it.¹⁹⁴ Indeed, “[t]his sudden visibility may have been at the root of the myth that the U.S. is experiencing an ‘explosion in domestic sex trafficking.’”¹⁹⁵

¹⁸⁷ See Cunningham & Kendall, *supra* note 146, at 273 (“[P]rostitution was among the first markets to develop online, with [one website] . . . active as early as the 1980s . . .”); Scott Shuger, *Hookers.com: How E-commerce Is Transforming the Oldest Profession*, SLATE (Jan. 28, 2000), <https://slate.com/news-and-politics/2000/01/hookers-com.html> [<https://perma.cc/4GAA-KH2B>] (reporting on online escort services in 2000).

¹⁸⁸ *About*, EROS MEDIA, <http://blog.eros.com/about/> [<https://perma.cc/ANF2-S7J6>].

¹⁸⁹ *CRAIGSLIST / On the Record: Craig Newmark*, SFGATE (Aug. 15, 2004), <https://www.sfgate.com/business/ontherecord/article/CRAIGSLIST-On-the-record-Craig-Newmark-2733312.php> [<https://perma.cc/R9TD-PZ53>].

¹⁹⁰ David Ovalle, *The ‘Adult’ Section Might Be Closed but Miami Sex Workers Still on the Job*, MIA. HERALD (Feb. 2, 2017), <https://www.miamiherald.com/news/local/crime/article130185689.html> [<https://perma.cc/9RS5-F6TG>].

¹⁹¹ See Levy, *supra* note 81, at 409 (describing Craigslist and Backpage as “a one-stop-shop . . . for everything from lawn care to sex acts”).

¹⁹² Websites dedicated exclusively to adult services continue to exist; some of them allow buyers to sort providers by specified physical traits or services performed. See, e.g., Peppet, *supra* note 17, at 2010 (discussing www.eros.com).

¹⁹³ See, e.g., *Hamilton v. Whitridge*, 11 Md. 128, 130, 137 (1857) (explaining the plaintiffs’ argument that the presence “of a house of ill-fame” in their neighborhood constituted a public nuisance); *L’Hôte v. City of New Orleans*, 177 U.S. 587, 598 (1900) (stipulating to the fact that zoning “operates to depreciate the pecuniary value of the property belonging to the plaintiffs in error”).

¹⁹⁴ After all, “[p]hysical sex markets have, historically, been physically confined; a breaching of the physical boundary, however, may have serious repercussions.” Levy, *supra* note 81, at 409 n.37

Notably, prostitution brokered offline is characteristically dangerous. Prostitutes selling sex in the physical world face “no protection against violence or disease,” nor do they have an ability to screen out “‘bad’ customers.”¹⁹⁶ Prostitutes commonly report that they find the internet to be important to their safety, citing screening and networking as among the most important features.¹⁹⁷

Online markets offer a critical benefit to prostitutes, in large part because they give them the opportunity to gather information before agreeing to a physical encounter.¹⁹⁸ They can perform preliminary screening through search engines before meeting and can require disclosure of an IP address or name.¹⁹⁹ Additionally, digital communication allows prostitutes to create a record, which in turn disciplines customers. Prostitutes operating online can take advantage of the client’s online footprint to conduct due diligence by reaching out to any of the client’s references and to their own peers to assure that a potential client is safe.²⁰⁰ Reviewing sites create reputational incentives among both sex workers and clients.²⁰¹

(citing DAVID J. LANGUM, *CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 21 (1994)* (“In the closing decades of the nineteenth century and the first decade of the twentieth, every American city of significant size supported a segregated district wherein prostitution was practiced openly. Prostitution in this form was not legal as such, but it was tolerated so long as it was kept within the boundaries of the district . . .”)).

¹⁹⁵ *Id.* at 409–10 (citing S. REP. NO. 114-214, at 3 (2016)).

¹⁹⁶ Peppet, *supra* note 17, at 2007.

¹⁹⁷ See Campbell et al., *supra* note 183, at 1550 (“For three quarters of survey respondents the internet was very (47.1 per cent, $n = 302$) or quite important (28.1 per cent, $n = 180$), with only 6.5 per cent ($n = 42$) identifying the internet as not very or not at all important. The main benefits to safety of the internet identified in the survey were screening, accessing information about safety, being anonymous, being able to advertise on website platforms with safety features, enabling networking with other sex workers.”).

