Sex work has a long and lucrative history in the United States (U.S.) and around the world. Today, the multi-billion-dollar commercial sex industry
encompasses a wide range of sexual services—some legal and others not—including pornography, stripping, phone and internet sex, and sexual services obtained in brothels, massage parlors, through escort services, or on the street.\(^2\) Until the nineteenth century, prostitution was generally legal in the 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

---


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.


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...

The sex work 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. Certain forms of commodified sexual activities, such as child abuse sex material, pimping, and pandering are criminalized in most states. Prostitution, generally understood to be the exchange of sexual activity for money or other financial compensation, is illegal in every state, with the...

Glossary of Terms


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

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, indicate popular reconsideration of the efficacy and equity of criminalization. Decriminalization campaigns have grown primarily from the sex workers’ rights movement, which has advocated for the legalization of sex work. These campaigns have been supported by various organizations and individuals, including Emily Bazelon, who has written about the decriminalization efforts in her article, "Why Amnesty International is Calling for Decriminalizing Sex Work." The movement has gained momentum in recent years, with many states and municipalities discussing the possibility of decriminalization. However, as of the last update, the legal landscape varies significantly across the United States, with some states fully or partially decriminalizing sex work, while others maintain strict regulations.

---


for decriminalization of sex work since the late 1970s.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{22} The crime of prostitution usually involves three elements: (1) some degree of sexual activity or conduct; (2) compensation; and (3) intent.\textsuperscript{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.\textsuperscript{24} While some states require that sexual contact actually take
the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place," the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.

State definitions of sexual activity for the purposes of prostitution vary. Illinois, for example, requires that the sexual activity be "an act of sexual penetration," while North Carolina requires sexual intercourse. Other states include fellatio, cunnilingus, assisted masturbation, or "physical contact of [a] person’s place, the mere offer or agreement to perform acts is sufficient for criminal liability in a majority of states. 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.
clothed or unclothed genitals, pubic area, buttocks, [or] if such person [is] female, breast" 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; kink and fetish acts such as “foot licking, spanking, domination and submission” where no other sexual activity is involved; and sexually suggestive acts where no other sexual activity is involved, such as sucking on another’s finger. The sexual act does not necessarily have to be performed on the paying individual. 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.

B. Compensation

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

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).
39. See id.
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.”).
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


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.”).


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

---


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


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.”\(^{65}\)

---


\(^{60}\) Michael Shively, Kristina Klorys, 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).


\(^{64}\) 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

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.).
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 cannot.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

---

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).
80. See People v. Mason, 642 P.2d 8, 12 (Colo. 1982) (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{87} Other courts have found that the defense cannot be raised without admitting to the crime of prostitution.\textsuperscript{88}

\textbf{B. DEFENSES NOT RECOGNIZED}

 Courts did not historically permit non-marital relationship defenses to prostitution charges.\textsuperscript{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.\textsuperscript{90} Courts have generally refused to recognize other defenses to prostitution as well: consent is not a legitimate defense,\textsuperscript{91} nor is impossibility of completion of the agreed-upon sexual act.\textsuperscript{92} Similarly, it is not a defense to claim that the defendant has been deceived\textsuperscript{93} nor that sexual acts

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{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.”).
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{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 coupledom is no defense).
\item \textsuperscript{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.”).
\item \textsuperscript{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).
\item \textsuperscript{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).
\end{itemize}
\end{footnotesize}
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 Lyon,107 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.


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).


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


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).

Regulatory schemes vary in each county because local and state officials have significant discretion in granting licenses and regulating sex workers. Several counties that permit sex work restrict some activities based on gender. One county bars brothels from employing male sex workers or allowing male employees to reside on the premises. 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. To avoid pimping, Nevada law makes it illegal for anyone to live off the earnings of a sex worker, and many counties require that brothel owners and managers be female.

The most regulated aspect of sex work in Nevada is the health of sex workers. 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. Individuals who engage in sex work after testing positive for exposure to HIV are guilty of a Category B felony. Additionally, the manager of a brothel must post health notices and notify health authorities when any worker contracts a communicable disease. However, these regulations do not necessarily protect a sex worker from being exposed to a client with a sexually transmitted disease. The regulations aim to keep sex work at licensed brothels rather than in private, unregulated spheres, such as homes or hotels. 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”).
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.
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

132. See statutes cited supra note 53.
134. Id. at 190.
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.\textsuperscript{141} Convictions have also been fought on due process grounds on the basis of alleged discrimination, vagueness or overbreadth, and infringement of privacy rights.\textsuperscript{142} Finally, claims of equal protection violations have been raised on the basis that sex work laws disproportionately affect a specific class of people.\textsuperscript{143}

A. FREEDOM OF SPEECH

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

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

\textsuperscript{141} Id.
\textsuperscript{142} See discussion infra Section VI-B.
\textsuperscript{143} See discussion infra Section VI-C.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{149} Id. at 1303–06.
\textsuperscript{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).
\textsuperscript{151} Id. at 1089.
\textsuperscript{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, and because such statutes are vague, overbroad, or improperly intrude on the conduct of consenting adults. 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.

