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Ending the War Against Sex Work: Why It's Time to Decriminalize Prostitution

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ENDING THE WAR AGAINST SEX WORK: WHY IT'S TIME TO DECRIMINALIZE PROSTITUTION

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ABSTRACT

Efforts to decriminalize sex work have gained momentum recently. After years of abolitionist rhetoric inflaming the public by conflating consensual sex work with human trafficking, sex workers and their allies are making themselves heard. The debate about whether exchanging sex for money should be legal is drawing attention. Sex worker advocates have gathered data to support their assertions that sex workers are harmed by efforts to eliminate an activity that has existed for as long as people have lived in communities.

This article responds to the impasse among scholarly advocates for decriminalizing consensual sex work. Over the last several decades, the voices of anti-prostitution advocates have shouted above those who support various forms of consensual sex work because supporters do not agree on a single position. This article explains why sex work was criminalized, explains why constitutional and policy reasons advanced for decriminalizing sex work have not yet succeeded, and offers an alternative advocacy strategy that focuses on identifying and eliminating the harm imposed on sex workers by the continued criminalization of sex work.

* Professor of Law, Stetson University College of Law. This project was possible because of the ability to spend a semester on sabbatical. The opportunity to immerse myself over several months in the scholarship and resources related to a subject that has held my interest in years was enlightening and invigorating. I am grateful to Stetson College of Law for affording me this opportunity. I must also thank the many people I have communicated with, both in person and virtually, as I delved deeper into issues related to sex work. Many of these connections were made as the result of my participation in a number of Sexual Freedom Summit conferences conducted by the Woodhull Freedom Foundation. The ability to learn from scholars, advocates, policymakers, and current and former sex workers of all sorts was and continues to be my great privilege. And, to Mark, Joe, Leigh-Anne, Courtney, and James – thanks for your support and tolerance as I explored and learned and wrote.

I. INTRODUCTION

> "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."[1]

The right to act as the sole authority over one's body in connection with medical procedures and sex is debatable, especially for women. Should it be the subject of debate? Why is this the case predominantly for women but not men? Is there any other facet of our lives where the government tells us what we can or cannot do with our bodies?

Let's take a brief look at what we are allowed to do with our bodies. We can overeat, not exercise, and become so obese that we need assistance with activities of daily living. We can starve ourselves to become thin enough that modeling agencies will pay to use our image to sell clothes or other products. We can allow someone to insert ink into our skin to create tattoos for all to see. We can train and exercise to build and sculpt the structure of our body to gain notoriety through bodybuilding competitions. We can pose nude for artists to capture our image and sell their rendering of our body for their profit. We can live in clothing-optional communities, carrying on our daily lives, inside and outside, completely or partially nude. We can offer our bodies for medical experimentation through drug trials. We can work as gynecological medical models, allowing a series of medical students to prod and probe our genitalia and reproductive organs while others observe. We can use our reproductive capacity to create and nurture a genetically related embryo, carry it to term, deliver it, and then give it to someone else to raise. We can offer our reproductive capacity to carry someone else's embryo and deliver someone else's baby. Yet, for some reason, we cannot offer our body for sex if we do so in exchange for money.

Many of the ways I just described as legitimate uses of our body involve earning money. Modeling, for clothing and products as well as nude modeling for artists, generates income. Participating in medically supervised drug trials involves an exchange of service for money. Gynecological medical models get paid an hourly rate or a salary. Yet we cannot offer our body for sex if that offer involves the exchange of money or something of value for the sex.

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[1] Roth v. U.S., 354 U.S. 476, 487 (1957).

As a woman, I can choose to be a swinger, have a poly relationship, have an affair, maintain an open relationship, have multiple "friends with benefits" partners, have sex with other women, men, or both. I can engage in threesomes, gang bangs, and orgies. I can work as an erotic dancer and get paid or get paid to have sex on camera to make commercial porn. I can also tacitly agree to have sex with someone in exchange for dinner out or some other sort of social activity. All of this is legal.

Some may believe that some, or even all of these activities are immoral, but none are criminal. Yet, if I engaged in any sort of sex act with someone and charged them a fee, I would commit a crime. And yes, some people would also think what I was doing was immoral. But why does my morality or lack thereof matter to them? And what makes taking money for sex criminal when getting paid for having sex in front of a production crew and camera that produce a film which is then distributed for someone else's profit, and getting paid to do so is not a crime?

Commercial sex work has existed as far back as we can document.[2] We refer to prostitution as the world's oldest profession, but it wasn't always a crime.[3] Efforts to criminalize sex work in the United States began around the time Congress passed the Mann Act, which was also known as the White Slave Trade Act.[4] Enacted around the time many people were immigrating from Asia, the underlying purpose of the Mann Act focused on preventing immigration and discouraging the dilution of the white race.[5] At the same time, the Mann Act had support because it criminalized behavior that many found distasteful, if not immoral.[6] This comprehensive legislation, originally enacted in 1910, made it a federal felony to knowingly transport women across state borders and into the United States from other countries, for prostitution, debauchery, or other "immoral purposes."[7]

But society's views about sex have changed. Most states have repealed criminal laws against fornication and adultery, making these types of consensual sexual activity legally tolerated.[8] Over time, as views about marriage and sexuality became more diverse, additional

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[2] JESSICA PLILEY, POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI 16–19 (2014).

[3] *Id.*

[4] 18 U.S.C. §§ 2421-2429 (2018).

[5] PLILEY, *supra* note 2, at 16–19.

[6] *See*, Barbara Holden-Smith, *Lynching, Federalism, and the Intersection. Of Race and Gender in the Progresive Era*, 8 YALE J. OF LAW & FEMINISM 31, 59 (1996).

[7] 18 U.S.C. § 2422.

[8] PLILEY, *supra* note 2, at 16–19.

restrictions and prohibitions were removed. Laws prohibiting interracial marriage were found unconstitutional,[9] married couples were allowed access to contraception,[10] unmarried individuals were eventually granted access to contraception,[11] private, adult consensual sexual behavior was protected from government intervention,[12] and eventually, the right to marry a person of one's choosing, regardless of gender was recognized.[13]

Similarly, if we step back and look at the commercial sex industry with a wider lens, we see that many types of commercial sex activities are legal. To the chagrin of some, the First Amendment legally protects pornography.[14] In fact, those who create pornography as actors are paid to engage in sexual activity whereas the same activity for pay in any other setting would be illegal.[15] Stripping, including providing lap dances for pay and tips is legal commercial sexual activity.[16] Erotic dancing, phone sex, and most forms of BDSM[17] are legal commercial sexual activities, despite being disdained by some members of today's society.[18]

So what sets prostitution, the private, consensual exchange of sexual activity for money, apart from these other forms of commercial

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[9] Loving v. Virginia, 388 U.S. 1 (1967).

[10] Griswold v. Connecticut, 381 U.S. 479 (1965).

[11] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[12] Lawrence v. Texas, 539 U.S. 558 (2003).

[13] Obergefell v. Hodges, 576 U.S. 644 (2015).

[14] *See* Miller v. California, 413 U.S. 15, 24 (1973) (holding that community standards about whether material is obscene must be used to determine whether material loses First Amendment protection) (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972)); Roth v. United States, 354 U.S. 476, 487 (1957) (recognizing that "sex and obscenity are not synonymous").

[15] *See* California v. Freeman, 758 P.2d 1128, 1131 (Cal. 1988) (distinguishing payment of acting fees for actor who engaged in sex acts for adult film from payment for prostitution that is payment for "sexual arousal or gratification.")

[16] Schad v. Mount Ephraim, 452 U.S. 61, 66 (1981) (holding "nude dancing is not without its First Amendment protections"); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (concluding that nude dancing falls "within the outer perimeters" of conduct protected by First Amendment).

[17] BDSM refers to the practices of bondage, domination, sadism, and masochism. *See* Nuna Alberts, *What Is BDSM? Fundamentals, Types and Roles, Safety Rules, and More*, Everyday Health, https://www.everydayhealth.com/hehealt-sex/bdsm/ (last visited Apr. 14, 2021).

[18] Because BDSM takes so many forms, it is possible that some activities that fall within this practice may be illegal. But in general, the practice of consensual BDSM is not illegal. *See* Simon Davis, *We Asked a Law Professor Whether the Government Could Really Ban Rough Sex,* VICE (Mar. 16, 2016), https://www.vice.com/en/article/vdxav4/we-asked-a-law-professor-if-bdsm-could-be-legally-banned (interviewing UCLA Law Professor Eugene Volokh in light of a Virginia court's ruling that a defendant had no constitutional right to engage in BDSM activity).

sexual activity and causes it to be criminalized? Why do we criminalize this particular form of sex work and no other?

This article will consider why the private, consensual exchange of sex for money, also referred to as commercial sex work, is criminalized and will argue that all commercial sex work should be decriminalized.[19] It will look at the history, the law and policy, and the harm associated with criminalizing prostitution.[20] And it will explain why now is the time to decriminalize sex work and protect those who do this work.[21]

A. *Terminology – Language is important*

Because the language we use when talking about behavior can have profound effects on how that behavior is viewed, this section will define the way this article uses certain terms.

i. Prostitution versus sex work

Throughout the article, I will use the terms prostitution and commercial sex work, or at times simply sex work. I will also use the descriptive phrase private, consensual exchange of sexual activity for money. These terms are often used interchangeably, and I will do so here, but it is important to understand that in many contexts the terms have important differences. Commercial sex work encompasses many different activities that involve sex or erotic services. Anyone who engages in an erotic service for money or something of value could be included in the phrase sex work. This includes legal activities as well as those that are illegal.[22]

Prostitution, the private, consensual exchange of sexual activity for money is a subset of commercial sex work that is currently illegal.[23] Generally, the distinction turns on whether there is any genital contact designed to provide sexual stimulation. But people who work as strippers, cam girls, phone sex operators, tantric sex instructors, or professional dominatrices are often included in the broad category of sex worker even though they provide legal erotic services.[24]

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[19] *See infra* Parts II, V.

[20] *See infra* Parts III–IV.

[21] *See infra* Parts V–VI.

[22] *See* STUART P. GREEN, CRIMINALIZING SEX 295–300 (2020) (providing a brief explanation of the various ways prostitution is defined, and what activities are included within those definitions).

[23] *Id.*

[24] *Id.*

Recently, the exchange of sexual services for money or other things of value has been referred to as sex work or commercial sex work because many who advocate for decriminalization of all sex work see the service provided as work just like other income-producing activities are described as work. Consequently, because this article focuses on the fight to decriminalize prostitution, and those who engage in the sale of sex for money or something of value prefer the term sex work, I will respect their preference and will frequently use the term sex work. However, because sex work is a relatively new way to describe this, when looking back at the history of such activity, I will often revert to the use of the word prostitution when describing times when that was the common term. Additionally, when attempting to determine why sex work differs from other personal decisions about sex, I will sometimes describe it as the private, consensual exchange of sexual activity for money. In all of these references I mean what has most traditionally been referred to as prostitution.

Key in these terms is the requirement that the exchange of sexual services for money or other value occurs between consenting adults. My focus here is on commercial sex work that is currently illegal, so references to that type of work should be interpreted as focusing on illegal sex work rather than other forms of legal sex work.

The goal of this article is to recognize that the time has come to decriminalize commercial sex work. Following this Introduction (Part I), which explains the distinctions between legal sex work and illegal sex work, Part II begins by exploring how and why sex work became criminalized.[25] Understanding the historical reasons that led to the current illegality of sex work allows us to see how those reasons are no longer relevant.

Part III explores some of the constitutional arguments that have been made to argue that individuals have the right to engage in sex work unrestricted by state prohibitions or regulations.[26] Because sex work necessarily involves sex and decisions regarding the way one uses one's body, the liberty and privacy interests associated with these issues have been bandied about in connection with discussions about decriminalizing sex work.

Part IV follows as a transition between the more theoretical legal arguments and the practical reality that supports decriminalizing sex work.[27] It offers an assessment of the potential interests a state may raise

[25] *See infra* Part II.
[26] *See infra* Part III.
[27] *See infra* Part IV.

for continuing to outlaw sex work. That assessment demonstrates the lack of viability of these positions, providing a segue to Part V,[28] where the practical and critically important reasons to decriminalize sex work are explored. Part VI concludes the article by describing a path forward that focuses on continued grassroots efforts to shift public and legislative opinions enough that proposals for legislation decriminalizing sex work can be successfully enacted.[29]

ii. Sex work/prostitution versus sex trafficking

It is important to avoid conflating sex work or prostitution with sex trafficking. A significant part of my analysis will criticize those who do so. The distinction between sex work and sex trafficking is critical because conflating the two makes it too easy to find reasons to continue to criminalize sex work in the false hope of preventing sex trafficking.

Sex trafficking is a subset of human trafficking. According to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Protocol, Especially Women and Children (the U.N. Human Trafficking Protocol),

> "(a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
> "(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
> "(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does

[28] *See infra* Part V.
[29] *See infra* Part VI.

> not involve any of the means set forth in subparagraph (a) of this article;
> "(d) 'Child' shall mean any person under eighteen years of age."[30]

Note that human trafficking is not limited to sex trafficking. As noted in the purpose and findings section of the United States federal law that implements the agreements of the U.N. Protocol, human trafficking occurs in connection with other forms of labor as well,[31] but the sex trafficking aspect garners the most attention.

The provisions of the U.N. Human Trafficking Protocol are incorporated into the Victims of Trafficking and Violence Protection Act (TVPA),[32] but the TVPA is more inclusive, expanding the definition of sex trafficking to include more than the exploitation of people. The Act defines a commercial sex act as "any sex act on account of which anything of value is given to or received by any person."[33] According to the TVPA, "[t]he term 'sex trafficking' means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act."[34] The Act also includes a definition of severe forms of sex trafficking:

> (A) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such acts has not attained 18 years of age, or
> (B) The recruitment, harboring, transportation, provision, or obtaining a person for labor services, through the use of force, fraud, or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery.[35]

The TVPA, as amended by the Justice for Victims of Trafficking Act, makes it a crime to use force, fraud, or coercion to make an adult

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[30] United Nations Convention Against Transnational Organized Crime with Protocols (Palermo Convention) Annex II: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Human Trafficking Protocol) *ratified by the President* Oct. 19, 2005 (entered into force Dec. 3, 2005) 2225 U.N.T.S. 209.

[31] *See* 22 U.S.C. § 7101(b)(3) (2018) ("Trafficking in persons is not limited to the sex industry").

[32] 22 U.S.C. §§ 7101-7114 (2018).

[33] *Id.* § 7102(4).

[34] *Id.* § 7102(12).

[35] *Id.* § 7102(11).

engage in commercial sex.[36] When sex trafficking involves individuals under eighteen years of age, the statute does not require a demonstration of force, fraud, or coercion; engaging in a commercial sex act with a minor is a criminal act whether there is coercion or not.[37]

Put more simply, anyone who engages in commercial sexual activity without consent is involved in sex trafficking, as either a victim or a perpetrator. Adult victims who are coerced, forced, or fraudulently induced to engage in sex work have not consented, and are therefore victims of sex trafficking. Individuals under the age of 18 who engage in commercial sex work cannot legally consent to this work, so they are also victims of sex trafficking.[38]

Though an initial review of the TVPA might suggest that it captures all forms of commercial sex, whether coerced or not, within its penalties, the only enforcement mechanisms in the statute apply to severe forms of sex trafficking or sex trafficking of minors.[39] However, reauthorizations of the TVPA in 2005 and 2008 added significant levels of funding for states to prosecute those who engaged in commercial sex, even if not coerced.[40]

B. *Listening to sex workers*

When considering issues around sex work we must avoid limiting the analysis to theoretical and abstract ideas alone. To inform the more abstract ideas one must include sex workers' voices and experiences, and real data about sex work. Beginning shortly after September 11th, efforts to combat human trafficking increased.[41] Most of the advocacy and resulting legislation focused on sex trafficking. The distinction between sex work and sex trafficking blurred. Public discussion of the efforts to combat sex trafficking has not distinguished between trafficking victims and those who engage in consensual sex work.[42]

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[36] 18 U.S.C. §§ 1589, 1591 (2018).

[37] *Id.* § 1591.

[38] 22 U.S.C. § 7102(11)(A)(2018).

[39] Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1679 (2010).

[40] *See* Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and* Partnership *in the Trafficking Victims Protection Act*, 117 PENN. STATE L. REV. 443, 467 (2012).

[41] Kevin D. DeCoursty, Human Trafficking and U.S. Government Responses Post-9/11 (Sept. 2016) (Master's Thesis, Naval Postgraduate School) (on file with Homeland Security Digital Library).

[42] Regina A. Russo, *Online Sex Trafficking Hysteria: Flawed Policies, Ignored Human Rights, and Censorship*, 68 CLEVELAND STATE L. REV. 314, 340–41 (2020).