¹⁹⁸ See, e.g., Anonymous, Opinion, *Rentboy Wasn’t My ‘Brothel.’ It Was a Tool to Stay Alive in This Economy of Violence*, THE GUARDIAN (Sept. 1, 2015), <https://www.theguardian.com/commentisfree/2015/sep/01/rentboy-online-brothel-tool-economy-sex-work> [<https://perma.cc/SDWA-99RX>] (describing the resources an escort website provided and the consequences of those resources being taken away).

¹⁹⁹ Cunningham & Kendall, *supra* note 146, at 276 (“At the same time, many sex workers indicate that e-mail and the Internet also facilitate more informal screening procedures, including entering the potential client’s name or telephone number into search engines, or simply communicating via email for a brief period before arranging an assignation.” (citing AMANDA BROOKS, *THE INTERNET ESCORT’S HANDBOOK: ADVERTISING AND MARKETING* (2009))); see, e.g., Burghart, *supra* note 183, at 324 (“Other concerns around safety related to the escort requiring the client to reveal some sort of identity, be it through email, thus traceable through their computer’s IP address, or a telephone number, for example: ‘Sorry no appointments will be accepted by text message or withheld number.’”).

²⁰⁰ See Claire Lampen, *Sex Workers and Advocates Explain Why the House’s Online Sex-Trafficking Bill Is Bulls**t*, DAILY DOT, <https://www.dailydot.com/irl/sex-workers-sex-trafficking-bill/> [<https://perma.cc/5P3C-ARJK>] (May 21, 2021).

²⁰¹ See, e.g., Cunningham & Kendall, *supra* note 146, at 276 (“Reviewing sites allow sex workers to build and maintain public reputations for quality service, as well as increasing the willingness-to-

Prostitutes commonly rely on information disseminated in professional networks; some require personal referrals from other prostitutes.²⁰² Clients who are unable to provide referrals may be asked to submit proof of identity prior to meeting. This practice allows prostitutes to research the person on the internet and gives prostitutes the power to retaliate in the event the client behaves badly. They may make use of websites or independent screeners to avoid dangerous clients.²⁰³

The value of online marketplaces to prostitutes is also made evident by the fallout from when they are shut down. One recent study notes a correlation between the availability of certain online platforms and a decrease in murder rates among prostitutes.²⁰⁴ The study's authors offer a causal theory that mirrors the anecdotal evidence presented by prostitutes that access to online marketplaces increases their safety.²⁰⁵ Prostitutes describe legislation that destabilized the online sex trade as particularly harmful to populations already vulnerable to exploitation.²⁰⁶

pay among risk-averse clients, for whom reviews serve as an indication that the worker is unlikely to be dangerous or fraudulent.”).

²⁰² For a description of vetting practices, see Peppet, *supra* note 17, at 2013–16.

²⁰³ See, e.g., *More Bang for Your Buck: How New Technology Is Shaking Up the Old Business*, THE ECONOMIST (Aug. 7, 2014) <https://www.economist.com/briefing/2014/08/07/more-bang-for-your-buck> [<https://perma.cc/UX46-JRCB>] (discussing how online forums provide health and safety benefits to prostitutes). Third-party screeners may offer open-source-intelligence-based safety ratings on clients. One popular “security risk management” screener estimates sixty to ninety minutes per screening. *Welcome to Laura Cohen Precautionary Investigation Reporting*, LAURA COHEN SEC. RISK MGMT., <https://lauracohensecurity.com/f-a-q/> [<https://perma.cc/Y2B7-YEQF>].

²⁰⁴ See generally Scott Cunningham, Gregory DeAngelo & John Tripp, *Did Craigslist's Erotic Services Reduce Female Homicide and Rape?*, 58 J. HUM. RES. (SPECIAL ISSUE) (2023) (examining whether online platforms have reduced violence against sex workers).

²⁰⁵ See Alex Levy, *Would Shutting Down Backpage Reduce Violence Against Women?*, TECH. & MKTG. L. BLOG (Nov. 7, 2017), <https://blog.ericgoldman.org/archives/2017/11/would-shutting-down-backpage-reduce-violence-against-women-guest-blog-post.htm> [<https://perma.cc/9HG2-Q8C2>] (“[S]ex workers have long argued that access to online marketplaces improve their safety and reduces their vulnerability to abuse.”).