Some individuals claim that sex work laws impermissibly interfere with privacy rights implicated by the Due Process Clause. These individuals note that sex work is often a consensual sexual act between two willing adults. 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. 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. Furthermore, the Supreme Court has declined to expand the privacy afforded to people in their homes, holding that there is no “zone of privacy” allowed for a consumer of criminal sexual activity. 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. 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. Similarly, a...
city ordinance prohibiting commercial sex acts in adult entertainment clubs was held not to be unconstitutionally vague or overbroad because the ordinance only 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

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


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.


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 prostitutes people really want to do what they have virtually no choice in doing.”).

criminalizing a single, uniform institution of sex work, given the numerous differing participants and interests implicated.\textsuperscript{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.\textsuperscript{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.\textsuperscript{190} These protests spur increased policing, which often forces street sex workers to relocate to more remote and dangerous areas.\textsuperscript{191}

Statutory prohibitions on sex work reflect legislative concerns over health, safety, economics, crime prevention, and community morality.\textsuperscript{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,\textsuperscript{193} as health concerns appear to be largely unfounded.\textsuperscript{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,”\textsuperscript{195} tending to scrutinize women’s sexual behavior and ascribe value in terms of their sexual innocence.\textsuperscript{196}

Decriminalization advocates further argue that sex work laws “do nothing to benefit society and everything to harm prostitutes themselves.”\textsuperscript{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.\textsuperscript{198} Criminalization withholds the legal protection afforded in other work environments from sex workers, making

\textsuperscript{189.} See Alliance, supra note 9, at 15.
\textsuperscript{190.} Id.
\textsuperscript{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.”).
\textsuperscript{193.} Id. at 106–08.
\textsuperscript{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).
\textsuperscript{195.} Id. at 99–108.
\textsuperscript{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).
it more difficult for those who are victims of violent crime—such as assault, rape, or robbery—to report those crimes to the police. Sex workers often face abuse from both clients and pimps, yet are deterred from reporting this abuse by the fear of facing prosecution themselves. Immigrant sex workers are particularly unlikely to report abuse or seek out services because they face the additional risk of deportation. Even when sex workers do report criminal activity to the police, they are often rebuffed, humiliated, or refused police protection or assistance.

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. 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. 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. 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.

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

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).
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, WHY (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. If sex work were decriminalized, sex workers who encounter illegal sex trafficking would also feel safer reporting it.

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. 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. The petitioners’ main argument was that Section 647(b) of the California Penal Code infringed on their fundamental liberty interest against unwarranted governmental intrusion. 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.” 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.

The Supreme Court’s 2003 decision in Lawrence v. Texas 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. 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. However, Justice Scalia’s fears notwithstanding, state court rulings since 2003 have not applied Lawrence to sex work. In 2005, the North Carolina Court of Appeals held that the


208. Chan, supra note 207.


210. Id. at *2.

211. Id. at *3.

212. Id. at *4.


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.\(^\text{218}\) The Idaho Court of Appeals has also stated that procurement of a sex worker is still a crime under Idaho law,\(^\text{219}\) and a Hawaii court upheld the constitutionality of an anti-sex-work statute.\(^\text{220}\) 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.\(^\text{221}\)

**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.\(^\text{222}\) 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.\(^\text{223}\) Although the legislation has since been deemed unconstitutional,\(^\text{224}\) 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.\(^\text{225}\) Moreover, police profiling and institutional discrimination against trans women lead to high rates of incarceration for sex

\[\text{221. For example, in 2004, a measure known as “Angel’s Initiative” would have de}\]
\[\text{criminalized sex work in Berkeley, California. Its goal was to protect sex workers who could not seek police protection from violence because of the illegal nature of their work. It received little support, however, and did not pass. Carolyn Marshall, *Bid to Decriminalize Prostitution in Berkeley*, N.Y. TIMES (Sept. 14, 2004), https://perma.cc/6LBP-SPYP. Four years later, activists put Proposition K on the ballot in San Francisco. The Proposition would have eliminated the power of local police to enforce sex work statutes against sex workers in San Francisco, but it ultimately failed with only 42% of the vote. Lagos, *supra* note 138.}\]
\[\text{224. Id. at 356.}\]
\[\text{225. Underserved, Overpoliced, Invisibilised. LGBT Sex Workers Do Matter, *supra* note 21, at 4.}\]
work-related offenses. Such law enforcement behavior exposes trans women to increased violence. Trans and LGB youth are especially vulnerable, with a disproportionately high rate of contact with law enforcement in comparison to their heterosexual and cisgender peers because police often “equate homosexuality with deviancy.”

Law enforcement’s profiling and abuse promulgates increased violence against the transgender community as a whole, but particularly those who engage in sex work. 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. 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, inadequate access to healthcare, low self-esteem, depression, and suicide.

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. 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.

227. Id. at *11.
228. Id. at *22.
229. Id. at *23.
230. Id. at *13.
232. Id. at 4.
233. Id. at 12.
234. Lagos, supra note 138.