Consequently, much of the recent legislative efforts to combat sex trafficking have had harmful effects on sex workers.[43]

As a result of discourse around the TVPA, the tendency to conflate prostitution and sex trafficking increased. Advocates consistently used images and narratives that reinforced the idea of trafficking as modern-day slavery, which made it almost impossible to consider that anyone might voluntarily choose to engage in sex work.[44] By controlling the narrative in this manner, those advocating for the prohibition of all sex work shifted the complicated issues of trafficking—immigration, labor, and poverty issues—to the moral problem of sexual violence against women and girls.[45] But they ignored the voices of those women and others involved in consensual sex work, specifically contradicting individuals who asserted they freely choose sex work.[46]

In addition to having lived experiences as sex workers, those engaged in this work have much greater insight into the way victims are trafficked for sex, and what steps we can take to reduce trafficking and the harm it causes to the victims. Unfortunately, those most affected by overbroad and overzealous efforts to combat sex trafficking have been ignored or purposely silenced.[47]

II. A BRIEF HISTORY OF SEX WORK IN THE UNITED STATES

Prostitution was not criminalized nationwide in the United States until 1910, around the time that abortion and alcohol were also prohibited.[48] Before that time prostitution and brothels existed legally, especially in areas with a low ratio of women to men.[49]

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[43] *See,* V. Blue, *How sex censoring killed the internet we love,* ENGADGET (Jan. 31, 2019) https://www.engadget.com/2019-01-31-sex-censorship-killed-internet-fosta-sesta.html. "In 2018, an estimated 42 million sex workers worldwide were evicted from the open internet and essentially went into hiding with the passage of FOSTA-SESTA." *See also*, DANIELLE BLUNT & ARIEL WOLF, ERASED: THE IMPACT OF FOSTA-SESTA 2-3 (2020), https://hackinghustling.org/wp-content/uploads/2020/01/HackingHustling-Erased.pdf.

[44] Chuang, *supra* note 39, at 1699.

[45] Chuang, *supra* note 39, at 1694.

[46] Chuang, *supra* note 39, at 1664–65. Chuang describes the radical feminist position as one that "recognize[s] no distinction between 'forced' and 'voluntary' prostitution" and insists that "[w]omen who (believe they) choose prostitution suffer from a 'false consciousness,' the inability to recognize their own oppression; whether or not these 'prostituted women' seemingly consent." Chuang, *supra* note 39, at 1664–65 (footnotes omitted).

[47] Russo, *supra* note 42, at 318.

[48] Dannia Altemimei, *Prostitution and the Right to Privacy: A Comparative Analysis of Current Law in the United States and Canada*, U. ILL. L. REV. 625, 630 (2013).

[49] *See* Scott Wasserman Stern, *The Long American Plan: The U.S. Government's Campaign Against Venereal Disease and its Carriers*, 38 HARV. J. OF L. & GENDER 373, 381–86 (2015).

In addition to frontier towns where most of the population was male, prostitutes tended to be found in areas where soldiers were gathered.[50] During the Civil War, some commanding officers attempted to protect their soldiers from the sexually transmitted diseases thought to be a consequence of engaging with prostitutes before medical control of sexually transmitted infections, especially syphilis.[51] Though some military leaders tolerated prostitution, others attempted to restrict it. For example, one general around Nashville, Tennessee rounded up all of the prostitutes and sent them off on a riverboat, hoping to rid the area of the temptation.[52] Unable to find a suitable place to relocate, the riverboat eventually returned to Nashville, where a compromise was reached.[53]The prostitutes were allowed to return but the city required that they undergo health screening and issued licenses to ensure that they had done so.[54] This was one of the early efforts to regulate prostitution. After the Civil War, this type of regulation continued in many locations, allowing the existence of legal brothels as long as the workers underwent health checks and the brothel owners obtained licenses.[55]

Anti-prostitution legislation was born as part of anti-immigration legislation. The Page Act of 1875—the precursor to the 1882 Chinese Exclusion Act that severely restricted who could immigrate from China—was the first federal legislation crafted to limit Chinese immigration, especially the immigration of immoral women from China.[56] Following the 1882 Chinese Exclusion Act Congress passed additional legislation aimed at restricting immigration.[57] The Immigration Act of 1903 and the Immigration Act of 1907 both expanded the criteria for exclusion in ways designed to prevent prostitution.[58] The 1903 Act added exclusions for those who procured prostitutes; the 1907 Act excluded anyone who admitted to crimes of moral turpitude and any

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[50] *Id.* at 382–83.

[51] *See* Angela Serratore, *The Curious Case of Nashville's Frail Sisterhood*, SMITHSONIAN MAG. (July 8, 2013), https://www.smithsonianmag.com/history/the-curious-case-of-nashvilles-frail-sisterhood-7766757/.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Kaytlin Bailey, *U.S. History from a Whore's Eye View*, YOUTUBE (Apr. 30, 2020), https://www.youtube.com/watch?v=pxrAAj8vqyg&feature=youtu.be.

[56] PLILEY, *supra* note 2, at 18.

[57] Walter A. Ewing, *Opportunity and Exclusion: A Brief History of U.S. Immigration Policy*, AM. IMMIGR. COUNS. (Jan. 13, 2012), https://www.americanimmigrationcouncil.org/research/opportunity-and-exclusion-brief-history-us-immigration-policy.

[58] *Id.*

women who acknowledged they were entering the United States for immoral purposes.[59]

The 1910 Mann Act took a step further, extending the reach of efforts to restrict prostitution beyond immigration restrictions to prohibitions within the country's borders as well.[60] This broadly drafted legislation, also known as the White Slave Act, purported to protect white women from slavery.[61] Fueled by public fear stoked by stories of black men abducting white girls and women to service nonwhite clients[62] and the Supreme Court's 1903 ruling that morality standards could support the use of the Commerce Clause to restrict the interstate transport of lottery tickets,[63] the Mann Act made it illegal to transport, or facilitate the transport of white women across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose."[64] Also in 1910, Congress strengthened existisng Immigration statutes to allow for the deportation of anyone engaged in prostitution who had immigrated to the United States, regardless of when that person arrived.[65] As a result, most of the prostitution that occurred throughout the country became illegal.

In addition to the fear of interracial sexual relationships, public health concerns formed the basis for anti-prostitution legislation and its enforcement. These public health concerns led to numerous state laws that prohibited prostitution *and* promiscuity.[66] Around the beginning of the United States' involvement in World War I, military leaders used the resources available to them to reduce access to prostitutes in the areas around military training camps.[67] Sexually transmitted diseases associated with prostitution and promiscuity were viewed as national security concerns because of their potential to weaken the strength of the military.[68] Military resources were used to provide medical treatment

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[59] PLILEY, *supra* note 2, at 34.

[60] *The Mann Act*, PBS, https://www.pbs.org/kenburns/unforgivable-blackness/mann-act/ (last visited Mar. 28, 2021).

[61] *Id.*

[62] PLILEY, *supra* note 2, at 25.

[63] Champion v. Ames, 188 U.S. 321, 357 (1903) (holding that a state could forbid lottery ticket sales to "guard[] the morals of its own people," so Congress could do the same through the Commerce Clause).

[64] PLILEY, *supra* note 2, at 67.

[65] PLILEY, *supra* note 2, at 75.

[66] PLILEY, *supra* note 2, at 118.

[67] Stern, *supra* note 49, at 382–83.

[68] Stern, *supra* note 49, at 382–83.

and health checks for soldiers who could not restrain themselves.[69] Additionally, using the newly formed Commission on Training Camp Activities, military leaders created a "moral zone" around military training camps, banning alcohol and prostitution within their limits.[70] As a result of the enforcement of the moral zones surrounding military training camps, women were prosecuted for engaging in prostitution, yet men were provided medical services if they made use of a prostitute's services.[71]

The potential for venereal disease to decimate the military forces led Congress to pass the Chamberlin-Kahn Act in 1918, which funded state efforts to detain and test citizens for sexually transmitted diseases.[72] This legislation, and state laws that came about as a result of it, allowed public health officials to "quarantine persons who ha[d], or who, after examination, [were] reasonably suspected of having syphilis, gonorrhea, or chancroid" until they became non-infectious.[73] Women were detained and forced to undergo intrusive medical examinations for venereal diseases.[74] If found to be infected, they were institutionalized and treated with arsenic and mercury until they were either cured of the infection or died.[75] Though utilized less frequently after World War II, these laws remained in effect until the 1970s.[76]

Criminalization of prostitution, with little, if any, consequences for their clients, continued until the 1970s when brothel owners in parts of Nevada won the right to operate legally, subject to strict regulation.[77] Though parts of Nevada currently allow legal prostitution in heavily regulated brothels, the rest of the United States jurisdictions continue to criminalize prostitution.[78]

The 1970s brought a period of revolution, giving reinvigorating the feminist movement, civil rights movement, and the disability rights

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[69] Susan L. Speaker, *Fit to Fight: Home Front Army Doctors and VD During WWI*, U.S. NAT'L LIBR. OF MED. (Oct. 18, 2018), https://circulatingnow.nlm.nih.gov/2018/10/18/fit-to-fight-home-front-army-doctors-and-vd-during-ww-i/.

[70] Stern, *supra* note 49, at 383.

[71] PLILEY, *supra* note 2, at 121.

[72] Chamberlain-Kahn Act, ch. XV, §§ 4-6, 40 Stat. 845 (1918).

[73] Stern, *supra* note 49, at 387–88.

[74] Stern, *supra* note 49, at 387.

[75] Stern, *supra* note 49, at 388.

[76] Stern, *supra* note 49, at 417, 419.

[77] Richard Symanski, *Prostitution in Nevada*, 64 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 357, 359 (1974).

[78] See *infra* notes 81–88 and accompanying text.

movement.[79] Sex workers became involved in all of these efforts, but most visibly in parts of the feminist movement and parts of the LGBTQ movement.[80]

A. Current status of criminalization of sex work in the United States

Except for ten rural counties in Nevada, sex work is criminalized throughout the United States.[81] Federal law prohibits anyone who intends to engage in prostitution, or who has done so within the last ten years, from entering the country legally or from changing their immigration status if they already reside in the country.[82] The original aspects of the Mann Act prohibiting one from bringing an alien into the country for prostitution or other immoral purposes still exists, though now the reference to immoral purposes refers more broadly to purposes considered criminal sexual activities.[83] This same expanded language has been altered in the statutes prohibiting the transport of individuals across state lines for purposes of prostitution.[84]

All fifty states make engaging in prostitution and purchasing sex criminal acts, though the type of crime and associated penalties differ.[85] For prostitution, sixteen states impose fines and incarceration that can exceed six months for the first offense.[86] These same sixteen states and four additional states impose fines and potential incarceration that can

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[79] *See How the Civil Rights Movement Launched the Fight for LGBT, Women's Equality*, PBS NEWSHOUR (Sep. 2, 2013 6:27 PM), https://www.pbs.org/newshour/show/civil-rights-launched-the-fight-for-lgbt-women-s-equality.

[80] Lindsey H. Jemison, *Feminist Theory and Sex Work Regulation: Comparing Regulatory Models and Implementation of Theoretical Policy*, J.L. SOC'Y 163, 170-71 (2021).

[81] ProCon.org, *US Federal and State Prostitution Laws and Related Punishments,* PROCON.ORG (May 4, 2018), https://prostitution.procon.org/us-federal-and-state-prostitution-laws-and-related-punishments/.

[82] 8 U.S.C. § 1182(a)(2)(D) (2018).

[83] 8 U.S.C. § 1328 (2018).

[84] 18 U.S.C. §§ 1952, 2421 (2018).

[85] ProCon.org, *supra*, note 81.

[86] Alabama, ALA. CODE §§ 13A-12-122, 13A-5-7 (2018); Arizona, ARIZ. REV. STAT. ANN. §§ 13-3214, 13-707 (2014); Connecticut, CONN. GEN. STAT. §§ 53a-82, 53a-26 (2016); Georgia, GA. CODE ANN. §§ 16-6-9, 16-6-13(a)(2), 17-10-3 (2019); Illinois, 720 ILL. COMP. STAT. 5/11-14, 730 ILL. COMP. STAT. 5/5-4.5-55 (2019); Indiana, IND. CODE §§ 35-45-4-2, 35-50-3-2 (2018); Iowa, IOWA CODE §§ 725.1, 903.1 (2015); Massachusetts, MASS. GEN. LAWS ch. 272 § 53A (2011); Michigan, MICH. COMP. LAWS §§ 750.448-449, 750.451 (2017); Minnesota, MINN. LAWS §§ 609.324 (Subd. 7), 609.0341 (2020); Oregon, OR. REV. STAT. §§ 167.007, 161.615(1) (2018); Pennsylvania, 18 PA. CONS. STAT. §§ 5902, 1104(3) (2011); South Dakota, S.D. CODIFIED LAWS §§ 22-23-1, 22-23-9, 22-6-2 (2019); Vermont, VT. STAT. ANN. tit. 13 § 2631; Virginia, VA. CODE ANN. §§ 18.2-346, 18.2-11(a) (2020); Wisconsin, WIS. STAT. §§ 944.30, 939.51(3)(a) (2013).

exceed six months on those purchasing sex as well,[87] though six of those states have different penalties for the purchaser.[88]

B. Current social and political perspectives about commercial sex work

The sex work community is diverse, composed of female, male and transgender sex workers; lesbian, gay and bi-sexual sex workers; male sex workers who identify as heterosexual; sex workers living with HIV and other diseases; sex workers who use drugs; young adult sex workers (between the ages of 18 and 29 years old); documented and undocumented migrant sex workers, as well as and displaced persons and refugees; sex workers living in both urban and rural areas; disabled sex workers; and sex workers who have been detained or incarcerated.[89]

Despite the variety among sex workers, most discussion of whether it should continue to be criminalized focuses on cisgender women and cisgender women's issues.

Even among feminists, tensions exist, if not an all-out battle. Broadly speaking, feminists recognize inequality based on sex and gender.[90] They work to create equal power, opportunity, and status for both women and men.[91] Feminists can be divided into three camps: abolitionists,[92] partial abolitionists,[93] and sex-positive or liberal feminists.[94]

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[87] The additional states are Kansas, KAN. STAT. ANN. § 21-6421, 21-6602; Montana, MONT. CODE ANN. § 45-5-601(2)(b); Tennessee, Tenn. Code Ann. §§39-13-514, 40-35-111(e)(1); and Utah, Utah Code Ann. §§ 76-10-1303, 76-3-204(1).

[88] *See supra* notes 86–87. Kansas, Massachusetts, Minnesota, Montana, Tennessee and Utah differentiate between those selling sex and those purchasing it within their statutory prohibitions. *Id.*

[89] *Decriminalisation: The Smart Sex Worker's Guide,* NSWP GLOBAL NETWORK OF SEX WORKER PROJECTS (2020) https://www.nswp.org/sites/nswp.org/files/sg_to_decriminalisation_prf05.pdf (unnumbered introductory page).

[90] *See Sex Work and Feminism: a guide on the feminist principles of sex worker organizing,* Sex Workers' Rights Advocacy Network 2 https://swannet.org/wp-content/uploads/2021/03/Sex_Work_and_Feminism_ENG_SnglPgs.pdf.

[91] *Feminism Needs Sex Workers, Sex Workers Need Feminism: Towards a Sex-Worker Inclusive Women's Rights Movement*, 4 INTERNATIONAL COMMITTEE ON THE RIGHTS OF SEX WORKERS IN EUROPE (March 2016) https://www.nswp.org/sites/nswp.org/files/Feminism%20Needs%20Sex%20Workers%2C%20Sex%20Workers%20Need%20Feminism%2C%20ICRSE%20-%202016.pdf

[92] *See, e.g.* Chuang, *supra* note 39, at 1664-1671..

[93] Jane E. Larson, *Prostitution, Labor, and Human Rights,* 37 U.C.Davis L. Rev. 673, 681 (2004).

[94] *See,* Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 Calif. L. Rev. 1195, 1209 (2015).

Each of these groups has differing views about inequality and how to address it.[95]

i. Abolitionists

One of the more vocal groups of feminists is the abolitionists, sometimes referred to as radical feminists.[96] Led by scholars and activists such as Catharine MacKinnon[97] and Andrea Dworkin,[98] radical feminists believe that women, as a biological class, are oppressed by men who maintain their power through institutional and cultural practices designed to maintain and potentially increase male superiority while reinforcing female inferiority.[99] Today's radical feminists continue to espouse the beliefs and goals of the Women's Liberation Movement of the 1960s and 1970s. Radical feminists work to unite all women in an effort to end domination by the male patriarchy.[100] This group of feminist activists "view[ ] sexual oppression as the root and model of all oppression in society."[101]

In addition to radical feminists, two other groups belong to the abolitionist camp: neoconservatives[102] and evangelical Christians.[103] The members of this unlikely alliance agree on two points that allow them to speak with one voice about sex work and sex trafficking. All three groups want prostitution abolished and consider it exploitative and

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[95] ANDREA J. NICHOLS, SEX TRAFFICKING IN THE UNITED STATES: THEORY, RESEARCH, POLICY, AND PRACTICE 25 (2016).

[96] *See*, Chuang, *supra*, note 39, at 1664.

[97] Catharine MacKinnon is the Elizabeth A. Long Professor of Law at the University of Michigan Law School. She has also been the James Barr Ames Visiting Professor of Law at Harvard Law School since 2009.

[98] Andrea Dworkin was a radical feminist and author best known for her work in the anti-pornography and anti-prostitution movements.

[99] *See generally* BARBARA BURRIS, THE FOURTH WORLD MANIFESTO, reprinted in RADICAL FEMINISM 322 (Anne Koedt, et al. eds., 1976). (explaining the beliefs and goals of the Women's Liberation Movement)

[100] Voichita Nachescu, *Radical Feminism and the Nation: History and Space in the Political Imagination of Second-Wave Feminism*, 3 J. FOR STUDY RADICALISM 29–30 (2009).

[101] *Id*. at 45.

[102] Neoconservatives refers to a network of people who share similar outlooks about conservative cultural and religious values combined with a focus on interventionist foreign policy and conservative economic approaches. Terrance Beal & Richard Dagger, *Neoconservatism*, ENCYC. BRITANNICA, (MAY 3, 2016), https://www.britannica.com/topic/neoconservatism.

