

SEX WORK

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I. INTRODUCTION

Sex work¹ has a long and lucrative history in the United States (U.S.) and around the world. Today, the multi-billion-dollar commercial sex industry

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). Throughout this Article, 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 and phone and Internet sex.

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 U.S. and flourished in large cities.³ Sex work remains criminalized in nearly every state,⁴ though it continues to have an entrenched and visible presence throughout the country. In the past quarter century, and particularly since the COVID-19 pandemic,⁵ the U.S. has witnessed a dramatic growth in the commercial sex industry, with an increase in the privatization of commercial sex services.⁶ Internet technology led to a rise in phone sex, Internet sex, and escort services, allowing more Americans to purchase pornography and sexual services from private spaces than before.⁷ 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; these are typically street sex workers, who are disproportionately low-income workers, women of color, transgender people, and immigrants.⁸ Street sex workers are among the most vulnerable in the industry to robbery, rape, murder, arrest, criminal prosecution, and police harassment and brutality.⁹ Some indoor sex workers—including low-income workers in brothels

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

5. Gabrielle Drolet, *The Year Sex Work Came Home*, N.Y. TIMES (Apr. 10, 2020) (noting that “OnlyFans reported a 75% increase in overall new sign-ups — 3.7 million new sign-ups [in the month of March, 2020], with 60,000 of them being new creators”).

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

7. Stewart Cunningham, Teela Sanders, Jane Scoular, Rosie Campbell, Jane Pitcher, Kathleen Hill, Matt Valentine-Chase, Camille Melissa, Yigit Aydin, & Rebecca Hamer, *Behind the screen: Commercial sex, digital spaces and working online*, 53 TECH. IN SOC'Y 47, 47 (2018).

8. See S.F. Task Force on Prostitution, Final Report (1996), <https://perma.cc/XRN2-Y3Y3> (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*, URB. JUST. CTR., 34–47 (2003), <https://perma.cc/H73P-FDWF>. For a discussion of how criminalization and disparate enforcement affects sex workers, see Janet Halley, Prabha Kotiswaran, Hila Shamir, & Chantal Thomas, *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 the lack of legal protections for sex workers contributes to their control and exploitation by pimps).

9. Weitzer, *supra* note 2, at 4; see also *Move Along: Policing Sex Work in Washington, D.C.*, ALL. FOR A SAFE AND DIVERSE D.C. 17 (2008), <https://perma.cc/ZZT6-HGBF> [hereinafter *Alliance*] (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

and massage parlors—also face significant dangers, including isolation, fear of police raids, and lack of support services.¹⁰ The sex work industry is thus gendered, racialized, and complex, necessitating intersectional analysis of human rights, workers' rights, criminal justice issues, public health priorities, and oppression related to race, class, sex, gender identity, and sexual orientation.

The sex industry includes both legal and illegal activities. The determination of the legal status of prostitution has been considered a reasonable exercise of state police power.¹¹ Certain forms of commodified sexual activities, such as child abuse sex material,¹² pimping, and pandering are criminalized in most states.¹³ Prostitution, generally understood to be the exchange of sexual activity for money or other financial compensation, is illegal in every state,¹⁴ with the

obtain help); Anna-Louise Crago, *Our Lives Matter: Sex Workers United for Health and Rights*, OPEN Soc'Y INST. 61 (2008), <https://perma.cc/PMC4-EQFF> (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).

10. See Thukral & Ditmore, *supra* note 8, at 37–43.

11. See, e.g., *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 880 F.3d 450, 460 (9th Cir.), *amended*, 881 F.3d 792 (9th Cir. 2018) (holding that “the criminalization of prostitution is a valid exercise of California’s police power and hence, the State may criminalize prostitution in the interest of the health, safety, and welfare of its citizens under the Tenth Amendment.”); *State v. Roberts*, 779 S. W.2d 576, 579 (Mo. 1989).

12. This Article prefers the term “child abuse sex material” to “child pornography,” a term which “may imply that the child is complicit in the sexual abuse, thus detracting from the fact that the images are evidence of the commission of the crime of sexual assault and/or rape of a child.” *Glossary of Terms*, INT’L CTR. FOR MISSING & EXPLOITED CHILD., <https://perma.cc/NAV4-4MAF> (last visited Mar. 5, 2023).

13. See, e.g., GA. CODE ANN. § 16-6-13 (West, Westlaw through 2022 Reg. Sess. of the Ga. Gen. Assemb.); LA. STAT. ANN. § 14:84 (West, Westlaw through 2022 1st Extra., Veto, Reg. & 2nd Extra. Sess.); MINN. STAT. ANN. § 617.247 (West, Westlaw through 2023 Reg. Sess.).

14. See ALA. CODE § 13A-12-121 (West, Westlaw through 2022 Reg. & 1st Spec. Sess.); ALASKA STAT. ANN. § 11.66.100 (West, Westlaw through 2022 2nd Reg. Sess. of the 32nd Leg.); ARIZ. REV. STAT. ANN. § 13-3214 (West, Westlaw through 2nd Reg. Sess. of the 55th Leg. (2022)); ARK. CODE ANN. § 5-70-102 (West, Westlaw through 2023 Reg. Sess. of 94th Ark. Gen. Assemb.); CAL. PENAL CODE § 647(b) (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); COLO. REV. STAT. ANN. § 18-7-201 (West, Westlaw through 2nd Reg. Sess. of the 73rd Gen. Assemb. (2022)); CONN. GEN. STAT. ANN. § 53a-82 (West, Westlaw through 2022 Reg. Sess.); DEL. CODE ANN. tit. 11, § 1342 (West, Westlaw through Ch. 5 of the 152nd Gen. Assemb. (2023–2024)); D.C. CODE ANN. § 22-2701 (West, Westlaw through Dec. 28, 2022); FLA. STAT. ANN. § 796.07 (West, Westlaw through 2022 2nd Reg. Sess. & Spec. “A”, “C”, & “D” Sess. of 27th Leg.); GA. CODE ANN. § 16-6-9 (West, Westlaw through 2022 Reg. Sess. of the Ga. Gen. Assemb.); HAW. REV. STAT. ANN. § 712-1200 (West, Westlaw through 2022 Reg. Sess.); IDAHO CODE ANN. § 18-5613 (West, Westlaw through 1st Reg. Sess. of the 67th Idaho Leg.); 720 ILL. COMP. STAT. ANN. 5/11-14 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); IND. CODE ANN. § 35-45-4-2 (West, Westlaw through 2022 2nd Reg. Sess., 2nd Reg. Tech. Sess., & 2nd Reg. Spec. Sess. of the 122nd Gen. Assemb.); IOWA CODE ANN. § 725.1 (West, Westlaw through 2023 Reg. Sess.); KAN. STAT. ANN. § 21-6419 (West, Westlaw through 2022 Reg. Sess. of the Kan. Leg.); KY. REV. STAT. ANN. § 529.020 (West, Westlaw through 2022 Reg. Sess.); LA. STAT. ANN. § 14:82 (West, Westlaw through 2022 1st Extra., Veto, Reg. & 2nd Extra. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 853-A (West, Westlaw through 2023 1st Reg. Sess. of the 131st Leg.); MD. CODE ANN., Crim. Law § 11-306 (West, Westlaw through 2022 Reg. Sess.); MASS. GEN. LAWS ANN. Ch. 272, § 53A (West, Westlaw through 2022 2nd. Ann. Sess.); MICH. COMP. LAWS ANN. § 750.449a (West, Westlaw through P.A.

exception of certain counties in Nevada, where the practice is highly regulated.¹⁵ Other acts, such as phone sex, stripping, erotic dancing, and adult pornography, are not explicitly prohibited, but are highly regulated by states.¹⁶

While this regime has remained relatively unchallenged in most states, recent efforts to decriminalize sex work, including calls from international human rights organizations such as Amnesty International,¹⁷ indicate popular reconsideration of the efficacy and equity of criminalization.¹⁸ Decriminalization campaigns have grown primarily from the sex workers' rights movement, which has advocated

