

SEX WORK

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INTRODUCTION

Sex work¹ has a long and lucrative history in the United States and around the world. Today, the multi-billion-dollar commercial sex industry encompasses a wide range of sexual services—some legal and others not—including pornography, stripping, phone and internet sex, and sexual services obtained in brothels, massage parlors, through escort services, or on the street.²

Until the nineteenth century, prostitution was generally legal in the United States and flourished in large cities.³ In the late nineteenth century, groups concerned with social morality—especially religious groups and women’s societies—crusaded against prostitution, leading some states to regulate and eventually ban prostitution.⁴ In 1910, Congress passed the Mann Act, which outlawed the transportation of individuals across state lines for the purpose of prostitution, and also ordered the deportation of undocumented immigrant sex workers.⁵ After various attempts to regulate prostitution, the federal government enacted the Standard Vice Repression Act in 1919, which prohibited the buying and selling of sexual acts.⁶

Sex work remains criminalized in nearly every state,⁷ though it continues to have an entrenched and visible presence throughout the country. In the past quarter century, the United States has witnessed a dramatic growth in the commercial

1. “Sex work” is preferable to the term “prostitution,” which both “describes and condemns.” Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 525 (2000) (“The primary meaning of the word [prostitute] has a sexual connotation, historically describing women who offer sexual services on an indiscriminate basis, whether or not for money, and more recently, the offer of sex for money Further, the term ‘prostitute’ conflates work and identity. Women who sell sex for money typically have other identities, that is, daughter, mother, athlete, musician, et cetera.”) (internal citations omitted). Here, when referring to individual actors, the term “sex worker” will be used except where “prostitute” is required for legal or historical accuracy. “Prostitution” and “sex work” will refer to the exchange of sexual acts for pay, as opposed to the “sex work industry” which refers to a broad range of sexual services including pornography, phone, and Internet sex.

2. See generally SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY (Ronald Weitzer, ed., 2d ed. 2010) (providing an overview of the sex industry including chapters dedicated to pornography, stripping, strip clubs, telephone sex work, legal prostitution, customers of prostitutes, sex tourism, and sex trafficking).

3. Timothy J. Gilfoyle, *Prostitution*, in THE READER’S COMPANION TO AMERICAN HISTORY 875, 875–77 (Eric Foner & John A. Garraty eds., 1991).

4. *Id.* at 876. The movement toward regulation and criminalization of prostitution had many sources: moral, religious, familial, political, and gendered discourses all played an important part. However, Gilfoyle argues that the overarching reason that prostitution was regulated and criminalized was economic: “market forces, epitomized by the ‘popularization’ or ‘sexualization’ of commercial sex,” caused a restructuring of perceptions of prostitution—from the view that prostitution was an institution that provided both social and sexual services, to one in which prostitution offered only carnal or sexual satisfaction. See Timothy J. Gilfoyle, *Prostitutes in History: From Parables of Pornography to Metaphors of Modernity*, 104 AM. HIST. REV. 117, 130 (1999).

5. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424). See Nicole A. Hough, *Sodomy and Prostitution: Laws Protecting the “Fabric of Society,”* 3 PIERCE L. REV. 101, 113 (2004).

6. Hough, *supra* note 5, at 113.

7. Nicloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE L.J. & FEMINISM 69, 69 (1998).

sex industry, with an increase in the privatization of commercial sex services.⁸ Internet technology has proliferated a rise in phone sex, Internet sex, and escort services, allowing more Americans to purchase pornography and sexual services within the private spheres of their homes or motel rooms.⁹ However, while increased privatization shields customers from police surveillance and arrest, it has not led to safer working conditions for all sex workers.

Often, police do not consistently enforce prostitution laws except against the most visible sex workers—street sex workers, women of color, transgender workers, and immigrants.¹⁰ Sex workers who solicit customers on the street, as opposed to other types of sex workers, typically have the lowest social status; are disproportionately low-income; and are among the most vulnerable in the sex industry to robbery, rape, murder, arrest, criminal prosecution, and police harassment and brutality.¹¹ Some indoor sex workers—including low-income workers of brothels and massage parlors—also face grave concerns, including isolation, fear of police raids, and lack of support services.¹² The sex work industry is complex and diverse, necessitating intersectional analysis on human rights, workers' rights, criminal justice issues, public health priorities, and oppression related to race, class, sex, gender identity, and sexual orientation. This complexity reveals the inadequacy of analyzing sex work strictly within a legal paradigm.

Considered broadly, the sex industry includes legal and illegal activities. Certain forms of sex work, such as child pornography, pimping, pandering, and

8. Weitzer, *supra* note 2, at 1.

9. *Id.*; see also Michael Chan, Catherine Leung, Chloe Ng & Cathy Chow, *Regulating the Oldest Profession in the New Economy: A Study of Online and Cyberprostitution in the Netherlands, the United States, China, and Hong Kong*, ONLINE CYBER L. (2004), <https://web.archive.org/web/20170612071305/http://newmedia.cityu.edu.hk/cyberlaw/gp22/intro.html>.

10. See S.F. Task Force on Prostitution, Final Report (1996), <http://www.bayswan.org/1TF.html> (last visited Oct. 31, 2021) (analyzing twelve months of prostitution-related arrest reports in San Francisco, California, in the Law and Law Enforcement section); see also Juhu Thukral & Melissa Ditmore, *Revolving Door: An Analysis of Street Based Prostitution in New York City*, URBAN JUST. CTR., 34–47 (2003), <http://sexworkersproject.org/downloads/RevolvingDoor.pdf> (last visited Oct. 31, 2021). For a discussion of how criminalization and disparate enforcement affects sex workers, see Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 337–38 (2006). See also Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (an Unfinished Draft)*, 105 HARV. L. REV. 1045, 1054 (1992) (explaining how the “legal terrorization” resulting from a lack of legal protection for sex workers contributes to their control and exploitation by pimps).

11. Weitzer, *supra* note 2, at 4; see also Alliance for a Safe and Diverse DC, *Move Along: Policing Sex Work in Washington, D.C.* 17 (2008), <https://dctranscoalition.files.wordpress.com/2010/05/movealongreport.pdf> (last visited Oct. 31, 2021) (citing a survey of street sex workers, among whom 90% had experienced violence such as rape, kidnapping or attempted kidnapping, assault, or robbery, and almost 50% had been treated badly when attempting to obtain help); Anna-Louise Crago, *Our Lives Matter: Sex Workers United for Health and Rights*, OPEN SOC'Y INST. 61 (2008), <https://www.opensocietyfoundations.org/publications/our-lives-matter-sex-workers-unite-health-and-rights>) (citing a study of New York City sex workers among whom 27% had experienced physical violence by the police). For a discussion of the unique vulnerabilities to violence of sex workers at the intersection of race, class, sexuality, and gender, see Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997).

12. See Thukral & Ditmore, *supra* note 10, at 37–43.

exchanging sexual acts for pay are prohibited in most states.¹³ Other acts, such as phone sex, stripping, erotic dancing, and adult pornography, are not explicitly prohibited, but are highly regulated by states.¹⁴ Prostitution is generally understood to be the exchange of sexual activity for money or other financial compensation.

Today, states largely determine the legal status of prostitution as a reasonable exercise of state police power.¹⁵ Prostitution is illegal in every state,¹⁶ with certain

13. *See, e.g.*, GA. CODE ANN. § 16-6-13 (West, Westlaw through 2021 Reg. Sess.); LA. STAT. ANN. § 14:84 (West, Westlaw through 2021 Reg. Sess.); MINN. STAT. ANN. § 617.247 (West, Westlaw through 2021 Reg. & 1st Spec. Sess.).

14. Courts have generally deferred to county zoning regulations for sexually explicit materials, despite claims of free speech violations. *See, e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding ordinance that confined adult theatres to certain locations in the city); *Young v. American Mini Theatres*, 427 U.S. 50, 72–73 (1976) (upholding Detroit “Anti-Skid Row Ordinance” that limited the number of displays of sexually explicit materials in an area, thus dispersing adult theatres).

15. *People ex rel. Thrasher v. Smith*, 114 N.E. 31, 32 (Ill. 1916) (declaring that the state’s regulation of prostitution-related activities “was an exercise of the police power of the state, passed in the interest of the public welfare, for the preservation of good order and public morals”); *see also* *City of Milwaukee v. Burnette*, 637 N.W.2d 447, 455 (Wis. Ct. App. 2001) (holding that government may regulate prostitution as a public nuisance).

16. *See* ALA. CODE § 13A-12-121 (West, Westlaw through 2021 Reg. Sess.); ALASKA STAT. ANN. § 11.66.100 (West, Westlaw through 2021 1st Reg. Sess.); ARIZ. REV. STAT. ANN. § 13-3214 (West, Westlaw through 2021 1st Reg. Sess.); ARK. CODE ANN. § 5-70-102 (West, Westlaw through 2021 Reg. Sess. & 1st Ex. Sess. of 93d. Ark. Gen. Assemb.); CAL. PENAL CODE § 647(b) (West, Westlaw through Ch. 770 of 2021 Reg. Sess.); COLO. REV. STAT. ANN. § 18-7-201 (West, Westlaw through 2021 1st Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-82 (West, Westlaw through 2021 Reg. Sess. & 2021 June Spec. Sess.); DEL. CODE ANN. tit. 11, § 1342 (West, Westlaw through 2021 Ch. 237); D.C. CODE ANN. § 22-2701 (West, Westlaw through Sept. 22, 2021); FLA. STAT. ANN. § 796.07 (West, Westlaw through 2021 1st Reg. Sess. & Spec. “A” Sess. of 27th Leg.); GA. CODE ANN. § 16-6-9 (West, Westlaw through 2021 Reg. Sess.); HAW. REV. STAT. ANN. § 712-1200 (West, Westlaw through 2021 Spec. Sess.); IDAHO CODE ANN. § 18-5613 (West, Westlaw through 2021 1st Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/11-14 (West, Westlaw through 2021 Reg. Sess.); IND. CODE ANN. § 35-45-4-2 (West, Westlaw through 2021 1st Reg. Sess.); IOWA CODE ANN. § 725.1 (West, Westlaw through 2021 Reg. Sess.); KAN. STAT. ANN. § 21-6419 (West, Westlaw through 2021 Reg. Sess.); KY. REV. STAT. ANN. § 529.020 (West, Westlaw through 2021 Reg. Sess.); LA. STAT. ANN. § 14:82 (West, Westlaw through 2021 Reg. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 853-A (West, Westlaw through 2021 1st Reg. Sess.); MD. CODE ANN., CRIM. LAW § 11-306 (West, Westlaw through 2021 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 272, § 53A (West, Westlaw through 2021 1st Ann. Sess.); MICH. COMP. LAWS ANN. § 750.449a (West, Westlaw through P.A.2021, No. 91, of the 2021 Reg. Sess.); MINN. STAT. ANN. § 609.321 (West, Westlaw through 2021 Reg. Sess. & 1st Spec. Sess.); MISS. CODE ANN. § 97-29-49 (West, Westlaw through 2021 Reg. Sess.); MO. ANN. STAT. § 567.020 (West, Westlaw through 2021 1st Reg. Sess. & 1st Ex. Sess.); MONT. CODE ANN. § 45-5-601 (West, Westlaw through 2021 Sess.); NEB. REV. STAT. ANN. § 28-801 (West, Westlaw through 2021 1st Reg. Sess.); N.H. REV. STAT. ANN. § 645:2 (West, Westlaw through 2021 Reg. Sess.); N.J. STAT. ANN. § 2C:34-1 (West, Westlaw through L.2021, c. 209 and J.R. No. 3.); N. M. STAT. ANN. § 30-9-2 (West, Westlaw through 2021 1st Reg. Sess.); N.Y. PENAL LAW § 230.00 (McKinney, Westlaw through L.2021, chapters 1 to 516.); N.C. GEN. STAT. ANN. § 14-204 (West, Westlaw through 2021 Reg. Sess.); N.D. CENT. CODE § 12.1-29-03 (West, Westlaw through 2021 Reg. Sess.); OHIO REV. CODE ANN. § 2907.25 (West, Westlaw through File 48 of the 134th General Assembly (2021-2022)); OKLA. STAT. ANN. tit. 21, § 1029 (West, Westlaw through 2021 1st Reg. Sess.); OR. REV. STAT. ANN. § 167.007 (West, Westlaw through 2021 Reg. Sess.); 18 Pa. Stat. Ann. § 5902 (West, Westlaw through 2021 Reg. Sess.); S.C. CODE ANN. § 16-15-90 (West, Westlaw through 2021 Act No. 116.); S.D. CODIFIED LAWS § 22-23-1 (West, Westlaw through 2021.); TENN. CODE ANN. § 39-13-513

exceptions in Nevada and, until November 2009, Rhode Island. In Nevada, prostitution is legalized in a handful of counties, where it is highly regulated and permitted in licensed brothels.¹⁷

In Rhode Island, the state's anti-prostitution statutes previously prohibited only sexual pandering,¹⁸ loitering for the purposes of prostitution,¹⁹ and soliciting from motor vehicles for "indecent purposes."²⁰ There was no law in Rhode Island outlawing indoor prostitution between consenting adults until November 2009, when the Rhode Island legislature signed a bill making prostitution illegal anywhere in Rhode Island.²¹

State regulations often take the form of penal codes criminalizing the solicitation of sex, pandering, and pimping.²² While this regime has remained relatively unchallenged in most states, recent efforts to decriminalize sex work indicate the popular reconsideration of the efficacy and equity of the current legal regime criminalizing prostitution.²³ Decriminalization campaigns such as these have grown primarily from the sex workers' rights movement, which has advocated for decriminalization of sex work since the late 1970s.²⁴

Furthermore, the effect of sex work within the LGBTQ community presents its own unique set of challenges. Individuals who identify as a part of this group are generally already marginalized because of their sexual orientation or gender identity.²⁵ As a sex worker, they are further exposed and scrutinized. Criminalization laws combined with societal pressures can lead to psychological stresses with consequences that cannot be undone.²⁶

(West, Westlaw through 2021 1st Reg. Sess.); TEX. PENAL CODE ANN. § 43.02 (West, Westlaw through 2021 Reg. Sess.); UTAH CODE ANN. § 76-10-1302 (West, Westlaw through 2021 1st Spec. Sess.); VT. STAT. ANN. tit. 13, § 2632 (West, Westlaw through 2021 Reg. Sess.); VA. CODE ANN. § 18.2-346 (West, Westlaw through 2021 Reg. Sess.); WASH. REV. CODE ANN. § 9A.88.030 (West, Westlaw through 2021 Reg. Sess.); W. VA. CODE ANN. § 61-8-5(b) (West, Westlaw through 2021 1st Spec. Sess.); WIS. STAT. ANN. § 944.30 (West, Westlaw through 2021); WYO. STAT. ANN. § 6-4-101 (West, Westlaw through 2021 Gen. Sess.); see also Halley et al., *supra* note 10, at 338–40 (explaining the different degrees of criminalization).

