

Sex, Drugs, and Ballot Measures: An Argument for Massachusetts to Fully Decriminalize Prostitution

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“Say that one of those women was a sex worker, then is that person meant to be shamed in their death? Would they have deserved it? The answer is no.”¹

I. INTRODUCTION

On March 16, 2021, an armed shooter killed eight people at two massage businesses associated with prostitution.² The shooter told law enforcement the victims were “temptations” to “eliminate.”³ These killings are merely one example of the perpetual violence and outright dehumanization sex workers face.⁴ This

* Suffolk University Law School, J.D. 2023; Vanderbilt University, B.A. 2016. First and foremost, I dedicate this Note to sex worker advocates who tirelessly fight for sex workers’ rights. This Note would not be possible without the unwavering support of my husband, Dan. I would also like to thank my parents and siblings for always believing in me. In addition, I am grateful to my fellow members of *Suffolk University Law Review*, my Note Editor, Joe, and my advisor, Professor Stephen Cody.

1. Emma Bowman, *Atlanta Killings: Sex Worker Advocate Sees Deadly Consequences of Overlapping Hatreds*, NPR (Mar. 21, 2021), <https://n.pr/3qKI3rJ> [<https://perma.cc/35NT-EEEF>].

2. Jessica Contrera et al., *Atlanta Spa Killings Lead to Questions About Sex Work and Exploitation*, WASH. POST (Mar. 19, 2021), <https://wapo.st/3qHtyX> [<https://perma.cc/3REX-3L9P>] (discussing shooting). This Note uses the term “prostitution” when referring to the consensual exchange of sexual acts for pay between adults. See Natalia Benitez et al., *Prostitution and Sex Work*, 19 GEO. J. GENDER & L. 331, 334 (2018) (defining prostitution). When referring to adults who engage in consensual sexual acts for pay, this Note uses the term “sex worker” as defined by Cheryl Overs, sex worker rights advocate and founder of the Global Network of Sex Work Projects. See CHERYL OVERS, *SEX WORKERS: PART OF THE SOLUTION 2* (2002), <https://www.nswp.org/sites/default/files-/OVERS-SOLUTION.pdf> [<https://perma.cc/D55Y-NFHW>] (defining term “sex worker”); see also GLOB. COMM’N ON HIV & L., *RISKS, RIGHTS & HEALTH* 96 (2012), <https://hivlawcommission.org/wp-content/uploads-/2017/06/FinalReport-RisksRightsHealth-EN.pdf> [<https://perma.cc/63W6-3DBV>] (identifying Cheryl Overs). “Sex workers are women, men and transgendered people who receive money or goods in exchange for sexual services, and who consciously define those activities as income generating even if they do not consider sex work as their occupation.” OVERS, *supra*, at 2. In this Note, the term “sex worker” does not include victims of sex trafficking or underage individuals engaging in sex for pay. See, e.g., *infra* Part II (restricting use of word “sex worker” to adults consciously engaging in commercial sexual activities); see also GLOB. COMM’N ON HIV & L., *supra*, at 39 (distinguishing exchange of consensual sex for pay from sex trafficking). Sex trafficking refers to the involuntary relocation and prostitution of individuals under coercive conditions. See Benitez et al., *supra*, at 342 n.86 (defining sex trafficking).

3. See Contrera et al., *supra* note 2 (explaining shooter’s motives). Although massage businesses are often associated with prostitution, there is no indication that the victims were sex workers. See *id.*

4. See, e.g., Kenna Quinet, *Prostitutes as Victims of Serial Homicide: Trends and Case Characteristics, 1970-2009*, 15 HOMICIDE STUD. 74, 74 (2011) (stating prostitutes accounted for 32% of serial murders involving female victims from 1970 to 2009); Bowman, *supra* note 1 (discussing stigma associated with sex work); Lucy

pervasive violence extends into pop culture and entertainment, where sex workers are killed for enjoyment and dehumanized upon their deaths.⁵ For example, in the popular video game series *Grand Theft Auto*, players hire sex workers to recharge their character's health before violently killing the sex worker to steal back their character's money.⁶ Beyond violence, the criminalization of prostitution and resulting stigmatization removes sex workers from the public eye, leading to further untreated issues like possible drug addiction.⁷