2023, No. 3, of the 2023 Reg. Sess. 102nd Leg.); MINN. STAT. ANN. § 609.321 (West, Westlaw through 2023 Reg. Sess.); MISS. CODE ANN. § 97-29-49 (West, Westlaw through 2022 Reg. Sess.); MO. ANN. STAT. § 567.020 (West, Westlaw through 2022 2nd Reg. Sess. & 1st Extra. Sess. of the 101st Gen. Assemb.); MONT. CODE ANN. § 45-5-601 (West, Westlaw through 2021 Sess. of the Mont. Leg.); NEB. REV. STAT. ANN. § 28-801 (West, Westlaw through 2nd Reg. Sess. of the 107th Leg. (2022)); N.H. REV. STAT. ANN. § 645:2 (West, Westlaw through Ch. 1 of the 2023 Reg. Sess.); N.J. STAT. ANN. § 2C:34-1 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1.); N.M. STAT. ANN. § 30-9-2 (West, Westlaw through 2022 2nd Reg. Sess. & 3rd Spec. Sess. of the 55th Leg. (2022)); N.Y. PENAL LAW § 230.00 (McKinney, Westlaw through L. 2022, Ch. 1-841); N.C. GEN. STAT. ANN. § 14-204 (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.); N.D. CENT. CODE § 12.1-29-03 (West, Westlaw through 2021 Reg. & Spec. Sess. of the 67th Leg. Assemb.); OHIO REV. CODE ANN. § 2907.25 (West, Westlaw through File 177 of the 134th General Assembly (2021-2022)); OKLA. STAT. ANN. tit. 21, § 1029 (West, Westlaw through 2nd Reg. Sess. & 1st & 2nd Extra. Sess. of the 58th Leg. (2022)); OR. REV. STAT. ANN. § 167.007 (West, Westlaw through 2022 Reg. Sess. of the 81st Leg. Assemb.); 18 PA. STAT. ANN. § 5902 (West, Westlaw through 2022 Reg. Sess. Act 97); S.C. CODE ANN. § 16-15-90 (West, Westlaw through 2022 Act No. 268.); S.D. CODIFIED LAWS § 22-23-1 (West, Westlaw through 2023 Reg. Sess.); TENN. CODE ANN. § 39-13-513 (West, Westlaw through 2022 2nd Reg. Sess. of the 112th Tenn. Gen. Assemb.); TEX. PENAL CODE ANN. § 43.02 (West, Westlaw through 2021 Reg. Sess. & Called Sess. of the 87th Leg.); UTAH CODE ANN. § 76-10-1302 (West, Westlaw through 2022 3rd Spec. Sess.); VT. STAT. ANN. tit. 13, § 2632 (West, Westlaw through Ch. 186 (End) & M-19 (End) of the Adj. Sess. of the 2021-2022 Vt. Gen. Assemb.); VA. CODE ANN. § 18.2-346 (West, Westlaw through 2022 Reg. Sess. & 2022 Spec. Sess. I); WASH. REV. CODE ANN. § 9A.88.030 (West, Westlaw through 2022 Reg. Sess. of the Wash. Leg.); W. VA. CODE ANN. § 61-8-5(b) (West Westlaw through 2023 Reg. Sess.); WIS. STAT. ANN. § 944.30 (West, Westlaw through 2021 Act 267); WYO. STAT. ANN. § 6-4-101 (West, Westlaw through 2023 Gen. Sess.); *see also* Halley, Kotiswaran, Shamir, & Thomas, *supra* note 8, at 338-40 (explaining the different degrees of criminalization).

15. NEV. REV. STAT. ANN. §§ 201.354, 244.345 (West, Westlaw through Ch. 2 (End) of the 33rd Spec. Sess. (2021)).

16. 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. Am. 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).

17. Emily Bazelon, *Why Amnesty International is Calling for Decriminalizing Sex Work*, N.Y. TIMES (May 25, 2016), <https://perma.cc/8E5A-5T2Q>.

18. *See, e.g.,* Jerald L. Mosley, *Decriminalizing Prostitution in Recognition of Fundamental Rights*, L.A. LAW., Mar. 2016, at 36; *Why Sex Work Should Be Decriminalized: Questions and Answers*, HUM. RTS. WATCH (Aug. 2019), <https://perma.cc/4GRW-YVZP>; *It's Time to Decriminalize Sex Work*, AM. C. L. UNION (last updated Jan. 2022), <https://perma.cc/8MR4-JNJX>; Anna North, *The Movement to Decriminalize Sex Work, Explained*, VOX (Aug. 2, 2019), <https://perma.cc/B8QW-32Q8>; Jasmine Garsd, *Should Sex Work be Decriminalized? Some Activists Say It's Time*, NAT'L PUB. RADIO (Mar. 22, 2019), <https://perma.cc/92DC-7DGZ>.

for decriminalization of sex work since the late 1970s.¹⁹ The effects of sex work within the LGBT+ community present their own unique set of challenges. LGBT+ individuals are generally already marginalized because of their sexual orientation or gender identity.²⁰ As sex workers, they are exposed to further scrutiny and a heightened risk of violence. Additional stressors, such as laws criminalizing commercial sex and other repressive institutions, can have long-term cultural and individual psychological impacts.²¹

In Part II, this Article begins by defining “sex work.” Part III 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 IV, this Article reviews the currently recognized and unrecognized legal defenses to prostitution. Part V outlines Nevada’s model of decriminalization and other efforts at the local level to decriminalize sex work. Part VI addresses constitutional issues raised by the criminalization of sex work, including freedom of speech, due process, and equal protection. Finally, Part VII concludes by presenting the current arguments and efforts for decriminalization.

II. 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 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.²² The crime of prostitution usually involves three elements: (1) some degree of sexual activity or conduct; (2) compensation; and (3) intent.²³

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.²⁴ While some states require that sexual contact actually take

19. 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).

20. Joey L. Mogul, Andrea J. Ritchie, & Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States*, 102 J. CRIM. L. & CRIMINOLOGY 171, 173 (2012).

21. *See Underserved. Overpoliced. Invisibilised. LGBT Sex Workers Do Matter*, INT’L COMM. ON THE RTS. OF SEX WORKERS IN EUR. 11 (Oct. 2015), <https://perma.cc/K7TZ-2PQ8>.

22. 1 Shapiro, *The Prosecution and Defense of Sex Crimes* § 6.02 (Matthew Bender, Rev. Ed.)

23. 63C AM. JUR. 2D *Prostitution* §§ 1–3 (2022).

24. *See, e.g.*, COLO. REV. STAT. ANN. § 18-7-201 (West, Westlaw through 2nd Reg. Sess 73rd Gen. Assemb. (2022)); 720 ILL. COMP. STAT. ANN. 5/11-14 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); NEB. REV. STAT. ANN. § 28-801 (West, Westlaw through 2nd Reg. Sess. of the 107th Leg. (2022)); WYO. STAT. ANN. § 6-4-101 (West, Westlaw through 2023 Gen. Sess.).

place,²⁵ the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states.²⁶ Where statutes criminalize an agreement to engage in sexual activity for compensation, the term “agreement” often becomes subject to intense scrutiny, enabling some defendants to successfully argue that no “agreement” ever took place.²⁷

State definitions of sexual activity for the purposes of prostitution vary.²⁸ Illinois, for example, requires that the sexual activity be “an act of sexual penetration,”²⁹ while North Carolina requires sexual intercourse.³⁰ Other states include fellatio,³¹ cunnilingus,³² assisted masturbation,³³ or “physical contact of [a] person’s

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

26. 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).

27. See, e.g., *State v. Pegouskie*, 113 P.3d 811, 815–17 (Haw. Ct. App. 2005) (finding the requisite elements for an agreement to be met for one charge of prostitution where the agreement between the defendant and the undercover police officer made explicit reference to “sex,” but not for another charge between the same two individuals where the agreement was simply to do “everything,” as opposed to naming any sexual acts in particular); *Harwell v. State*, 821 N.E.2d 381, 383 (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).