17. NEV. REV. STAT. ANN. §§ 201.354, 244.345 (West, Westlaw through Ch. 557 (End) of the 81st Reg. Sess. (2021)).

18. tit. 11 R.I. GEN. LAWS ANN. §§ 11-34-1, *repealed by* tit. 11 R.I. GEN. LAWS ANN. § 11-34.1-7 (West, Westlaw through Chapter 424 of the 2021 Reg. Sess.).

19. tit. 11 R.I. GEN. LAWS ANN. § 11-34-8, *repealed by* tit. 11 R.I. GEN. LAWS ANN. § 11-34.1-7 (West, Westlaw through Chapter 424 of the 2021 Reg. Sess.).

20. tit. 11 R.I. GEN. LAWS ANN. § 11-34-8.1, *repealed by* tit. 11 R.I. GEN. LAWS ANN. § 11-34.1-7 (West, Westlaw Chapter 424 of the 2021 Reg. Sess.).

21. See Tracy Breton & Amanda Milkovits, *State Law Foils Efforts to Thwart Prostitution*, Prov. J. Bull. A01 (May 24, 2005); tit. 11 R.I. GEN. LAWS ANN. § 11-34-1-2 (West, Westlaw through Chapter 424 of the 2021 Reg. Sess.).

22. See statutes, *supra* note 16; see also discussion *infra* Part III.

23. Jerald L. Mosley, *Decriminalizing Prostitution in Recognition of Fundamental Rights*, L.A. Lawyer, Mar. 2016, at 36.

24. Priscilla Alexander, *The International Sex Workers' Rights Movement*, in *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* 14, 15 (Frederique Delacoste & Priscilla Alexander eds., 1987).

25. Joey L. Mogul, et al., *Queer (In)Justice: The Criminalization of LGBT People in the United States*, 102 J. CRIM. L. & CRIMINOLOGY 171, 173 (2012).

In Part I, this article begins by defining “sex work.” Part II identifies crimes related to prostitution, such as patronizing, pandering to, and procuring a sex worker, as well as the law surrounding sexual transmission of disease during these activities. In Part III, this article acknowledges the currently recognized and unrecognized legal defenses to prostitution. Part IV outlines the two models of decriminalization in the United States—in Nevada and Rhode Island. Part V describes the larger federal regulation scheme for sex work. Part VI addresses constitutional issues raised by the illegality of sex work, including freedom of speech, due process, and equal protection. Finally, Part VII presents the current arguments and efforts for decriminalization.

I. DEFINITION OF PROSTITUTION UNDER STATE LAWS

Prostitution is generally understood to be the exchange of sexual activity—including but not always limited to sexual intercourse, oral sex, anal sex, or assisted masturbation—for money or other financial compensation. State statutes regarding prostitution are not uniform. While all states, with the exception of Nevada, explicitly ban prostitution or the act of soliciting sexual activity for financial compensation, some states also regulate prostitution through vagrancy and loitering statutes.²⁷ The crime of prostitution usually involves three elements: (1) some degree of sexual activity or conduct, (2) compensation, and (3) intent to commit prostitution.²⁸

A. SEXUAL ACTIVITY OR CONDUCT

State prostitution statutes generally require that an individual perform, offer to perform, or agree to perform a sexual act in order for that individual to be charged with prostitution.²⁹ While some states require that sexual contact actually take place,³⁰ in a majority of states, the mere offer or agreement to perform acts is sufficient for criminal liability.³¹ Where statutes criminalize an agreement to engage in sexual activity for compensation, the term “agreement” often becomes subject to intense scrutiny.³²

26. See *Underserved. Overpoliced. Invisibilised. LGBT Sex Workers Do Matter*, 11 (Int’l Comm. on the Rts. of Sex Workers in Eur., Intersection Briefing Paper #1, (Oct. 2015), <http://www.nswp.org/sites/nswp.org/files/Underserved.%20Overpoliced.%20Invisibilised.%20LGBT%20Sex%20Workers%20Do%20Matter%2C%20ICRSE%20-%202015.pdf>).

27. Jay Shapiro, *Prosecution And Defense of Sex Crimes* § 6.02 (2008).

28. 63C Am. Jur. 2d *Prostitution* §§ 1–3 (2022).

29. See, e.g., COLO. REV. STAT. ANN. § 18-7-201 (West, Westlaw through 2021 1st Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/11-14 (West, Westlaw through 2022 Reg. Sess.); NEB. REV. STAT. ANN. § 28-801 (West, Westlaw through 2021 1st Reg. Sess.); WYO. STAT. ANN. § 6-4-101 (West, Westlaw through 2021 Gen. Sess.).

30. See, e.g., *Wooten v. Superior Court*, 113 Cal. Rptr. 2d 195, 197, 200–15 (Cal. Ct. App. 2001) (holding that a charge of prostitution requires sexual contact between parties).

31. See, e.g., *Files v. Bernal*, 22 P.3d 57, 59 (Ariz. Ct. App. 2001); see also *People v. DeBartolo*, 610 N.E.2d 131, 138 (Ill. Ct. App. 1993); *State v. Kittilstad*, 231 Wis. 2d 245, 259 (Wis. Sup. Ct. 1999).

32. See, e.g., *State v. Pegouskie*, 113 P.3d 811, 816–17 (Haw. Ct. App. 2005) (finding the requisite agreement for one charge of prostitution, but not for another); *Harwell v. State*, 821 N.E.2d 381, 383

State definitions of sexual activity for the purposes of prostitution vary.³³ Illinois, for example, requires that the sexual activity be “an act of sexual penetration,”³⁴ while North Carolina requires sexual intercourse.³⁵ Other states include fellatio,³⁶ cunnilingus,³⁷ assisted masturbation,³⁸ or “physical contact of [a] person’s clothed or unclothed genitals, pubic area, buttocks, [or] if such person be a female, breast”³⁹ as sexual activity for the purposes of prostitution.

Some states have explicitly excluded certain acts from the definition of sexual activity, including self-masturbation where there is no physical contact between parties;⁴⁰ sado-masochistic acts such as “foot licking, spanking, domination and

(Ind. Ct. App. 2004) (stating that “agreement is considered to be a meeting of the minds between the parties, a mutual understanding of all terms of the contract.”); *Commonwealth v. Potts*, 460 A.2d 1127, 1135 (Pa. Super. Ct. 1983) (finding that in a prostitution statute prohibiting engagement in sexual activity as business, the term “sexual activity” encompassed defendant’s “*agreement to perform, for hire, ‘sexual intercourse and fellatio’*”) (emphasis added).

33. There is no uniform definition for sexual activity across state statutes, though most states criminalize intercourse, anal sex, oral sex, and manual sexual stimulation of another. Georgia defines a “sexual act” broadly as “including but not limited to sexual intercourse or sodomy.” GA. CODE ANN. § 16-6-9 (West, Westlaw through 2021 Reg. Sess.). New Mexico defines “sexual act” as “sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or anal opening of another, whether or not there is any emission.” N.M. STAT. ANN. § 30-9-2 (West, Westlaw through 2021 1st Reg. Sess.). The Court of Appeals of New Mexico held that because “masturbation” was not statutorily defined, the statute did not criminalize erotic stimulation “by sexual fantasies” where no touching was involved. *Cf. State v. Mayfield*, 900 P.2d 358, 360–61 (N.M. Ct. App. 1995).

34. *People v. Martin*, 606 N.E.2d 1265, 1266 (Ill. App. Ct. 1992) (“[T]o sustain a charge of prostitution, the State must prove beyond a reasonable doubt that the defendant either performed, offered to perform, or agreed to perform an act of sexual penetration for money.”).

35. *State v. Richardson*, 300 S.E.2d 379, 380 (N.C. 1983) (determining that the state statute “unequivocally defines prostitution as an act of *sexual intercourse*, and nothing else”); *see also* Christopher R. Murray, *Grappling with “Solicitation”: The Need for Statutory Reform in North Carolina after Lawrence v. Texas*, 14 DUKE J. GENDER L. & POL’Y 681 (2007) (proposing revision to prostitution statute that criminalizes only vaginal intercourse between a man and woman).

36. *Fla. Bar v. Bryant*, 813 So. 2d 38, 42 (Fla. 2002) (convicting defendant of procuring a prostitute when the sexual act was limited to fellatio).

37. For example, New Hampshire and New Mexico include “cunnilingus” in statutory definitions of “sexual penetration” and “sexual act,” respectively. N.H. REV. STAT. ANN. § 632A:1 (West, Westlaw through 2021 Reg. Sess.); N.M. STAT. ANN. § 30-9-2 (West, Westlaw through 2021 1st Reg. Sess.).

38. *See People v. Warren*, 535 N.W.2d 173, 175 (Mich. 1995) (“[S]exual stimulation of a customer’s penis by direct manual contact, in exchange for money, is prostitution.”); *see also State v. Foster*, 356 N.W.2d 548, 550–51 (Iowa 1984) (finding that assisted masturbation, or a “hand job,” is a sexual act for prostitution purposes).

39. *State v. Oanes*, 543 N.W.2d 658, 661 (Minn. Ct. App. 1996) (determining breasts to be “intimate parts” under common law); *People v. Block*, 337 N.Y.S.2d 153, 156 (N.Y. Ct. Cl. 1972).

40. *See Commonwealth v. Bleigh*, 586 A.2d 450, 452–53 (Pa. Super. Ct. 1991) (stating that “self-masturbation for hire without any physical contact between performer and viewer is not the type of conduct intended to come within” the definition of sexual activity).

submission” where no other sexual activity is involved;⁴¹ and sexually suggestive acts where no other sexual activity is involved, such as sucking on another’s finger.⁴² The sexual act does not necessarily have to be performed on the individual paying compensation.⁴³ An individual who performs a sexual act on a third party for the viewing of a customer may, in some states, be charged with prostitution.⁴⁴

B. COMPENSATION

While some states criminalize the mere solicitation or negotiation of prospective prostitution,⁴⁵ others require actual compensation.⁴⁶ The compensation, however, does not need to be monetary. Courts have found compensation in a number of different circumstances. For example, a gold necklace was deemed compensation when offered in exchange for sexual services;⁴⁷ the purchase of “forty dollar drinks” constituted a “fee” for the purposes of prostitution;⁴⁸ and the purchase of a nude “private dance” which did not expressly call for sexual contact, but where contact ensued, was sufficient compensation to sustain a prostitution charge.⁴⁹ Moreover, some jurisdictions further stipulate that “in order to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification*” of either the customer or the sex worker.⁵⁰

C. INTENT

States also differ in requiring a finding of specific or general intent to support a conviction of prostitution.⁵¹ Strict liability in prostitution statutes—not requiring any finding of intent for a criminal conviction—is contrary to the purpose of the

41. *People v. Georgia A.*, 621 N.Y.S.2d 779, 781 (N.Y. Crim. Ct. 1994).

42. *See State v. Boyd*, 925 S.W.2d 237, 241 (Tenn. Crim. App. 1995) (finding no “sexual activity” in violation of prostitution statute where the two female defendants were naked, touched each other’s buttocks, and one of the defendants placed her face “near” the other’s genital area and sucked on undercover officer’s finger).

43. *See State v. Taylor*, 808 P.2d 314, 316 (Ariz. Ct. App. 1990) (finding defendant guilty of prostitution for fondling another woman’s breasts after an undercover detective paid to watch).

44. *See id.*

45. *Frieling v. State*, 67 S.W.3d 462, 470–71 (Tex. Ct. App. 2002) (determining that quoting prices for sexual services was sufficient for prostitution charge).

46. *See State v. Baxley*, 633 So. 2d 142, 145 (La. 1994) (“[M]ere discussion or solicitation without a financial aspect cannot constitute an attempt to engage in conduct prohibited.”).

47. *Muse v. United States*, 522 A.2d 888, 891 (D.C. 1987).

48. *State v. Jing Hua Xiao*, 231 P.3d 968, 977 (Haw. 2010).

49. *State v. Keawe*, 108 P.3d 304, 306 (Haw. 2005) (holding that the touching was not gratuitous because evidence showed that “a ‘private dance’ usually involved sexual contact for a fee”).

50. *Compare People v. Freeman*, 46 Cal. 3d 419, 424 (Cal. 1988) (holding that the filmmaker of a pornographic film was not guilty of pandering prostitution because the fees he paid were for the right to photograph actors engaging in consensual sex, not his own sexual gratification), *with State v. Taylor*, 808 P.2d 314, 316 (Ariz. Ct. App. 1990) (upholding conviction where undercover detective paid to watch defendant fondle a breast, pretextually for the detective’s own sexual gratification).

51. *Compare Ford v. State*, 262 P.3d 1123, 1126 (Nev. 2011) (construing prostitution statute as requiring a specific intent to become or remain a prostitute), *with State v. Allen*, 37 Conn. Supp. 506, 513 (Conn. Super. Ct. 1980) (“[A] general intent to do the proscribed act of one’s own volition is an element of the crime of prostitution.”).

criminal law and implicates defendants' due process rights.⁵² However, where the age of the defendant is relevant for criminal liability, in most circumstances as an aggravating factor, strict liability is permissible.⁵³

II. CRIMES RELATED TO PROSTITUTION

Performing sexual acts for a fee is not the only crime related to prostitution. Patronizing a sex worker and pandering or procuring an individual for the purpose of prostitution is also a crime under certain state statutes. Some states also have statutes that impose mandatory HIV and sexually transmitted disease testing and impose harsher penalties on those who engage in prostitution when knowingly infected with HIV or a sexually transmitted disease.

A. PATRONIZING A PROSTITUTE

Historically, prostitution laws were primarily enforced against sex workers, not their customers.⁵⁴ More recently, states have enacted statutes targeted at those who solicit sex workers.⁵⁵ Similar to prostitution statutes, these solicitation statutes criminalize paying, offering to pay, or agreeing to pay compensation for sexual activity.⁵⁶

Some states, however, have deliberately refused to criminalize the act of patronizing.⁵⁷ Other states criminalize patronizing under specific circumstances, such as the patronizing of a minor.⁵⁸ Yet, even in the absence of a specific statute

52. *Cf. Feliciano v. State*, 937 So. 2d 818, 819 (Fla. Dist. Ct. App. 2006) (finding no due process violation under Florida's strict liability statute for rape, which does not require the state to prove defendants' knowledge of a minor's age).