²⁰⁶ See, e.g., Emily McCombs, *'This Bill Is Killing Us': 9 Sex Workers on Their Lives in the Wake of FOSTA*, HUFFPOST, https://www.huffpost.com/entry/sex-workers-sesta-fosta_n_5ad0d7d0e4b0edca2cb964d9 [<https://perma.cc/KBX9-YCAP>] (May 17, 2018) (“We have run out of practically ALL safe avenues of advertising and screening. We have to rely on poor screening, due to this [bill]. We are also having our blacklists shut down—websites where the sex worker community would post and warn other providers about dangerous clients, from robbery, assault, rape and even murder! We mainly rely on our close-knit community and one another for our safety and well-being. Ripping that away from us puts everyone at risk—especially the most marginalized groups, like women of color [and] trans, LGBTQ and disabled providers.”); see also Annamarya Scaccia, *SESTA Is Already Having Devastating Impacts on Sex Workers—Just Like They Predicted*, REWIRE NEWS GRP., <https://rewirenewsgroup.com/article/2018/04/02/sesta-already-devastating-impacts-sex-workers-just-like-predicted/> [<https://perma.cc/6JRJ-7LAS>] (Apr. 11, 2018) (explaining the impact of FOSTA and its counterpart, Stop Enabling Sex Traffickers Act (SESTA), on online forums immediately after passing through Congress); Isabelle T. Lee, *One Year Later, FOSTA-SESTA Throws Sex Workers Back into*

In short, lemons are counteracted by a better flow of information. The internet—and, specifically, intermediaries—provide that. In the context of prostitution, compromising those intermediaries is a form of strategic endangerment.

C. The Role of Section 230

Like all online platforms, MSPs enjoy wide latitude to decide how (or whether) to curate user-generated content without fear of legal repercussions. This freedom stems from Section 230 of the Communications Decency Act, which immunizes platforms from most civil suits and state criminal prosecutions for content they post but do not create.²⁰⁷ Before Section 230, platforms that actively moderated user-generated content were legally liable for their users' posts.²⁰⁸ The underlying premise was that content moderation conferred a private benefit on platforms, and that concomitant liability was a fair price to pay for it.²⁰⁹

Nevertheless, it soon became apparent that content moderation was also a *public* good and encouraging platforms to do more of it would make everyone better off. Accordingly, Congress passed the Communications Decency Act in 1996 "to protect minors from 'indecent' and 'patently offensive' communications on the Internet."²¹⁰ In 1997, the Supreme Court held that much of the Act ran afoul of the First Amendment and struck down portions of it as unconstitu-

the Fire, BITCH MEDIA (Dec. 17, 2019), <https://www.bitchmedia.org/article/fosta-sesta-throws-sex-workers-into-fire> [<https://perma.cc/C2KU-MMUM>] (explaining the health and safety impacts of FOSTA and SESTA).

²⁰⁷ 47 U.S.C. § 230(c). As will be discussed, platforms are still subject to federal criminal prosecution and, as of a 2018 amendment to § 230, they can now be sued in federal court and prosecuted in state court under narrow circumstances. § 230(e)(5).

²⁰⁸ This created what one scholar calls the "moderator's dilemma," wherein "all online services that moderate user content . . . had to choose between two strategies: one, exercise full editorial control over user content and accept liability for whatever legally problematic content they miss; or, two, minimize potential liability by exercising no editorial control over user content." *The Latest Developments in Combating Online Sex Trafficking: Hearing Before the Subcomm. on Comm'n's & Tech. of the Comm. on Energy & Com. H.R.*, 115th Cong. 44 (2017) (statement of Eric Goldman, Professor, Santa Clara University School of Law) [hereinafter *Hearing*].