There are four main legal approaches to regulating prostitution: total criminalization, the Nordic Model, full decriminalization, and legalization.⁸ Total

Platt et al., *Associations Between Sex Work Laws and Sex Workers' Health: A Systemic Review and Meta-Analysis of Quantitative and Qualitative Studies*, PUB. LIBR. SCI. MED., Dec. 11, 2018, at 1, 42, <https://doi.org/10.1371/journal.pmed.1002680> [<https://perma.cc/4RT2-9AAT>] (noting studies demonstrate institutional acceptance of violence and stigma against sex workers). For example, Gary Ridgway, better known as the "Green River Killer," murdered forty-eight sex workers. See *Green River Killer Gary Ridgway's Statement to the Court*, CNN (Nov. 5, 2003), <https://cnn.it/3pMc2QN> [<https://perma.cc/VK2W-TS72>] (detailing Gary Ridgway's written statement). In his statement to the court, he said: "I wanted to kill as many women as I thought were prostitutes as I possibly could . . . I picked prostitutes because I thought I could kill as many of them as I wanted without getting caught." *Id.*

5. See, e.g., Cassie Rodenberg, *Grand Theft Auto V Makes It Cool to Pick Up—Even Kill—Prostitutes*, GUARDIAN (Dec. 27, 2013), <https://www.theguardian.com/commentisfree/2013/dec/27/grand-theft-auto-v-prostitutes-killed> [<https://perma.cc/92VJ-TB47>] (discussing killing of sex workers in popular video game); Riley Smith, "When They're Dead, They're Just Hookers," MEDIUM (Aug. 26, 2019), <https://medium.com/pulpmag/when-theyre-dead-they-re-just-hookers-the-media-trope-that-is-killing-people-f3501763073c> [<https://perma.cc/VC4L-45FX>] (calling media's portrayal of disposable sex worker "nameless, faceless, throwaway").

[H]er death is a joke, usually one involving a cover-up, such as in *Archer* and *Rough Night*, or one where her disposability is the joke, such as in *Family Guy* or in Anna Kendrick's AMA speech. She rarely gets screen time. If her body is shown, it is dead and dismembered. . . . She does not get to advocate for herself, and anyone speaking for her sees her death as inevitable at best and deserved at worst.

Smith, *supra*.

6. See Rodenberg, *supra* note 5 (condemning *Grand Theft Auto*'s encouragement of beating, running over, and killing sex workers).

7. See, e.g., Lynzi Armstrong, *Stigma, Decriminalisation, and Violence Against Street-Based Sex Workers: Changing the Narrative*, 22 SEXUALITIES 1288, 1289 (2019) (overviewing link between criminalization, stigma, and violence); Rodenberg, *supra* note 5 (providing stories of sex workers' struggles with addiction and abuse).

8. See WORLD AIDS CAMPAIGN, SEX WORK AND THE LAW: THE CASE FOR DECRIMINALIZATION 18-19 (2010), <https://www.nswp.org/sites/nswp.org/files/Sex%20Work%20%26%20the%20Law.pdf> [<https://perma.cc/KR8S-Z2Q7>] (describing legal approaches); YALE GLOB. HEALTH JUST. P'SHIP, THE LAW & SEX WORK: FOUR LEGAL APPROACHES TO THE SEX SECTOR 1-2 (2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/the_law_and_sex_work.pdf [<https://perma.cc/8N4U-HEJB>] (outlining legal frameworks). The inconsistent approaches to regulating prostitution illustrate the controversy surrounding its regulation. See Emily Mullin, *How Different Legislative Approaches Impact Sex-Workers*, ORG. FOR WORLD PEACE (Jan. 20, 2020), <https://theowp.org/reports/how-different-legislative-approaches-impact-sex-workers/> [<https://perma.cc/X7NX-YEPY>] (recognizing inconsistencies in legislative approaches). Perspectives on prostitution typically fall into two categories: Prostitution is either inherently exploitative, or prostitution is legitimate work. See *id.* (categorizing perspectives surrounding prostitution).