53. *Id.*

54. Elizabeth M. Johnson, *Buyers Without Remorse: Ending the Discriminatory Enforcement of Prostitution Laws*, 92 TEX. L. REV. 717, 720–22 (2014).

55. ARK. CODE ANN. § 5-70-103 (West, Westlaw through 2021 Reg. Sess.); COLO. REV. STAT. ANN. § 18-7-205 (West, Westlaw through 2021); CONN. GEN. STAT. ANN. § 53a-83 (West, Westlaw through 2021 Reg. Sess.); Del. Code Ann. tit. 11, § 1343 (West, Westlaw through 2021); IDAHO CODE ANN. § 18-5614 (West, Westlaw through 2021 1st Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/11-18 (West, Westlaw through 2021); IND. CODE ANN. § 35-45-4-3 (West, Westlaw through 2021 1st Reg. Sess.); N.Y. Penal Law § 230.02 (McKinney, Westlaw through 2021); UTAH CODE ANN. § 76-10-1303 (West, Westlaw through 2021 1st Sess.); WASH. REV. CODE ANN. § 9A.88.110 (West, Westlaw through 2021).

56. *See id.*

57. *See, e.g., State v. Espinosa*, 210 P.3d 1, 2 (Haw. Ct. App. 2009).

58. *See* COLO. REV. STAT. ANN. § 18-7-406 (West, Westlaw through 2021 1st Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/11-18.1 (West, Westlaw through 2021 Reg. Sess.); Me. Rev. Stat. Ann. tit. 17-A, § 855 (West, Westlaw through 2021 Reg. Sess.); MONT. CODE ANN. § 45-5-601 (West, Westlaw through 2021); N.C. GEN. STAT. ANN. § 14-205.2(c) (West, Westlaw through 2021 Reg. Sess.); S.C. CODE ANN. § 16-15-425 (West, Westlaw through 2021). In contrast, regarding minor customers, multiple states have enacted legislation that precludes prosecution of minors or children under the age of sixteen for the offense of prostitution. Assemb. B. 4352, 230 Leg. Sess. (N.Y. 2007); WASH. REV. CODE ANN. § 13.40.219 (West, Westlaw through 2021) (statute presuming that any minor engaging in prostitution is a victim of commercial sex abuse of a minor and meets the criteria for certification as a victim of a severe form of trafficking in persons); *see also* TENN. CODE ANN. § 39-13-514(4) (West, Westlaw through 2021 Reg. Sess.) (children under eighteen cannot be charged with prostitution); CONN. GEN. STAT. ANN. § 53a-82 (West, Westlaw through 2021 Reg. Sess.) (children under eighteen cannot be charged with prostitution); N.Y. SOC. SERV. LAW § 447-a, b (McKinney, Westlaw through 2021, Ch. 1-

against patronization, customers can nonetheless be charged with solicitation.⁵⁹ In contrast, some state courts have held that laws against prostitution apply equally to sex workers and customers.⁶⁰ Similarly, many state statutes treat sex workers and customers equally, applying the same penalties for both.⁶¹

Despite state legislatures' attempt to create concrete rules regarding punishment in state prostitution law, inequities still exist in the enforcement of such prostitution laws. At least in the 1990s, customers were rarely charged.⁶² For example, in 1990, the Boston Municipal Court did not arraign any customers for patronizing a sex worker.⁶³ In general, women are arrested and prosecuted more often and sentenced more harshly than their male customers.⁶⁴ Some argue that the differential treatment of sex workers and customers is due to a "sexual double standard," in which men's sexual behavior is excused while women are punished for essentially identical behavior.⁶⁵ Proponents of the status quo, conversely, contend that punishing those who sell prohibited services "whose profit motivation could lead him or her to violate the law more frequently than potential customers" effectively reduces the supply of commercial sex.⁶⁶ Arresting sex workers, however, may be an ineffective way to combat illegal sex work. Instead, many advocate for punishing "johns," or buyers, and pimps instead of sex workers.⁶⁷

B. PANDERING AND PROCURING

Several states also have statutes against pandering or procuring an individual for the purpose of prostitution.⁶⁸ Pandering statutes have been broadly

451, 453-484) (children under eighteen cannot be charged with prostitution); MICH. COMP. LAWS ANN. § 750.448 (West, Westlaw through 2021 Reg. Sess.) (children under sixteen cannot be charged with prostitution).

59. N.C. GEN. STAT. ANN. § 14-205.1 (West, Westlaw through 2021 Reg. Sess.); WIS. STAT. ANN. § 944.32 (West, Westlaw through 2021); LA. STAT. ANN. § 14:84 (West, Westlaw through 2021); D.C. CODE ANN. § 22-2701 (West, Westlaw through September 22, 2021); COLO. REV. STAT. ANN. § 18-7-202 (West, Westlaw through 2021).

60. *See, e.g.*, *Leffel v. Mun. Court*, 126 Cal. Rptr. 773, 777 (Cal. Ct. App. 1976) (stating that the statutory prohibition against solicitation applies to both prostitutes and customers).

61. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 53A (West, Westlaw through Chapter 29 of the 2021 1st Ann. Sess.).

62. Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990*, 4 YALE J.L. & FEMINISM 329, 333 (1992).

63. *Id.*

64. Alexandra Bongard Stremler, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 FLA. J.L. & PUB. POL'Y 189, 194 (1995).

65. Julie Leffler, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 12 (1999).

66. *State v. Tookes*, 699 P.2d 983, 988 (Haw. 1985).

67. Bingham, *supra* note 7, at 91 (focusing on arresting sex workers "is an ineffective way to curb prostitution and secondarily victimizes women." Instead, a focus on punishing "johns" and pimps may help break the cycle of victimization).

68. ARIZ. REV. STAT. ANN. § 13-3209 (West, Westlaw through 2021); CAL. PENAL CODE § 266i (West, Westlaw through 2021 Reg. Sess.); COLO. REV. STAT. ANN. § 18-7-203 (West, Westlaw through 2021 1st Reg. Sess.); D.C. CODE ANN. § 22-2705 (West, Westlaw through Sept. 22, 2021); GA. CODE ANN. § 16-6-12 (West, Westlaw through 2021 Reg. Sess.); IOWA CODE ANN. § 725.3 (West, Westlaw

interpreted, with “pandering,” “procuring,” and “pimping” being used synonymously in many jurisdictions.⁶⁹ Generally, pandering statutes prohibit inducing an individual to commit prostitution and procuring individuals for the purpose of prostitution. More specifically, pandering has been defined as “intentionally maintaining a place where prostitution is habitually practiced,” “[receiving] the earnings of a prostitute,” “procuring or inducing a female to become an inmate of a house of prostitution or to become a prostitute,” or “transporting a person from one place to another for the purpose of promoting the practice of prostitution.”⁷⁰

Under some statutes, one who procures a sex worker for another person and subsequently receives compensation is guilty of pandering.⁷¹ However, compensation is not always necessary for liability. For example, in some jurisdictions, one who arranges clientele for a sex worker but does not receive money may also be guilty of pandering.⁷² Patrons of a sex worker may also be convicted under a pandering statute.⁷³ A person who manages a business or enterprise that profits from allowing prostitution on its premises may also be guilty of pandering or procuring a sex worker.⁷⁴

C. HEALTH AND SEXUALLY TRANSMITTED DISEASES

Since the 1990s, public health officials have taken an interest in prostitution due to the links between multiple sex partners, intravenous drug use, and HIV transmission.⁷⁵ The first known feminist challenge to society’s treatment of sex workers related to an early statute aimed at protecting public health, the Contagious Disease Acts of 1869, under which women believed to be prostitutes were subjected to forced medical examinations, while their male clients were

through 2021 Reg. Sess.); LA. STAT. ANN. § 14:84 (West, Westlaw through 2021 Reg. Sess.); MICH. COMP. LAWS ANN. § 750.455 (West, Westlaw through 2021); NEB. REV. STAT. ANN. § 28-802 (West, Westlaw through 2021 1st Reg. Sess.); NEV. REV. STAT. ANN. § 201.300 (West, Westlaw through 2021 81st Reg. Sess.); tit. 11 R.I. GEN. LAWS ANN. § 11-34.1-7 (West, Westlaw through Chapter 424 of the 2021 Reg. Sess.); WIS. STAT. ANN. § 944.33 (West, Westlaw through 2021).

69. 63C Am. Jur. 2d, *supra* note 28, at § 17.

70. *Id.* at § 15.

71. *See* United States v. Brown, 273 F.3d 747, 749 (7th Cir. 2001) (citing *Lutes v. Commonwealth*, 33 S.W.2d 620, 622 (Ky. Ct. App. 1930)), *rev’d on other grounds sub nom.* Brown v. Rios, 696 F.3d 638, 643-44 (7th Cir. 2012).

72. *People v. Hashimoto*, 54 Cal. App. 3d 862, 866 (Cal. Dist. Ct. App. 1976); *see* *People v. Bowman*, No. A126930, 2011 WL 1606286, at *4-6 (Cal. Ct. App. Apr. 28, 2011).

73. *See, e.g., Stanifer v. State*, 849 P.2d 282, 285 (Nev. 1993); *Fluker v. State*, 282 S.E.2d 112, 115 (Ga. 1981).

74. *See, e.g., Hood v. Commonwealth*, 230 S.W.3d 596, 599 (Ky. Ct. App. 2007).

75. Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 428 (1998); *see also* Amanda Kloer, *Sex Trafficking and HIV/AIDS: A Deadly Junction for Women and Girls*, 37 Hum. Rts. 2, 8 (2010) (discussing sex trafficking victims’ heightened vulnerability to HIV); *HIV Risk Among Persons Who Exchange Sex for Money or Nonmonetary Items*, Center for Disease Control, <https://www.cdc.gov/hiv/group/sexworkers.html> (last updated Nov. 12, 2019) (discussing heightened risk of HIV and other STDs among sex workers and factors making it difficult to prevent exchange of such diseases).

not.⁷⁶ The focus on sexually transmitted diseases and prostitution was fueled by increased evidence of gonorrhea and syphilis during World War I.⁷⁷ Yet, even after penicillin was discovered as an effective treatment for gonorrhea and syphilis, the treatment was more available to sex workers' customers and the general public than to sex workers themselves.⁷⁸

Some states specifically criminalize the act of engaging in prostitution while infected with HIV or another sexually transmitted disease.⁷⁹ In Kentucky, for example, convicted sex workers are required to undergo HIV testing, and it is a Class A misdemeanor to engage in prostitution after having been diagnosed with a sexually transmitted disease.⁸⁰ Committing prostitution while knowing that one has HIV, or inducing another to do the same, is a Class D felony in Kentucky.⁸¹

Some states, like Kentucky, mandate testing for individuals convicted of prostitution, though not for the customers of sex workers.⁸² Other states also require testing for sexually transmitted diseases for both sex workers and customers.⁸³ Despite legislation that mandates testing, sex workers often cannot access public health services.⁸⁴ Abuse at the hands of both pimps and customers may also make it more difficult for women engaged in prostitution to demand consistent condom usage to prevent the spread of HIV.⁸⁵ It is even more difficult for victims of human trafficking to demand consistent condom usage, especially minors who do not have the ability to successfully negotiate condom usage or may not understand the importance of condom usage.⁸⁶

76. DeCou, *supra* note 75, at 429–30.

77. *Id.* at 438.

78. *Id.* at 445–46.

79. See FLA. STAT. ANN. § 796.08(5) (West, Westlaw through 2021 1st Reg. Sess.) (engaging in prostitution while knowingly infected with a sexually transmitted disease is a misdemeanor; doing so with HIV is a third degree felony); TENN. CODE ANN. § 39-13-516 (West, Westlaw through 2021 Reg. Sess.) (engaging in prostitution while knowingly infected with HIV is “aggravated prostitution,” a Class C felony); UTAH CODE ANN. § 76-10-1309 (West, Westlaw through 2021) (engaging in prostitution while knowingly infected with a sexually transmitted disease is a misdemeanor; doing so with HIV is a third degree felony).

80. KY. REV. STAT. ANN. § 529.090 (West, Westlaw through 2021 Reg. Sess.).

81. *Id.*

82. See, e.g., W. VA. CODE ANN. § 16-3C-2 (West, Westlaw through 2021 1st Spec. Sess.); tit. 11 R.I. GEN. LAWS ANN. § 11-34-10 (repealed 2009).

83. See 730 ILL. COMP. STAT. ANN. 5/5-5-3(g) (West, Westlaw through 2018 Reg. Sess.).

84. See Michele R. Decker et. al., *Human Rights Violations Against Sex Workers: Burden and Effect on HIV*, LANCET (July 22, 2014), [http://dx.doi.org/10.1016/S0140-6736\(14\)60800-X](http://dx.doi.org/10.1016/S0140-6736(14)60800-X).

85. DeCou, *supra* note 75, at 446–47.

86. Alison Phinney, *Trafficking of Women and Children for Sexual Exploitation in the Americas*, WOMEN, HEALTH & DEV. PROGRAM, 5–6, (2001), <http://www1.paho.org/english/hdp/hdw/traffickingPaper.pdf>. Sex trafficking refers to the forced migration of individuals into and within national borders for the purposes of performing sex work under coercive conditions; See Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2981 (2006). Although this article will not delve into sex trafficking law, the relationship between prostitution legislation and sex trafficking is notable. For a discussion of the historical relationship between prostitution law and sex trafficking, see Rebecca L. Wharton, *A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, 16 WM. & MARY J. WOMEN & L. 753, 759 (2010) (tracking how changes in prostitution law, and

III. DEFENSES TO PROSTITUTION CHARGES

A. RECOGNIZED DEFENSES

Courts recognize two defenses against prostitution charges: 1) marriage, and 2) entrapment. Both of these defenses apply to charges of prostitution and charges of patronizing or soliciting.