28. 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 [being] limited to sexual intercourse or sodomy.” GA. CODE ANN. § 16-6-9 (West, Westlaw through 2022 Reg. Sess. of the Ga. Gen. Assemb.). 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 2022 2nd Reg. Sess. & 3rd Spec. Sess. of the 55th Leg. (2022)). 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).

29. *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.”).

30. *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).

31. *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).

32. 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 Ch. 1 of the 2023 Reg. Sess.); N.M. STAT. ANN. § 30-9-2 (West, Westlaw through 2022 2nd Reg. Sess. & 3rd Spec. Sess. of the 55th Leg. (2022)).

33. 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).

clothed or unclothed genitals, pubic area, buttocks, [or] if such person [is] female, breast³⁴ as sexual activity for the purposes of prostitution. Still other states have explicitly excluded certain acts from the definition of sexual activity, including self-masturbation where there is no physical contact between parties;³⁵ kink and fetish acts such as “foot licking, spanking, domination and submission” where no other sexual activity is involved;³⁶ and sexually suggestive acts where no other sexual activity is involved, such as sucking on another’s finger.³⁷ The sexual act does not necessarily have to be performed on the paying individual.³⁸ 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.³⁹

B. COMPENSATION

While some states criminalize the mere solicitation or negotiation of prospective prostitution,⁴⁰ other states require actual compensation.⁴¹ The compensation, however, need not be monetary. Courts have found compensation where a gold necklace was offered in exchange for sexual services;⁴² where an individual purchased “forty dollar drinks” as a “fee”;⁴³ and where payment for a nude “private dance” did not expressly call for sexual contact, but where contact ensued.⁴⁴ Moreover, some jurisdictions 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.⁴⁵

34. *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).

35. *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).

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

37. *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).

38. *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).

39. *See id.*

40. *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).

41. *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.”).

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

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

44. *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”).

45. *Compare People v. Freeman*, 46 Cal. 3d 419, 424 (Cal. 1988) (holding that the maker 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).

C. INTENT

States also differ over requiring a finding of specific or general intent to support a conviction of prostitution.⁴⁶ Strict liability in prostitution statutes—which does not require any finding of intent for a criminal conviction—is contrary to the purpose of the criminal law and implicates defendants’ due process rights.⁴⁷ However, where the age of the defendant is relevant for criminal liability, in most circumstances as an aggravating factor, strict liability is permissible.⁴⁸

III. CRIMES RELATED TO PROSTITUTION

Patronizing a sex worker, pandering, and procuring an individual for the purpose of prostitution are crimes under some state statutes. Certain states also have statutes that impose mandatory testing for HIV and other sexually transmitted infections, imposing harsher penalties on those who engage in sex work while knowingly infected with HIV or other sexually transmissible infections.

A. PATRONIZING A PROSTITUTE

Historically, prostitution laws were primarily enforced against sex workers, not their customers.⁴⁹ More recently, states have enacted statutes targeted at those who solicit sex workers.⁵⁰ Similar to prostitution statutes, these solicitation statutes criminalize paying, offering to pay, or agreeing to pay compensation for sexual activity.⁵¹ Some states, however, have deliberately refused to criminalize the

46. *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.”).

47. *See generally* Ford v. State, 262 P.3d 1123, 1126 (Nev. 2011) (construing prostitution statute as requiring a specific intent to become or remain a prostitute); 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.”).

48. *See generally* Ford v. State, 262 P.3d 1123, 1126 (Nev. 2011) (construing prostitution statute as requiring a specific intent to become or remain a prostitute); 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.”).

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

50. ARK. CODE ANN. § 5-70-103 (West, Westlaw through 2023 Reg. Sess. of the Ark. Gen. Assemb.); COLO. REV. STAT. ANN. § 18-7-205 (West, Westlaw through 2nd Reg. Sess. of the 73rd Gen. Assemb. (2022)); CONN. GEN. STAT. ANN. § 53a-83 (West, Westlaw through 2022 Reg. Sess.); DEL. CODE ANN. tit. 11, § 1343 (West, Westlaw through Ch. 5 of the 152nd Gen. Assemb. (2023–2024)); IDAHO CODE ANN. § 18-5614 (West, Westlaw through 1st Reg. Sess. of the 67th Idaho Leg.); 720 ILL. COMP. STAT. ANN. 5/11-18 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); IND. CODE ANN. § 35-45-4-3 (West, Westlaw through 2022 2nd Reg. Sess., 2nd Reg. Tech. Sess., & 2nd Reg. Spec. Sess. of the 122nd Gen. Assemb.); N.Y. PENAL LAW § 230.02 (McKinney, Westlaw through L. 2022 Ch. 1–841); UTAH CODE ANN. § 76-10-1303 (West, Westlaw through 2022 3rd Spec. Sess.); WASH. REV. CODE ANN. § 9A.88.110 (West, Westlaw through 2022 Reg. Sess. of the Wash. Leg.).

51. ARK. CODE ANN. § 5-70-103 (West, Westlaw through 2023 Reg. Sess. of the Ark. Gen. Assemb.); COLO. REV. STAT. ANN. § 18-7-205 (West, Westlaw through 2nd Reg. Sess. of the 73rd Gen.

act of patronizing.⁵² Others criminalize patronizing only under specific circumstances, such as the patronizing of a minor.⁵³ Even in the absence of a specific statute against patronization, customers can, in some states, be charged with solicitation.⁵⁴ In contrast, other statutes apply to both sex workers and customers,⁵⁵ and many state statutes penalize sex workers and customers equally.⁵⁶

Despite state legislatures' attempts to create concrete rules regarding punishment in state prostitution laws, inequities still exist in the enforcement of those laws. In general, female sex workers are arrested and prosecuted more often and sentenced more harshly than their male customers.⁵⁷ 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.⁵⁸ Proponents of the status quo, conversely, contend

Assemb. (2022)); CONN. GEN. STAT. ANN. § 53a-83 (West, Westlaw through 2022 Reg. Sess.); DEL. CODE ANN. tit. 11, § 1343 (West, Westlaw through Ch. 5 of the 152nd Gen. Assemb. (2023–2024)); IDAHO CODE ANN. § 18-5614 (West, Westlaw through 1st Reg. Sess. of the 67th Idaho Leg.); 720 ILL. COMP. STAT. ANN. 5/11-18 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); IND. CODE ANN. § 35-45-4-3 (West, Westlaw through 2022 2nd Reg. Sess., 2nd Reg. Tech. Sess., & 2nd Reg. Spec. Sess. of the 122nd Gen. Assemb.); N.Y. PENAL LAW § 230.02 (McKinney, Westlaw through L. 2022 Ch. 1–841); UTAH CODE ANN. § 76-10-1303 (West, Westlaw through 2022 3rd Spec. Sess.); WASH. REV. CODE ANN. § 9A.88.110 (West, Westlaw through 2022 Reg. Sess. of the Wash. Leg.).

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

53. See COLO. REV. STAT. ANN. § 18-7-406 (West, Westlaw through 2nd Reg. Sess. of the 73rd Gen. Assemb. (2022)); 720 ILL. COMP. STAT. ANN. 5/11-18.1 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.); ME. REV. STAT. ANN. tit. 17-A, § 855 (West, Westlaw through 2023 Reg. Sess. of the 131st Leg.); MONT. CODE ANN. § 45-5-601 (West, Westlaw through 2021 of the Mont. Leg.); N.C. GEN. STAT. ANN. § 14-205.2(c) (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.); S.C. CODE ANN. § 16-15-425 (West, Westlaw through 2022 Act No. 268). 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 2022 Reg. Sess. of the Wash. Leg.) (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 2022 2nd Reg. Sess. of the 112th Tenn. Gen. Assemb.) (children under eighteen cannot be charged with prostitution); CONN. GEN. STAT. ANN. § 53a-82 (West, Westlaw through 2022 Reg. Sess.) (children under eighteen cannot be charged with prostitution); N.Y. SOC. SERV. LAW § 447-a, b (McKinney, Westlaw through 2022, Ch. 1–841) (children under eighteen cannot be charged with prostitution); MICH. COMP. LAWS ANN. § 750.448 (West, Westlaw through P.A. 2023, No. 3, of the 2023 Reg. Sess., 102nd Leg.) (children under sixteen cannot be charged with prostitution).