[103] Evangelicals churches are those that "stress the preaching of the gospel of Jesus Christ, personal conversion experiences, Scripture as the sole basis for faith, and active evangelism (the winning of personal commitments to Christ)." J. Gordon Melton, *Evangelical Church*, ENCYC. BRITANNICA, (Apr. 9, 2021), https://www.britannica.com/topic/Evangelical-church-Protestantism.

degrading to women.[104] They characterize prostitution as a form of violence.[105]

The neoconservative and evangelical Christian groups view the need to criminalize prostitution with the ultimate goal of abolishing it through a religious or morals-based lens.[106] They focus on keeping sex confined to heterosexual, monogamous marriage.[107] To the chagrin of the feminists in this alliance, the neoconservatives and evangelical Christians view women's sexual vulnerability as natural and proper.[108] Whether based on religious beliefs or views about societal structure, non-feminist abolitionists recognize that society's views are shifting or have already shifted. By fighting to keep prostitution criminalized they fight to retain or re-establish the old patriarchal structure with which they are more comfortable.[109]

Among the abolitionist feminists, some do not accept the idea that a woman could choose or consent to engage in prostitution, instead asserting that women who engage in prostitution have a false consciousness that prevents them from recognizing their oppression, making them unable to meaningfully consent.[110] Often referred to as radical feminists, this subset of feminists view gender and sex inequality on a broad social scale, focusing on the patriarchal conditions that oppress all women.[111] They focus on the common experiences of all women to effect larger societal change.[112] Making no distinctions between sex trafficking, prostitution, and pornography, radical feminists believe that all women's agency is "reduced through the sexual objectification of women in sexual commerce."[113]

Others accept that some women may freely choose or consent to engage in sex work but posit that so few women freely choose sex work in comparison to those who do not make that choice that the harm imposed on the women making the voluntary choice is *de minimus* and must be tolerated to protect the true victims.[114]

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[104] Chuang, *supra* note 39, at 1658.
[105] Chuang, *supra* note 39, at 1664.
[106] Chuang, *supra* note 39, at 1665.
[107] Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1744 (2010).
[108] *Id.*
[109] *Id.* at 1744–45.
[110] Chuang, *supra* note 39, at 1664–65.
[111] Chuang, *supra* note 39, at 1664–65.
[112] Nichols, *supra* note 95, at 26–27.
[113] Nichols, *supra* note 95, at 27.
[114] Dempsey, *supra* note 107, at 1768–69.

While the feminist abolitionists view prostitution as an example of the problems of a patriarchal society, neoconservatives and evangelical Christians want to abolish prostitution to maintain a patriarchal society.[115] Neoconservatives and evangelical Christians believe prostitution contradicts "traditional social values rooted in heterosexual, patriarchal marriage and family," which is the only place to express sexuality.[116]

Though both points of view within the abolitionist group lead to prohibiting prostitution, the reasons for doing so exist as polar opposites: patriarchy rules versus patriarchy as the evil to be eradicated.[117] Despite their differences, the united voice of abolitionists has successfully shaped the messaging about trafficking to focus on the victimization of women and girls.

ii. Partial Abolitionists

Most feminists who advocate for the prohibition of prostitution also view those who engage in commercial sex as victims.[118] They recognize the harm that results from being arrested and continuing to engage in the world with a criminal record.[119] Consequently, many feminists, including some radical feminists, support partial decriminalization, or what is known as the Nordic model, or end-demand model of criminalization.[120]

The Nordic model decriminalizes those who sell sex—the prostitutes themselves—but criminalizes all other aspects of sex work.[121] Under this model, those who exchange sex for money are provided with social services and assistance to leave the industry rather than being considered criminals.[122] Those who purchase sex are subject to arrest and sanctions, including criminal sanctions.[123] The Nordic model also criminalizes those who promote or profit from prostitution—the pimps and owners of brothels and massage parlors.[124]

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[115] Chuang, *supra* note 39, at 1665–66.
[116] Chuang, *supra* note 39, at 1665.
[117] Chuang, *supra* note 39, at 1665–66.
[118] Chuang, *supra* note 39, at 1670–71.
[119] Chuang, *supra* note 39, at 1670–71.
[120] Berta E. Hernandez-Truyol & Jane Larson, *Sexual Labor and Human Rights*, 37 COLUM. HUM. RTS. L. REV. 391, 401 (2005).
[121] Dempsey, *supra* note 107, at 1749–50.
[122] Dempsey, *supra* note 107, at 1749–50.
[123] Sylvia Law, *Commercial Sex: Beyond Decriminalization*, 73 CAL. L. REV. 523, 567–68 (2000).
[124] *Id.* at 569–70.

iii. Liberal Feminists

Liberal feminists focus on individual rights and choices.[125] Unlike radical feminists who take a top-down approach to eliminate oppression, liberal feminists focus on oppression at the individual level.[126]

Liberal feminists believe women should have the ability to choose to engage in sex work, recognizing that making that choice can be financially rewarding and empowering.[127] By supporting the choice to engage in sex work, liberal feminists challenge societal ideas about traditional femininity, monogamy, and sexual purity.[128] Like the radical feminists, liberal feminists are concerned about patriarchal control of women, but liberal feminists view legislation that prohibits prostitution as the attempt to control women's sexuality, rather than protection from patriarchal views of women as sex objects.[129]

Liberal feminists support the full decriminalization of sex work, distinguishing voluntary sex work from trafficking.[130] The critical inflection point between radical feminists and their liberal counterparts is the latter's position that the "agency of individuals involved in sex work does not have a broader negative impact on the agency of women and girls in society."[131]

The tension points, in a nutshell, the disagreement among feminists centers on agency and victimization. Radical feminists view all prostitution as sex trafficking and violence against women, regardless of consent.[132] Within the radical feminist group, we find differences in what to do about prostitution, with some believing in harsh penalties even for the women involved because they have chosen to engage in criminal behavior.[133] They hope that continuing to impose criminal penalties on those who engage in sex work will deter others from following that path.[134] Others, on the other hand, prefer to treat the women who sell sex as victims and to support them to change their path.[135]

Liberal feminists recognize an individual's right to choose sex work, but also acknowledge that sex workers can be victimized—by

[125] *See* Nichols, *supra* note 95, at 25–26.
[126] *See* Nichols, *supra* note 95, at 25–26.
[127] *See* Nichols, *supra* note 95, at 25.
[128] Nichols, *supra* note 95, at 25.
[129] *See* Nichols, *supra* note 95, at 25–26.
[130] *See* Nichols, *supra* note 95, at 25–26.
[131] Nichols, *supra* note 95, at 26.
[132] *See* Nichols, *supra* note 95, at 26.
[133] *See* Nichols, *supra* note 95, at 26.
[134] *See* Nichols, *supra* note 95, at 26.
[135] *See* Nichols, *supra* note 95, at 26.

their clients, those who manage them, the police, and the criminal justice system.[136]

III. CONSTITUTIONAL CONSIDERATIONS ON CRIMINALIZING SEX WORK

> We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.[137]

The concept of a woman's right to make decisions about her body and an individual's right to make intimate decisions important to human dignity without state interference underpins many of the arguments of those who want to decriminalize sex work. In *Griswold v. Connecticut*, the Supreme Court identified a right to privacy emanating from the specific guarantees contained in the Bill of Rights.[138] At times the right to privacy is found in the penumbra of the First Amendment;[139] at other times the right to privacy is part of the liberty interest found in the Due Process Clause of the Fourteenth Amendment.[140]

As recently as 2003, when the Supreme Court addressed homosexual sodomy, it recognized that the fundamental right to liberty "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[141] This liberty interest includes the right of a woman to make "certain fundamental decisions affecting her destiny."[142] While the Court has specifically identified several fundamental privacy rights,[143] it has also noted that "personal privacy

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[136] *See* Nichols, *supra* note 95, at 62–63.

[137] Oliver Wendall Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

[138] 381 U.S. 479 (1965).

[139] *Id.* at 483 ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members.").

[140] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[141] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[142] *Id*. at 565.

[143] Fundamental privacy rights identified by the U.S. Supreme Court include the right to same-sex marriage, Obergefell v. Hodges, 576 U.S. 644, 675 (2015); the right to engage in private, consensual sodomy, *Lawrence*, 539 U.S. at 562; a woman's right, under certain conditions, to

includes the interest in independence in making certain kinds of important decisions . . . [but] the outer limits of this aspect of privacy has not been marked by the Court."[144] If the limits of the fundamental right to privacy are unknown, it is reasonable to ask whether the right to determine whether and under what conditions one engages in sexual activity falls within those boundaries.

A. Does a fundamental right to engage in sex work exist?

The criminalization of commercial sex work may have seemed appropriate when people believed legitimate concerns about health risks to the public existed, crime increased because of sex work, and when other forms of non-marital sex were also illegal. But, evidence demonstrates that the health and safety concerns to the public are unrelated to commercial sex work, and other forms of non-marital sex like adultery, fornication, and sodomy have been decriminalized.[145] Consequently, the fundamental right to make decisions about intimate associations, that is who one has sex with and under what conditions, is now manifested. Continuing to criminalize an individual's choice to exchange sex for money violates our constitutional protection of individual liberty.

To those who want to criminalize sex work, sexual intimacy is meant for marriage or committed relationships.[146] Those with more sex-positive beliefs who still don't approve of commercial sex work often believe commercializing sex demeans those who engage in this activity and the intimate act of sex itself.[147] People are entitled to these beliefs. But just because the majority may believe in a critical difference between sex where no money exchanges hands and sex where the exchange of money occurs, does not mean that the latter should be prohibited. If the majority of people in the country believed that all forms of contraception were wrong, that would not justify prohibiting those who held different beliefs from having access to contraceptive methods.

The criminalization of commercial sex is similar to the criminalization of homosexuality. Both have been treated differently by the criminal law over time. As Justice Kennedy noted in *Obergefell v.*

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terminate a pregnancy, Roe v. Wade, 410 U.S. 113, 153 (1973); the right of individuals to make decisions regarding whether or not to have children, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); the right to interracial marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); the right to marital privacy, Griswold v. Connecticut., 381 U.S. 479, 485–86 (1965); and the right to procreation, Skinner v. Oklahoma., 316 U.S. 535, 541 (1942).

[144] Carey v. Population Servs. Int'l., 431 U.S. 678, 684 (1977) (internal citations omitted).

[145] *See infra* Part IV.B.

[146] *See supra* notes 108, 109.

[147] *See supra* note 115.

Hodges, "[u]ntil the mid-20th century, same sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law."[148] Justice Kennedy continued, noting:

> Th[e] Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*. There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans* the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003 [in *Lawrence v. Texas*], the Court overruled *Bowers,* holding that laws making same-sex intimacy a crime 'demea[n] the lives of homosexual persons.'[149]

Similarly, criminal law has treated prostitution differently over time. Instead of a long history of being criminalized, prostitution has a long history of being tolerated without criminal penalties. Once criminalized, like the legal status of homosexuals under *Bowers*, when it was controlling, prostitutes have seen an erosion of the laws surrounding restrictions on similar types of behavior.[150] If laws that make same-sex intimacy a crime demean the lives of homosexual persons, then laws that make the exchange of sex for money demean the lives of prostitutes.

B. Criminalizing the exchange of sex for money violates constitutional rights to liberty and privacy.

The United States constitution protects personal liberty.[151] "[T]here is a realm of personal liberty which the government may not enter,"[152] and that realm includes decisions about consensual sexual

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[148] Obergefell v. Hodges, 576 U.S. 644, 660 (2015); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[149] *Obergefell*, 576 U.S. at 661–62 (citations omitted).

[150] Criminal laws relating to sodomy, fornication, and adultery have either been repealed or are no longer enforced.

[151] U.S. CONST. amends. V, XIV §1.

[152] *Casey*, 505 U.S. at 847.

activity.[153] The Constitution has no express provision guaranteeing a person's right to conduct his or her life protected by a zone of privacy. The Supreme Court has ruled that the penumbras of the specific guarantees found in the Bill of Rights creates such a zone of privacy.[154] Though the Court has named some liberty interests, there are other unenumerated, fundamental, substantive rights and interests.[155]

The expansion of privacy rights does not happen easily. To establish a previously unrecognized fundamental privacy right one must expect to take a case through the entire court system and hope that the Supreme Court will consider the case. Though the recognition of additional privacy rights should not be made hastily, lower courts should refrain from reading the cases that have enumerated fundamental liberty or privacy rights as imposing hard limits on the potential privacy rights that have not been imposed by the Supreme Court. But, exactly that has happened, creating a line of cases that appear to rely on analysis that interprets Supreme Court precedent even more strictly than the Court itself has indicated should occur.

C. The commercial nature of sex work

Decisions in many state courts appear to impose restrictions on the right to privacy that are not supported by existing precedent. One aspect of sex work continues to be used to distinguish it from other decisions about sexual activity. At times this is described as the commercial nature of the sexual interaction. At other times, the emphasis is on the public interaction involved in negotiating the terms of the sexual interaction. However, no basis exists for concluding that the exchange of money for sexual activity eliminates the fundamental liberty interest protected by the Fourteenth Amendment.

Several state cases rely on *Paris Adult Theatre I v. Slaton*[156] for the proposition that privacy rights do not extend to interactions with a commercial nature, such as prostitution. These cases assert that the exchange of money for sexual activity makes the action commercial, and

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[153] Lawrence v. Texas, 539 U.S. 558, 572 (2003) (acknowledging "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex").

[154] Griswold v. Connecticut, 381 U.S. 479 (1965). The specific provisions of the Bill of Rights that created zones of privacy were the First, Third, Fifth, and Ninth Amendments.

[155] *See* Carey v. Population Servs., Int'l., 431 U.S. 678, 684–85 (1977). The Carey Court identified examples of cases identifying fundamental rights not mentioned specifically in the Bill of Rights, including "marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* (citations omitted).

[156] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

that characterization makes it impossible to fall within the constitutional protections afforded to liberty interests.[157] For instance, in *Lutz v. United States*, the District of Columbia Court of Appeals found there was "no fundamental right for commercial sexual solicitation."[158] The *Lutz* court asserted that "although the Supreme Court has recognized that the constitutional right to privacy for certain intimate conduct extends beyond the home to a hotel room, this right does not extend to protection for commercial sexual solicitation."[159] The court continued to distinguish commercial sex from those relationships previously identified as protected liberty interests, relying on *Paris Adult Theatre I*.[160] The examples of already-recognized privacy interests the *Lutz* Court cited included marriage, procreation, contraception, family relationships, child-rearing, and education.[161] The Court completed this comparison by suggesting that the fundamental personal right of a woman to choose whether to "bear or beget a child" should not extend to selling "the use of one's body for sexual purposes."[162] The *Lutz* Court's reliance on *Paris Adult Theatre I* to support its assertion that the commercial nature removes prostitution from the constitutionally-protected sphere is misplaced.

Paris Adult Theatre I v. Slaton reviewed a decision of the Georgia Supreme Court that held the sale and delivery of obscene material to willing adults was not protected by the First Amendment.[163] Though the Court remanded the case for further evaluation in light of its decision, it also held that there was no constitutional prohibition that prevented the state of Georgia from restricting materials considered obscene from being shown in an adult theater.[164]

When considering the potential constitutional protection, the Court reminded us that the First and Fourteenth Amendments do not protect obscenity.[165] Additionally, the Court reinforced its position that states have a legitimate interest in regulating obscenity when it circulates in commerce and appears in places of public accommodation.[166] It rejected the argument that regulation of obscenity made available only to consenting adults brought the obscenity within the material protected

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[157] *Id.*; Lutz v. United States, 434 A.2d 442, 445–46 (D.C. 1981).
[158] *Lutz*, 434 A.2d at 445–46.
[159] *Id*.
[160] *Id.*
[161] *Id.*
[162] *Id*. at 446.
[163] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 53 (1973).
[164] *Id*. at 70.
[165] *Id*. at 54.
[166] *Id*. at 57.

from regulation.[167] In doing so, the Court referred to the obscenity at issue as "commercialized obscenity"[168] apparently to distinguish obscenity available in places of public accommodation such as theaters from obscenity viewed in the privacy of one's home. The latter situation is entitled to protection from state interference,[169] but commercial ventures such as a theater are not private and therefore are subject to state regulation.[170]

The commercial aspect of the Court's analysis related to where the obscenity was being viewed, not the fact that those viewing it had paid to do so. In fact, as the Court reviewed its Fourteenth Amendment right to privacy decisions it noted that "[n]othing . . . in [the] Court's decisions intimates that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty' to watch obscene movies in places of public accommodation."[171]

The other part of the *Paris Adult Theater I* case that touches on the commercial aspect of viewing obscenity involved the argument that by restricting the viewing to consenting adults the obscene material was not subject to state regulation.[172] Rejecting this argument, the Court stated:

> Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment. . . . The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material has a tendency to injure the community as a whole, to endanger the public safety or to jeopardize . . . the States' 'right . . . to maintain a decent society.'[173]

It is important to recognize that the *Paris Adult Theatre I* Court was addressing an activity that had already been identified as beyond the protection afforded fundamental rights. It was attempting to determine whether the location—a publicly available theater—meant the

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[167] *Id.* Individuals have the right to view obscene materials in the privacy of their home without interference from the state. *See* Stanley v. Georgia, 394 U.S. 557 (1969).