Marriage is a valid defense to a prostitution charge. A man who buys his wife a dress in return for a sexual act cannot be prosecuted for prostitution, but a man who buys a dress for a sex worker in exchange for a sexual act may be prosecuted.⁸⁷ This uneven application of the law does not violate the Equal Protection Clause of the Fourteenth Amendment because of the expanded zone of privacy attached to the marital relationship.⁸⁸ In addition, as one court observed, the “attendant evils” associated with commercial sex, such as the spread of venereal diseases and organized crime, are usually not present when sexual conduct occurs between married partners.⁸⁹

The defense of marriage, however, is not absolute; it is not a viable defense when one spouse exploits the other for purposes of prostitution.⁹⁰ The courts grant marital relationships a special degree of privacy and do not intrude to determine whether spouses are exchanging sexual favors for money or gifts.⁹¹ However, that privacy is limited, and the state may intrude, if a married couple invites onlookers into their home to watch their sexual encounters.⁹²

the consequent “supply” of sex workers, impacts sex trafficking). Additionally, for a review of U.S. policy attempts to curb sex trafficking through national legislation, see Susan Tiefenbrun, *The Saga of Susannah - A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 114–15 (2002) (arguing that “specific enforceable trafficking laws aimed at the prevention of the crime, prosecution of the perpetrator, and protection of the victim” must be enacted nationally and globally to combat lax enforcement against trafficking in many countries currently); see also LeRoy G. Potts, Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT’L L. REV. 227, 227 (2003) (suggesting ways in which the United Nations and member states can more effectively stop trafficking, following the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children). States may also combat trafficking through enforcement of strict penalties for offenders; tougher penalties without an investment in relevant law enforcement training, however, may amount only to superficial solutions. See Priscila A. Rocha, *Our Backyard Slave Trade: The Result of Ohio’s Failure to Enact Comprehensive State-Level Human-Sex-Trafficking Legislation*, 25 J.L. & HEALTH 381, 442 (2012) (arguing that despite tougher trafficking penalties in Ohio, law enforcement will be ineffective in combating sex trafficking if officers continue to receive inadequate training in identifying victims and perpetrators).

87. See *State v. Romano*, 155 P.3d 1102, 1110–15 (Haw. 2007). But see *State v. Jing Hua Xiao*, 231 P.3d 968, 977 (Haw. 2010) (stating that \$40 drinks did not constitute a “fee” that bought sexual conduct).

88. See *People v. Mason*, 642 P.2d 8, 12 (Colo. 1982) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

89. See *Cherry v. Koch*, 491 N.Y.S.2d 934, 945–46 (N.Y. Sup. Ct. 1985).

90. *Id.* at 945.

91. See, e.g., *Thaeter v. Palm Beach Cty. Sheriff’s Office*, 449 F.3d 1342, 1353 n.8 (11th Cir. 2006).

92. *Id.*

Historically, courts did not permit non-marital relationship defenses to prostitution charges.⁹³ State courts today, consistent with the historical view, prohibit non-marital cohabiting partners from raising a valid defense to prostitution charges based on their relational status.⁹⁴

Entrapment is a valid defense for both sex workers and customers where the defendant can show that a state official induced her or him to perform a proscribed act that he or she was not predisposed to perform.⁹⁵ A defendant may also raise an entrapment defense in cases involving a non-police decoy or victim or in cases involving state officials working with a decoy or victim.⁹⁶ However, an entrapment defense will fail if the intent to commit the criminal act originated with the defendant or the police only afforded the opportunity to commit the proscribed act.⁹⁷

Courts have reached contradictory results about the availability of an entrapment defense where the accused denies committing the crime. Some courts have held that defendants need not admit to committing a crime in order to raise an entrapment defense.⁹⁸ Other courts have found that the defense cannot be raised without admitting to the crime of prostitution.⁹⁹

93. See *Wilson v. United States*, 167 F.2d 223 (6th Cir. 1948) (refusing to recognize a common-law marriage defense to prostitution charge under the Mann Act).

94. See *State v. Varner*, 643 N.W.2d 298, 307 (Minn. 2002); see also *Della Zoppa v. Della Zoppa*, 86 Cal. App. 4th 1144, 1148–49 (Cal. Ct. App. 2001) (finding that no prostitution occurred but claiming that, with respect to prostitution, non-marital coupledness is no defense).

95. See, e.g., *Strong v. State*, 591 N.E.2d 1048, 1050–51 (Ind. Ct. App. 1992) (holding that the trial court erred in refusing to give instruction on entrapment defense where defendant showed that the defendant was not predisposed to prostitution in police encounter where the police officer raised the subject of sexual activity and where the defendant denied agreeing to commit a sexual act upon the police officer in return for remuneration).

96. Gregory G. Sarno, Annotation, *Entrapment Defense in Sex Offense Prosecutions*, 12 A.L.R. 4th 413 § 2[a] (2009).

97. See *Rubey v. City of Fairbanks*, 456 P.2d 470, 476 (Alaska 1969) (finding entrapment unavailable to defendant who showed predisposition to illegal act where defendant, the alleged prostitute, stated her willingness to meet undercover decoy at hotel and gave her “price” as \$50 in response to decoy’s question of whether he could “see” her that night); see also *Hill v. State*, 166 S.E.2d 338, 340 (Ga. 1969) (stating “there is no entrapment to commit a crime where the officer merely furnishes an opportunity to a defendant who is ready to commit the offense”).

98. See, e.g., *State v. Rokos*, 771 So. 2d 47, 49 (Fla. Dist. Ct. App. 2000) (citing *Wilson v. State*, 577 So. 2d 1300, 1302 (Fla. 1991)) (“[W]here the circumstances are such that there is no inherent inconsistency between claiming entrapment and yet not admitting commission of the criminal acts, certainly the defendant must be allowed to raise the defense of entrapment without admitting the crime.”); cf. *Parrott v. Mun. of Anchorage*, 69 P.3d 1, 6 (Alaska Ct. App. 2003) (stating that a claim of self-incrimination does not exist where the defendant, who is claiming an entrapment defense, is not forced to admit that he in fact partook in prostitution).

99. See, e.g., *Torres v. State*, No. 14-00-01221, 2002 WL 370014, at *2 (Tex. App. Mar. 7, 2002) (citing *Norman v. State*, 588 S.W.2d 340, 345 (Tex. Crim. App. 1979)) (stating that “if the defendant denies that she committed the offense, she will not be entitled to an entrapment instruction.”); *People v. Hendrickson*, 45 P.3d 786, 791 (Colo. App. 2001) (holding that because entrapment is an affirmative defense, it does not apply where a defendant denies committing the crime).

B. DEFENSES NOT RECOGNIZED

Courts have generally refused to recognize other defenses to prostitution. Consent to the crime is not a legitimate defense,¹⁰⁰ nor is impossibility of completing the agreed upon sexual act.¹⁰¹ Similarly, it is not a defense to claim that the defendant has been deceived¹⁰² nor that sexual acts between members of the same sex offered in exchange for financial compensation do not constitute prostitution.¹⁰³

IV. LEGAL MODELS OF REGULATION AND DECRIMINALIZATION

As of November 2009, the only state that does not entirely outlaw the exchange of sexual activity for compensation is Nevada.¹⁰⁴ Until a November 2009 bill that closed a loophole in Rhode Island's laws permitting indoor prostitution, Rhode Island presented a legal model of decriminalized prostitution.¹⁰⁵ Unlike legislators in Nevada, legislators in Rhode Island did not take steps to regulate prostitution.¹⁰⁶ Nevada's current laws, and Rhode Island's laws prior to the passage of the November 2009 bill, thus represent two different legal models: regulation and decriminalization. Additionally, cities have enacted various forms of regulation and decriminalization of prostitution, with differing results.

A. PROSTITUTION IN NEVADA

Nevada decriminalized prostitution in 1971, amending its laws regulating gambling and dance halls.¹⁰⁷ The 1971 amendment provided that in "a county whose population is 250,000 or more, the license board shall not grant any license to a petitioner for the purpose of operating a house of ill fame or repute or any other business employing any person for the purpose of prostitution."¹⁰⁸ In 1978, the Supreme Court of Nevada officially ruled that this new statutory licensing

100. *Dornbusch v. State*, 156 S.W.3d 859, 871 (Tex. App. 2005) ("A prostitute's consent to sex in exchange for money does not make the conduct legal.").

101. *Files v. Bernal*, 22 P.3d 57, 59 (Ariz. Ct. App. 2001) (finding that even where it is not possible that the act agreed upon could have taken place, solicitation is still prosecuted).

102. *Alexandra v. DeAngelo*, 329 F.3d 912, 915 (7th Cir. 2003) (citing *United States v. Simpson*, 813 F.2d 1462, 1466–68, n.4 (9th Cir. 1987)) (determining that the fact that a prostitute was working with police to "trick" a defendant into having sex is not a defense to a charge of prostitution).

103. See CONN. GEN. STAT. ANN. § 53a-82 (West, Westlaw through 2017 Jan. Reg. Sess.); DEL. CODE ANN. tit. 11, § 1342 (West, Westlaw through 2017); N.Y. PENAL LAW § 230.00 (McKinney, Westlaw through 2017 Reg. Sess.); WASH. REV. CODE ANN. § 9A.88.030 (West, Westlaw through 2017 3d Spec. Sess.).

104. NEV. REV. STAT. ANN. §§ 201.354(1), 244.345(8) (West, Westlaw through 2017 Reg. Sess.).

105. See Simmi Aujla & Jennifer Levitz, *Legal Prostitution Under Pressure in Rhode Island*, WALL ST. J. (Sept. 5, 2009), <https://www.wsj.com/articles/SB125210953971287935>.

106. *Id.*

107. Law, *supra* note 1, at 553, 559. For a discussion of the merits of legalization, see Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1922–25 (1987).

108. NEV. REV. STAT. ANN. § 244.345(8) (Michie 1995).

scheme permitted houses of prostitution outside of incorporated towns and cities.¹⁰⁹

Today, prostitution in Nevada is a regulated profession. Exchange of sexual activity for compensation is allowed only in licensed brothels and only in counties with a population less than 700,000.¹¹⁰ Each eligible county individually decides whether to allow prostitution.¹¹¹ The decision can be made by official policy (e.g., ordinances) or through public referenda.¹¹² Currently, prostitution is completely illegal in six counties: Carson City,¹¹³ Clark,¹¹⁴ Douglas,¹¹⁵ Lincoln,¹¹⁶ Pershing,¹¹⁷ and Eureka.¹¹⁸ Prostitution is legal everywhere within the borders of seven counties: Churchill,¹¹⁹ Esmeralda,¹²⁰ Lander,¹²¹ Lyon,¹²² Mineral,¹²³ Nye,¹²⁴ and Storey.¹²⁵ Prostitution is permitted, except in unincorporated areas, in four counties: Elko,¹²⁶ Humboldt,¹²⁷ Washoe,¹²⁸ and White Pine.¹²⁹

Regulatory schemes vary in each county because local and state officials have significant discretion in granting licenses and regulating sex workers.¹³⁰ Several counties that permit prostitution restrict some activities based on gender. For example, Churchill County defines a prostitute as a “female person . . . who engages in acts of prostitution with a patron” and patron as a “male person twenty one (21) years of age or older who provides a fee to a prostitute for any act or acts

109. *Nye County v. Plankinton*, 587 P.2d 421, 423 (Nev. 1978) (reasoning that Nevada Revised Statutes Sections 244.345(8) and 244.345(1), when read together, manifested a statutory licensing scheme that repealed the common-law rule that a house of prostitution constitutes a nuisance per se).

110. NEV. REV. STAT. ANN. §§ 201.354(1), 244.345(8) (West, Westlaw through 79th Reg. Sess. 2017).

111. *Kuban v. McGimsey*, 605 P.2d 623, 625–26 (Nev. 1980) (finding that the state reserved the total ban question to the counties but demanded licensing in counties where brothels were allowed, and the county’s electorate was vested with the power to prohibit such schemes if it chose to do so).

112. *Id.*

113. Carson City, NEV. CODE tit. 8, § 8.04.110 (1980).

114. Clark County, NEV. CODE ch. 6.140, § 6.140.150 (1988), ch. 7.54, § 7.54.160 (1933), ch. 8.50, § 8.50.010 (1991), ch. 12.08, § 12.08.015 (1987).

115. Douglas County, NEV. CODE ch. 9.20, §§ 9.20.010 to 9.20.050 (1995).

116. Lincoln County, NEV. CODE tit. 7, ch. 2, § 7-2-1 (1983).

117. Pershing County, NEV. CODE ch. 9.08, §§ 9.08.010 to 9.08.050 (1972).

118. Eureka County, NEV. CODE ch. 60, §§ 60.10 to 60.30 (2018).

119. Churchill County, NEV. CODE ch. 5.20 §§ 5.20.010 to 5.20.370 (2005).

120. Esmeralda County, NEV. ORDINANCE 124 (1972).

121. Lander County, NEV. CODE ch. 5.16, §§ 5.16.010 to 5.16.140 (1994).

122. Lyon County, NEV. CODE tit. 5, ch. 3, §§ 5.03.01 to 5.03.17 (1990).

123. Mineral County, NEV. CODE ch. 5.12, §§ 5.12.010 to 5.12.170 (2005).

124. Nye County, NEV. CODE ch. 9.20, §§ 9.20.010 to 9.20.280 (2012).

125. Storey County, NEV. CODE ch. 5.16, §§ 5.16.010 to 5.16.200 (2009).

126. Elko County, NEV. CODE tit. 7, ch. 1, § 7-1-6 (1978).

127. Humboldt County, NEV. CODE ch. 5.08, § 5.08.030 (1994).

128. Washoe County, NEV. CODE tit. 50, §§ 50.238 to 50.242 (2012).

129. White Pine County, NEV. CODE ch. 10.36, §§ 10.36.010 to 10.36.040 (1980).

130. Bingham, *supra* note 7, at 88–89. A board of county commissioners holds significant power regarding the granting or revocation of brothel licenses. Local sheriffs exercise control over unincorporated parts of the county and public officials apply extralegal rules regarding the activities of brothel workers, including regulating when prostitutes may go into town or change employment, and promoting general authoritative control over prostitutes. *See id.*

of prostitution.”¹³¹ Mineral County bars brothels from employing male prostitutes or allowing male employees to reside on the premises.¹³²

To prevent potential violence against sex workers, brothels may refuse entry to drunk or rowdy individuals, as well as women not employed by the brothel who are thought to be jealous wives or girlfriends.¹³³ To avoid pimping, Nevada law makes it illegal for anyone to live off the earnings of a sex worker¹³⁴ and many counties require that brothel owners and managers be female.¹³⁵

The most regulated aspect of prostitution in Nevada is the health of sex workers.¹³⁶ To avoid the spread of sexually transmitted diseases, Nevada law requires sex workers to use condoms for every relevant sexual encounter and to submit to weekly Sexually Transmitted Infections (STI) testing and monthly HIV testing.¹³⁷ Individuals who engage in prostitution work after testing positive for exposure to HIV are guilty of a Category B felony.¹³⁸ Additionally, the manager of a brothel must post health notices and notify health authorities when any worker contracts a communicable disease.¹³⁹ However, these regulations do not necessarily protect a sex worker from being exposed to a client with a sexually transmitted disease.¹⁴⁰

These regulations aim to keep prostitution inside licensed brothels rather than private homes or hotels.¹⁴¹ Nonetheless, despite these efforts to control and regulate prostitution, illegal—i.e. unlicensed—prostitution continues to flourish in Nevada, particularly in large cities like Las Vegas.¹⁴²

B. PROSTITUTION IN RHODE ISLAND

Between 1980 and 2009, Rhode Island statutes outlawed sexual pandering,¹⁴³ loitering for the purpose of prostitution,¹⁴⁴ and soliciting from motor vehicles for

131. Churchill County, NEV. CODE ch. 5.20 § 5.20.010 (2005).

132. Mineral County, NEV. CODE ch. 5.12, § 5.12.140 (2005).

133. Hough, *supra* note 5, at 114.

134. NEV. REV. STAT. ANN. § 201.320 (West, Westlaw through 2017 79th Reg. Sess.).

135. Hough, *supra* note 5, at 114.

136. Bingham, *supra* note 7, at 89; NEV. ADMIN. CODE § 441A.805 (2017) (sex worker must use “a latex or polyurethane prophylactic while the sex worker is engaging in any form of sexual intercourse involving the insertion of the penis into the vagina, anus or mouth of the patron, oral-genital contact or any touching of the sexual organs or other intimate parts of a person”).