54. N.C. GEN. STAT. ANN. § 14-205.1 (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.); WIS. STAT. ANN. § 944.32 (West, Westlaw through 2021 Act 267); LA. STAT. ANN. § 14:84 (West, Westlaw through 2022 1st Extra., Veto, Reg, & 2nd Extra. Sess.); D.C. CODE ANN. § 22-2701 (West, Westlaw through Dec. 28, 2022); COLO. REV. STAT. ANN. § 18-7-202 (West, Westlaw through 2nd Reg. Sess. of the 73rd Gen. Assemb. (2022)).

55. 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).

56. See, e.g., MASS. GEN. LAWS ANN. ch. 272, § 53A (West, Westlaw through 2022 2nd Ann. Sess.).

57. 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).

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

that punishing sellers of prohibited services “whose profit motivation could lead [them] to violate the law more frequently than potential customers” effectively reduces the supply of commercial sex.⁵⁹ Arresting sex workers, however, may be an ineffective way to combat illegal sex work.⁶⁰ As an alternative, many advocate for punishing clients, sometimes referred to as “johns,” and pimps, rather than sex workers.⁶¹ Other sex workers’ rights advocates encourage the decriminalization of sex work entirely.⁶²

B. PANDERING AND PROCURING

In states which have statutes criminalizing pandering or procuring an individual for the purpose of prostitution,⁶³ such statutes have been broadly interpreted, with “pandering,” “procuring,” and “pimping” being used synonymously in many jurisdictions.⁶⁴ Pandering has been broadly 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.”⁶⁵

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

60. Michael Shively, Kristina Kliorys, Kristin Wheeler, & Dana Hunt, *A National Overview of Prostitution and Sex Trafficking Demand Reduction Efforts, Final Report*, NAT’L INST. OF JUST. (2012), <https://perma.cc/8EMK-XJZ2> (“Efforts to reduce prostitution and sex trafficking by constraining supply have not usually been successful, aside from temporary effects or displacing markets to other areas. Where demand is strong, interfering with supply chains usually results in shifting to other sources or other means of distribution. The ‘service gap’ is too great to close by addressing supply only.”).

61. Bingham, *supra* note 4, at 91 (stating that 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).

62. See, e.g., *Why Sex Work Should Be Decriminalized: Questions and Answers*, HUM. RTS. WATCH (Aug. 2019), <https://perma.cc/VKG4-WC44>; *It’s Time to Decriminalize Sex Work*, AM. C.L. UNION (Jan. 2022), <https://perma.cc/7QRF-TVHF>; Anna North, *The Movement to Decriminalize Sex Work, Explained*, VOX (Aug. 2, 2019), <https://perma.cc/4LM2-HGU7>; Jasmine Garsd, *Should Sex Work be Decriminalized? Some Activists Say It’s Time*, NAT’L PUB. RADIO (Mar. 22, 2019), <https://perma.cc/5UPG-KYT8>.

63. ARIZ. REV. STAT. ANN. § 13-3209 (West, Westlaw through 2nd Reg. Sess. of the 55th Leg. (2022)); CAL. PENAL CODE § 266i (West, Westlaw through Ch. 997 of 2022 Reg. Sess.); COLO. REV. STAT. ANN. § 18-7-203 (West, Westlaw through 2nd Reg. Sess. of the 73rd Gen. Assemb. (2022)); D.C. CODE ANN. § 22-2705 (West, Westlaw through Dec. 28, 2022); GA. CODE ANN. § 16-6-12 (West, Westlaw through 2022 Reg. Sess. of the Ga. Gen. Assemb.); IOWA CODE ANN. § 725.3 (West, Westlaw through 2023 Reg. Sess.); LA. STAT. ANN. § 14:84 (West, Westlaw through 2022 1st Extra., Veto, Reg. & 2nd Extra. Sess.); MICH. COMP. LAWS ANN. § 750.455 (West, Westlaw through P.A. 2023, No. 3, of the 2023 Reg. Sess., 102nd Leg.); NEB. REV. STAT. ANN. § 28-802 (West, Westlaw through 2nd Reg. Sess. of the 107th Leg. (2022)); NEV. REV. STAT. ANN. § 201.300 (West, Westlaw through Ch. 2 (End) of the 33rd Spec. Sess. (2021)); tit. 11 R.I. GEN. LAWS ANN. § 11-34.1-7 (West, Westlaw through Chapter 442 of the 2022 Reg. Sess. of the R.I. Leg.); WIS. STAT. ANN. § 944.33 (West, Westlaw through 2021 Act 267).

64. 63C AM. JUR. 2D, *supra* note 23, § 17.

65. *Id.* § 15.

Under such broad statutes, patrons of sex workers,⁶⁶ those who procure sex workers for others,⁶⁷ those who arrange clientele for sex workers,⁶⁸ and those who manage businesses which profit from prostitution on the premises⁶⁹ may all be convicted of pandering or procuring.

C. HEALTH AND SEXUALLY TRANSMITTED INFECTIONS

Public health officials have taken a special interest in prostitution since the 1990s due to the links between multiple sex partners, intravenous drug use, and the spread of HIV and other sexually transmissible infections.⁷⁰ Abuse at the hands of both pimps and clients can make it difficult, and sometimes dangerous, for sex workers to insist on condom usage.⁷¹ In an effort to combat infection transmission, some states specifically criminalize the act of engaging in prostitution while infected with HIV or another sexually transmitted infection.⁷² In Kentucky, for example, convicted sex workers are required to undergo HIV testing, and it is a Class D felony to knowingly engage in prostitution while HIV-positive.⁷³ Some states which mandate testing for individuals convicted of prostitution do not require the same of sex workers' clients.⁷⁴ Other states require testing for both sex workers and their clients.⁷⁵ Though legislation may mandate

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

67. *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).

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

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

70. 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*, *CTRS. FOR DISEASE CONTROL*, <https://perma.cc/E54D-C6KY> (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).

71. DeCou, *supra* note 70, at 446–47.

72. *See* FLA. STAT. ANN. § 796.08(5) (West, Westlaw through 2022 2nd Reg. & Spec. Sess. “A,” “C,” & “D” Sess. of the 27th Leg.) (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 2022 2nd Reg. Sess. of the 112th Tenn. Gen. Assemb.) (engaging in prostitution while knowingly infected with HIV is “aggravated prostitution,” a Class C felony); UTAH CODE ANN. § 76-10-1309 (West, Westlaw through 2022 3rd Spec. Sess.) (engaging in prostitution while knowingly infected with a sexually transmitted disease is a misdemeanor; doing so with HIV is a third degree felony).

73. KY. REV. STAT. ANN. § 529.090 (West, Westlaw through 2022 Reg. Sess.).

74. *See, e.g.*, W. VA. CODE ANN. § 16-3C-2 (West, Westlaw through 2023 Reg. Sess.); tit. 11 R.I. GEN. LAWS ANN. § 11-34-10 (repealed 2009).

75. *See* 730 ILL. COMP. STAT. ANN. 5/5-5-3(g) (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.).

testing, sex workers often cannot access public health services.⁷⁶

IV. DEFENSES TO PROSTITUTION CHARGES

A. RECOGNIZED DEFENSES

Courts recognize two main defenses against prostitution charges: (1) marriage, and (2) entrapment.⁷⁷ Each of these defenses applies to both charges of prostitution and charges of patronizing or soliciting.