[168] *Paris Adult Theater I*, 413 U.S. at 57.

[169] *Stanley*, 394 U.S. at 568.

[170] *Paris Adult Theater I*, 413 U.S. at 65.

[171] *Id*. at 66 (citation omitted).

[172] *Id.* at 68 (citation omitted).

[173] *Id*. at 68–69.

obscenity in that specific location became protected because it had similarities to the viewing of obscenity in a private home, an activity protected because of its location.[174] Nothing in the Court's discussion focused on the exchange of money being important to the commercial nature of the case. The public accommodation aspect brought the viewing into the commercial realm.

The *Lutz* court focused on the commercial nature of the activity under review.[175] But the *Lutz* court did not consider the connection between the fundamental rights related to sexual intimacy and its consequences and the right to make decisions about one's body. The activity in *Paris Adult Theatre I* did not involve personal decisions relating to sexual intimacy, so the Court could not address how that intimacy and its consequences were connected to the right to make decisions about one's body. Yet, ignoring that part of the issue, the *Lutz* court relied on *Paris* and the commercial nature of both activities to exclude commercial sexual activity from protection.[176]

D. Liberty and privacy interests in decisions about private, consensual sexual activity

The Constitution limits the ability of the government to compel, forbid, or regulate intimate details of private, consensual behavior between adults.[177] In *Lawrence v. Texas*, the Supreme Court stated that there is a fundamental right to liberty "that presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[178] Found under the Due Process Clause of the Fourteenth Amendment, this liberty interest includes the right of a woman to make "certain fundamental decisions affecting her destiny."[179] Regulating private decisions related to sexual activity violates an individual's right to be free from unwarranted intrusion into decisions core to a person's identity.[180] Whether and how one engages with another sexually is such a profound attribute of personhood that government interference is repugnant to human dignity and the liberty interest protected by our

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[174] Paris Adult Theatre I v. Slaton, 413 U.S. 50 (1973).

[175] Lutz v. United States, 434 A.2d 442, 445 (D.C. 1981).

[176] *Id.*

[177] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[178] *Id*. at 562.

[179] *Id.* at 565 (referencing Roe v. Wade, 410 U.S. 113 (1973)).

[180] *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (striking down a criminal law that forced couples to accept the risk of pregnancy when engaging in sexual intercourse by prohibiting access to contraception); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (recognizing the right of individuals to be free from government intrusion in decisions related to sex).

constitution. Like the freedom to make decisions about preventing or terminating a pregnancy, the decision about under what conditions one will engage in sexual activity with another consenting adult is a decision central to personal dignity and autonomy and the liberty interest protected by the Fourteenth Amendment.[181]

E. Liberty interest in bodily integrity

As the Court noted when addressing the right to make decisions about abortions in *Planned Parenthood v. Casey*, "[i]t is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about . . . bodily integrity."[182] Likewise, in his concurrence in *Washington v. Glucksberg*, Justice Souter pointed out that one's liberty interest in bodily integrity generally means that competent adults have "a right to determine what shall be done with his own body."[183]

In *Washington v. Glucksberg* the Supreme Court considered whether a fundamental right to assisted suicide exists.[184] The Court outlined a two-step process for analyzing due process liberty interests.[185] The first step requires looking to the "Nation's history, legal traditions, and practices."[186] The second step requires the court to use a "careful description of the asserted fundamental interest."[187]

Implementing the first step of the analysis, the *Glucksberg* Court looked back more than 700 years to consider how suicide and assisting suicide have been treated.[188] After conducting that review the Court found opposition to suicide consistent and enduring.[189] After noting that the specific interest being considered was whether there was a constitutionally protected liberty right to commit suicide, including to have assistance in doing so,[190] the Court ultimately found no fundamental right to suicide, so it applied a rational basis review to find the legislation under consideration constitutional.[191]

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[181] *Cf.* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
[182] *Id.* at 849.
[183] Washington v. Glucksberg, 521 U.S. 702, 777 (1997) (Souter, J., concurring).
[184] *Id*. at 702.
[185] *Id.* at 703.
[186] *Id*. at 710.
[187] *Id*. at 721.
[188] *Id*. at 711.
[189] *Glucksberg*, 521 U.S. at 711.
[190] *Id*. at 723.
[191] *Id*. at 728.

Though *Glucksberg* did not include suicide and assisted suicide in the group of fundamental rights, the Court relied heavily on another case that involved decisions over one's body, *Cruzan v. Director, Missouri Department of Health*.[192] Characterizing *Cruzan* not as a case about the right to die as it is often referred to, but as a case about the right to "refuse life saving hydration and nutrition,"[193] the Court noted that the decision in *Cruzan* was appropriate because it followed the concepts of personal autonomy and a long history of forced medication being considered battery.[194]

Control over one's body is essential in matters relating to sexual activity. In fact, that control over what happens to one's body when engaging in or deciding not to engage in sexual activity is the bedrock concept of consent.[195] How someone chooses to use his or her body in connection with consensual sexual activity is as personal a decision as whether to prevent or terminate a pregnancy, whether to allow doctors to perform medical procedures, or whether to end one's own life. By criminalizing an individual's choice to engage in private, consensual sexual activity in exchange for money, the state invades that individual's liberty interest in bodily integrity by dictating and limiting the conditions under which one can engage in sexual activity.

The liberty interest at stake here is not whether one has a protected interest in exchanging sex for money. It is the fundamental interest in decisions about consensual sexual activity, with the details of what those decisions look like left to the participants. If two adults have the protected right to determine whether they engage in oral or anal sex, these same adults should have the right to decide whether one will provide the other with money or something of value as part of their agreement to engage in sexual activity. If the exchange of a dinner date for sex would be protected, the exchange of money for sex should be similarly protected. The Due Process Clause does not distinguish among classes of citizens, shielding the choices of some over others.[196] Swingers who choose to engage in recreational sex with people they just met and may never know by their real name are no different from sex workers who choose to engage in sex with people they just met. The fact that a swinger gets an adrenaline rush and the sex worker gets cash should

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[192] Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261 (1990).

[193] *Glucksberg*, 521 U.S. at 723; *see Cruzan*, 497 U.S. at 269.

[194] *Glucksberg*, 521 U.S. at 725.

[195] For an interesting discussion of the way consent creates tension between rape and prostitution see Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988).

[196] U.S. CONST. amend. XIV § 1.

not change the protection afforded their liberty interest in making those choices without state interference or criminal penalty.

Legal change moves at a snail's pace. When determining whether to recognize a choice as a fundamental liberty interest the Court looks beyond historical precedent to the way the activity at issue has been treated over time.[197]

When the Supreme Court decided *Bowers v. Hardwick* it relied on long-standing prohibitions against sodomy.[198] When the *Lawrence* Court overturned this decision, it recognized that most decisions about individual sexual activity involve more than just the conduct involved; they are about individual identity.[199] The Court also noted that there was no long-standing prohibition against homosexual conduct specifically, but instead, those long-standing roots' were related to non-procreative sex.[200] Further, the Court noted that criminal prohibition of homosexual sodomy only developed in the latter part of the twentieth century.[201]

The laws criminalizing sex work are twentieth-century enactments. Like the sodomy statutes addressed in *Bowers*, and then reconsidered and found unconstitutional in *Lawrence*, criminal prohibitions against sex work were enacted to prohibit non-procreational sex in general, along the same lines as laws prohibiting fornication, adultery, access to birth control, and abortion.[202] As becomes evident from the repeal of most of these laws, and the lack of prosecution of those that may remain on the books, the "ancient roots" argument does not hold water. The same is true of criminal prohibitions of sex work.

Looking at relevant legal traditions and practices, it becomes clear that protected liberty interests extend beyond those explicitly recognized when the Fourteenth Amendment was ratified.[203] Traditionally, prostitution was not criminalized. In fact, it was an important part of the way society operated. Women who were expected to marry were also expected to be chaste; men were expected to be sexually experienced.[204] Prostitutes filled the gap. Women of the marrying type were thought to

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[197] *See Glucksberg*, 521 U.S. at 710–19.

[198] Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (*overruled by* Lawrence v. Texas, 539 U.S. 558 (2003)).

[199] *Lawrence*, 539 U.S. at 567.

[200] *Id*. at 568–69.

[201] *Id*. at 570.

[202] *Bowers*, 478 U.S. at 195.

[203] *See* Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992).

[204] Kathryn Hughes, *Gender roles in the 19th century*, BRITISH LIBRARY, https://www.bl.uk/romantics-and-victorians/articles/gender-roles-in-the-19th-century#.

be disinterested in sex, yet men were expected to have healthy sexual appetites. Prostitutes filled the gap..[205]

If sodomy is no longer criminalized, prostitution should not be either. The criminalization of all forms of sodomy—heterosexual or homosexual—has a longer legal tradition than other forms of sexual activity, dating as far back as Plato's Laws.[206] At the time the Bill of Rights was ratified in 1791, all thirteen states outlawed sodomy by criminal statute.[207] The tradition of making sodomy a criminal offense continued in all fifty states for many years, though by 1986, there remained only twenty-four states and the District of Columbia that continued to have sodomy prohibitions in their statutes.[208]

As noted earlier,[209] similar to the twenty-first-century criminalization of homosexuality, prostitution did not become criminalized until the beginning of the twentieth century. At the time, other behaviors associated with sexual activity were also prohibited through criminal statutes.[210] Except for prostitution, the criminal penalties for other forms of sexual activity such as adultery, sodomy, and fornication have either been eliminated or are no longer enforced in any meaningful way.[211] The unmistakable trend is to remove government intrusion into decisions about consensual sex among adults.

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[205] *Id.*

[206] Yao Apasu-Gbotsu, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986).

[207] *See* Bowers v. Hardwick, 478 U.S. 186, 193–94, 192 n.5 (1986) (*overruled by* Lawrence v. Texas, 539 U.S. 558 (2003)).

[208] Apasu-Gbotsu, *supra* note 208, at 524.

[209] *See supra* Part II.

[210] PLILEY, *supra* note 2, at 67 (discussing state laws that prohibited acts such as promiscuity).

[211] Examples of the repeal of laws relating to sodomy include: 1993 Nev. Stat. ch. 236 (repealing NEV. REV. STAT. § 201.193); 2001 Ariz. Legis. Serv. 382 (West) (repealing ARIZ. REV. STAT. §§ 13-1411, 13-1412); 1998 R.I. Pub. Laws 24 (amending R.I. GEN. LAWS § 11-10-1 to exclude conduct with other persons). For a description of the history of sodomy prohibitions, see Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003). As of this writing, only sixteen states have statutes criminalizing adultery. Alabama, ALA. CODE § 13A-13-2 (2020); Arizona, ARIZ. REV. STAT. ANN. § 13-1408 (2020); Florida, FLA. STAT. § 798.01 (2020); Georgia, GA. CODE ANN. §16-6-19 (2020); Idaho, IDAHO CODE § 18-6601 (2020); Illinois, 720 ILL. COMP. STAT. 5/11-35 (2020); Kansas, KAN. STAT. ANN. § 21-5511 (2020); Michigan, MICH. COMP. LAWS § 750.30 (2020); Minnesota, MINN. STAT. § 609.36 (2020); Mississippi, MISS. CODE ANN. § 97-29-1 (Jan 11, 2021); New York, N.Y. PENAL CODE § 255.30 (McKinney 2020); North Dakota, N.D. CENT. CODE § 12.1-20-09 (2019); Oklahoma, OKLA. STAT. tit. 21, § 871 (2020); South Carolina, S.C. CODE ANN. § 16-15-60 (2020); Virginia, VA. CODE ANN. §18.2-365 (2020); Wisconsin, WIS. STAT. § 944.16 (2021). Fornication statutes remain in only four states: Idaho, IDAHO CODE § 18-6603 (2020); Illinois, 720 ILL. COMP. STAT. 5/11-40 (2020); Mississippi, MISS. CODE ANN. § 97-29-1 (Jan. 11, 2021); and South Carolina, S.C. CODE ANN. § 16-15-60 (2020).

While sodomy has been illegal throughout much of recorded history, prostitution is considered "the world's oldest profession."[212] Unregulated and accepted for centuries before being caught up in the relatively short-term and unsuccessful temperance efforts, prostitution could be decriminalized without breaking with long-standing legal tradition. As we will see in Part IV,[213] any secular reasons to criminalize a person's decision about whether to accept money for sexual activity have been repudiated, and no long-standing legal history of making such a choice a criminal act exists. Consequently, the only potential justifications for criminalizing exchanging sexual activity for money are religious and moral objections. Those objections are not sufficient to infringe upon an individual's liberty interest. Like those who hold religious objections to the recognition of the right of same-sex couples to marry, who "may continue to advocate with utmost, sincere conviction that, by divine precepts same-sex marriage should not be condoned,"[214] those who object to the decriminalization of sex work can continue to advocate in line with their convictions. But just as objections to same-sex marriage cannot justify infringing on individual rights,[215] similar convictions about sex work should not justify infringing on an individual's liberty interest to make decisions about consensual sexual behavior.

F. Sex work and the right to privacy

The statutes at issue in *Lawrence* only prohibited a particular sex act,[216] but because they involved personal choices about sexual behavior, they touched a personal relationship that falls within a person's liberty to choose. According to the Court, the state and courts should refrain from setting boundaries about this relationship when it causes no harm to a person or institution protected by law.[217]

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[212] Though this phrase is thought to have been coined by Rudyard Kipling, the fact is, prostitution has been around in some form or another throughout history. Humans have exchanged sex for money or things of value for as long as history has documented. *See generally* Forrest Wickman, *Is Prostitution Really the World's Oldest Profession?*, SLATE (Mar. 6, 2012, 5:57 PM), https://slate.com/news-and-politics/2012/03/rush-limbaugh-calls-sandra-fluke-a-prostitute-is-prostitution-really-the-worlds-oldest-profession.html.

[213] *See infra* Part IV.

[214] Obergefell v. Hodges, 576 U.S. 644, 679 (2015).

[215] *Id.* at 680.

[216] Lawrence v. Texas, 539 U.S. 558, 567 (2003) (discussing Texas statute which made it a crime for two individuals of the same sex to partake in intimate sexual conduct was unconstitutional "as applied to adult males who had engaged in consensual act of sodomy in privacy of home").

[217] *Id.*

Looking back at the way *Bowers* supported the criminal statutes later found unconstitutional in *Lawrence*, it becomes clear that the Court at that time believed it appropriate to use legislation to enforce moral objections to homosexuality.[218] These moral beliefs were shaped by religion and traditional ideas about family. However, the position of the Court has changed. Majority opinion about morality can no longer be enforced through criminal law or state action.[219] Instead, "[the Court's] obligation is to define the liberty of all, not to mandate [its] own moral code."[220] Instead, protecting liberty rights includes protecting adults' ability to make their own decisions about how they conduct their sexual lives.[221] Intimate decisions about one's physical relationships are part of the liberty interest protected by the Due Process Clause.[222]

Lawrence, and other decisions involving analysis of fundamental rights that the majority of society might consider immoral, such as *Paris Adult Theater I v. Slaton*[223] and *Romer v. Evans*,[224] make clear that each time the Court considers a potential fundamental right claim, it addresses only the specific facts of the case. These cases do so by elaborating on other factual situations not found before the Court.[225]

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[218] *Id.* at 567 (citing Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)) ("The *Bowers* Court was . . . making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral, but this Court's obligation is to define the liberty of all, not to mandate its own moral code."); Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[219] Thomas L. Hindes, *Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 U. PENN. L. REV., 344, 344–45 (1977); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code.").

[220] *Lawrence*, 539 U.S. at 571 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)).

[221] *Id.* at 572. ("These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

[222] *Id.* at 559, 577 (reaffirming Justice Stevens' dissent from Bowers that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice").

[223] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (addressing public showing of obscene movies).

[224] Romer v. Evans, 517 U.S. 620 (1996) (addressing discrimination against homosexual individuals).

[225] *Paris Adult Theatre I*, 413 U.S. at 69 (pointing out that the Court's holding was directed "not at thoughts or speech, but at depiction and description of specifically defined sexual conduct"); *Romer*, 517 U.S. at 632 (identifying several laws that disadvantaged specific groups but were upheld because there was a rational basis); *see also Lawrence*, 539 U.S. at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

Statements identifying factual situations that are not justiciable based on the facts present in the cases before the Court do not mean the Court would refuse to recognize a fundamental liberty interest in the non-justiciable facts. The references to alternative situations point out facts and issues not ripe for review in the case being decided because no party with standing to bring the issue to the Court is a party.[226] As noted earlier in this section, several cases addressing criminal statutes prohibiting prostitution have mischaracterized the Supreme Court's dicta as holding by misinterpreting the purpose of the Court mentioning related issues not under review.

G. The Effect of Lawrence v. Texas

The simple fact that an activity is commercial does not eliminate the possibility that it can be protected by the constitution.[227] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[228] the Court addressed a different fundamental right—the First Amendment right to freedom of speech—and held that just because speech was commercial did not take it out of the realm of protected speech.[229] In support of its decision, the Court referenced the fact that it had held commercial speech that involved content about a protected subject—abortion—could also not be restricted just because of its commercial nature.[230]

Whether engaging in sexual activity for money is a protected right depends on how one interprets *Lawrence*. Unfortunately, the exact nature of the right protected in *Lawrence* is unclear. The Court addressed specific facts yet used broad language about privacy and choice to engage in sexual intimacy.[231] Consequently, it is difficult to determine how far *Lawrence* extends. That the *Lawrence* holding extends beyond its specific facts is evident from the Court's use of that holding when determining that same-sex couples have the same rights as

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[226] *See generally* Russell W. Galloway, *Basic Justiciability Analysis*, 30 SANTA CLARA L. REV. 911, 918 (1990).