137. *Id.*

138. NV LEGIS 491 (2021), 2021 Nevada Laws. Ch. 491 (S.B. 275).

139. Bingham, *supra* note 7, at 90.

140. *Id.* at 89.

141. *Id.*

142. Jenny Heineman, Rachel MacFarlane & Barbara G. Brents, *Sex Industry and Sex Workers in Nevada*, THE SOCIAL HEALTH OF NEVADA: LEADING INDICATORS AND QUALITY OF LIFE IN THE SILVER STATE, 12 (Dmitri N. Shalin, ed., 2012), http://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1023&context=social_health_nevada_reports.

143. tit. 11 R.I. GEN. LAWS § 11-34-1, *repealed by* tit. 11 R.I. GEN. LAWS § 11-34.1-7 (West, Westlaw through 2017 Jan. Sess.).

144. tit. 11 R.I. GEN. LAWS § 11-34-8, *repealed by* tit. 11 R.I. GEN. LAWS § 11-34.1-7 (West, Westlaw through 2017 Jan. Sess.).

indecent purposes.¹⁴⁵ However, there was no law in Rhode Island outlawing prostitution indoors among consenting adults.¹⁴⁶ Prostitution was once a felony in Rhode Island, but the state's prostitution statutes were rewritten in 1980 following a lawsuit where a group of female sex workers challenged the constitutionality of the statutes by claiming that the Providence police enforced the law primarily, and disproportionately, against women.¹⁴⁷ Public opposition to the most visible forms of prostitution and a desire to speed up prosecution may have also motivated the legislature to pass the 1980 amendment.¹⁴⁸

The lack of a clear statutory prohibition led a Rhode Island District Court to drop prostitution charges against women accused of committing prostitution indoors.¹⁴⁹ Rhode Island law enforcement officials continued to raid massage parlors and arrest individuals suspected of prostitution, but those individuals were generally charged with either practicing massage without a license or pandering rather than prostitution.¹⁵⁰

Prior to the criminalization of indoor prostitution, in an effort to crack down on prostitution, legislators introduced bills to perform criminal background checks on persons applying for massage licenses¹⁵¹ and to criminalize prostitution in brothels and massage parlors.¹⁵² The legislature also attempted to increase the penalties for sexual pandering and to repeal the motor vehicle section from the statutory definition of prostitution, replacing it with language making prostitution illegal both indoors and outdoors.¹⁵³ After the passage of the 2009 bill, police had authority to raid the thirty brothels they suspected of operation in Rhode Island.¹⁵⁴

145. tit. 11 R.I. GEN. LAWS § 11-34-8.1, *repealed by* tit. 11 R.I. GEN. LAWS § 11-34.1-7 (West, Westlaw through 2017 Jan. Sess.).

146. Aujla, *supra* note 105.

147. Between 1974 and 1977, Rhode Island police arrested 846 women under laws prohibiting "lewd, wanton or lascivious" behavior and all were charged with prostitution. During the same years, 251 men were arrested, and "[t]here is dispute as to whether more than 3 of these males were actually charged." Coyote v. Roberts, 502 F. Supp. 1342, 1352-53 (D.R.I. 1980), *opinion supplemented by* Coyote v. Roberts, 523 F. Supp. 352 (D.R.I. 1981).

148. *See* State v. DeMagistris, 714 A.2d 567, 574 (R.I. 1998) ("Indeed, what little legislative history exists suggests that the major revision to this section in 1980 . . . was inspired by public outcry over a rash of overt streetwalking in the West End of the city of Providence.") (internal citation omitted); Aujla, *supra* note 105.

149. Aujla, *supra* note 105.

150. Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health*, THE REV. ECON. STUD., 1686-87 (2017), <https://academic.oup.com/restud/advance-article/doi/10.1093/restud/rdx065/4756165>.

151. Lynn Arditi, *How R.I. Opened the Door to Prostitution*, PROVIDENCE J. (Nov. 14, 2014), <http://www.providencejournal.com/news/content/20141114-5-31-2009-how-r.i.-opened-the-door-to-prostitution---broken-legal-barriers-made-public-nuisance-a-private-act.ece>.

152. Breton, *supra* note 21.

153. tit. 11. R.I. GEN. LAWS § 11-34.1-2, *repealed by* tit. 11 R.I. GEN. LAWS § 11-34.1-7 (West, Westlaw through 2017 Jan. Sess.).

154. Ray Henry, *RI Closes Loophole That Allowed Indoor Prostitution*, S. COAST TODAY (Nov. 3, 2009), <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20091103/NEWS/911039993/-1/rss01&updfcache=1>.

C. OTHER LOCAL REGULATORY EFFORTS

Many cities have enacted ordinances that both decriminalize and regulate prostitution. St. Louis was one of the first cities to enact a regulation ordinance in 1870.¹⁵⁵

Many other states have laws mandating a minimum age at which an individual can be charged with prostitution.¹⁵⁶ Because federal law does not allow minors to be charged with the crime of prostitution, reformers are calling for the remaining states to amend their laws to conform to this national standard.¹⁵⁷ Reformers also argue that because minors cannot consent to sexual activity, they should not be charged with the crime of prostitution.¹⁵⁸

Cities have tolerated prostitution in specific areas at various times, generally meaning that police have refrained from arresting sex workers and buyers of sex. For example, Chicago police tolerated prostitution in certain areas of the city until gentrification occurred in the early twenty-first century and residents began to organize against sex work.¹⁵⁹

Similarly, San Francisco created a task force in the mid-1990s to address the issue of prostitution.¹⁶⁰ The task force recommended that the city stop enforcing or prosecuting prostitution offenses and instead direct the money previously spent on prosecuting prostitution offenses to social services for needy constituents.¹⁶¹ Despite these recommendations, the citizens of San Francisco and Berkeley have voted against decriminalizing or legalizing prostitution.¹⁶² In 2004, the “Angel’s Initiative,” named after a murdered sex worker, would have instructed city police to treat the enforcement of prostitution laws as their lowest priority.¹⁶³ The initiative was defeated with approximately sixty-four percent of voters voting against it.¹⁶⁴

In 2008, sex workers and human rights advocates in San Francisco placed Proposition K on the ballot to eliminate the power of local police to enforce prostitution statutes against local sex workers.¹⁶⁵ Many politicians argued that

155. Bingham, *supra* note 7, at 74.

156. See statutes cited *supra* note 55.

157. K. Michael Baker, *Time for Change: Handling Child Prostitution Cases in Georgia*, 4 J. MARSHALL L.J. 177, 190 (2011).

158. *Id.* at 190.

159. Andrea Callow, *Addressing the Causes Behind the Chicago Sex Trade*, 16 PUB. INT. L. REP. 103, 104 (2011).

160. S.F. Task Force on Prostitution, Final Report, *supra* note 10.

161. *Id.*

162. Marisa Lagos, *Election Results for San Francisco Propositions*, SFGATE (Nov. 5, 2008), <http://www.sfgate.com/politics/article/Election-results-for-San-Francisco-propositions-3187007.php>.

163. Carolyn Marshall, *Bid to Decriminalize Prostitution in Berkeley*, N.Y. TIMES (Sept. 14, 2004), <http://www.nytimes.com/2004/09/14/national/14porn.html>.

164. City of Berkeley, General Municipal Election November 2, 2004 Official Results (2004), <http://www.ci.berkeley.ca.us/uploadedFiles/Clerk/Elections/110204resultsfinal.pdf>.

165. Jesse McKinley, *San Francisco’s Prostitutes Support a Proposition*, N.Y. TIMES (Oct. 31, 2008), http://www.nytimes.com/2008/11/01/us/01prostitute.html?_r=0.

decriminalization would hurt law enforcement efforts to prevent human trafficking.¹⁶⁶ Proponents of the measure countered, unsuccessfully, that decriminalization would increase sex worker safety and reporting of violence during commercial sex.¹⁶⁷ The proposition was defeated after securing only forty-two percent of the vote.¹⁶⁸

Boston adhered to a zoning model in the 1960s and 1970s, allowing a zone of the city, designated as the “Combat Zone,” to contain a concentrated number of strip clubs, massage parlors, and adult entertainment outlets.¹⁶⁹ Prostitution occurred frequently in this zone and was not highly regulated.¹⁷⁰ The zone was eventually targeted for regulation in the 1980s and the sex workers left to find work elsewhere.¹⁷¹

In 2017, lawmakers in the District of Columbia¹⁷² and Hawaii¹⁷³ introduced bills proposing the decriminalization of prostitution in those states. Additionally, lawmakers in New Hampshire have introduced a bill to study the effects of decriminalizing prostitution both in the United States and worldwide.¹⁷⁴ Although only proposed legislation, these recent legislative efforts are representative of some of the efforts lawmakers have taken to decriminalize sex work in their respective jurisdictions.

Alternatively, some cities have created “Prostitution-Free Zones.” In 1995, the city of Portland, Oregon enacted an ordinance banning known sex workers from certain areas of the city.¹⁷⁵ However, in 2007 the city eliminated the zones due to allegations that they were leading to a disproportionate number of arrests of African-Americans.¹⁷⁶ Likewise, sex workers in Vallejo, California organized and petitioned the Mayoral Prostitution Task Force to allow for a zone of legal

166. *Id.*

167. *Id.*

168. Lagos, *supra* note 162.

169. Sam Allis, *This Was Where Johns, Hookers and Trouble Met*, BOSTON GLOBE (Mar. 7, 2010), http://archive.boston.com/ae/theater_arts/articles/2010/03/07/taking_a_sidewalk_stroll_on_the_seedy_side_of_the_combat_zone/.

170. *Id.*

171. *Id.*

172. Rachel Chason, ‘A mecca for prostitution’? A new bill proposes decriminalizing sex work in D.C., WASH. POST (Oct. 13, 2017), https://www.washingtonpost.com/local/dc-politics/a-mecca-for-prostitution-a-new-bill-proposes-decriminalizing-sex-work-in-dc/2017/10/13/18f3dd12-adf4-11e7-a908-a3470754bbb9_story.html?utm_term=.d70aa597def0.

173. Cathey Bussewitz, *Hawaii Bill Would Legalize Prostitution Industry*, AP NEWS ARCHIVE (Feb. 3, 2017), <http://www.apnewsarchive.com/2017/Hawaii-lawmakers-are-considering-decriminalizing-prostitution-in-the-Aloha-State-after-the-speaker-of-the-House-introduced-a-bill/id-8986c2b68b9f4f4e9be5da02276072b7>.

174. Elizabeth Dinan, *Bill Calls for Study Decriminalizing Sex Work*, SEACOASTONLINE (Jan. 15, 2017), <http://www.seacoastonline.com/news/20170115/bill-calls-for-study-decriminalizing-sex-work>.

175. PORTLAND, OR., CITY CODE, ch. 14B.30 (2014) (amended 2006).

176. Mary Kitch, *Look Again at Prostitution Free Zones*, THE OREGONIAN (Aug. 21, 2008), http://www.oregonlive.com/opinion/index.ssf/2008/08/look_again_at_prostitutionfree.html.

prostitution in the city.¹⁷⁷ The efforts were unsuccessful and were met with increased police activity and neighborhood patrols by local citizens.¹⁷⁸ More recently, Vallejo police have focused on investigating human trafficking and have arrested traffickers who coerced victims into sex work.¹⁷⁹

In Louisiana, prior to a 2021 proposal recommending the Louisiana State Law Institute study and recommend new legislature regarding prostitution based offenses,¹⁸⁰ individuals who solicit oral or anal sex can be prosecuted under either the prostitution statute¹⁸¹ or the crimes against nature statute.¹⁸² Prior to a 2011 amendment that eliminated the registration requirement, an individual convicted under the crimes against nature statute was required to register as a sex offender.¹⁸³ Nine individuals subject to the registration requirement under the crimes against nature statute prior to the 2011 amendment succeeded in claiming that the requirement deprived them of equal protection of the laws because it only applied to the crimes against nature statute, not the prostitution statute.¹⁸⁴

V. FEDERAL REGULATION OF PROSTITUTION

Federal courts have recognized that the primary responsibility of policing sexual misconduct lies with the states rather than the federal government.¹⁸⁵ Still, certain federal regulations regarding prostitution exist.

The Mann Act—also known as the White-Slave Traffic Act¹⁸⁶—makes it a criminal offense for anyone to “knowingly transport any individual in interstate or foreign commerce . . . with intent that such individual engage in

177. Kevin Fagan, *Vallejo Public, Police Team to Reduce Prostitution*, SFGATE (Sept. 25, 2011), http://articles.sfgate.com/2011-09-25/news/30215710_1_hookers-vallejo-pimps.