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.⁷⁸ This is why a person who buys a dress for their spouse in exchange for a sexual act cannot be prosecuted for prostitution, but a person who does the same for a sex worker can.⁷⁹ Courts have found that this uneven application of the law does not violate the Equal Protection Clause of the Fourteenth Amendment because marital relationships enjoy an expanded zone of privacy.⁸⁰ In addition, as one court observed, the “attendant evils” associated with commercial sex, such as the spread of venereal diseases and organized crime, are typically not present when sexual conduct occurs between married partners.⁸¹

The defense of marriage, however, is not absolute. For example, marriage is not a viable defense when one spouse exploits the other for purposes of prostitution.⁸² Furthermore, the expanded zone of privacy enjoyed by marital relationships does not extend to circumstances in which a married couple invites onlookers into their home to watch their sexual encounters.⁸³

Entrapment is a valid defense for both sex workers and clients where the defendant can show that a state official induced them to perform a proscribed act that they were not predisposed to perform.⁸⁴ A defendant may also raise an

76. See Michele R. Decker, Anna-Louise Crago, Sandra K. H. Chu, Susan G. Sherman, Meena S. Seshu, & Kholi Buthelezi, *Human Rights Violations Against Sex Workers: Burden and Effect on HIV*, LANCET (July 22, 2014), <https://perma.cc/BB6E-3VQM>.

77. Defendants are also sometimes able to secure acquittals on the grounds that there was no actual agreement between worker and client. See, e.g., *State v. Pegouskie*, 113 P.3d 811, 816 (Haw. Ct. App. 2005) (finding the requisite elements for an agreement were not met for one charge of prostitution where the agreement was simply to do “everything,” as opposed to naming any sexual acts in particular).

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

79. 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 forty dollar drinks did not constitute a “fee” that bought sexual conduct).

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

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

82. *Id.* at 945.

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

84. 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 he was not predisposed to prostitution in police encounter where the police officer raised the subject of sexual activity and the defendant denied agreeing to commit a sexual act upon the police officer in return for remuneration).

entrapment defense in cases involving a non-police decoy or victim.⁸⁵ However, an entrapment defense will fail if the intent to commit the criminal act originated with the defendant, or if the police only afforded the opportunity to commit the proscribed act.⁸⁶

Courts have reached contradictory results regarding 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.⁸⁷ Other courts have found that the defense cannot be raised without admitting to the crime of prostitution.⁸⁸

B. DEFENSES NOT RECOGNIZED

Courts did not historically permit non-marital relationship defenses to prostitution charges.⁸⁹ Consistent with the historical view, state courts today do not recognize the relational status of non-marital cohabiting partners as a valid defense to prostitution charges.⁹⁰ Courts have generally refused to recognize other defenses to prostitution as well: consent is not a legitimate defense,⁹¹ nor is impossibility of completion of the agreed-upon sexual act.⁹² Similarly, it is not a defense to claim that the defendant has been deceived⁹³ nor that sexual acts

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

86. *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 fifty dollars 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) (“[T]here is no entrapment to commit a crime where the officer merely furnishes an opportunity to a defendant who is ready to commit the offense.”).

87. *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. Municipality of Anchorage*, 69 P.3d 1, 6 (Alaska Ct. App. 2003) (stating that a claim of self-incrimination does not exist where a defendant who is claiming an entrapment defense is not forced to admit that they partook in prostitution).

88. *See, e.g., Torres v. State*, No. 14-00-01221, 2002 WL 370014, at *2 (Tex. App. 2002) (citing *Norman v. State*, 588 S.W.2d 340, 345 (Tex. Crim. App. 1979)) (“[I]f 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).

89. *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).

90. *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).

91. *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.”).

92. *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).

93. *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).

between members of the same sex offered in exchange for financial compensation do not constitute prostitution.⁹⁴

V. LEGAL MODELS OF REGULATION AND DECRIMINALIZATION

The only state that does not entirely outlaw the exchange of sexual activity for compensation is Nevada.⁹⁵ Cities have enacted various forms of regulation and decriminalization of prostitution with differing results.

A. PROSTITUTION IN NEVADA

Sex work 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 of less than 700,000 people.⁹⁶ Each eligible county individually decides whether to allow prostitution.⁹⁷ The decision can be made by official policy (e.g., ordinances) or through public referenda.⁹⁸ Currently, prostitution is completely illegal in six counties: Carson City,⁹⁹ Clark,¹⁰⁰ Douglas,¹⁰¹ Lincoln,¹⁰² Pershing,¹⁰³ and Eureka.¹⁰⁴ Prostitution is legal everywhere within the borders of seven counties: Churchill,¹⁰⁵ Esmeralda,¹⁰⁶ Lander,¹⁰⁷ Lyon,¹⁰⁸ Mineral,¹⁰⁹ Nye,¹¹⁰ and Storey.¹¹¹ Prostitution is permitted, except in unincorporated areas, in four counties: Elko,¹¹² Humboldt,¹¹³ Washoe,¹¹⁴ and White Pine.¹¹⁵

94. See CONN. GEN. STAT. ANN. § 53a-82 (West, Westlaw through Jan. 1, 2023); DEL. CODE ANN. tit. 11, § 1342 (West, Westlaw through Ch. 5 of the 152nd Gen. Assemb. (2023–2024)); N.Y. PENAL LAW § 230.00 (McKinney, Westlaw through L. 2022 Ch. 1–841); WASH. REV. CODE ANN. § 9A.88.030 (West, Westlaw through 2022 Reg. Sess. of the Wash. Leg.).

95. NEV. REV. STAT. ANN. §§ 201.354(1), 244.345(8) (West, Westlaw through Ch. 2 (End) of the 33rd Spec. Sess. (2021)).

96. *Id.*

97. *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).

98. *Id.*

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

100. 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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Regulatory schemes vary in each county because local and state officials have significant discretion in granting licenses and regulating sex workers.¹¹⁶ Several counties that permit sex work restrict some activities based on gender.¹¹⁷ One county bars brothels from employing male sex workers or allowing male employees to reside on the premises.¹¹⁸ To prevent potential violence against sex workers, brothels may refuse entry to drunk or rowdy individuals, as well as to women not employed by the brothel who are thought to be jealous wives or girlfriends.¹¹⁹ To avoid pimping, Nevada law makes it illegal for anyone to live off the earnings of a sex worker,¹²⁰ and many counties require that brothel owners and managers be female.¹²¹

The most regulated aspect of sex work in Nevada is the health of sex workers.¹²² To avoid the spread of sexually transmitted infections, Nevada law requires sex workers to use condoms for every relevant sexual encounter and to submit to weekly sexually transmitted infection testing and monthly HIV testing.¹²³ Individuals who engage in sex work after testing positive for exposure to HIV are guilty of a Category B felony.¹²⁴ Additionally, the manager of a brothel must post health notices and notify health authorities when any worker contracts a communicable disease.¹²⁵ However, these regulations do not necessarily protect a sex worker from being exposed to a client with a sexually transmitted disease.¹²⁶ The regulations aim to keep sex work at licensed brothels rather than in private, unregulated spheres, such as homes or hotels.¹²⁷ Despite these efforts to

116. Bingham, *supra* note 4, 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.*

117. Churchill County, NEV. CODE ch. 5.20 § 5.20.010 (2005) (defining a prostitute as a “female person . . . who engages in acts of prostitution with a patron,” and a 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 of prostitution”).

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

119. Nicole A. Hough, *Sodomy and Prostitution: Laws Protecting the “Fabric of Society”*, 3 PIERCE L. REV. 101, 114 (2004).

120. NEV. REV. STAT. ANN. § 201.320 (West, Westlaw through Ch. 2 (End) of the 33rd Spec. Sess. (2021)).

121. Hough, *supra* note 119, at 114.

122. Bingham, *supra* note 4, at 89; NEV. ADMIN. CODE § 441A.805 (2017) (“[A 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.”).