[227] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[228] *Id*. at 761–62.

[229] *Id*. at 770.

[230] *Id.* at 759–60 (describing Bigelow v. Virginia, 421 U.S. 809 (1975)).

[231] Lawrence v. Texas, 539 U.S. 558, 577, 595 (2003) (stating that "*Eisenstadt* contains well-known dictum relating to the 'right to privacy,' but this referred to the right recognized in *Griswold*—a right penumbral to the *specific* guarantees in the Bill of Rights, and not a 'substantive due process' right" and that "there has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent").

opposite-sex couples to enjoy intimate association in *Obergefell*.[232] However, it is unclear whether this right extends to all forms of sexual activity among consenting adults.

Additionally, the type of scrutiny the *Lawrence* Court applied to reach its decision concerning Due Process lacks clarity. If there is a fundamental liberty interest in engaging in consensual sexual activity regardless of the exchange of money, restrictions on this behavior must survive the high standard of strict scrutiny. If no fundamental liberty interest exists, prohibitions are subject to the rational basis standard of review.[233]

Recently, the Ninth Circuit Court of Appeals examined a California criminal statute prohibiting prostitution.[234] The Court determined that *Lawrence* was not relevant to its determination, stating:

> As we have observed before, "the bounds of *Lawrence's* holding are unclear." The nature of the right *Lawrence* protects—be it a right to private sexual activity among consenting adults, or the right to achieve a "'personal bond more enduring'" by the use of private sexual conduct—never stated explicitly in the opinion and has not been elaborated upon by the Supreme Court since. But whatever the nature of the right protected in *Lawrence*, one thing *Lawrence* does make explicit is that the *Lawrence* case "does not involve . . . prostitution."[235]

Ignoring the Supreme Court's elaboration of *Lawrence* in *Obergefell*, the Ninth Circuit went on to apply Ninth Circuit precedents to rule that laws prohibiting prostitution were subject to rational basis review.[236]

The Ninth Circuit and several other courts correctly point out that *Lawrence* did not address prostitution.[237] The Supreme Court could

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[232] Obergefell v. Hodges, 576 U.S. 644, 646 (2015).

[233] Erotic Serv. Provider Legal Educ. & Research Project v. Gascon, 880 F.3d 450, 455 (9th Cir. 2018).

[234] *See id.*

[235] *Id*. at 456 (citations omitted).

[236] *Id*. at 457.

[237] *See id.* at 456. The Ninth Circuit identified at least six cases that point out the limitations of *Lawrence*. Some of the cases noted address the question of the standard of review used by the *Lawrence* Court. Others specifically note that *Lawrence* did not address commercial sex. At least one case, *State v. Romano*, 155 P.3d 1102 (Haw. 2007) states that *Lawrence* expressly rejected prostitution as potentially included within the protected right. This may be overstating what the Court did when it identified the factual situation that were not before the Court, and therefore, not covered by the holding.

not do so, because it did not have the appropriate facts. In addition to avoiding a decision about prostitution, the *Lawrence* Court also noted that it was not addressing issues related to minors, coerced sex, or public sex.[238] But, Justice Scalia noted in his dissent that other laws relating to sexual activity, including those related to prostitution, "are . . . sustainable only in light of *Bowers'* validation of laws based on moral choices"[239] and those laws were now questionable after *Lawrence*. Expressing his indignation with the majority position, Scalia reminds us that the majority recognized "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex.*"[240]

Justice Scalia was right to point this out. The majority opinion not only recognized this understanding that adults' decisions regarding sex should be protected, but it also noted that the 1955 Model Penal Code specifically "did not recommend or provide for 'criminal penalties for consensual sexual relations conducted in private.'"[241] Justification provided in the comments to the Model Penal Code noted that penalizing conduct in which people commonly engaged undermined respect for the law; consensual, private sex was not harmful to others; and, laws that criminalized these behaviors were not enforced, which could lead to the use of the law for threatening purposes.[242]

Assuming that *Lawrence* and *Obergefell* establish a fundamental right to privacy in all consensual sexual conduct between adults, strict scrutiny would apply to statutes prohibiting sexual activity between consenting adults that involves the exchange of money. The additional factor of this prohibition applying most frequently to women and the choices they make about what they do with or allow to be done to their bodies also argues for the application of strict scrutiny.

IV. PURPORTED STATE INTERESTS TO SUPPORT CRIMINALIZATION

Strict scrutiny requires that the state provide a compelling government interest to support the challenged action and demonstrate that the law is narrowly tailored to achieve the intended result.[243] If strict

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[238] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[239] *Id*. at 590 (Scalia, J., dissenting).

[240] *Id.* at 597 (Scalia, J., dissenting) (quoting Kennedy, J., at 572) (emphasis in dissent but not in the majority opinion being quoted by the dissent).

[241] *Id*. at 572.

[242] *Id.*

[243] Roe v. Wade, 410 U.S. 113, 155 (1973).

scrutiny is not appropriate, a rational basis must still exist for the criminal legislation.[244]

When challenged, states have identified several potential justifications for prohibiting prostitution.[245] None identify compelling interests. Additionally, state action criminalizing prostitution is not narrowly tailored to address those purported interests.

Five broad concerns are often identified as justification for criminalizing prostitution:

1. Prostitution causes an increase in crime;
2. Prostitution jeopardizes public health by increasing the transmission of sexually transmitted infections;
3. Prostitution commodifies and objectifies sex workers;
4. Prostitution exploits and oppresses sex workers and is equivalent to sex trafficking; and
5. Prostitution is hostile to religious values and traditional family integrity.[246]

More specific justifications for criminalizing prostitution follow similar themes as those noted above. They may be examples of the more broadly stated concerns, but they are distinct enough to deserve specific mention. The link between prostitution and trafficking[247] is a more precise way of articulating a concern about the exploitation and oppression of innocent women and girls.

Within the broad category of increased crime are concerns about prostitution increasing violence against women because prostitutes might be more likely to depend on those involved in organized crime.[248] Also, a subset of the increased crime concern is the link between prostitution and drug use.[249] Each of these justifications has been shown to be specious at best.

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[244] *Rational Basis Test*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/rational_basis_test (last visited Mar. 28, 2021).

[245] GREEN, *supra* note 22, at 313.

[246] GREEN, *supra* note 22, at 313. *See also* David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1215–21 (1979).

[247] *See* Erotic Serv. Provider Legal Educ. & Research Project v. Gascon, 880 F.3d 450, 457 (9th Cir. 2018); Coyote Pub., Inc. v. Miller, 598 F.3d 592, 600 (9th Cir. 2010).

[248] *See* Erotic Serv. Provider Legal Educ. & Research Project, 880 F.3d at 457; U. S. v. Carter, 266 F.3d 1089, 1091 (9th Cir. 2011); Illinois v. Conroy, 145 N.E.3d 537, 542 (Ill. App. 2019); Law, *supra* note 123, at 533. *See also* HAW. REV. STAT. ANN. § 712-1200 (2020) Commentary on 712-1200.

[249] *Erotic Serv. Provider Legal Educ. & Research Project*, 880 F.3d at 458.

A. Criminal activity

Connections between prostitution and crime exist, but prostitution does not necessarily cause crime. Prostitution is more prevalent in areas with higher crime because those who engage in street-based prostitution may also have substance-abuse issues, which requires that they locate themselves in areas where drugs are sold.[250] What is more likely than prostitution causing increased crime is the easy access to drugs in a high-crime neighborhood makes it a convenient location for sex workers who have drug habits to conduct their transactions. There is no direct cause-and-effect relationship between prostitution and an increase in neighborhood crime.[251]

Because prostitution is criminalized, those who engage in this activity must avoid detection and interaction with the police. One effective way to do so is to accept the protection of those involved in organized crime or others who engage in criminal activity.[252] This requires operating in areas where crime exists, and this leads to those engaged in prostitution becoming the victims of violence and crime. No one disputes that women who engage in prostitution are subject to violence. Twenty years ago, Sylvia Law reported the prevalence of violence suffered by women engaged in prostitution thusly:

> Many studies of women who work the street report that eighty percent have been physically assaulted during the course of their work. Women who provide commercial sex are often the victims of rape. They are murdered, perhaps at a rate forty times the national average. Police systematically ignore commercial sex workers' complaints about violence and fail to investigate even murder. Indeed, police officers rape and beat sex workers, and are rarely prosecuted for their wrongdoing. Customers, pimps, police and other men inflict these harms on women.[253]

But is it prostitution that brings crime and violence? Do those who engage in sex work also want to be part of the criminal element that appears to be attributed to them? Those of us who conduct research and

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[250] *See generally* JILL MCCRACKEN, STREET SEX WORKERS DISCOURSE (Routledge 2013).
[251] *Id*. at 14–20.
[252] Michèle Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward a Reformation of Drug and Prostitution Regulations*, 78 UMKC L. REV. 101, 111 (2009).
[253] Law, *supra* note 123, at 533 (footnotes omitted).

engage in advocacy about sex work often get criticized by sex workers for not listening to them and for not engaging them in the discussion. Whether prostitution causes crime or whether sex workers become victims of crime because their work is criminalized is an area where sex workers have spoken out.

As Sylvia Law pointed out, many sex workers are the victims of violence.[254] And they become involved with the criminal element to have some protection. However, they also quickly point out that decriminalizing sex work would alleviate much of the concern about crime and violence.

According to Hacking/Hustling, a group consisting of sex workers and sex worker allies, having the ability to negotiate with clients without the pressure and fear of arrest as they negotiate would make interactions with clients safer.[255] By managing client expectations regarding price and services they can minimize the chance of a violent encounter because of misunderstandings about price or expected service.[256] Decriminalization would allow sex workers to return to online communication, negotiation, and screening practices, reducing the risk of violence and reducing the need for the protection of a pimp.[257] The ability to operate independently means sex workers would not need to rely on others who are often involved in criminal activity, for protection or to generate business. Until recently, sex workers had found safety by using online platforms. As noted by Hacking/Hustling "[w]hen Craigslist Erotic Services opened, a 17% reduction in all female homicide was reported in the following years."[258] The change in the ability to work with the protection of online platforms allows us to compare the relative safety before and after the additional barriers to safer sex work were put in place.

Using their intimate connection to the sex worker community, Hacking/Hustling documented a 33.8% increase in violence from clients[259] and a return to working under the control and protection of a

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[254] Law, *supra* note 123, at 572–73 (footnotes omitted).

[255] BLUNT & WOLF, *supra* note 43, at 3.

[256] *Id.*

[257] *Id*. at 4.

[258] *Id.* The ability to use online platforms and the resulting safety was eliminated when SESTA/FOSTA was enacted in April 2018. This legislation made online platforms liable for any content that encouraged or solicited those involved in sex trafficking. One result of the legislation was an almost immediate shutdown of any platforms that had previously allowed advertisements by sex workers. *See* Alexandra Villarreal, *Side Effect of Trafficking Law: More Street Prostitution?,* AP NEWS (Sept. 24, 2018), https://apnews.com/article/5866eb2bcf54405694d568e2dd980a28.

[259] BLUNT & WOLF, *supra* note 43, at 18.

pimp.[260] In addition to violence from clients, sex workers often face violence from police officers, ranging from threats and harassment to rape.[261]

Sex workers recognize that much of the violence they endure stems from the criminal nature of their work.[262] Decriminalizing sex work would allow those engaged in the work to more easily report violence and exploitation.[263] Sex work does not cause increased crime or violence against women. It is a symptom of the result of criminalizing prostitution. There is no legitimate support for the state using increased crime or violence as a justification for criminalizing prostitution.

B. Public health concerns

One of the reasons most often advanced for the criminalization of prostitution is the prevention of disease, and more specifically, preventing the spread of sexually transmitted infections (STIs) and HIV.[264] In the commentary to the Model Penal Code, the American Law Institute noted that the "perceived relationship between prostitution and venereal disease" was of special importance in the decision to maintain the criminal prohibitions against prostitution.[265] The comment continues by explaining that the way STIs are transmitted and detected makes testing an ineffective method of preventing the spread of disease by an infected individual who engages in sexual activity with numerous people every day.[266] It ends the comment about the spread of disease by relying on data from World War II as support for the implication that prostitutes increase the prevalence of sexually transmitted disease.[267]

Citing to information from the Centers for Disease Control and Prevention (CDC), courts identify preventing the spread of disease as a

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[260] BLUNT & WOLF, *supra* note 43, at 19.

[261] BLUNT & WOLF, *supra* note 43, at 23–24.

[262] *See supra* text accompanying note 254.

[263] BLUNT & WOLF, *supra* note 43, at 38.

[264] *See infra* text accompanying note 270.

[265] MODEL PENAL CODE § 251.2 Part II commentaries 458 (AM. LAW. INST., 1985). Though the American Law Institute is currently drafting proposed revisions to the sections related to sexual assault and related offenses, the prohibitions against prostitution are not part of the proposed revisions. Rather than being placed with other sexual offenses, prostitution is part of Article 251, Public Indecency. *See* AMERICAN LAW INSTITUTE 2020 https://www.ali.org/publications/show/model-penal-code/ (accessed Nov 17, 2020).

[266] MODEL PENAL CODE § 251.2 Part II commentaries 458 (AM. LAW. INST., 1985).

[267] MODEL PENAL CODE § 251.2 Part II commentaries at 458–59.

legitimate concern of the state.[268] Those courts and advocates relying on the CDC report to suggest criminalizing prostitution may somehow decrease the prevalence of STIs and HIV fail to point out that the report itself acknowledges that its conclusions are not based on actual data. The report specifically notes that there have been "[f]ew large-scale (population-based) studies . . . on HIV among [those who exchange sex for money or other items of value]."[269] It asserts, with no data to support such assertion, that "[p]ersons who exchange sex are at increased risk of getting or transmitting HIV and other sexually transmitted diseases (STDs) because they are more likely to engage in risky sexual behaviors (e.g. sex without a condom, sex with multiple partners) and substance abuse."[270] However, in the very next section, under the heading "Lack of Data," the report specifically acknowledges its lack of data and the resulting barriers to prevention efforts.[271]

The report continues to identify socioeconomic factors, sexual risk factors, drug and alcohol use, and knowledge of HIV status as potential risk factors for HIV and sexually transmitted diseases.[272] Yet on each of these sections, the report makes assumptions with no underlying support: Sex workers "*may* have a history of homelessness . . . if under the influence of drugs or alcohol, *may* have impaired judgment, engage in riskier forms of sex such as anal sex . . . *may* not know their HIV status . . ."[273] It seems that these concerns could be connected to anyone, whether they engage in sex work or not.

However, when we look at a report that relies on actual, recent data, we see that it suggests that decriminalization would promote public health by eliminating the reasons that sex workers may present a higher risk for sexually transmitted diseases. According to Data for Progress:

> The criminalization of sex work interferes with efforts to prevent and treat HIV/AIDS and other health conditions in several ways. A Human Rights Watch report found

[268] *See, e.g.*, Erotic Serv. Provider Legal Educ. & Research Project v. Gascon, 880 F.3d 450, 458 (9th Cir. 2018); Illinois v. Conroy, 145 N.E.3d 537, 541 (Ill. App. 2019). *But cf*. Coyote Pub., Inc. v. Miller, 598 F.3d 592, 596 (9th Cir. 2010) (noting that in areas of Nevada where prostitution is no longer criminalized sex workers are subject to frequent and mandatory testing for STIs and HIV).

[269] CENTER FOR DISEASE CONTROL AND PREVENTION, HIV RISK AMONG PERSONS WHO EXCHANGE SEX FOR MONEY OR NONMONETARY ITEMS, https://www.cdc.gov/hiv/pdf/group/cdc-hiv-sex-workers.pdf.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.* (emphasis added).

> because prosecutors use condoms as evidence in prostitution cases and police often harass and arrest people for carrying condoms, people in the sex trades are afraid of carrying condoms and health outreach workers are unable to distribute condoms freely. Sex workers are also less able to negotiate condom usage or other safer sex practices with clients under criminalization because they must prioritize their immediate safety from arrest over possible infections. A Lancet study found that the decriminalization of sex work could avert 33-46% of new HIV/AIDS infections in the next decade. Criminalization also disrupts general healthcare access for people in the sex trades. Because of stigma and fears of "discrimination, lower quality of service, and legal consequences" many sex workers do not disclose that they are trading sex. Even adjusting other factors out, the pure isolation of hiding involvement in sex work from friends, family and community is independently associated with additional barriers to healthcare access. Disclosure can be critical to addressing and preventing violence and exploitation. A systematic review of 33 countries by the London School of Hygiene & Tropical Medicine found that sex workers are 3x more likely to experience sexual and physical violence in countries with criminalization policies (including the Nordic Model) as compared to decriminalization approaches.
>
> Decriminalization is also critical to addressing the overdose crisis. Some studies indicate the rate of sex trade participation is as high as 56% for women who inject opioids. Research has shown that the criminalization of sex work and law enforcement violence disrupt medication assisted treatment programs and outcomes for such communities.[274]

C. Objectification and commodification of women

Another objection to sex work arises from concerns that sex work transforms "sex into an impersonal encounter with no emotional

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[274] Nina Luo, *Memo: Decriminalizing Survival: Policy Platform and Polling on the Decriminalization of Sex Work*, DATA FOR PROGRESS 11 (Jan. 30, 2020), https://www.dataforprogress.org/memos/decriminalizing-sex-work (internal footnotes omitted).

significance . . ."[275] Those who espouse this concern believe this transformation degrades all women, turning them into sexual objects to be bought and sold.[276] The underlying premise necessary to support such a position is that sex without romantic love is immoral.[277]

The weakness of this position is its need to be based on a certain belief about morality. As noted in earlier sections, enforcement of one group's ideas of morality cannot serve as the basis for restricting individual freedoms.[278] Imposing one particular view of morality on all individuals violates basic tenets of human rights protections—that all humans have the capacity to make choices about their lives and how they choose to live those lives, regardless of whether others believe those choices are inappropriate.[279]

The belief that impersonal, commercialized sex undertaken by some causes harm to all women and consequently means all women will be objectified as sex objects is a form of authoritarianism. The only difference between this and the patriarchal structures that some believe contribute to the commodification and objectification of women is the lack of emphasis on the gender of those imposing their beliefs and structures on others. One of the foundations of basic human rights—for all, not just women—is that humans have the right to be autonomous—to control their lives and bodies.