178. *Id.*

179. Jessica A. York, *Human Trafficking in Vallejo, Bay Area More than Prostitution*, VALLEJO TIMES HERALD (July 20, 2016), <https://www.eastbaytimes.com/2013/05/06/human-trafficking-in-bay-area-more-than-prostitution/>.

180. H. B. 67, 2021 Reg. Sess. (La. 2021) (The Louisiana state legislature proposed new legislation to decriminalize sex work. The proposal is aimed at reducing high rates of incarceration in the American legal system. The report will be issued by February 1, 2022).

181. LA. STAT. ANN. § 14:82 (West, Westlaw through 2017 2d Ex. Sess.).

182. LA. STAT. ANN. § 14:89.2 (West, Westlaw through 2017 2d Ex. Sess.).

183. *Id.*

184. *See Doe v. Jindal*, 851 F. Supp. 2d 995, 1007 (E.D. La. 2012).

185. *See, e.g., United States v. Wolf*, 787 F.2d 1094, 1097 (7th Cir. 1986) (“The primary responsibility for policing sexual misconduct lies with the states rather than the federal government. The Mann Act is merely a prohibition against transporting women across state lines for immoral purposes.”).

186. At least one scholar has asserted that the term “white slavery” is racist, as it implies that “that the slavery of ‘white women’ was of a different, and worse, sort than ‘black’ slavery.” Nesheba Kittling, *God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 919 (2006) (“‘White slavery’ came to mean the procurement, by force, deceit, or drugs, of a white woman or girl against her will, for prostitution.’ White women were viewed as victims of prostitution, rather than willing participants . . . While . . . black women were deemed criminals, even if they were not actually prostitutes.” (citing Jo Doezeema, *Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women*, 18 GENDER ISSUES 23, 31 (2000), http://www.academia.edu/802152/Loose_women_or_lost_women_The_re-emergence_of_the_myth_of_white_slavery_in_contemporary_discourses_of_trafficking_in_women)).

prostitution.”¹⁸⁷ The Mann Act was amended in 1986 to prohibit transporting any person with the intent to engage in prostitution or any other illegal sexual activity.¹⁸⁸ The Act has been upheld even when the individual is willingly transported to a jurisdiction in which prostitution is legal.¹⁸⁹ The Act has also been used to prosecute defendants who have induced the voluntary travel of minors to jurisdictions where the defendant mistakenly believed the minor could legally consent to the encounter.¹⁹⁰

Federal law also prohibits the transportation of minors for illegal sexual activity.¹⁹¹ A defendant violates the statute if he or she “knowingly transports an individual who has not attained the age of 18 years . . . with intent that the individual engage in prostitution.”¹⁹² Ignorance of the defendant’s age is no defense to the prohibition on transport of minors.¹⁹³ The government does not need to prove that a minor was actually placed at risk to sustain a conviction: a showing of intent is all that is necessary.¹⁹⁴ The dominant purpose of interstate travel need not be criminal sexual activity to support a conviction under the statute, but such criminal sexual activity must not be merely incidental to the trip.¹⁹⁵

Federal law also prohibits the importation of any immigrant for the purpose of prostitution.¹⁹⁶ In addition, U.S. citizens or admitted aliens are prohibited from engaging in illicit sexual conduct (such as certain sexual acts with persons under eighteen years of age) in foreign places.¹⁹⁷ In April 2003, Congress passed the Prosecutorial Remedies and Tools Against the Exploitation of Children Today

187. 18 U.S.C.A. § 2421 (West, Westlaw through Pub. L. No. 115-90).

188. Kittling, *supra* note 186, at 918.

189. *United States v. Pelton*, 578 F.2d 701, 712 (8th Cir. 1978) (holding that the language of the statute states that interstate transportation for the purpose of prostitution is illegal regardless of the status of prostitution in destination state).

190. *Goodwin v. United States*, 869 F.3d 636, 639 (8th Cir. 2017) (holding that Defendant was in violation of Texas Penal Code § 43.25(b), which stipulates that an adult cannot induce sexual activity from a person under 18, when he arranged to meet with a 17-year-old from North Dakota in Texas, even though other areas of the penal code defined the age of consent to be 17).

191. 18 U.S.C.A. § 2423 (West, Westlaw through Pub. L. No. 115-90).

192. *Id.*

193. *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001) (“If someone knowingly transports a person for the purposes of prostitution or another sex offense, the transporter assumes the risk that the victim is a minor, regardless of what the victim says or how the victim appears.”).

194. *United States v. Kelly*, 510 F.3d 433, 441 (4th Cir. 2007); *see also United States v. Tykarsky*, 446 F.3d 458, 466 (3d Cir. 2006) (concluding that Congress did not intend to require an actual minor to be placed at risk to sustain a conviction).

195. *United States v. Hayward*, 359 F.3d 631, 637 (3d Cir. 2004) (“The government must prove beyond a reasonable doubt . . . that a significant or motivating purpose of the travel across state or foreign boundaries was to have the individual transported engage in illegal sexual activity. In other words, the illegal sexual activity must not have been merely incidental to the trip.”).

196. 8 U.S.C.A. § 1328 (West, Westlaw through Pub. L. No. 115-90).

197. 18 U.S.C.A. §§ 2423(c), (f) (West, Westlaw through Pub. L. No. 115-90) (Illicit sexual conduct means (1) a sexual act, as defined in 18 U.S.C.A. § 2246, with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act, as defined in 18 U.S.C.A. § 1591, with a person under 18 years of age).

Act of 2003 (PROTECT Act), which prohibits illicit sexual conduct with minors in foreign places.¹⁹⁸ The PROTECT Act stiffens individual penalties for sex tourism (the practice of traveling to foreign locations for the purpose of engaging in illicit sexual activities, often with minors, outside the ambit of US law) by increasing the maximum imprisonment term as a result of conviction to thirty years.¹⁹⁹ The Act also decreases the government's burden in prosecuting defendants accused of engaging in illicit sexual conduct in foreign places.²⁰⁰ Furthermore, the Act criminalized the activities of sex tourism operators.²⁰¹

In April 2004, a federal district court held the substance of the PROTECT Act to be a proper exercise of extraterritorial jurisdiction and reasonable under principles of international law as applied to an American citizen who had engaged in illicit sexual conduct with two minors in Cambodia.²⁰² The same court upheld the Act in the face of due process²⁰³ and Commerce Clause²⁰⁴ challenges.

Another federal statute, the Trafficking Victims Protection Act of 2000, provides for harsher penalties for human traffickers in order to combat the "contemporary manifestation of slavery" and "to protect [human traffickers'] victims."²⁰⁵ Human trafficking is not limited to sex trafficking; it also involves forced labor for domestic, agricultural, retail and other work industries.²⁰⁶ In sex trafficking, victims are mostly immigrant women and children.²⁰⁷ They are held against their will in brothels or other establishments and forced to perform sexual services to

198. Prosecutorial Remedies and Tools against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

199. 18 U.S.C.A. §§ 2423(b)-(c) (West, Westlaw through Pub. L. No. 115-90). Prior to the PROTECT Act amendment of 18 U.S.C.A. § 2423, subsection (b) provided for maximum imprisonment of not more than 15 years for persons traveling or conspiring to travel for the purpose of engaging in illicit sexual conduct.

200. See 18 U.S.C.A. § 2423(c) (West, Westlaw through Pub. L. No. 115-90); see also H.R. Conf. Rep. No. 108-66, at 686 (2003) ("Current law requires the government to prove that the defendant traveled with the intent to engage in the illegal activity. Under this section, the government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country.").

201. 18 U.S.C.A. § 2423(d) (West, Westlaw through Pub. L. No. 115-90).

202. *United States v. Clark*, 315 F. Supp. 2d 1127, 1131-32 (W.D. Wash. 2004) (holding that Congress may exercise extraterritorial jurisdiction with regard to the defendant where defendant used American sources of financing to live in Cambodia, used military benefits to travel between the United States and Asia, and participated in universally condemned actions).

203. *Id.* at 1132-33 (determining that a crime committed against a foreign national by a U.S. citizen or resident alien creates the sufficient nexus required by the Due Process Clause of the Fifth Amendment because a citizen could reasonably expect to be hauled into court in the United States for illicit sexual conduct with a child in a foreign country where the eradication of trafficking in and exploitation of juvenile sex workers is a foreign policy, law enforcement, and public health policy priority for the United States Government).

204. *Id.* at 1135-36.

205. 22 U.S.C.A. §§ 7101 (West, Westlaw through Pub. L. No. 115-90).

206. *Id.* at § 7101(b)(3)-(4) ("Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.").

207. *Id.* at § 7101(b)(1).

repay inflated debts to their traffickers.²⁰⁸ Unlike sex workers, victims of human trafficking do not profit financially from the sexual services they perform. Traffickers frequently withhold all profits and use abusive tactics and the threat of violence to keep victims isolated and enslaved.²⁰⁹

The Act states that it is the policy of the United States to deny non-humanitarian and non-trade-related foreign assistance to any government that fails to comply or make significant efforts to comply with the minimum standards for the elimination of trafficking set forth in the Act.²¹⁰ These minimum standards require a country to prohibit trafficking and to make serious and sustained efforts to eliminate severe forms of trafficking in persons; the Act also requires countries to prescribe punishment that is commensurate to particular forms of human trafficking.²¹¹

In 2013, Congress passed the Trafficking Victims Protection Reauthorization Act, which appropriated funding for and expanded upon the Trafficking Victims Protection Act of 2000.²¹² In this bill, Congress explicitly set out recommendations to States to presume that a child charged with a prostitution offense is a victim of sex trafficking and to avoid prosecuting these victims.²¹³ Congress reiterated this sentiment in 2015 with the passage of the Justice for Victims of Trafficking Act, which encourages states to enact safe harbor laws to prevent children from being prosecuted for prostitution.²¹⁴

At least one advocacy organization has made it a priority to pursue sex workers' rights and anti-trafficking work as "mutually reinforcing and equally crucial to empowering people in the sex trade."²¹⁵ However, despite that nonprofit organization's persistent and successful efforts supporting investigations and government prosecution of traffickers, the nonprofit, until recently, could not accept anti-trafficking funding from the U.S. Government because grantees are required to sign an anti-prostitution pledge.²¹⁶ The United States Leadership Against HIV/

208. *Id.* at § 7101(b)(2) (describing how trafficked victims, whom are "predominantly women and girls," are trafficked into the international sex trade "often by force, fraud, or coercion" and forced into "activities related to prostitution, pornography, sex tourism, and other commercial sexual services").

209. *Id.* at § 7101(b)(2)-(4). To evaluate the impact of the Trafficking Victims Protection Reauthorization Act of 2005, compare Susan Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L L. 249 (2007), with Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. J. L. 337 (2007).

210. 22 U.S.C.A. § 7107 (West, Westlaw through Pub. L. No. 115-90).

211. 22 U.S.C.A. § 7106(a) (West, Westlaw through Pub. L. No. 115-90).

212. Trafficking Victims Protection Reauthorization Act, H.R. 898, 113th Cong. (1st Sess. 2013), <https://www.congress.gov/bill/113th-congress/house-bill/898/text>.

213. *Id.*

214. Justice for Victims of Trafficking Act, S. 178, 114th Cong., Pub. L. No. 114-22 (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/178>.

215. Crago, *supra* note 11, at 58 ("[T]he [New York City Sex Worker's P]roject's success has prompted law enforcement officials and service providers to frequently call the Sex Workers Project and request assistance for people involved in trafficking cases.").

216. *Id.* at 60.

AIDS, Tuberculosis, and Malaria Act of 2003, which provides funding to foreign governments and non-governmental organizations fighting HIV/AIDS, barred any organization that did not have a policy explicitly opposing prostitution from receiving funds.²¹⁷ The Supreme Court held that this policy requirement violated the First Amendment because it conditioned funding on the affirmation of a belief that was outside the program's scope.²¹⁸

A federal statute also existed regarding prostitution near military bases. Congress passed the May Act in 1941 in response to reports of widespread prostitution and increases in sexually transmitted diseases on military bases during World War II. The May Act made it "a federal offense to practice prostitution in areas designated by the [S]ecretaries of the [A]rmy and the [N]avy" until 1945.²¹⁹ The statute forbade prostitution within "reasonable distance" of military camps and bases and granted the Secretaries of the Army, Navy, and Air Force the authority to "take such steps as they deem necessary to suppress and prevent" prostitution.²²⁰ Despite these historical deterrents, United States military authorities have "often condoned, or facilitated, commercial sex opportunities for fighting men."²²¹

VI. CONSTITUTIONAL ISSUES

Sex work statutes and their enforcement have been challenged on various constitutional grounds, including the violation of freedom of speech, due process, and equal protection.²²² In the free speech realm, sex work convictions based solely upon an offer for sex have been argued to implicate First Amendment concerns.²²³ In these cases, no actual sexual conduct occurred, but the offer of sexual conduct has been sufficient for a sex work conviction.²²⁴ Sex work convictions have also been challenged on due process grounds on the basis of alleged discrimination, vagueness or over-breadth, and infringement of privacy rights.²²⁵ Finally, claims of equal protection violations have been raised on the basis that sex work laws disproportionately affect a specific class of people more than other classes.²²⁶

217. See United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711.

218. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013).

219. Chan, *supra* note 9; May Act, H.R. 2475, 77th Cong. (1st Sess. 1941), <https://congressional.proquest.com/congressional/docview/t29.d30.hrg-1941-mah-0002?accountid=11091>.

220. 18 U.S.C.A. § 1384 (West, Westlaw through Pub. L. No. 115-90).

221. Law, *supra* note 1, at 239.

222. See discussion *infra* part III.A, B, C.

223. See *infra* note 232.

224. *Id.*

225. See discussion *infra* part III.B.

226. See discussion *infra* part III.C.

A. FREEDOM OF SPEECH

Under many state statutes, individuals can be arrested for merely offering to perform a sexual act for compensation.²²⁷ Individuals have challenged these statutes, claiming that arrests based on “mere words” violate free speech rights protected by the First Amendment of the Constitution.²²⁸ However, courts have upheld such statutes, stating that speech is not protected where it is an integral part of the criminal act.²²⁹

Petitioners have unsuccessfully argued that sex work cases should be prosecuted only to the extent that pornography cases are prosecuted.²³⁰ Criminal sexual activity, however, is not considered a protected expression under the First Amendment.²³¹ Courts have rejected the argument that prohibiting sex work unduly burdens other activities protected by the First Amendment, such as selling pornography.²³²

Likewise, courts have rejected arguments that commercial sex acts may implicate free expression of individual views.²³³ In Arizona, plaintiffs unsuccessfully claimed that engaging in commercial sexual activity allowed them to send a message of “social and sexual liberation.”²³⁴ The court found that the sex acts conveyed no particularized message that was comprehensible to the public, so the acts were not protected on free expression grounds.²³⁵

B. DUE PROCESS

Sex work statutes have been challenged as violations of the Fourteenth Amendment’s right to due process because they unfairly discriminate against certain persons or unfairly penalize certain actions.²³⁶ Plaintiffs have claimed that sex work statutes are vague, overbroad, or improperly intrude on the conduct of consenting adults.²³⁷ Courts generally hold that sex work statutes are not unconstitutionally vague or overbroad because the general public knows what sex work

227. *See, e.g.*, *State v. Pegouskie*, 113 P.3d 811, 820 (Haw. Ct. App. 2005).