²⁰⁹ This was the premise of *Stratton Oakmont, Inc. v. Prodigy Services Co.*, namely, that platforms would have independent incentives to moderate (even notwithstanding liability) because of the value added to the website. 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) ("Presumably PRODIGY's decision to regulate the content of its bulletin boards was in part influenced by its desire to attract a market . . . consisting of users seeking a 'family-oriented' computer service. This decision simply required that to the extent computer networks provide such services, they must also accept the concomitant legal consequences."), *superseded by statute*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

²¹⁰ *Reno v. ACLU*, 521 U.S. 844, 849 (1997). For instance, the Supreme Court discussed how the Act sought to prohibit the transmission of "offensive" sexual material to people under eighteen. *Id.* at 859.

tional.²¹¹ Section 230 was the lone section that survived. Unlike the rest of the Act, which impermissibly put the government in the role of censor, Section 230 encouraged platforms to police content more aggressively.²¹² Two assumptions were at play: first, that the threat of legal liability may stymie a platform's otherwise independent incentive to moderate, and second, that private moderation efforts have positive externalities.

Section 230's authors described the fledgling internet as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" that has "flourished, to the benefit of all Americans, with a minimum of government regulation."²¹³ Platforms' ability to innovate with moderation practices is arguably the bedrock of the modern internet.²¹⁴

The counterintuitive premise of Section 230 is that legal liability can *disincentivize* responsible behavior. When platforms are heavily policed, they will face risks for policing users.²¹⁵ Thanks to Section 230, however, platforms can be creative with their moderation efforts without fear of liability.²¹⁶

By virtue of its effect on MSPs, Section 230 allows platforms to function in a way that makes vice safer. It does so in two ways: first, by facilitating social accountability at scale, and second, by changing the tempo of transactions to allow for more careful vetting. But making sex work safer is at odds with anti-prostitution activists, whose campaigns rely on the optics of endangerment.

D. FOSTA

Online platforms' pivotal role in the proliferation of illicit online commerce has made them attractive regulatory targets.²¹⁷ One way to suppress il-

²¹¹ *Id.* at 885 ("As a matter of constitutional tradition . . . we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.").

²¹² Platforms, being private companies, are not bound by the First Amendment and are thus free to restrict whatever speech they want.

²¹³ 47 U.S.C. § 230(a)(3)–(4).

²¹⁴ JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 8 (2019) (arguing that the "modern Internet in the United States is built on more than two decades of reliance on Section 230," and that "[t]o remove those twenty-six words from the United States Code would unravel the Internet that we know today").

²¹⁵ Of course, *not* being policed doesn't guarantee good behavior, but the obvious risk—that platforms will go completely rogue on their long leashes—is at least partly mitigated by § 230(e), which provides that platforms are not immune from federal criminal prosecution.

²¹⁶ *Hearing, supra* note 208, at 44 (statement of Eric Goldman) ("[O]nline services can deploy, and experiment with a wide range of content moderation techniques without fearing liability for whatever they miss.").

²¹⁷ *See, e.g.*, U.S. DEP'T OF JUST., SECTION 230—NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? 15 (2020), <https://www.justice.gov/file/1286331/download> [<https://perma.cc/ZW4A-A>].

licit markets, the theory goes, is to attack the infrastructure that allows them to thrive. This logic led to the passage of the Allow Victims to Fight Online Sex Trafficking Act (FOSTA), passed with bipartisan support in 2017 and signed into law in 2018.²¹⁸ FOSTA did three important things: first, it amended Section 230 to allow sex trafficking victims to sue intermediaries in federal court;²¹⁹ second, it eliminated platforms' immunity from certain trafficking- and prostitution-related state criminal prosecutions; and third, it criminalized "own[ing], manag[ing] or operat[ing]" a platform "with the intent to promote or facilitate the prostitution of another person."²²⁰

FOSTA's supporters painted a dire picture of the internet and pointed their collective finger at Section 230. Calling it a "legal loophole in the law," they alleged that Section 230 allowed websites to "knowingly sell[] the bodies of children online" and "getting away with unthinkable acts of inhumanity."²²¹ In their view, websites could operate with "no serious, legal consequences" thanks to this provision.²²²

The reality is that Section 230 does nothing of the sort. The immunity it provides to websites is limited to *civil* actions, leaving the possibility of federal

AUJW] ("One important way to confront the grave and worsening problem of illicit and unlawful material on the internet is to ensure that providers do not design or operate their systems in any manner that results in an inability to identify or access most (if not all) unlawful content.").

²¹⁸ 18 U.S.C. § 2421A.