123. *Id.*

124. Nev. Leg. 491 (2021), 2021 Nev. L. Ch. 491 (S.B. 275).

125. Bingham, *supra* note 4, at 90.

126. *Id.* at 89; *see also* S. Day & H. Ward, *Sex Workers & the Control of Sexually Transmitted Disease*, GENITOURINARY MED. (1997), <https://perma.cc/5RSG-2AYL> (finding that due to social prejudice, “sex workers avoid even the most appropriate and accessible specialist services” and “a general health infrastructure and anti-discriminatory measures will be equally important to effective disease control”).

127. Bingham, *supra* note 4, at 89.

control and regulate sex work, illegal—i.e. unlicensed—sex work flourishes in Nevada, particularly in large cities like Las Vegas.¹²⁸

B. OTHER LOCAL REGULATORY EFFORTS

Many cities have introduced ordinances that both decriminalize and regulate sex work. In 2017, for example, lawmakers in the District of Columbia¹²⁹ and Hawaii¹³⁰ introduced bills proposing the decriminalization of prostitution in those states. The New Hampshire legislature introduced a bill to study the effects of decriminalizing sex work in the U.S. and worldwide.¹³¹ Although none of these bills were ultimately enacted, many states have enacted laws mandating a minimum age at which an individual can be charged with prostitution.¹³² 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.¹³³ Reformers also argue that because minors cannot consent to sexual activity, they should never be charged with criminal prostitution.¹³⁴

Cities such as Chicago,¹³⁵ San Francisco,¹³⁶ and Boston¹³⁷ have tolerated sex work in specific areas at various times, illustrated by law enforcement's restraint from arresting sex workers and clients. However, cities have likewise consistently declined to outright decriminalize or even cease enforcement of prostitution laws.¹³⁸

VI. CONSTITUTIONAL ISSUES

Sex work statutes and their enforcement have been challenged on various constitutional grounds.¹³⁹ In the free speech realm, prostitution convictions based solely upon an offer for sex have been litigated under the First Amendment.¹⁴⁰ In

128. Jenny Heineman, Rachel MacFarlane, & Barbara G. Brents, *Sex Industry and Sex Workers in Nevada*, in *The Social Health of Nevada: Leading Indicators and Quality of Life in the Silver State*, 12 (Dmitri N. Shalin, ed., 2012), <https://perma.cc/9GBF-SRWQ>.

129. Rachel Chason, 'A mecca for prostitution'? A new bill proposes decriminalizing sex work in D.C., WASH. POST (Oct. 13, 2017), <https://perma.cc/E3K4-MKJT>.

130. Cathey Bussewitz, *Hawaii Bill Would Legalize Prostitution Industry*, ASSOCIATED PRESS (Feb. 3, 2017), <https://perma.cc/YL6E-75CH>.

131. Elizabeth Dinan, *Bill Calls for Study Decriminalizing Sex Work*, SEACOASTONLINE (Jan. 15, 2017), <https://perma.cc/RM26-Z8YE>.

132. See statutes cited *supra* note 53.

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

134. *Id.* at 190.

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

136. S.F. Task Force on Prostitution, Final Report, *supra* note 8.

137. Sam Allis, *This Was Where Johns, Hookers and Trouble Met*, BOSTON GLOBE (Mar. 7, 2010), <https://perma.cc/V8T7-2G26>.

138. Marisa Lagos, *Election Results for San Francisco Propositions*, SFGATE (Nov. 5, 2008), <https://perma.cc/B27K-RNE3>; Jesse McKinley, *San Francisco's Prostitutes Support a Proposition*, N.Y. TIMES (Oct. 31, 2008), <https://perma.cc/JW2P-4WZU>; Kevin Fagan, *Vallejo Public, Police Team to Reduce Prostitution*, SFGATE (Sept. 25, 2011), <https://perma.cc/WL8F-5C84>.

139. See discussion *infra* Sections VI-A-C.

140. See *infra* note 144.

these cases, no actual sexual conduct occurred, but the offer of sexual conduct was sufficient for a conviction.¹⁴¹ Convictions have also been fought on due process grounds on the basis of alleged discrimination, vagueness or overbreadth, and infringement of privacy rights.¹⁴² Finally, claims of equal protection violations have been raised on the basis that sex work laws disproportionately affect a specific class of people.¹⁴³

A. FREEDOM OF SPEECH

Under many state statutes, individuals can be arrested for simply offering to perform a sexual act for compensation.¹⁴⁴ Challenges to these statutes claim that arrests based on “mere words” violate free speech rights protected by the First Amendment of the Constitution.¹⁴⁵ However, courts have upheld such statutes on the grounds that speech is not protected where it is integrally part of a criminal act.¹⁴⁶

Petitioners have unsuccessfully argued that sex work cases should be prosecuted only to the extent that pornography cases are prosecuted.¹⁴⁷ Since criminalized sexual activity is not considered a protected expression under the First Amendment,¹⁴⁸ courts have rejected the argument that prohibiting prostitution unduly burdens other activities protected by the First Amendment, such as selling pornography.¹⁴⁹ Likewise, courts have rejected arguments that commercial sex acts may implicate free expression of individual views.¹⁵⁰ In Arizona, plaintiffs unsuccessfully claimed that engaging in commercial sexual activity allowed them to send a message of “social and sexual liberation.”¹⁵¹ 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.¹⁵²

141. *Id.*

142. See discussion *infra* Section VI-B.

143. See discussion *infra* Section VI-C.

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

145. This legal approach is reflected in the speech/conduct distinction in certain First Amendment cases. See, e.g., *Vivid Ent., 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).

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

147. 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).

148. 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).

149. *Id.* at 1303–06.

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

151. *Id.* at 1089.

152. *Id.* at 1090.

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,¹⁵³ and because such statutes are vague, overbroad, or improperly intrude on the conduct of consenting adults.¹⁵⁴ Courts generally hold that sex work statutes are not unconstitutionally vague or overbroad because the general public knows what prostitution is, what is meant by sexual activity and compensation, and that the law does not discourage individuals from performing permitted acts.¹⁵⁵

Some individuals claim that sex work laws impermissibly interfere with privacy rights implicated by the Due Process Clause.¹⁵⁶ These individuals note that sex work is often a consensual sexual act between two willing adults.¹⁵⁷ However, one court held 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.¹⁵⁸ Similarly, in *Lawrence v. Texas*, the Supreme Court ruled that the Fourteenth Amendment protects consensual sexual relations, but explicitly declined to extend that protection to sex work.¹⁵⁹ Furthermore, the Supreme Court has declined to expand the privacy afforded to people in their homes,¹⁶⁰ holding that there is no "zone of privacy" allowed for a consumer of criminal sexual activity.¹⁶¹ Thus, sex work is not necessarily covered by due process protections.

Likewise, statutes that prohibit the derivation of earnings and support from sex work have not been found to violate the Due Process Clause.¹⁶² One Californian court held that there is no personal liberty interest in profiting from commercialized sex acts and that a prohibition against such profiting advanced proper legislative goals—upholding morals and preventing a public evil—and was not overbroad because it only proscribed specific criminal activity.¹⁶³ Similarly, a

153. *Id.* at 1081–82.

154. *Id.* at 1081–89.

155. *Id.*

156. 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).

157. *Id.*

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

159. *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*).