228. This legal approach is reflected in the speech/conduct distinction in certain First Amendment cases. *See, e.g.*, *Vivid Entm’t, LLC v. Fielding*, 774 F.3d 566, 579 (9th Cir. 2014) (holding that conduct only raises First Amendment concerns when a particular message is intended and likely to be understood).

229. *See, e.g.*, *Pegouskie*, 113 P.3d at 820; *see also* *People v. Braddock*, 809 N.E.2d 712, 717 (Ill. App. Ct. 2004).

230. *See* *United States v. Thompson*, 458 F. Supp. 2d 730, 732–33 (N.D. Ind. 2006) (holding that the obscenity standard set forth in *Miller v. California*, 413 U.S. 15 (1973) cannot be applied to prostitution statutes because prostitution is not protected activity under the First Amendment).

231. *See* *Bushco v. Shurtleff*, 729 F.3d 1294, 1303 (10th Cir. 2013) (upholding statute that criminalized certain touching or exposure when done with requisite criminal intent).

232. *Id.* at 1303–06.

233. *Recreational Devs. of Phx., Inc. v. City of Phx.*, 83 F. Supp. 2d 1072, 1094–95 (D. Ariz. 1999), *aff’d sub. nom.* *Recreational Dev. of Phx., Inc. v. City of Phx.*, 238 F.3d 430 (9th Cir. 2000).

234. *Id.* at 1089.

235. *Id.* at 1090.

236. *Id.* at 1081–82.

237. *Id.* at 1081–89.

is, what is meant by sexual activity and compensation, and that the law does not discourage individuals from performing permitted acts.²³⁸

Some individuals claim that sex work laws impermissibly interfere with privacy rights implied by the Due Process Clause.²³⁹ These individuals note that sex work is often a consensual sexual act between two willing adults.²⁴⁰ In *Lawrence v. Texas*, the Supreme Court ruled that the Fourteenth Amendment protects consensual sexual relations, but declined to extend that protection to sex work.²⁴¹ Furthermore, the Supreme Court has declined to equate the privacy afforded to people in their homes with privacy outside the home.²⁴² The Court has held that there is no “zone of privacy” allowed for a consumer of criminal sexual activity.²⁴³ Thus, sex work is not necessarily covered by due process protections. One court noted that sex work statutes do not prevent individuals from engaging in consensual sexual relations with one another, but only prevent an exchange of sexual acts for compensation.²⁴⁴

Likewise, statutes that prohibit the derivation of earnings and support from sex work have not been held to violate the Due Process Clause.²⁴⁵ One Californian court has held that there is no personal liberty interest in profiting from commercial sex acts and that such a prohibition upheld proper legislative goals, namely upholding morals and preventing a public evil, and was not overbroad because it only prohibited specific criminal activity.²⁴⁶ Similarly, a city ordinance prohibiting commercial sex acts in adult entertainment clubs was held not to be unconstitutionally vague or overbroad because the ordinance only prohibited live sex acts in the course of business for health and safety reasons and did not prohibit legal activities, such as exotic dancing.²⁴⁷

C. EQUAL PROTECTION

Petitioners have also argued that sex work statutes violate equal protection by discriminating against women and unmarried persons, and by discriminating

238. *Id.*

239. See generally Belkys Garcia, *Reimagining the Right to Commercial Sex: The Impact of Lawrence v. Texas on Prostitution Statutes*, 9 N.Y.C. L. REV. 161 (2005).

240. *Id.*

241. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The present case . . . does not involve public conduct or prostitution.”); see also *State v. Pope*, 608 S.E.2d 114, 115-16 (N.C. Ct. App. 2005) (holding that the statute stating solicitation as a crime against nature did not offend *Lawrence v. Texas*).

242. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 50 (1973).

243. *Id.*

244. *Roe II v. Butterworth*, 958 F. Supp. 1569, 1579–80 (S.D. Fla. 1997).

245. *People v. Grant*, 123 Cal. Rptr. 3d 840, 845 (Cal. Ct. App. 2011).

246. *Id.* at 845–46; see also *People v. Zambia*, 254 P.3d 965, 980 (Cal. 2011) (holding that statute prohibiting pandering for prostitution was not overbroad because the statute required “specific intent” that the person being pandered become a prostitute); *State v. Williams*, 257 P.3d 849, 856–58 (Kan. Ct. App. 2011) (holding that the aggravated trafficking statute was not unconstitutionally vague or overbroad); *Ford v. State*, 262 P.3d 1123, 1130 (Nev. 2011) (holding that statute prohibiting pandering of prostitution was not unconstitutionally overbroad because it is acceptable to prohibit speech that is “intended to induce criminal activities”).

247. *Recreational Dev. of Phx., Inc. v. City of Phx.*, 83 F. Supp. 2d 1072, 1086–87 (D. Ariz. 1999).

based on sex.²⁴⁸ In areas where sex work is illegal, people of all genders are banned from the practice of exchanging money for sexual acts. Even though sex work statutes are generally couched in gender neutral language, female sex workers are arrested four times more often than male sex workers and are far more likely to be subjected to prosecution, despite evidence suggesting that there are roughly as many male as female sex workers.²⁴⁹ Still, many courts have upheld sex work statutes because they are facially neutral, and do not, in their language, refer to a certain gender.²⁵⁰ At least one court, however, has stated that if the petitioner could show that the reason for passing a sex work statute was based on gender discrimination, an equal protection claim might succeed.²⁵¹ For example, the Supreme Court of Wisconsin stated that if female sex workers are consistently prosecuted and male patrons are consistently not prosecuted, equal protection claims could be implicated.²⁵²

Another discrimination claim made by sex workers is that sex work statutes violate due process rights by permitting married individuals to exchange sexual acts for compensation within the marriage but do not allow unmarried individuals to do the same.²⁵³ This debate is particularly an issue in prosecutions for sex work involving homosexual acts.²⁵⁴ Courts have repeatedly held that this distinction is legitimate because legislators are “free to treat dissimilarly situated people differently.”²⁵⁵ Courts also note that such marital exchanges lack the “commercial aspect” of sex work.²⁵⁶

A defendant’s claim that a ban on sex work disproportionately affected Asian massage parlors more than other kinds of massage parlors was rejected because the statute did not involve a suspect classification, did not affect a fundamental right, and was rationally related to a legitimate state interest.²⁵⁷ In another case, a claim that the prohibition of commercial sex acts in an adult entertainment club violated the Equal Protection Clause failed.²⁵⁸ Although the club was a “members only” institution, the court did not find any selective criteria for the club.²⁵⁹ Therefore, the club was a public place and not subject to any constitutional privacy protections.²⁶⁰

248. *State v. Johnson*, 246 N.W.2d 503, 506 (Wis. 1976).

249. Hough, *supra* note 5, at 118.

250. *See, e.g., Roe II v. Butterworth*, 958 F. Supp. 1569, 1581 (S.D. Fla. 1997).

251. *Id.*

252. *Johnson*, 246 N.W.2d at 506.

253. *People v. Medina*, 685 N.Y.S.2d 599 (N.Y. Crim. Ct. 1999).

254. *Id.* at 601 (holding that same-sex sexual activity is within the statutory definition of prostitution).

255. *Roe II v. Butterworth*, 958 F. Supp. 1569, 1581 (S.D. Fla. 1997).

256. *Cherry v. Koch*, 491 N.Y.S.2d 934, 945–46 (N.Y. Sup. Ct. 1985).

257. *United States v. Thompson*, 458 F. Supp. 2d 730, 732 (N.D. Ind. 2006).

258. *Recreational Dev. of Phx., Inc. v. City of Phx.*, 83 F. Supp. 2d 1072, 1098 (D. Ariz. 1999).

259. *Id.* at 1083–84.

260. *Id.* at 1084.

VII. ARGUMENTS AND EFFORTS FOR DECRIMINALIZATION

Despite the overwhelming criminalization of sex work in the United States, much debate still exists over the appropriate legal status of sex work. Three legal paradigms dominate the debate. *Criminalization* is the dominant legal framework, whereby both providing and soliciting sex work is illegal and punishable by criminal sanctions. *Decriminalization*, the approach favored by many American sex workers' advocates, would eliminate criminal penalties and leave sex work unregulated by the state. *Legalization*, the framework applied to legal brothels in parts of Nevada, would make sex work a regulated industry in which the State would play such roles as providing licenses, requiring medical examinations, and collecting taxes.

A. DEBATE OVER DECRIMINALIZATION

Proponents of criminalization base their arguments on moral and public health concerns. These arguments were inveighed against sex work at the inception of sex work statutes in the United States, when religious, medical, and women's groups advocated for criminalization. Proponents emphasized the "immoral" qualities of sex workers and their patrons, the spread of venereal disease, and the victimized nature of women who were forced into sex work.²⁶¹

Feminist theorists represent diverse and wide-ranging views on sex work.²⁶² Many conceive of sex workers as wage laborers who perform a service in exchange for a payment.²⁶³ Legalization or decriminalization of this exchange, they argue, would not only protect sex workers but also legitimize economic opportunities for these women.²⁶⁴ Others take the opposite view, construing sex work as violence against women, violating female sexual autonomy by reducing it to economic exchange.²⁶⁵ Proponents of this view argue that women do not choose to become sex workers "unconstrained by circumstance"—rather, socio-economic circumstances unduly influence their choice to engage in sex work.²⁶⁶

Some theorists argue that the inequalities of sex work are the product of a broader societal framework of female-male relations that must be restructured before one can begin to understand whether or not sex work is inherently harmful

261. See generally TIMOTHY J. GILFOYLE, *CITY OF EROS: NEW YORK CITY PROSTITUTION AND THE COMMERCIALIZATION OF SEX, 1790–1920* (1992).

262. For an interesting survey of liberal, social, and radical feminist views on prostitution, see Gregg Aronson, Note, *Seeking a Consolidated Feminist Voice for Prostitution in the US*, 3 RUTGERS J. L. & URB. POL'Y 357 (2006) (concluding that, despite disagreements, the fundamental aims of each group are not grossly different).

263. Stremler, *supra* note 64, at 193.

264. *Id.*

265. See, e.g., Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220 (Nov. 1999); Andrea Dworkin, *Prostitution and Male Supremacy*, 1 MICH. J. GENDER & L. 1 (1993); Christine Overall, *What's Wrong with Prostitution?: Evaluating Sex Work*, Signs, Summer 1992, at 722; Evelina Giobbe, *Prostitution: Buying the Right to Rape*, in RAPE AND SEXUAL ASSAULT III 143 (Ann Wolbert Burgess ed., Garland 1991).

266. Stremler, *supra* note 64, at 193.

to women.²⁶⁷ Still others question the universal assumption that all sex workers are “victims,” instead emphasizing the heterogeneity of commercial sex work exchanges and the complex nexus of desire and sexual power inherent in all sexual relations. These critics have questioned the possibility of identifying and criminalizing a single, uniform institution of sex work, given the numerous differing participants and interests implicated.²⁶⁸

Contemporary advocates of criminalization often argue that sex work has a negative effect on neighborhoods by generating other criminal activity and slowing the growth of property values.²⁶⁹ This debate is especially fierce in newly gentrified, formerly industrial urban areas, where an influx of middle-class and affluent residents will often object to the presence of massage parlors, adult video stores, and often long-existing street work “strolls” in the neighborhood.²⁷⁰ These protests spur increased policing, which often force street sex workers to relocate to more remote and dangerous areas.²⁷¹

Statutory prohibitions on sex work reflect legislative concerns based on health, safety, economics, crime prevention, and reflecting a community morality.²⁷² Proponents of decriminalization, however, argue that it is only social morality and not a concern for women’s safety that perpetuates sex work’s status as a criminal offense.²⁷³ They argue that anti-sex-work statutes, and their supporters, are “conservative moralists” who “classify all women as either loving mothers or deviant whores.”²⁷⁴ Similarly, they contend, anti-sex-work statutes and the criminal law in general, tend to scrutinize a woman’s sexual behavior and ascribe value to her in terms of her sexual innocence or lack thereof.²⁷⁵ Further, the concerns based on health appear to be largely unfounded.²⁷⁶

267. See, e.g., Martha Nussbaum, ‘*Whether From Reason or Prejudice*’: Taking Money for Bodily Services, in *SEX AND SOCIAL JUSTICE*, 176 (Oxford University Press 1999); Sibyl Schwarzenbach, *Contractarians and Feminists Debate Prostitution*, 18 N.Y.U. REV. L. & SOC. CHANGE 125 (1990–91); Lars O. Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*, 90 ETHICS 366 (1980).

268. See, e.g., JULIA O’CONNELL DAVIDSON, *PROSTITUTION, POWER AND FREEDOM* (1998).

269. See Alliance, *supra* note 11, at 15.

270. *Id.*

271. *Id.* at 13–17 (“[N]ew residents moving into the area requested more police enforcement of prostitution laws,” and increased policing forced sex workers into still abandoned areas of the city. “These areas were less well-lit and less well known to health and outreach agencies . . . the new areas were significantly more dangerous.”)

272. See Belinda Cooper, *Prostitution: A Feminist Analysis*, 11 WOMEN’S RTS. L. REP. 99 (1989)

273. *Id.* at 106–08

274. *Id.* at 99–108.

275. Beverly Balos, *Teaching Prostitution Seriously*, 4 BUFF. CRIM. L. REV. 709, 712 (2001).

276. See Sylvia A. Law, *Commercial Sex: Beyond Criminalization*, 73 S. CAL. L. REV. 523, 545, 548 (2000) (stating that, “the facts do not support the assumption that commercial sex workers are primary transmitters of venereal disease, including HIV,” and noting that “even when a sex worker is infected with HIV, it is difficult for her to transmit the disease to a man through sexual intercourse” since transmission by vaginal fluid has not been observed, and it’s much more likely that the sex worker be infected by her client than the other way around).