²¹⁹ 47 U.S.C. § 230(e)(5)(A). In 2003, Congress created a private right of action for human trafficking victims. 18 U.S.C. § 1595(a). Subsequently amended in 2008 and 2015, § 1595 now allows victims to sue for any violations of Chapter 77, including the prohibition against sex trafficking codified in 18 U.S.C. § 1591(a). See ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 7–9 (2018), <https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf> [<https://perma.cc/6MV4-P2VU>] (detailing the history and amendments to the law).

²²⁰ 18 U.S.C. § 2421A(a). Notably, FOSTA did not create a private cause of action or a § 230 carve-out for this new law, leaving enforcement up to the federal government. It also did not create a private right of action in state court or under state trafficking laws.

²²¹ See Press Release, ECPAT-USA, New Federal Law Will Allow Victims and Prosecutors to Go After Websites That Promote Sex Trafficking (Mar. 21, 2018), <https://www.wearepact.org/blog/2018/3/21/new-federal-law-will-allow-victims-and-prosecutors-to-go-after-websites-that-promote-sex-trafficking> [<https://perma.cc/X8JK-X6MR>] (noting that FOSTA supporters characterized § 230 as "a legal loophole in the law"); Kevin M. Ryan, *Rallying Today, to Protect Sex Trafficking Survivors*, HUFFPOST (Jan. 11, 2018), https://www.huffingtonpost.com/entry/rallying-today-to-protect-sex-trafficking-survivors_us_5a5765a7e4b024fa0543b6f4 [<https://perma.cc/DC3M-9A4G>] (writing that supporters viewed § 230 as allowing websites to sell the bodies of children online); see also Ann Wagner, *Not for Sale: The SAVE Act*, <https://wagner.house.gov/not-sale-save-act#:~:text=The%20protections%20included%20in%20the,trafficking%20by%20advertising%20the%20victims> [<https://perma.cc/8S6F-SUP6>] (discussing "the scourge of human trafficking" in the United States and the historical lack of congressional efforts to stop it).

²²² Press Release, Ann Wagner, Congresswoman, House of Representatives, Wagner Trafficking Bill Headed to House Floor (Feb. 21, 2018), <https://wagner.house.gov/media-center/press-releases/wagner-trafficking-bill-headed-house-floor> [<https://perma.cc/FUV5-REU2>].

criminal prosecution—a “serious, legal consequence[.]” if ever there was one—intact.²²³ Contrary to FOSTA’s advocates, FOSTA’s amendment to Section 230 did not *restore* the rule of law over platforms—the rule of law was never suspended.

When FOSTA was enacted, many platforms did exactly what Section 230’s architects feared would happen in the absence of statutory immunity: they erred on the side of caution, removing far more than just directly problematic speech. More specifically, they closed discussion forums, shuttered personals sections, and removed vast swaths of content related to sexual exploitation.²²⁴ Proponents of harm reduction, at-risk populations, and survivors of sexual assault, among many others, found themselves unable to communicate and access resources as a result.

If such websites enable criminalized commerce, then it would seem to follow that prohibiting them from doing so would reduce crime. This is only partly true. Although targeting intermediaries will undoubtedly disrupt first-order crimes, it is likely to increase second-order ones. Destabilized black markets are not simply smaller versions of their stable counterparts. Chaotic markets are often breeding grounds for exploitation and corruption, and rely on second-order crimes to stay afloat. The harm these second-order crimes cause—and redistribute to vulnerable populations—is of paramount importance, especially in the context of a law allegedly designed to address trafficking.

FOSTA is another example of strategic endangerment: it regulates third parties (platforms) in order to make the environment in which a crime takes