D. Exploitation of women and girls

As discussed earlier, a prominent reason for supporting the continued criminalization of prostitution is to protect women and girls from exploitation.[280] No one disputes that some people engaged in sex work—regardless of gender—are exploited. But continued criminalization does not prevent this exploitation. Criminalization likely increases the number of people exploited and prevents some from finding ways to stop the exploitation.

To exploit means to take advantage of one who is vulnerable.[281] Opponents of sex work suggest that the activity exploits women, that it

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[275] Richards, *supra* note 248, at 1220.

[276] Richards, *supra* note 248, at 1220.

[277] Richards, *supra* note 248, at 1220.

[278] *See infra* text accompanying notes 204-222, discussing various Supreme Court decisions that specifically reject the imposition of one group's ideas about morality on others.

[279] *See* Richards, *supra* note 248, at 1225–27.

[280] *See supra* Part IV.A.

[281] *See* Meredith McFadden, *The Decriminalization of Prostitution and the Commodification of Sex*, THE PRINDLE POST (June 19, 2019), https://www.prindlepost.org/2019/06/the-decriminalization-of-prostitution-and-the-commodification-of-sex/.

somehow takes advantage of vulnerable women.[282] But characterizing sex workers as people who are exploited ignores the fact that many sex workers begin doing this work because they are already part of disadvantaged groups and they make a conscious choice to engage in sex work. This characterization as people who are being exploited suggests that these individuals are somehow incapable of making decisions about their lives and their bodies.[283]

In addition to the potential exploitation of women and girls by those who induce them into sex work through fraud, threats, or coercion, even individuals who voluntarily choose to engage in sex work are exploited as a direct result of the criminalization of their actions.[284] Because sex work is illegal, but enforcement is ineffective, it is not uncommon for law enforcement officers to "have sex with trafficking victims and then arrest them."[285] Undercover officers are not legally allowed to engage in sexual activity with those who they suspect work as prostitutes before they make an arrest, yet many do despite the illegality.[286] Police officers themselves may use coercion, by threatening to arrest someone if they don't provide sexual services to the officer.[287]

Decriminalization can reduce exploitation by law enforcement and allow sex workers to report instances of exploitation, of themselves or others, without fear of their own arrest.

E. Distinctions between "moral rights" and "public or private morality"

Whether it is appropriate to use moral values as the basis for law is debatable.[288] While there is strong support for legislation that addresses public morality, especially regarding restrictions on harm to others, that support is less evident when the morality being codified involves private morality, or virtues.[289]

Private morality, related to virtuous behavior as judged by one's religious beliefs, was governed by ecclesiastical courts until King Henry VII enlarged the royal authority, subsuming ecclesiastical courts into his

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[282] *Id.*
[283] *Id.*
[284] Luo, *supra* note 276, at 4.
[285] Luo, *supra* note 276, at 15.
[286] Luo, *supra* note 276, at 6.
[287] *See, e.g.*, Way v. United States, 982 A.2d 1135, 1137 (D.C. 2009).
[288] G. Marcus Cole, *What is the Government's Role in Promoting Morals? … Seriously?,* 31 HARV. J. OF L. & PUB. POL'Y 77, 78 (2008).
[289] *Id*. at 79.

authority.[290] Today our unified legal system imposes restrictions on individuals who may hold vastly different ideas about moral versus immoral behavior when those terms refer to virtues based on religious values.[291]

Laws that regulate public morality, that prevent people from harming others, arguably have a connection to moral rights, meaning human rights. Prohibiting the killing or assault of another demonstrates the respect for all humans to be able to exercise their right to live life as they see fit. These types of laws respect basic human dignity. There is a stark difference between laws protecting human dignity and laws forcing society's majority view about virtuous behavior on everyone, regardless of whether all espouse the same view about the virtuousness of the behavior.[292] Some laws regulate private morality because of its potential to harm others, but even these are marginally effective. In her analysis of the effectiveness of legislation criminalizing drugs and prostitution, Dean Michèle Alexandre points out that one of the consequences of attempting to influence the morality of individual behaviors by heavily regulating or criminalizing the behavior is to subject individuals to additional harm.[293] By making certain activities illegal, those who engage in the activity flee underground where they become vulnerable to violence, predators, and exploitation by those who purport to provide them protection.[294]

When criminal laws are justified by public morality interests those laws are subject to careful consideration to ensure that the claim of morality is valid and not simply the imposition of the prevailing public sentiment about the offending behavior. Many references to public morality are actually references to prevailing sentiment about values rather than moral rights. Though at one time courts appeared to accept public morality as a legitimate justification for legislation, none of these decisions were based exclusively on public morality.[295]

Many cases continue to include the state's ability to regulate public morality as a legitimate rationale for legislation, but enforcing

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[290] *See* Edwin Maxey, *The Ecclesiastical Jurisdiction in England*, 3 MICH. L. REV. 360, 363 (1905).

[291] *See infra* text accompanying notes 290-303.

[292] *See* KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY, 26 (Oxford Univ. Press 1989) (asserting that "reasons relating exclusively to one's own welfare do not establish what, morally, one ought to do; people are free morally not to pursue their own welfare").

[293] *See* Alexandre, *supra* note 254, at 104–11.

[294] *See* Alexandre, *supra* note 254, at 104–11.

[295] Bowers v. Hardwick, 478 U.S. 186, 194–96 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

private morality rarely suffices to uphold legislative action.[296] In fact, in *Lawrence v. Texas*,[297] the Supreme Court explicitly embraced Justice Stevens' statement in his dissent in *Bowers v. Hardwick* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[298]

Attempts to enforce private morality—choices individuals make about whether to engage in behavior that does not harm others—attempt to enforce what some might consider virtuous behavior.[299] But the problem with attempting to enforce virtuous behavior is that virtues and the resulting benefits of virtuous behavior require that individuals choose to behave virtuously rather than being forced to do so. The freedom to make such choices, either to behave in a manner generally considered virtuous or to behave in ways not considered virtuous, is one of the basic human rights to which everyone is entitled. Treating people with dignity and respect for their autonomy requires accepting the choices they make about whether to conform to others' ideas about virtuous behavior. Legislation that attempts to enforce virtuous behavior that is likely to have a positive effect on others is legislation that regulates public morality. This legislation establishes duties to others, for instance, the duty to send children to school, or the duty to pay child support.[300]

Law inherently reflects society's views about morality, but the use of the term morality deserves careful scrutiny. Public morality reasons for legislation, especially criminal legislation, are usually reasons based on society's values rather than protecting fundamental human rights, or basic moral rights. Laws attempting to regulate private morality—individual choices about behavior that do not impact others—are based on societal opinions about virtue, which usually clash with respect for individual autonomy about choices for their personal behavior.

F. The clash of morality and constitutionality

Our legislative process generally results in the views of the majority becoming law, subject to compromises to build that majority. This process results in no one group getting everything they would prefer in

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[296] Lawrence v. Texas, 539 U.S. 558, 577 (2003).

[297] *Id.* at 577–78.

[298] Bowers v. Hardwick, 478 U.S. 186, 216 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[299] *See* Raymond Ku, *Swingers: Morality Legislation and the Limits of State Police Power*, 12 ST. THOMAS L. REV. 1, 34 (1999).

[300] Linda S. Anderson, *Legislative Oppression: Restricting Gestational Surrogacy to Married Couples is an Attempt to Legislate Morality*, 42 U. BALT. L. REV. 611, 649–50 (2013).

the legislation that ultimately passes. However, in addition to the give and take of political compromise, certain fundamental concerns—the basic human rights embodied in our federal constitution—limit our laws. Protection of these human rights trumps even the majority point of view.[301]

Underlying the belief that certain basic human rights exist is the understanding that all human beings have the capacity to determine how they live their lives, and each person is entitled to "equal concern and respect in exercising that capacity."[302] This autonomy includes the right to make individual choices, whether rational or irrational, morally desirable or morally wrong.[303] This autonomy is so fundamental to what it means to be human that all humans are entitled to equal concern and respect in exercising their right to make such choices about their lives.[304] Consequently, when autonomous choices of individuals clash, the rights involved must be weighed against each other rather than evaluated based on the prevailing majority opinion about which right is more appropriate.[305]

Moral views must not be based on conventional wisdom or widely held opinions but on mutual respect for individual self-determination. In addition to protecting specific liberties like freedom of speech, freedom of religion, equal protection, and due process, an underlying theme of our constitution requires that the moral rights—fundamental human rights—of individuals cannot be violated even if the popular majority believe otherwise.[306] The Supreme Court, as well as various state courts, have found restrictions on constitutional rights based on popular prejudices unconstitutional.[307] For instance, in *Loving v. Virginia* the United States Supreme Court held that racial restrictions on the fundamental right to marry that were grounded in ideas about white supremacy were unconstitutional.[308] Racial prejudice also played a major role in *Brown v. Board of Education of Topeka (Brown I)*, the Court's decision that separate but equal public schools were unconstitutional.[309] In *Brown II*, which guided implementation of the Court's original order to integrate public schools, the Court stressed that "it should

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[301] Richards, *supra* note 248, at 1223.
[302] Richards, *supra* note 248, at 1224.
[303] Richards, *supra* note 248, at 1225.
[304] Richards, *supra* note 248, at 1225.
[305] Richards, *supra* note 248, at 1227.
[306] Ku, *supra* note 301, at 25.
[307] Richards, *supra* note 248, at 1234.
[308] Loving v. Virginia., 388 U.S. 1, 12 (1967).
[309] Brown v. Bd. of Educ. of Topeka (Brown I), 347 U.S. 483, 495 (1954).

go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[310]

More recently, in *Romer v. Evans*, the Supreme Court invalidated an amendment to the Colorado state constitution prohibiting any state, legislative, or judicial action that would provide protected status to any group of individuals based on their sexual orientation.[311] Despite the amendment reflecting the majority viewpoint, demonstrated by its adoption by statewide referendum,[312] the Court inferred the only reason for the amendment was animus against homosexuals and noted that animus can never constitute a legitimate government interest.[313]

State courts have also refused to allow majority popular opinion to infringe on fundamental rights. The Supreme Court of Alaska, addressing the constitutionality of a conviction for a "crime against nature" pointed out that "we should avoid the fallacy that a rule of morality is necessarily a rule of law, or that the morality of some groups is, without more, entitled to legal enforcement."[314] Concerning enforcement of the moral majority's norms regarding sexuality, the Pennsylvania Supreme Court made it clear that "no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority."[315]

All of these references to morality (moral rights, public morality, private morality) describe attempts to guide behavior.[316] Noted legal philosopher H.L.A. Hart distinguishes between public morality that protects others from harm and private morality involving individual actions, usually in connection with decisions about sexual behavior.[317] Whether public or private, religious values most often ground these types of morality.[318] As a result of differing ideas about religious values,

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[310] Brown v. Bd. of Educ. of Topeka (Brown II), 349 U.S. 294, 300 (1955).

[311] Romer v. Evans, 517 U.S. 620, 623–24 (1996).

[312] *Id*. at 623.

[313] *Id*. at 634.

[314] Harris v. State, 457 P.2d 638, 645 (Alaska 1969).

[315] Pennsylvania. v. Bonadio, 415 A.2d 47, 49 (Pa. 1980). *See also*, *e.g*., Jegley v. Picado, 80 S.W.3d 332, 353 (Ark. 2002) (agreeing "that the police power may not be used to enforce a majority morality on persons whose conduct does not harm others"); Kentucky v. Wasson, 842 S.W.2d 487, 498 (Ky. 1992) (recognizing the growing trend to reject widely held ideas about morality where the behavior being criminalized does not harm others), *overruled by* Calloway Cty. Sheriff's Dep't v. Woodall, 607 S.W.3d 557, 568 (Ky. 2020); New York v. Onofre, 415 N.E.2d 936, 942 (N.Y. 1980) (noting that majority disapproval of behavior cannot provide a valid basis for intruding on privacy rights guaranteed by the United States Constitution).

[316] Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579, 1585–86 (2006).

[317] H.L.A. HART, LAW, LIBERTY AND MORALITY 50–51, (Stanford Univ. Press 1963).

[318] *See id*.

conflicting opinions arise about whether behavior is morally acceptable or not.[319] These conflicting views can provide a rationale for legislation that settles the dispute for the moment, yet can still be altered if the viewpoints leading to the legislation evolve.[320]

When private morality or individual choice to behave in ways some consider lacking in virtue is the only rationale for legislation, the U.S. Supreme Court has held it unconstitutional.[321] "Vice alone, without damage to others, has not been the subject of legitimate regulation."[322]

V. REASONS TO DECRIMINALIZE SEX WORK

As Parts III and IV have explained, a number of legal theories would potentially support decriminalizing sex work. While these theories may occupy legal scholars, they do little to change the status quo. But practical reasons exist for decriminalizing sex work—reasons that can support efforts to change existing statutes and create additional protective legislation. Once changes to current laws get made, the legal and theoretical arguments become relevant to any challenges to the legislative changes.

Among the many reasons to decriminalize sex work, this article will focus on two:

1. Decriminalizing sex work reduces harm to sex workers.
2. Decriminalizing sex work assists with identifying and protecting victims of sex trafficking.

A third important reason for decriminalizing sex work is that doing so would allow resources to be shifted from surveillance and enforcement to assistance that helps provide other options than sex work to vulnerable persons. This article will not elaborate on that reason because it falls within a larger discussion of the benefits of restructuring the funding of law enforcement efforts.

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319 Alexander & Schauer, *supra* note 318, at 1584–85.
320 Alexander & Schauer, *supra* note 318, at 1583–84.
321 Anderson, *supra* note 302, at 648.
322 Anderson, *supra* note 302, at 648.

A. Decriminalization will reduce harm to sex workers

Decriminalizing sex work will make sex workers less vulnerable to abuse by clients, abuse by police officers, and abuse by society based on the stigma associated with a criminal record.[323]

Sex work (prostitution) has been described as the world's oldest profession.[324] Whether criminalized or not it will continue to exist.[325] Those who engage in this work suffer a wide array of harms as a result of criminalization.

When sex workers attempt to avoid arrest, or other entanglement in the criminal justice system, they are forced to engage in behaviors that increase their risk of harm. Knowing that one is risking arrest leads sex workers to choose to work in locations less visible to law enforcement.[326] This lack of visibility means more vulnerability to potential violence, whether from clients or those who see them as easy targets. According to a recent report published by the American Civil Liberties Union, there is "a strong association between rushing negotiation and experiences with client-perpetrated violence; [and] when sex work is illegal workers may not be able to as effectively screen clients or negotiate fees or activities."[327]

Working in isolated areas also makes it more difficult for sex workers to watch out for each other. There is safety in numbers, a fact no less true for sex workers than others. Working in isolated areas to avoid detection means being unable to make use of others to offer assistance. By being present in small groups, sex workers can offer each other assistance if things get out of hand, can protect personal property that may need tending to while a worker engages with a client, and can let others (including law enforcement if necessary) know if a situation becomes too dangerous.[328]

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[323] *Policy Brief: Impact of Criminalisation on Sex Workers' Vulnerability to HIV and Violence* 2, NSWP GLOBAL NETWORK OF SEX WORKER PROJECTS (2018), https://www.nswp.org/sites/nswp.org/files/impact_of_criminalisation_pb_prf01.pdf.

[324] RUDYARD KIPLING, ON THE CITY WALL: AND OTHER STORIES (Indian Railway Library 1889).

[325] Alexandre, *supra* note 254, at 110.

[326] *Policy Brief: Impact of Criminalisation on Sex Workers' Vulnerability to HIV and Violence, supra* note 325, at 3.

[327] ACLU, *Is Sex Work Decriminalization the Answer: ACLU Research Brief* 5, (2021), https://www.aclu.org/sites/default/files/field_document/aclu_sex_work_decrim_research_brief_new.pdf.

[328] *Policy Brief: Impact of Criminalisation on Sex Workers' Vulnerability to HIV and Violence, supra* note 325, at 6.

Attempting to avoid the attention of law enforcement officers also leads sex workers to rush negotiations with potential clients so they avoid detection.[329] This can lead sex workers to engage in behaviors that expose them to more potential for violence or to engage in more unprotected sex because the client insists and threatens harm if refused.[330]

Decriminalization of sex work would remove the continued police surveillance that forces sex workers to make decisions that increase their risk of harm. If avoiding detection was not a concern, sex workers could take as long as necessary to establish the terms of their interactions with clients. By working in less remote areas with more opportunities for others to observe violence or escalating behaviors that suggest impending violence, sex workers could decrease the chances of becoming a victim. Eliminating the need to escape detection by working in isolation would also allow sex workers to utilize the informal support networks commonplace in most social settings—having a "wingman"[331] who can watch your back and provide support as needed.