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

161. *Id.*

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

163. *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").

city ordinance prohibiting commercial sex acts in adult entertainment clubs was held not to be unconstitutionally vague or overbroad because the ordinance only proscribed live sex acts in the course of business for health and safety reasons and did not prohibit legal activities, such as exotic dancing.¹⁶⁴

C. EQUAL PROTECTION

Petitioners have argued that sex work statutes violate equal protection by discriminating against women and unmarried persons, and by discriminating based on sex.¹⁶⁵ 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 at four times the rate of male sex workers and are far more likely to be subjected to prosecution, despite evidence suggesting that there are roughly as many male sex workers as female sex workers.¹⁶⁶ The disparity is especially pronounced for trans sex workers,¹⁶⁷ who are already disproportionately likely to be stopped by police simply because they are transgender.¹⁶⁸ Still, many courts have upheld sex work statutes because they are facially neutral and do not explicitly refer to a certain gender.¹⁶⁹ At least one court, however, stated that if a petitioner could show that the reason for passing a sex work statute was based on gender discrimination, an equal protection claim might succeed.¹⁷⁰ Additionally, the Supreme Court of Wisconsin acknowledged that if female sex workers are consistently prosecuted and male patrons are consistently not prosecuted, equal protection claims could be implicated.¹⁷¹

Sex work laws are disproportionately enforced against the most vulnerable sex workers, including women of color and transgender women.¹⁷² Women of color and trans 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

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

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

166. Hough, *supra* note 119, at 118.

167. Erin Fitzgerald, Sarah Elspeth Patterson, & Darby Hicky, *Meaningful Work: Transgender Experiences in the Sex Trade*, RED UMBRELLA PROJECT & BEST PRACS. POL'Y PROJECT (Dec. 2015), <https://perma.cc/N3M2-AQJT> (finding that 83.9% of transfeminine sex workers surveyed reported police interaction, while only 65.8% of transmasculine sex workers reported police interaction).

168. *Id.* at 5 (noting the high levels of interaction transgender folks have with police); see also Alexi Jones, *Visualizing the Unequal Treatment of LGBTQ People in the Criminal Justice System*, PRISON POL'Y INITIATIVE (Mar. 2, 2021), <https://perma.cc/P99Z-F8HC> (noting that, although there is no data on transgender arrest rates, “other research shows police are extremely biased against trans people, especially Black trans people . . . [and] nearly half of trans people reported that they do not feel comfortable seeking help from the police”).

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

170. *Id.*

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

172. S.F. Task Force on Prostitution, Final Report, *supra* note 8 (citing studies of arrest reports from the San Francisco Police Department).

harassment.¹⁷³ While only 40% of sex workers who work on streets are women of color, 55% of sex workers who are arrested and 85% of sex workers who are jailed for sex work are women of color.¹⁷⁴ A report on New York's Human Trafficking Intervention Courts found that the state's prohibition against loitering for the purpose of sex work was disproportionately enforced against women of color; in Brooklyn, African-American defendants faced 69% of all charges and 94% of charges of loitering for the purpose of sex work.¹⁷⁵

An Indiana court rejected a claim that a ban on sex work disproportionately affected Asian massage parlors because the statute did not involve a suspect classification, did not affect a fundamental right, and was rationally related to a legitimate state interest.¹⁷⁶ At least one court has also rejected claims that prohibitions of commercial sex acts in adult entertainment clubs violate the Equal Protection Clause because other commercial businesses which may contribute to the spread of sexually transmitted infections are not similarly prohibited.¹⁷⁷ It found that because a club is a public place, it is not subject to any constitutional privacy protections.¹⁷⁸

Another discrimination claim made by sex workers is that sex work statutes violate the Equal Protection Clause by permitting married individuals to exchange sexual acts for compensation within the marriage but do not allow unmarried individuals to do the same. However, courts have repeatedly held that this distinction is legitimate because legislators are "free to treat dissimilarly situated people differently."¹⁷⁹ Courts also note that such marital exchanges lack the "commercial aspect" of sex work.¹⁸⁰

VII. ARGUMENTS AND EFFORTS FOR DECRIMINALIZATION

Despite the overwhelming criminalization of sex work in the U.S., 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 brothels in parts

173. *Id.*

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

175. 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), <https://perma.cc/74CD-4JSH>.

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

177. *See, e.g., Recreational Dev. of Phx., Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072, 1098 (D. Ariz. 1999).

178. *Id.*

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

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

of Nevada, would make sex work a regulated industry in which the State would provide licenses, require medical examinations, and collect taxes.

A. DEBATE OVER DECRIMINALIZATION

Proponents of criminalization base their arguments on moral and public health concerns. These arguments inveighed against sex work at the inception of sex work statutes in the U.S., when religious, medical, and women's groups advocated for criminalization. Supporters have 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.¹⁸¹

Feminist theorists express diverse and wide-ranging views on sex work.¹⁸² Many conceive of sex workers as wage laborers who perform a service in exchange for payment.¹⁸³ Legalization or decriminalization of this exchange, they argue, would not only protect sex workers, but also legitimize their economic opportunities.¹⁸⁴ Others take the opposite view, construing sex work as violence against women, violating female sexual autonomy by reducing it to economic exchange.¹⁸⁵ Proponents of this latter 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.¹⁸⁶

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 it is possible to decide whether or not sex work is inherently harmful to women.¹⁸⁷ 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

181. See generally TIMOTHY J. GILFOYLE, *CITY OF EROS: NEW YORK CITY PROSTITUTION AND THE COMMERCIALIZATION OF SEX, 1790–1920* (W.W. Norton & Co. ed., 1st ed. 1992).

182. For a 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 dissimilar).

183. Stremler, *supra* note 57, at 193.

184. *Id.*

185. 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 (1992), at 722; Evelina Giobbe, *Prostitution: Buying the Right to Rape*, in RAPE AND SEXUAL ASSAULT III: A RESEARCH HANDBOOK 143 (Ann Wolbert Burgess ed., Garland 1991).

186. See, e.g., Stremler, *supra* note 57, at 193; Catharine A. MacKinnon, *OnlyFans is Not a Safe Platform for 'Sex Work.' It's a Pimp.*, N.Y. TIMES (Sept. 6, 2021), <https://perma.cc/YBJ4-MHF8> ("Sex work' implies that prostituted people really want to do what they have virtually no choice in doing.")

187. 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).

criminalizing a single, uniform institution of sex work, given the numerous differing participants and interests implicated.¹⁸⁸

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.¹⁸⁹ 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.¹⁹⁰ These protests spur increased policing, which often forces street sex workers to relocate to more remote and dangerous areas.¹⁹¹

Statutory prohibitions on sex work reflect legislative concerns over health, safety, economics, crime prevention, and community morality.¹⁹² Proponents of decriminalization, however, argue that it is only social morality, and not genuine concern for women’s safety, that perpetuates sex work’s status as a criminal offense,¹⁹³ as health concerns appear to be largely unfounded.¹⁹⁴ They argue that anti-sex-work statutes, and their supporters, are “conservative moralists” who “classify all women as either loving mothers or deviant whores,”¹⁹⁵ tending to scrutinize women’s sexual behavior and ascribe value in terms of their sexual innocence.¹⁹⁶

Decriminalization advocates further argue that sex work laws “do nothing to benefit society and everything to harm prostitutes themselves.”¹⁹⁷ Countries with the strictest sex work laws, like the U.S., have the highest rates of pimping, juvenile sex work, and violence against sex workers.¹⁹⁸ Criminalization withholds the legal protection afforded in other work environments from sex workers, making

188. See, e.g., JULIA O’CONNELL DAVIDSON, *PROSTITUTION, POWER AND FREEDOM* (U. of Mich. Press ed., 1st ed. 1998).

189. See *Alliance*, *supra* note 9, at 15.

190. *Id.*

191. *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.”)

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

193. *Id.* at 106–08.

194. 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).

195. *Id.* at 99–108.

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

197. 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).

198. Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990*, 4 *YALE J.L. & FEMINISM* 329, 346 (1992).

it more difficult for those who are victims of violent crime—such as assault, rape, or robbery—to report those crimes to the police.¹⁹⁹ Sex workers often face abuse from both clients and pimps, yet are deterred from reporting this abuse by the fear of facing prosecution themselves.²⁰⁰ Immigrant sex workers are particularly unlikely to report abuse or seek out services because they face the additional risk of deportation.²⁰¹ Even when sex workers do report criminal activity to the police, they are often rebuffed, humiliated, or refused police protection or assistance.²⁰²

Proponents argue that decriminalization would shift police resources away from arresting sex workers and towards protecting them, thereby making sex workers less vulnerable and decreasing crime.²⁰³ But other sex worker advocates urge a shift away from policing altogether, noting the routine violence inflicted by police against sex workers when the two populations interact.²⁰⁴ These advocates tend to argue that, from the perspective of advancing public health, 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.²⁰⁵ Supervised injection sites—locations where people can bring in illicit drugs and inject them under medical supervision and which boast impressive reductions in overdose rates—may provide a model of effective harm-reduction strategies for responding to high risk behavior, including sex work.²⁰⁶

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

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

200. Kandel, *supra* note 198, at 346.

201. S.F. Task Force on Prostitution, Final Report, *supra* note 8.

202. See *Alliance*, *supra* note 9, 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).

203. *Decriminalize Sex Work for Better Policing*, DECRIMINALIZE SEX WORK, <https://perma.cc/U22N-6WH5> (last visited Mar. 5, 2023).