²²³ *Id.*

²²⁴ See Jenna Amatulli, *Craigslist, Reddit Shut Down Personal Ads in Wake of Sex Trafficking Bill*, HUFFPOST, https://www.huffpost.com/entry/craigslist-reddit-fosta-sex-trafficking_us_5ab50538e4b054d118e222da [https://perma.cc/F85X-7J56] (Mar. 26, 2018) (discussing the decision by Reddit and Craigslist to take down or remove certain personal ads); see, e.g., *About FOSTA*, CRAIGSLIST, <https://www.craigslist.org/about/FOSTA> [https://perma.cc/J2NY-TG6A] (highlighting a post from Craigslist announcing the end of personal ads due to the passage of FOSTA); *What Happened to Pounced.org?*, POUNCED (May 20, 2018), <https://web.archive.org/web/20180520072916/http://pounced.org/why.html> [https://perma.cc/9ANX-ZE37] (explaining FOSTA’s increased liability for operating the website). Some dating sites selectively eliminated communities; fetlife.com, for instance, banned “consensual blackmail.” Lana Nam, *FetLife Updates TOS in a Reaction to SESTA*, ORIENTAL CUISINE (Mar. 11, 2022), <https://orientalcuisine.co.nz/fetlife-updates-tos-in-a-reaction-to-sesta-fetlife/products> [https://perma.cc/C4EC-43AH]. Experts predicted other dating sites also would fold. Heidi Vogt & John D. McKinnon, *New Law Targets Sex Trafficking. It Could Also Hit Online Dating*, WALL ST. J. (May 30, 2018), <https://www.wsj.com/articles/new-law-targets-sex-trafficking-it-could-also-hit-online-dating-1527672600> [https://perma.cc/Q8QF-FYAD]; see, e.g., Elizabeth Nolan Brown, *Hours After FOSTA Passes, Reddit Bans ‘Escorts’ and ‘SugarDaddy’ Communities*, REASON (Mar. 22, 2018), <https://reason.com/2018/03/22/reddit-bans-escort-subreddits/> [https://perma.cc/3RYC-RGNS] (explaining that “four subreddits related to sex have [been] banned”). For a partial list of shut-downs following the law’s passage, see *Documenting Tech Actions*, SURVIVORS AGAINST SESTA, <https://survivorsagainstsesta.org/documentation/> [https://perma.cc/EK44-DPCT]. Not all of these actions were explicitly attributed to the law.

place more dangerous. Like the other examples, FOSTA seeks to reduce one kind of crime by increasing another. Perversely, these second-order crimes are likely to be committed against the individuals the law supposedly seeks to protect: trafficking victims.

CONCLUSION

This Article connects the dots between the poison mandate during Prohibition, “end demand” approaches to prostitution, and FOSTA. Each of these actions seeks to reduce the prevalence of vice by altering the ecosystem in which it proliferates. Each one introduces danger into a black market, on the assumption that corrupting the market will hobble it and thus shrink its corresponding harm.

Whether this is a good approach depends on whom the law seeks to protect, and from what. There is little doubt that strategic endangerment reduces the prevalence of vice. Danger is an effective deterrent. But on the other side of the ledger, danger multiplies harm. Although it motivates some people to opt out of vice, it punishes those who have no choice but to stay. In the ecosystem of illicit commerce, this means that human trafficking victims are squarely in its crosshairs.

Like vice itself, the war on vice calls to the senses. A mandatory curriculum for people convicted of certain solicitation offenses teaches offenders that “everyone”—including them—“is a victim of prostitution.”²²⁵ Hiring prostitutes exposes clients to the possibility of being “stabbed . . . with AIDS-infected needles.” Clients victimize prostitutes; prostitutes, meanwhile, victimize everyone by leaving a trail of “dirty needles and used condoms.”²²⁶

The case against vice falters when vice begins to look safe.²²⁷ Vice prohibitions thus become laws in search of danger. By exerting pressure on third parties to problematize illicit transactions, strategic endangerment creates the pyrotechnics that then justify the war on vice.

²²⁵ Scot Wortley, Benedikt Fischer & Cheryl Webster, *Vice Lessons: A Survey of Prostitution Offenders Enrolled in the Toronto John School Diversion Program*, 44 CANADIAN J. CRIMINOLOGY 369, 382 (2002).

²²⁶ *Id.* at 374.

²²⁷ Prostitution laws, for instance, are often reluctantly enacted and weakly enforced. Barnett, *supra* note 39, at 439 (“On the one hand, the government satisfies majoritarian preferences by enacting . . . formal prohibition[s] against a morally offensive practice. On the other hand, the government satisfies minoritarian preferences by adopting a weak enforcement strategy that institutionalizes clandestine markets that satisfy demand for certain unsavory goods and services.”); see David J. Giacopassi & Jerry R. Sparger, *Cognitive Dissonance in Vice Enforcement*, 10 AM. J. POLICE 39, 42 (1991) (noting that “vice enforcement is . . . given a low priority in many departments”).