Sex work laws are disproportionately enforced against the most vulnerable sex workers, including women of color and transgender women.²⁷⁷ Women of color and transgender women, even those who do not participate in sex work, report that police officers target them for arrest and engage in racist and homophobic verbal harassment.²⁷⁸ While only forty percent of sex workers who work on streets are women of color, fifty-five percent of sex workers who are arrested and eighty-five percent of sex workers who are jailed for sex work are women of color.²⁷⁹ A report on New York's Human Trafficking Intervention Courts found that the state's prohibition of loitering for the purpose of sex work was disproportionately enforced against women of color; in Brooklyn, New York, African-American defendants faced sixty-nine percent of all charges and ninety-four percent of charges of loitering for the purpose of sex work.²⁸⁰

Decriminalization advocates further argue that sex work laws “do nothing to benefit society and everything to harm prostitutes themselves.”²⁸¹ Criminalization isolates sex workers from the legal protection afforded to workers in other work environments, making it more difficult for sex workers who are victims of violent crime—such as assault, rape, or robbery—to report the crimes to the police.²⁸² Sex workers often face abuse from both clients and pimps, yet are deterred from reporting this abuse for fear of facing prosecution themselves.²⁸³ Immigrant sex workers are particularly unlikely to report abuse or seek out services because they face the additional risk of deportation.²⁸⁴ Countries with the strictest sex works laws, like the United States, also have the highest rates of pimping, juvenile sex work, and violence against sex workers.²⁸⁵ Even when sex workers do report criminal activity to the police, they are often rebuffed, humiliated, or refused police protection or assistance.²⁸⁶ Proponents argue that decriminalization would shift police resources from arresting sex workers to

277. S.F. Task Force on Prostitution, Final Report, *supra* note 10 (citing studies of arrest reports from the San Francisco Police Department).

278. *Id.*

279. Katie Beran, *Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform*, 30 MINN. J. L. & INEQ. 19, 25 (2012).

280. Audacia May & Emma Caterine, *Criminal, Victim, or Worker? The Effects of New York's Human Trafficking Intervention Courts on Adults Charged with Prostitution-Related Offenses*, RED UMBRELLA PROJECT 6 (2014), <http://www.nswp.org/sites/nswp.org/files/RedUP-NYHTIC-FINALweb.pdf>.

281. Patricia Padrino, Note & Comment, “Bad” Women Deserve Equal Protection: A Look at the Constitutionality of the Florida Prostitution Statute, 14 ST. THOMAS L. REV. 641 (Spring 2002). *See, e.g.*, Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 HASTINGS WOMEN'S L.J. 119 (Winter 1999).

282. Michael Conant, *Federalism, The Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J. L. & PUB. POL'Y 99, 100 (1996).

283. Kandel, *supra* note 62, at 346.

284. S.F. Task Force on Prostitution, Final Report, *supra* note 10.

285. Kandel, *supra* note 62, at 346.

286. *See* Alliance, *supra* note 11, at 39–42 (describing the experiences of sex workers in Washington, D.C. who reported crimes to the police and were met with discrimination, humiliation, dismissal, or requests for sex).

protecting sex workers, thus decreasing crime by discouraging criminals who take advantage of sex workers' vulnerable status in society.²⁸⁷

Similarly, from the perspective of advancing public health, some argue that criminalization may make issues such as intravenous drug use and unprotected sex with multiple partners even more of a danger for sex workers because of their isolation from health and social services.²⁸⁸

Additionally, decriminalization could assist law enforcement officials in enforcing human trafficking laws, which are distinct from anti-sex-work laws. Advocates of decriminalization argue that enforcement of anti-sex-work laws drive non-trafficked sex workers underground to avoid arrest, making it difficult for police to distinguish between voluntary sex workers and enslaved trafficking victims.²⁸⁹ If sex work is decriminalized, sex workers who encounter illegal sex trafficking, it is argued, might also feel safer reporting it.²⁹⁰

B. LEGAL EFFORTS TO ACHIEVE DECRIMINALIZATION

Legal efforts to achieve decriminalization have been largely unsuccessful in the United States. Decriminalization measures on local election ballots have been defeated in both San Francisco and Berkeley, California in recent years. In 2008, sex workers and human rights advocates placed Proposition K on the ballot to eliminate the power of local police to enforce sex work statutes against sex workers in San Francisco, California.²⁹¹ The proposition was defeated after securing only forty-two percent of the vote.²⁹²

In 2004, voters in Berkeley, California had the opportunity to decriminalize sex work. Robin Few, a former call girl and a sex workers' rights activist, sponsored the "Angel's Initiative" legislation, which would have decriminalized sex work in Berkeley, and instructed the city to lobby for repeal of California's anti-sex-work laws.²⁹³ The measure, named for a transgender sex worker who was murdered in 1992, was aimed at protecting sex workers who cannot seek police protection from crime and violence because of the illegal nature of their work.²⁹⁴ Supporters argued that decriminalization would allow sex workers to unionize, enjoy workplace protections, earn a fair wage, and report violence without fear of

287. *Supra* note 281.

288. *See, e.g.*, DeCou, *supra* note 75, at 447.

289. The international bill of human rights for women, Convention on the Elimination of All Forms of Discrimination Against Women, argues that legalizing prostitution is one way to alleviate human trafficking in countries where trafficking is already a problem. Jason Chan, *Decriminalization of Prostitution in China*, 13 *NEW ENG. J. INT'L & COMP. L.* 329, 329 (2007); *see also* Ji Hye Kim, Comment, *Korea's New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature's Intent to Protect Prostitutes from Abuse*, 16 *PAC. RIM L. & POL'Y J.* 493, 519 (Mar. 2007).

290. *See id.*

291. Lagos, *supra* note 162.

292. *Id.*

293. Marshall, *supra* note 163.

294. *Id.*

arrest.²⁹⁵ The measure, however, received little support and did not pass.²⁹⁶

In March 2015, the Erotic Service Providers Legal, Education and Research Project (“ESPLERP”) filed a lawsuit in U.S. District Court challenging the constitutionality of a California statute criminalizing the commercial exchange of sexual activity.²⁹⁷ The plaintiffs—three former prostitutes, and a male client wishing to hire prostitutes—alleged that the sex work law violates their rights to privacy, free speech, and freedom of association, as well as their substantive due process right to earn a living.²⁹⁸ The petitioners’ main argument was that Section 647(b) of the California Penal Code infringes on their fundamental liberty interest against unwarranted governmental intrusion.²⁹⁹ The District Court granted the state’s motion to dismiss the case, stating, “the intimate association between a prostitute and client, while it may be consensual and cordial, has not merited the protection of the Due Process Clause of the Fourteenth Amendment.”³⁰⁰ The United States Court of Appeals for the Ninth Circuit affirmed, and the decision could have implications for anti-sex-work laws in other states under the Ninth Circuit’s Jurisdiction.³⁰¹

While it is uncertain whether judicial action will bring about the decriminalization of sex work in the United States, the Supreme Court’s 2003 decision in *Lawrence v. Texas*³⁰² has sparked some interest among scholars of sex work. Some writers have likened current sex work laws to sodomy laws, categorizing both as futile attempts to protect the moral fabric of society.³⁰³ In this vein, *Lawrence* could be a potential step toward the decriminalization of sex work. *Lawrence* ruled that states could not outlaw private, consensual sexual activities between adult members of the same sex because the Fourteenth Amendment protects private consensual sexual relations between adults.³⁰⁴

Although the majority opinion explicitly states that sex work is outside the scope of the ruling,³⁰⁵ Justice Scalia’s dissent avers that the ruling will open the door to legalization of other sexual acts, including prostitution.³⁰⁶

295. *Id.*; see also Sylvia A. Law, *supra* note 276 523, 598 (noting that “one of the most effective ways for commercial sex workers to promote decent working conditions and protect themselves from violence, abuse, and health and safety hazards, is to work in a collection. . . [and that] that seems to be the lesson of Hawaii during World War II and Australia”).

296. City of Berkeley, *supra* note 164.

297. Erotic Serv. Provider Legal Educ. & Research Project v. Gascon, No. C15-01007 JSW, 2016 WL 1258638 (N.D. Cal. Mar. 31, 2016).

298. *Id.* at *2.

299. *Id.* at *3.

300. *Id.* at *4.

301. Erotic Serv. Provider Legal Educ. & Research Project v. Gascon, 800 F.3d 450, 454 (9th Cir. 2018).

302. *Lawrence v. Texas*, 539 U.S. 558 (2003).

303. See Hough, *supra* note 5, at 119.

304. *Lawrence*, 539 U.S. at 578.

305. *Id.*

306. *Id.* at 590 (Scalia, J., dissenting).

Contrary to Justice Scalia's fears, though, state court rulings since 2003 have not applied *Lawrence* to sex work. In 2005, the North Carolina Court of Appeals held that the Supreme Court's exclusion of sex work from the *Lawrence* holding meant that sex work was not a protected sexual act under the Fourteenth Amendment.³⁰⁷ The Idaho Court of Appeals has also deliberately stated that procurement of a sex worker is still a crime under Idaho law,³⁰⁸ and a Hawaii court upheld the constitutionality of an anti-sex-work statute.³⁰⁹ Thus, it appears that the Supreme Court and the state courts still do not deem the prohibition of sex work unconstitutional. Any change in the status of sex work will likely have to come first from state legislatures.

However, *Lawrence* may perhaps lead to decriminalization of sex work in a less overt manner. Given that some protections from government infringement afforded by marital privacy were extended to same-sex relationships, *Lawrence* may offer a vehicle for providing a defense against sex work for non-marital defendants. The recognition of these and other defenses to sex work could ultimately lead to decriminalization of sex work by creating a comprehensive list of exceptions to conviction. Currently, however, state courts seem reluctant to adopt this approach.³¹⁰

C. SEX WORK IN THE LGBTQ COMMUNITY

Anti-sex work legislation has had a negative impact on members of the LGBTQ community. Solicitation laws and related criminal offenses, in addition to being used to curtail sex work, have also been utilized to police gay men's sexual behavior.³¹¹ Louisiana, for example, imposed a "crime against nature by solicitation" provision ("CANS"), which singled out solicitation of oral or anal sex for compensation for harsher punishment than that meted out under the solicitation provision of the state's sex work statute, including mandatory registration as a sex offender for a period of fifteen years to life.³¹² Although the legislation has since been deemed unconstitutional,³¹³ laws like it are aimed at curtailing such sexual behavior.

Transgender individuals often choose sex work because of the homophobic and transphobic social climates that exist in their communities.³¹⁴ These environments impose barriers to education and employment, resulting in limited

307. *State v. Pope*, 608 S.E.2d 114, 116 (N.C. Ct. App. 2005).

308. *State v. Grazian*, 164 P.3d 790, 794 (Idaho 2007).

309. *State v. Pegouskie*, 113 P.3d 811, 818–20 (Haw. Ct. App. 2005).

310. See discussion *supra* Parts III.A–B.

311. Brief for American Civil Liberties Union Foundation of Southern California et al. as Amici Curiae Supporting Plaintiffs-Appellants, *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, No. C15-01007 JSW, 2016 WL 1258638 (N.D. Cal. Mar. 31, 2016).

312. Andrea Ritchie, *Crimes Against Nature: Challenging Criminalization of Queerness and Black Women's Sexuality*, 14 *LOY. J. PUB. INT. L.* 355, 355 (2013).

313. *Id.* at 356.

314. *LGBT Sex Workers Do Matter*, *supra* note 26, at 4.

economic opportunities.³¹⁵ For example, in an effort to further marginalize transgender women, police profiling and institutional discrimination lead to high rates of incarceration for sex work-related offenses.³¹⁶ Such activity from law enforcement also exposes transgender women to more violence.³¹⁷ Especially vulnerable are LGBTQ youth. Generally, these youths have a highly disproportionate rate of contact with law enforcement in comparison to their heterosexual peers.³¹⁸ This disparity is because police often “equate homosexuality with deviancy.”³¹⁹

Law enforcement’s profiling and abuse promulgates increased violence against the transgender community as a whole, especially those who are engaged in sex work.³²⁰ High levels of criminalization and discrimination in society make LGBTQ individuals easy targets for violence. The violence comes not only from public institutions like law enforcement, but also from private persons, hate groups, family members, and intimate partners.³²¹ Sex workers of the LGBTQ community are especially affected by criminalization efforts because of the scrutiny toward their sexual behavior and gender identity, further keeping them on the fringes of society. The resulting stigma can lead to homelessness, poverty,³²² inadequate access to healthcare, lack of self-esteem, depression, and suicide.³²³

CONCLUSION

Though there is some variation among state anti-sex work statutes, all state courts have held that laws criminalizing sex work are constitutional. All states, at least to some extent, view anti-sex work statutes as desirable. However, many of these statutes ignore the disproportionate impact of such laws on the most vulnerable, particularly LGBTQ people of color, due to the intersection of different forms of oppression. Law enforcement’s bias and profiling towards the LGBTQ community in general influences its enforcement of anti-sex work statutes and leads to increased violence towards a particular community in the sex-work industry. Despite the vigorous debate in support of decriminalization of sex work in several areas of the country, these proposals continue to face public opposition. For example, Rhode Island re-criminalized sex work in 2009, even though it once marked a potential, though unintentional, trend toward decriminalization.

315. *Id.*

316. Brief of American Civil Liberties Union Foundation of Southern California, et al. as Amici Curiae Supporting Plaintiffs-Appellants, *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, No. C15-01007 JSW, 2016 WL 1258638 (N.D. Cal. 2016), at *8.

317. *Id.* at *11.

318. *Id.* at *22.

319. *Id.* at *23.

320. *Id.* at *13.

321. *LGBT Sex Workers Do Matter*, *supra* note 26, at 11.

322. *Id.* at 4.

323. *Id.* at 12.V

Nevertheless, the legalization of sex work in certain counties in Nevada offers the United States an opportunity to learn more about the impact of legalized sex work on sex workers and communities. While the holding in *Lawrence v. Texas* found that the right to consensual, private sex between adults is embodied in the Constitution, courts have not extended this right to consensual commercial sex. Currently, it does not seem likely that *Lawrence* creates a privacy right to engage in sex work. Furthermore, although many counties have added decriminalization measures to their local ballots, voters have not supported these initiatives. While sex work remains illegal in most of the United States, the debate is far from over.