204. Molly Smith & Juno Mac, *Cops, Borders, and Carceral Feminists*, VERSO BOOKS (July 8, 2019) <https://perma.cc/JW3P-NTDF> (noting that “carceral feminism has gained popularity even though the police - and the wider criminal justice system - are key perpetrators of violence against women” and that “sex workers do not share this rosy view of arrest and incarceration”).

205. See, e.g., DeCou, *supra* note 70, at 447.

206. Elana Gordon, *Lessons from Vancouver: US Cities Consider Supervised Injection Facilities*, WHYY (July 5, 2018), <https://perma.cc/WP3F-G8TL> (describing Insite, a supervised injection site in Vancouver, British Columbia, which connects illicit drug users with nurses who are able to administer naloxone if needed, detox programs if desired, and hygienic syringes, and at which millions of supervised injections have taken place with zero deaths over the past fifteen years).

victims.²⁰⁷ If sex work were decriminalized, sex workers who encounter illegal sex trafficking would also feel safer reporting it.²⁰⁸

B. LEGAL EFFORTS TO ACHIEVE DECRIMINALIZATION

Attempts to achieve decriminalization through the judiciary have been unsuccessful. In March 2015, the Erotic Service Providers Legal, Education and Research Project filed a lawsuit in U.S. District Court challenging the constitutionality of a California statute criminalizing the commercial exchange of sexual activity.²⁰⁹ The plaintiffs—three former sex workers and a male client wishing to hire a sex worker—alleged that the sex work law violated their rights to privacy, free speech, and freedom of association, as well as the sex workers’ substantive due process right to earn a living.²¹⁰ The petitioners’ main argument was that Section 647(b) of the California Penal Code infringed on their fundamental liberty interest against unwarranted governmental intrusion.²¹¹ The district court granted the state’s motion to dismiss the case, stating that “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.”²¹² The decision, which the U.S. Court of Appeals for the Ninth Circuit affirmed, could have implications for anti-sex-work laws in other states under the Ninth Circuit’s jurisdiction.²¹³

The Supreme Court’s 2003 decision in *Lawrence v. Texas*²¹⁴ sparked interest among scholars of sex work, with some writers likening current sex work laws to sodomy laws, categorizing both as futile attempts to protect the moral fabric of society.²¹⁵ *Lawrence* was viewed as a potential step toward the decriminalization of sex work in ruling 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.²¹⁶ However, Justice Scalia’s fears notwithstanding,²¹⁷ state court rulings since 2003 have not applied *Lawrence* to sex work. In 2005, the North Carolina Court of Appeals held that the

207. 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).

208. Chan, *supra* note 207.

209. Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon, 2016 WL 1258638 (N.D. Cal. 2016).

210. *Id.* at *2.

211. *Id.* at *3.

212. *Id.* at *4.

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

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

215. See Hough, *supra* note 119, at 119.

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

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

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.²¹⁸ The Idaho Court of Appeals has also stated that procurement of a sex worker is still a crime under Idaho law,²¹⁹ and a Hawaii court upheld the constitutionality of an anti-sex-work statute.²²⁰ 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, and legal efforts to achieve decriminalization through legislation have been largely unsuccessful in the U.S. as well. Decriminalization measures on local election ballots in the 2000s were defeated in both Berkeley and San Francisco, California.²²¹

C. SEX WORK IN THE LGBT+ COMMUNITY

Anti-sex-work legislation has had a uniquely negative impact on members of the LGBT+ 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.²²² Louisiana, for example, imposed a "crime against nature by solicitation" provision, which singled out solicitation of commercial oral and anal sex for harsher punishment than the solicitation provision of the state sex work statute, including mandatory registration as a sex offender for a period of fifteen years to life.²²³ Although the legislation has since been deemed unconstitutional,²²⁴ laws like it are aimed at curtailing homosexual behavior.

Transgender individuals often choose sex work because homophobia and transphobia impose barriers to education and employment, resulting in limited economic opportunities.²²⁵ Moreover, police profiling and institutional discrimination against trans women lead to high rates of incarceration for sex

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

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

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

221. For example, in 2004, a measure known as "Angel's Initiative" would have decriminalized sex work in Berkeley, California. Its goal was to protect sex workers who could not seek police protection from violence because of the illegal nature of their work. It received little support, however, and did not pass. Carolyn Marshall, *Bid to Decriminalize Prostitution in Berkeley*, N.Y. TIMES (Sept. 14, 2004), <https://perma.cc/6LBP-SPYP>. Four years later, activists put Proposition K on the ballot in San Francisco. The Proposition would have eliminated the power of local police to enforce sex work statutes against sex workers in San Francisco, but it ultimately failed with only 42% of the vote. Lagos, *supra* note 138.

222. Brief for American Civil Liberties Union Foundation of Southern California et al. as Amici Curiae Supporting Plaintiffs-Appellants, *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 2016 WL 1258638 (N.D. Cal. 2016).

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

224. *Id.* at 356.

225. *Underserved. Overpoliced. Invisibilised. LGBT Sex Workers Do Matter*, *supra* note 21, at 4.

work-related offenses.²²⁶ Such law enforcement behavior exposes trans women to increased violence.²²⁷ Trans and LGB youth are especially vulnerable, with a disproportionately high rate of contact with law enforcement in comparison to their heterosexual and cisgender peers²²⁸ because police often “equate homosexuality with deviancy.”²²⁹

Law enforcement’s profiling and abuse promulgates increased violence against the transgender community as a whole, but particularly those who engage in sex work.²³⁰ High levels of criminalization and discrimination in society make LGBT+ individuals easy targets for violence. This violence comes not only from public institutions like law enforcement, but also from private persons, hate groups, family members, and intimate partners.²³¹ Sex workers in the LGBT+ community are especially affected by criminalization efforts because the increased scrutiny toward their sexual behavior and gender identity pushes them further to the fringes of society. The resulting stigma can lead to homelessness, poverty,²³² inadequate access to healthcare, low self-esteem, depression, and suicide.²³³

VIII. CONCLUSION

Though there is some variation among state anti-sex work statutes, all state courts have held laws criminalizing sex work constitutional. However, many of these statutes ignore the disproportionate impact such laws have on the most vulnerable—particularly LGBT+ people of color, due to the intersection of different forms of oppression. Law enforcement’s bias toward and profiling of the LGBT+ community influences its implementation of anti-sex work statutes and leads to increased violence toward that particular demographic within the sex work industry. Despite the vigorous debate in support of decriminalization of sex work, these proposals continue to face public opposition, evidenced by the consistent lack of voter support when decriminalization measures are added to local county ballots.²³⁴ Nevertheless, the legalization of sex work in certain counties in Nevada offers the U.S. an opportunity to learn more about the impact of legalized sex work on sex workers and communities more broadly. 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.

226. Brief of American Civil Liberties Union Foundation of Southern California, et al. as Amici Curiae Supporting Plaintiffs-Appellants, *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 2016 WL 1258638 (N.D. Cal. 2016), at *8.

227. *Id.* at *11.

228. *Id.* at *22.

229. *Id.* at *23.

230. *Id.* at *13.

231. *Underserved. Overpoliced. Invisibilised. LGBT Sex Workers Do Matter*, *supra* note 21, at 11.

232. *Id.* at 4.

233. *Id.* at 12.

234. Lagos, *supra* note 138.