Once arrested, sex workers face additional harm as they make their way through the criminal justice system. Though some jurisdictions have chosen to avoid prosecuting sex workers and have embraced a more rehabilitative approach,[332] even under these alternative criminal justice systems, those caught up in the system suffer harm because the determination of whether someone will be funneled through the traditional criminal justice system or through the pre-arrest/pre-booking diversion and rehabilitation programs is made by the same law enforcement officers who often perpetrate abuse.[333]

New York City provides an example of a diversion program. In 2013, New York created the Human Trafficking Intervention Courts (HTIC), "a statewide system of courts, designed to intervene in the lives of trafficked human beings and to help them to break the cycle of

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[329] *Policy Brief: Impact of Criminalisation on Sex Workers' Vulnerability to HIV and Violence, supra* note 325, at 6.

[330] *Policy Brief: Impact of Criminalisation on Sex Workers' Vulnerability to HIV and Violence, supra* note 325, at 6.

[331] Though "wingman" is often used in reference to men who use other male friends to more easily approach women, women often use female friends to create barriers that allow women to avoid or remove themselves from unwelcome interactions with men. *See generally*, Joshua M. Ackerman & Douglas T. Kenrick, *Cooperative Courtship: Helping Friends Raise and Raze Relationship Barriers*, 35 PERSONALITY & SOC. PSYCHOL. 1285 (2009).

[332] GLOBAL HEALTH JUSTICE PARTNERSHIP, *Un-Meetable Promises: Rhetoric and Reality in New York City's Human trafficking Intervention Courts* 22, (Sept. 2018). https://law.yale.edu/sites/default/files/area/center/ghjp/documents/un-meetable_promises_htic_report_ghjp_2018rev.pdf.

[333] *Id.*

exploitation and arrest."[334] Though the description refers to victims of trafficking in general, the courts were established to address prostitution-related offenses.[335] From its inception, the HTIC system has conflated sex trafficking and prostitution or other forms of sex work and has considered all forms of sex work exploitative, violent, or both.[336]

By offering services post-arrest, the HTIC system still leaves sex workers exposed to abuses by police officers. Even those who go through the HTIC system report being profiled or harassed.[337] Many also become victims of false arrest, physical or verbal abuse, excessive force, and sexual assault (including rape).[338]

Finally, even though many cases get resolved by a process where the court can suspend the charges and then dismiss them after a waiting period with no re-arrests, the waiting period is fraught with harm.[339] Once known to police officers, sex workers are more likely to be re-arrested, thereby forfeiting the opportunity to have their original charges dismissed. Additionally, because they cannot engage in sex work without risking arrest, those in the waiting period must find other ways to generate income, a task made more challenging by having an open criminal case still pending.[340]

B. Decriminalizing sex work assists with identifying and protecting victims of sex trafficking

One of the tools used to make sex work more challenging was the enactment of legislation commonly referred to as SESTA/FOSTA.[341] This legislation resulted from the consolidation of two similar bills: the Stop Enabling Sex Traffickers Act (SESTA) and the Fight Online Sex Trafficking Act (FOSTA). The final legislation changes the federal Communications Decency Act that had previously prevented internet host providers from becoming criminally or civilly

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334 *Id*. at 23 (quoting Judge Jonathan Lippman).

335 *Id*. at 25.

336 *Id*. at 27.

337 *Id.* at 45–46.

338 *Id* at 46.

339 *Id.* at 68 (explaining that this waiting period harms defendants who are over-policed and discriminatorily profiled; are noncitizens or undocumented; encounter access barriers such as housing and employment; or are legally vulnerable due to open cases).

340 *Id.* at 50.

341 The official name for SESTA/FOSTA is the Allow States and Victims to Fight Online Sex Trafficking Act of 2017. Pub. L. No. 115-164, 132 State. 1253 (2018). Some refer to the legislation as FOSTA, some use SESTA, and some use SESTA/FOSTA. I am choosing to use the combined form, SESTA/FOSTA.

liable for content posted by others on their websites.[342] With the enactment of SESTA/FOSTA, internet host providers faced criminal or civil liability if material that facilitated or attempts to facilitate sex trafficking was posted on their platforms.[343] SESTA/FOSTA created a new federal offense for anyone who "owns, manages, or operates an interactive computer service" that promotes or facilitates prostitution.[344] Though SESTA/FOSTA does not criminalize sex work itself, it adds criminal penalties for others in ways that directly impact the ability of sex workers to engage in their work.

The expanding potential criminal and civil liability of internet host providers resulted in the rapid voluntary shut down of a number of sites and the removal of forums and websites that previously allowed sex workers to post information that helped them generate clients and protect themselves. The more consequential result of the passage of SESTA/FOSTA was that it forced many of those who had engaged in sex work indoors to return to the streets. This meant sex workers who had operated in relative safety now faced additional dangers. Though there were promises and expectations that SESTA/FOSTA would decrease prostitution and sex trafficking, instead, "[w]ithin one month of [SESTA/]FOSTA's enactment, thirteen sex workers were reported missing, and two were dead from suicide. Sex workers operating independently faced a tremendous and immediate uptick in unwanted solicitation from individuals offering or demanding to traffic them."[345] At the same time, advertisements and digital records that investigators had utilized to locate and rescue sex trafficking victims disappeared when internet hosting platforms shut down.[346]

Before SESTA/FOSTA, internet platforms such as Craigslist and Backpage provided forums to promote a wide variety of sexual services.[347] Both Craigslist and Backpage provided forums to advertise

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[342] 42 U.S.C. § 230(c).

[343] 18 U.S.C. § 2421A.

[344] 18 U.S.C. § 2421A(a).

[345] Lura Chamberlain, Note, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171, 2174 (2019); *see also* Villarreal, *supra* note 260.

[346] Villarreal, *supra* note 260.

[347] Craigslist is a website that allows advertisements for a wide variety of items and services ranging from housing and jobs to services to items for sale or wanted to resumes and a discussion forums. *See, e.g.* CRAIGSLIST, https://vermont.craigslist.org/ (last visited June 7, 2021) (showing the various categories available for posting ads). Backpage was a "free classified advertisement service that operat[ed] very similarly to Craigslist. Users [could] place classified advertisements for a fee . . . and Backpage offer[ed] services for metropolitan regions across all fifty states and the District of Columbia, as well as several foreign countries." Memorandum by Aravind Swaminathan & Catherine Crisham on Backpage.com Investigation to Jenny Durkan 1 (Apr. 3,

everything from cars, apartments, furniture, and antiques to specific forms of erotic or sexual services.[348] Until the changes created by SESTA/FOSTA, the Communications Decency Act shielded the platforms from civil or criminal liability.[349] These platforms, along with many others, provided a way for content providers to communicate their messages to the public, but because the platforms did not create or significantly edit the content, they did not become liable for any of the consequences of the messages themselves.

When the advertisements for sexual services were easily accessible to anyone, juxtaposed with advertisements for pets and baby supplies, more people became aware of the robust sexual commerce industry. And, predictably, more people became concerned about the sexual commerce industry.[350] As members of the public were now able to see ads for sexual services, and potential customers were able to look for specific types of services, law enforcement officers were also able to monitor these ads. If a sex trafficker posted ads of victims to market them to potential customers, those same ads were visible to those looking for victims to help them. In fact, according to investigation memos prepared by assistant U.S. attorneys for the Western District of Washington as part of an investigation into potential criminal charges against Backpage, the website's posting rules for ads and reporting options for posted ads prohibited any that involved human trafficking.[351] The reporting feature also provided specific details about how to report an ad that involved a threat to a child.[352]

2012). Backpage was seized by the Department of Justice on April 9, 2018 and has not operated since that date. OFF. OF PUB. AFFAIRS, DOJ, JUSTICE DEPARTMENT LEADS EFFORT TO SEIZE BACKPAGE.COM, THE INTERNET'S LEADING FORUM FOR PROSTITUTION ADS, AND OBTAINS 93-COURT FEDERAL INDICTMENT (Apr. 9, 2018).

[348] *See* Backpage.com LLC v. Dart, 807 F.3d 229, 230 (7th Cir. 2015).

[349] *E.g.* Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 969 (2009) (holding that Craigslist was not liable under 42 U.S.C. § 230(c)(1) as it does not "cause or induce anyone to create, post, or search for illegal content"); M.A. v. Vill. Voice Media Holdings, 809 F. Supp. 2d 1041, 1058 (holding that Backpage's publication of images of a minor did not distinguish its actions from any other website that posted content that led to an innocent person's injury).

[350] A.F. Levy, *The Virtues of Unvirtuous Spaces*, 52 WAKE FOREST L. REV. 403, 409–10 (2017).

[351] Swaminathan & Crisham, *supra* note 349, at 3.

[352] Swaminathan & Crisham, *supra* note 349, at 3. In at least two places users were informed that ads exploiting a minor would be reported to law enforcement. The posting rules contained the following bold language: "Any post exploiting a minor in any way will be subject to criminal prosecution and will be reported to the Cyber tip line and law enforcement." Swaminathan & Crisham, *supra* note 349, at 3. The "Report Ad" feature for a published ad provided "Inappropriate or Illegal Content" as the first option for reporting, telling users "If this involves a threat to a child or an image of child exploitation, please email abuse@backpage.com the URL of the posting" and then repeats these instructions to the user once an ad has been reported. Swaminathan & Crisham, *supra* note 349, at 6.

SESTA/FOSTA provides just one example of the way criminalizing sex work creates more harm than good. Though abolitionist advocates assert that allowing ads for erotic services causes or increases human trafficking, the description of the way the most utilized service, Backpage, operated clearly demonstrates the opposite.[353] Backpage, and other similar websites that previously allowed advertisements for erotic services made this industry more visible. But they also made it safer. And they made it easier for law enforcement to locate true victims of sex trafficking.

Very little empirical data exists in connection with sex work because of its illegality. However, one study looked at the way online clearinghouses affected overall female safety by causing the reorganization of the way much sex work occurred.[354] Conducted by researchers who focus on "causal impacts of policies, incentives, and actions by legal and extra-legal actors on public safety,"[355] the impact of social networking on people's lives,[356] and information technology,[357] this study found that the introduction of the Erotic Services (ERS) advertisement category, caused a shift in the sex work industry. Available on Craigslist between 2002 and 2010, this category coincided with an increase in the number of sex workers who operated independently and a decrease in the number who operated on the streets.[358] The study also found that during this same time period the rate of female homicides decreased by "as much as 10-17 percent."[359] The authors conclude that Craigslist's Erotic Services pages "had a major disruptive effect on the market for commercial sex in the United States despite the nations' prohibition of prostitution. It is likely that ERS reduced many dimensions of risk, and this, in turn, was responsible for both the market's growth and the decline in violence."[360] The data "support sex workers' claims that introduction of ERS made them significantly safer. [The authors] estimate that ERS led to a 10-17 percent reduction in female homicides."[361]

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[353] Swaminathan & Crisham, *supra* note 349, at 3.

[354] Scott Cunningham, Gregory DeAngelo & John Tripp, *Craigslist's Effect on Violence Against Women* 3 (Feb. 2019) (on file with Stanford University).

[355] GREGORY DEANGELO, http://gregoryjdeangelo.com/ (last visited June 7, 2021).

[356] *Casual Interference,* SCOTT CUNNINGHAM, https://www.scunning.com/ (last visited June 7, 2021).

[357] *John F. Tripp*, CLEMSON U., https://www.clemson.edu/business/about/profiles/JFTRIPP (last visited Mar. 28, 2021).

[358] Cunningham, et al., *supra* note 356, at 3–4.

[359] Cunningham, et al., *supra* note 356, at 4.

[360] Cunningham, et al., *supra* note 356, at 27.

[361] Cunningham, et al., *supra* note 356, at 29.

C. Tools that assist sex workers also help police identify and protect victims of sex trafficking

Backpage actually assisted with the enforcement of anti-trafficking laws. The DOJ investigation report mentioned earlier explains that Backpage had, on many occasions, provided ads containing pictures of children or flagged as illegal to the local FBI agent in charge of locating victims of sex trafficking and had cooperated with requests to remove ads.[362] The report also notes that Backpage screened for certain code words that would indicate potential trafficking and required credit cards for payment, which allowed law enforcement access to additional information about the person paying for the ad.[363]

The investigative report notes that Backpage actively assisted with law enforcement by responding to approximately 100 subpoenas a month, often providing responses within an hour of receipt of the subpoena, cooperating with requests to remove ads or posts alerting users about potential sting operations, and providing other ongoing assistance to law enforcement throughout investigations and trials.[364] In a follow-up investigation dated nine months later, the assistant U.S. attorneys noted that "Backpage was making substantial efforts to prevent criminal conduct on its site, that it was coordinating its efforts with law enforcement agencies and [the National Center for Missing and Endangered Children]" and that it followed the advice of its attorneys.[365]

When analyzing potential litigation strategies, the second of the investigation memos identifies the variety of ads that are similar to prostitution, but not illegal.[366] This list includes "pay[ing] actors to have sex in a film . . . [and] be[ing] a 'sugar daddy'—offering to take care of someone in exchange for companionship."[367] It is also legal to "simulate sex for a fee, to dance or perform solo sex acts, to provide companionship, and to give 'sensual' massages."[368] "Posing in sexually explicit

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[362] Swaminathan & Crisham, *supra* note 349, at 7; *see also* Taylor Goebel, *Sex Trafficking: Backpage Gone, But Note the Problem*, DELMARVA NOW (Feb. 7, 2019, 6:23 AM), https://www.delmarvanow.com/story/news/local/delaware/2019/02/07/backpage-gone-but-not-sex-trafficking-police/2539934002/.

[363] Swaminathan & Crisham, *supra* note 349, at 8.

[364] Swaminathan & Crisham, *supra* note 349, at 8–10.

[365] Memorandum from John T. McNeil & Aravind Swaminathan, Assistant U.S. Attorneys, on Backpage.com Investigation Update to Jenny Durkan, Annette Hayes & Robert Westinghouse 2 (Jan. 16, 2013) (on file with author).

[366] *Id*. at 9.

[367] *Id*.

[368] *Id.*

positions or . . . giving hands-on therapy" is also legal.[369] As these investigators note, and many of those who have argued for criminalization ignore, "while someone who has little experience with the adult services market may readily conclude that Backpage's escort advertisements offer prostitution services, such a conclusion is not so plain after one recognizes how much sexually explicit commercial conduct is lawful."[370]

D. Reducing police surveillance reduces harm

In addition to the potential for harm from clients that criminalization exacerbates, sex workers face harm from law enforcement officers themselves.[371] Abuse from the police in exchange for avoiding arrest can take the form of extortion involving money or information or can be more of a quid pro quo—a sex act in exchange for avoiding arrest for prostitution.[372] Decriminalizing sex work would remove the ability of police officers to extort or abuse sex workers in exchange for not arresting them.

According to a sex worker-led study using data collected from surveys of online sex workers and those who work on the streets, interactions with police range from threats of violence to sexual harassment to rape.[373] A survey of sex workers in Baltimore, Maryland reported "that 78 percent had experienced at least one abusive encounter with the police."[374] An investigation of the Baltimore City Police Department, conducted by the U.S. Department of Justice supports sex workers' experiences. In that investigation, the DOJ found that officers routinely ignored reports of sexual abuse made by sex workers.[375] More shockingly, the investigation also found evidence that the Baltimore police officers coerced sex workers into exchanging sex acts to avoid arrest, and when reported, failed to investigate, allowing the conduct to recur.[376] According to the report, one sex worker told investigators "that she met with a certain officer and engaged in sexual activities in the officer's patrol car once every other week 'in exchange for U.S.

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369 *Id.*

370 *Id.*

371 *See, e.g.,* GLOBAL HEALTH JUSTICE PARTNERSHIP, *supra* note 334, at 45.

372 Blunt & Wolf, *supra* note 43, at 4.

373 Blunt & Wolf, *supra* note 43, at 23–24.

374 ACLU, *supra* note 329, at 7 (citing Katherine H. A. Footer et al., *Police-Related Correlates of Client-Perpetrated Violence Among Female Sex Workers in Baltimore City, Maryland*, 109 Am. J. Pub. Health 289, 292 (2019)).

375 U.S. DEP'T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 10 (2016).

376 *Id*. at 149.

Currency or immunity from arrest.'"[377] The investigation ended without interviewing the officer and resulted in no actions.[378]

The same officer had additional complaints levied against him, of the same nature.[379] The department investigated the complaints, but those doing so took almost a year to investigate one complaint, so charges were never brought, and the next investigation, which ultimately led to the officer's resignation, took an additional six months.[380]

In many states, individuals can be arrested for loitering for purposes of prostitution.[381] In New York, police make these arrests based on observations of criteria that are all legal activities. Arrests can be based on things such as standing somewhere other than a bus stop or taxi stand, carrying money or sexual paraphernalia,[382] being with someone who has previously been arrested for prostitution, wearing provocative or revealing clothing, or engaging with passers-by.[383]

Another example of the increased interaction sex workers have with law enforcement was described in an article about Georgia's law prohibiting loitering for purposes of prostitution.[384] Similar to New York's law, the Georgia statute allows police to use activities such as being a known prostitute, engaging in conversations with passers-by, or attempting to stop passing cars, as evidence of intent to commit prostitution.[385] Using criteria like this, police arrested a person for carrying condoms and dressing as a woman when the identification the person carried identified the individual as male.[386] As a result, the court sentenced the individual to 20 days in jail or a $200 fine,[387] yet none of the underlying activities are illegal.

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[377] *Id.*

[378] *Id.* at 149–50.

[379] *Id.* at 150.

[380] *Id.*

[381] *See, e.g.*, N.Y. PENAL LAW § 240.37 (McKinney 2020) (repealed Feb. 2021).

[382] Though some states allow the possession of condoms to be used as evidence of prostitution, New York specifically does not do so for prostitution or loitering for the purpose of prostitution. N.Y. CRIM. PROC. LAW § 60.47 (McKinney 2020). However, possession of condoms is still admissible for sex trafficking charges. *See id*. (Practice Commentaries).

[383] Ricardo Cortés, *An Arresting Gaze: How One New York Law Turns Women into Suspects*, VANITY FAIR (Aug. 3, 2017), https://www.vanityfair.com/culture/2017/08/nypd-prostitution-laws/amp. It is worth noting that of the approximately 1300 individuals arrested using these criteria from 2012-2015, eighty-five percent were Black or Latinx. *Id*. Though this article does not address the disproportionate effect of criminalization on persons of color, that is a significant concern.

[384] Elizabeth Nolan Brown, *Profiling and Prostitution Pre-Crime in Georgia*, REASON (Aug. 8, 2017), https://reason.com/2017/08/08/loitering-for-purpose-of-prostitution/.

[385] *Id.*

[386] *Id.*

[387] *Id.*

In addition to the ability to make arrests simply by observing seemingly innocent behavior, some police departments add a financial incentive by paying overtime when officers make arrests that require them to work extra time taking care of processing and paperwork.[388] According to a former New York Police Sergeant, "[u]nits that involve a lot of arrests, like vice and narcotics, are known destinations for overtime pay. 'It's called collars for dollars,' . . . 'The more bodies you put in the van, the more overtime there was.'"[389] Overtime can affect an officer's pension, which in some situations is based on the years the officer made the highest salary.[390] Overtime pay is used to encourage arrests and increase numbers.[391]

ProPublica reported one story of the kind of abuse sex workers experience at the hands of police. It describes a recording of an interaction between an undercover police officer and a woman who police eventually charged with prostitution.[392] ProPublica noted that the recording was unusual because these types of recordings are not usually made public.[393] This one is worth sharing in its entirety:

> In October 2018, Undercover 157 knocked on the door of an East New York apartment six weeks after someone complained that the woman inside was selling sex. The 27-year-old single mother had lived there for eight months after years of instability and stints in a shelter. Through the door he tried to convince her to do business. "Excuse me," she replied, "I said no. I do not know you. I have children here. No."
>
> In the recording, she could be heard saying 'no' or 'bye' or telling him to leave 12 times. At one point, the conversation went silent and she seemed to step away. His loud knocking resumed. "Yo!" he called out. She replied. "Stop knocking on my door."
>
> He persisted, feigning exasperation until she gave in. It's unclear from the recording who brought up money first, but eventually she asked him how much he had. He

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388 *Id.*

389 Joshua Kaplan & Joaquin Sapien, *NYPD Cops Cash in on Sex Trade Arrests With Little Evidence, While Black and Brown New Yorkers Pay the Price*, PROPUBLICA (Dec. 7, 2020), https://www.propublica.org/article/nypd-cops-cash-in-on-sex-trade-arrests-with-little-evidence-while-black-and-brown-new-yorkers-pay-the-price?utm_source=twitt%E2%80%A6.

390 *Id.*

391 *Id.*

392 *Id.*

393 *Id.*

> increased his offer until she agreed to let him in, raising the cash in front of her peephole at her request.
> An infant could be heard crying in the background as he asked for anal sex. She told him she didn't want to be hurt. "Are you going to be rough?" she asked.
> She checked on the baby, who was now screaming. Then came another knock on the door, a banging this time.
> The backup team stormed in. One shouted at her to get on the floor. She was so panicked, she said, she urinated on herself.
> At least five cops were involved in the arrest. She was charged with prostitution and endangering the welfare of a child. The city's welfare agency removed her children and she lost custody for two months.[394]

Removing the criminal aspect of sex work would protect sex workers from the harm they suffer at the hands of the police. The combination of almost-anything-counts standards for prostitution-related arrests and the financial incentive for high numbers of arrests means sex workers are easy prey. And, as noted earlier, even if a sex worker is not arrested, the potential for extortion, harassment, and physical abuse at the hands of police officers looms large.

VI. THE PATH FORWARD

Many reasons exist to decriminalize sex work. Maintaining the criminal nature is simply a moral imperative of a portion of society. It appears rooted in animus toward those who disagree, and especially toward those who choose to engage in sex work. Additionally, sex workers have a liberty interest in making decisions about their behavior and their bodies; criminalizing sex work infringes on this liberty interest.

As noted by the U.S. Department of Justice itself, of all the similar forms of commercial erotic services, only sex work gets singled out as criminal. [395] Other sexual behaviors that are not commercial, such as adultery and sodomy, have been decriminalized. And, according to a study supported by the Whitman-Walker Institute, the Georgetown University O'Neill Institute of National and Global Health Law, and HIPS, a non-profit focused on health rights of sex workers, there is evidence that "criminalization of sex work contributes to community violence, propagates crime, blocks access to public health resources, is an

[394] *Id.*

[395] *See supra* text accompanying notes 368–371.

ineffective deterrent to participation in sex work, and is deeply harmful to sex workers."[396] It appears that criminalizing sex work may not only have little effect on human trafficking but may make it more challenging to see and prevent trafficking. Finally, criminalizing sex work harms those who engage in such conduct in ways that make it more difficult to remove themselves, as well as puts them at risk of additional harm.[397]

In a 2015 article analyzing the conflict among feminists regarding the appropriate way to advocate for decriminalizing sex work, Professor Adrienne Davis suggests the multiple feminist positions within the pro-sex-work group must coalesce or the pro-sex-work movement will remain stalled.[398] Davis delves into the various positions, describing the arguments that sex work is a form of labor or a choice of occupation that should be regulated[399] and that sex work, because it involves sex and women's choices about sex, should be decriminalized completely.[400] Others point out the tensions between advocates who seek to reform the way we address sex work but do so with different arguments and at least somewhat different results.[401] Still others focus on decriminalizing victims of trafficking, which leads to support for the Nordic model, which criminalizes the purchase of sex, but not its sale.[402]

Scholars will continue to debate the appropriate path forward at the leisurely pace typical of academic discourse. But, at the same time, sex workers have made their wishes clear. Sex workers want their trade decriminalized—not regulated, not partially decriminalized so only the purchase of sex is illegal—fully decriminalized so they can operate without fear of arrest, without the harms that come from criminalization, and without the stigma associated with activities legal to offer yet illegal to partake in.[403] According to Red Canary, a grassroots organization of sex workers and sex worker allies, "[t]he goal of decrim[inalizatio] is to

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396 Sean Bland & Benjamin Brooks, *Improving Laws and Policies to Protect Sex Workers and Promote Health and Wellbeing: A Report on Criminalization of Sex Work in the District of Columbia*, WHITMAN-WALKER INST., O'NEILL INST. FOR NAT'L AND GLOB. HEALTH L., HIPS executive summary (2020), https://whitmanwalkerimpact.org/wp-content/uploads/2020/12/Sex-Worker-Law-and-Policy-Report-FINAL.pdf.

397 *See supra* Part V.A.

398 Davis, *supra* note 94, at 1201..

399 *Id*. at 1218–20.

400 *Id*. at 1214–18.

401 *See, e.g.,* Chuang, *supra* note 39, at 1670–71 (describing the disagreement between those who want to legalize and those who want full decriminalization).

402 *See generally,* Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207 (2014).

403 *Why Sex Worker's Rights & Why Decriminalization,* SEXWORKERED (Oct. 17, 2019), https://www.sexworkered.com/sex-worker-ed/2020/04/why-sex-workers-rights-why-decriminalization.

allow for self-determination, and for the industry to be worker-run and led."[404]

This article has identified a number of arguments for decriminalizing sex work, as well as the prominent opposing positions. Many of the arguments scholars make are based on legal theories that will almost always have multiple interpretations. Whether a fundamental right to engage in sex work exists will generate debate until the Supreme Court hears a case where that is the primary issue. Taking a case from inception to the Supreme Court is highly unlikely, especially when so many intermediate courts and state supreme courts appear to accept the overly ambitious interpretation of dicta in cases that have addressed similar, but not identical issues. This challenge becomes even more difficult by the fact that cases that could put the issue before the Court involve sex workers, who are almost always marginalized and lacking in resources.

If the Supreme Court ever accepted a case presenting the right to engage in sex work, the Court would likely have to consider the various purported justifications for maintaining the criminal nature of sex work. The evaluation of the purported justifications—even if only to establish a rational relationship between the criminal statute and the state interest in enforcing it—is also relevant to an alternative method for bringing about the decriminalization of sex work—legislative efforts.

Only in the last few years has there been any momentum behind legislative efforts to decriminalize sex work. Though a legislative glitch allowed legal indoor sex work in Rhode Island for several years, that result was unintended.[405] However, as federal efforts to enhance sex trafficking enforcement have increased, subsuming consensual commercial sex work in those efforts, legislatures in a number of jurisdictions have seen a variety of proposals to decriminalize sex work[406] or to study whether it should be decriminalized.[407] To date, none of these proposals have been enacted, but support is growing.

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[404] Red Canary Song, *Rights, Not Rescue: A Response to AF#IRM in Defense of DSA Resolution #53,* MEDIUM (Aug. 2, 2019), https://medium.com/@Redcanarysong/in-support-of-dsa-res-53-decrim-platform-8eb4d164588.

[405] *See* Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health* 7–11 (Nat'l Bureau of Econ. Research, Working Paper No. 20281), https://www.nber.org/system/files/working_papers/w20281/w20281.pdf. Cunningham and Shah explain the Rhode Island court decisions that inadvertently decriminalized indoor prostitution from 2003 to 2009.

[406] *E.g.,* H. 3499, 190th Sess. (Mass. 2017-2018); H.P. 251, 129th Sess. (Me. 2019); S. 6419, 2019-2020 Reg. Sess. (N.Y. 2019); B. 23-0318, 23rd Council (D.C. 2019).

[407] *E.g.,* H.B. 287, 2017 Sess. (N.H. 2017); H. 5354, 2019 Reg. Sess. (R.I. 2019).

Even the current Vice President of the United States, Kamala Harris, a former prosecutor instrumental in the efforts to shut down Backpage, has now endorsed the need to decriminalize sex work.[408] And, though neither bill was enacted, several proposals for federal legislation related to studying sex work and decriminalization were introduced in 2019.[409] Additionally, the platform of the Democratic Socialists of America, a growing movement within the Democratic Party, included a resolution supporting the decriminalization of sex work,[410] and several prosecutors have announced that they will not prosecute prostitution charges and support decriminalizing prostitution.[411]

Professor Adrienne Davis' assertion that the pro-sex-work movement has stalled may be accurate if we limit our observations to academics and scholars.[412] But, at the grassroots level, the movement is strong and growing. And it is time for the scholarly discussion to recognize that movement and amplify the voices of those most affected.

The grassroots efforts of sex workers are similar to those of the gay and lesbian community as members of that community worked toward achieving marriage rights. Like the opposition pro-sex work advocates face today, those who fought for same-sex marriage faced opposition rooted in religious beliefs, assertions of morality, and fear.

The grassroots efforts leading to same-sex marriage began with small groups discussing possibilities.[413] It grew to a more organized effort that focused first on helping those involved understand how to effectively advocate.[414] Doing so required building consensus about goals and expectations before any efforts to influence others began. Like the efforts to decriminalize prostitution, the same-sex marriage movement

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[408] Interview with Terrell Jermaine Starr, *Exclusive: Kamala Harris Calls for Decriminalization of Sex Work, Unequivocally Calls Trump a Racist and Wants Reparations (Sort of)*, THE ROOT (Feb. 26, 2019), https://www.theroot.com/exclusive-kamala-harris-calls-for-decriminalization-of-1832883951 (at 14:40-17:15 of video).

[409] SESTA/FOSTA Examination of Secondary Effects for Sex Workers Study Act, H.R. 5448, 116th Cong. (2019); SESTA/FOSTA Examination of Secondary Effects for Sex Workers Study Act, S. 3165, 116th Cong. (2020); Recognizing the United States has a moral obligation to meet its foundational promise of guaranteed justice for all, H.R. 702, 116th Cong. § (2)(A)(ii) (2019).

[410] *DSA Supports Full Decriminalization of Sex Work*, DEM SOCIALISTS OF AM. (Mar. 3, 2020), https://www.dsausa.org/statements/dsa-supports-full-decriminalization-of-sex-work/.

[411] *See, e.g.*, Otillia Steadman, *More than 1000 Open Prostitution Cases in Brooklyn Are Going To Be Wiped From the Files*, BUZZFEED NEWS (Jan. 28, 2021), https://www.buzzfeednews.com/article/otilliasteadman/prostitution-loitering-cases-brooklyn.

[412] Davis, *supra* note 94, at 1201–02.

[413] Interview with Beth Robinson, Associate Justice, VT Supreme Court, in South Royalton, VT (Sept. 12, 2014) (Video available at https://addendabyanderson.com/video-story-of-civil-unions/).

[414] *Id.*

had several unsuccessful efforts in the courts before recognizing that it would take legislative action in each state to achieve its goal.[415]

The decriminalization movement has reached that point. Efforts are underway to propose legislation.[416] Advocates are speaking with similar voices and a unified message, staying focused on the reasons to decriminalize sex work. Alliances are building. Though some disagreement among sex workers and former sex workers about whether decriminalization is truly the right move still exists, those who support the decriminalization effort are coalescing around a unified message, advocating for full decriminalization rather than legalization or partial decriminalization (also known as the Nordic model).

The next steps pose challenges. To build support for legislative change, sex workers and their allies must counter the emotion-laden images and stories told by abolitionists. They must not only point out the flaws in these messages, but they must also personalize their own stories, letting people see who they are, what they do, why they do it, and how they engage in society when they are not working.

Though the ultimate goal may be the decriminalization of all forms of sex work, it may be possible to garner more support, more quickly for a transitional step toward that result. Like the same-sex marriage movement did by accepting civil unions as an interim step toward the final result, decriminalization advocates may find it useful to offer an interim step by focusing on decriminalizing indoor and online sex work.

The most vocal critics of sex work have been successful at blurring the lines between consensual sex work and human trafficking. According to some reports, the sex workers most vulnerable to being trafficked are those who work on the streets.[417] Even sex workers who engaged in consensual sex work when it was safe to conduct their business online have acknowledged that returning to doing business on the streets makes them more vulnerable to those who want to traffic them.[418] Removing the prohibition against online advertising and allowing sex workers to legally advertise, screen, and provide support to each other online and indoors will also make it easier for law enforcement to locate those who are being trafficked in that manner, just as they were doing when Backpage was operating and cooperating. Removing the criminal liability for consensual commercial adult sexual behavior out of the

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[415] *Id.*

[416] *Supra* text accompanying notes 409–410.

[417] Brooks & Bland, *supra* note 398, at 9.

[418] Brooks & Bland, *supra* note 398, at 45.

public eye would put sex work in the same category as any other consensual adult sexual behavior, none of which is legal to conduct on the streets.

The most obvious difference between commercial street-based sex work and non-commercial, consensual sexual behavior would be that the transactional details would be limited to indoor spaces. Whereas it is entirely possible, and legal, for a person to proposition another outdoors and in public, doing so as a commercial exchange would remain illegal. The effect of this distinction on neighborhoods where street sex work is common would mean that sex workers would no longer spend time in the neighborhood looking for clients. Removing them from the neighborhoods would likely go a long way toward appeasing those who believe that sex workers attract a criminal element.

Allowing sex work conducted indoors and online would mean the repeal of statutes making commercial sex interactions illegal. It would also require the repeal of provisions of FOSTA/SESTA that make it illegal to engage in online advertising or any online behavior that encourages or facilitates commercial sex. Human trafficking statutes and other criminal statutes that penalize those who benefit from transactions involving commercial sex would need alterations to become more precise about focusing only on human trafficking.

In addition to removing or significantly revising criminal statutes, it would be important to affirmatively prohibit discrimination against those who engage in legal commercial sex. Doing so would presumably prevent banks from refusing to allow transactions related to commercial sex, landlords from refusing to rent to those who work as commercial sex providers, and employers from refusing to hire someone who has or still is, engaged in commercial sex. Rather than having students removed from educational programs because they do sex work to support themselves while in school, or courts remove children from parents who engage in commercial sex to provide for their families, those who make this choice would be treated in the same way another who chooses to work as a waitress or factory worker, or any other type of worker would be treated. The sex worker would be no different from the medical model who allows students to poke and prod their sexual organs to learn how to provide appropriate medical care. They would be no different from those who become gestational surrogates, allowing the use of their body to create a child for another party, or for a professional athlete who is paid for using his or her body to entertain fans.

And, most importantly, by decriminalizing commercial sex work, even if doing so requires that it not be conducted on the streets, we will recognize that those who engage in this work have the right, the

liberty interest, and potentially the privacy interest, to engage in this behavior, just as anyone who engages in this behavior without the commercial aspect has the right to do so. It's time to act.