criminalization makes prostitution an illegal offense under the criminal code.⁹ The Nordic Model, also known as partial decriminalization, criminalizes buying sexual services but removes criminal penalties for selling sexual services.¹⁰ Treating prostitution like many other occupations, full decriminalization removes criminal penalties for the sale and purchase of consensual sex between adults and all related activities.¹¹ Legalization makes prostitution legal under strict, state regulations governed by labor and licensure laws.¹²

Sex worker advocates and public health organizations generally support some form of decriminalization to improve sex workers' health and safety and to decrease sex trafficking, but they disagree on the approach.¹³ Some advocates

9. See WORLD AIDS CAMPAIGN, *supra* note 8, at 18 (defining total criminalization); ELAINE MOSSMAN, MINISTRY OF JUST., INTERNATIONAL APPROACHES TO DECRIMINALISING OR LEGALISING PROSTITUTION 5 (2007), <https://web.archive.org/web/20100523095258/http://www.justice.govt.nz/policy-andconsultation/legislation/prostitution-law-review-committee/publications/international-approaches/documents/report.pdf> [<https://perma.cc/W7JH-FPVF>] (describing criminalization).

10. See YALE GLOB. HEALTH JUST. P'SHIP, *supra* note 8, at 2 (summarizing Nordic Model).

11. See *id.* at 1 (defining full decriminalization); MOSSMAN, *supra* note 9, at 6 (recognizing involuntary prostitution and child prostitution remains illegal under full decriminalization); see also LAURA BARNETT & LYNE CASAVANT, LIBR. OF PARLIAMENT, PROSTITUTION: A REVIEW OF LEGISLATION IN SELECTED COUNTRIES 2 (2014), https://publications.gc.ca/collections/collection_2015/bdp-lop/bp/2011-115-1-eng.pdf [<https://perma.cc/Z96Z-PF9R>] (stating decriminalization's objective); Mullin, *supra* note 8 (analyzing decriminalization and its adoption); Melissa Gira Grant, *This Is How Sex Workers Win*, NEW REPUBLIC (Mar. 2, 2021), <https://newrepublic.com/article/161525/sex-workers-win> [<https://perma.cc/CD2W-GACB>] (providing sex workers' view on decriminalization). Jurisdictions that decriminalize prostitution distinguish the sale of voluntary prostitution between adults from sex trafficking and prostitution involving minors, with the latter remaining illegal. See MOSSMAN, *supra* note 9, at 6 (noting decriminalization does not remove criminal penalties for sex trafficking or prostitution of minors).

12. See Mullin, *supra* note 8 (defining legalization). Under legalization, the city or state government regulates prostitution by proscribing specific conditions like licensing, registration, mandatory health checks, and work permits. See *id.* (detailing common conditions under legalization); YALE GLOB. HEALTH JUST. P'SHIP, *supra* note 8, at 2 (stating city or state government regulates prostitution). Sex workers and advocates generally do not support legalization because legalization imposes strict regulations that infringe on sex workers' autonomy, and sex workers who do not adhere to the strict provisions remain criminalized. See YALE GLOB. HEALTH JUST. P'SHIP, *supra* note 8, at 2 (recognizing immigrant, LGBTQ+, and impoverished sex workers remain at risk for criminal penalties under legalization); *What About Legalization?*, DECRIMINALIZE SEX WORK, <https://decriminalizesex.work/why-decriminalization/briefing-papers/decriminalization-is-the-only-solution/> [<https://perma.cc/ENT4-37CP>] (rejecting legalization for full decriminalization arguing legalization creates two-tiered system failing to support sex workers). The Netherlands, Germany, Austria, Greece, and select counties in Nevada have legalized prostitution. See Mullin, *supra* note 8 (listing countries and states with legalization); *Nevada*, DECRIMINALIZE SEX WORK (last updated Feb. 15, 2020), <https://decriminalizesex.work/advocacy/state/nv/> [<https://perma.cc/LG66-JC5A>] (noting prostitution legal status in select counties in Nevada). The main distinction between legalization and full decriminalization is the degree of state control. See WORLD AIDS CAMPAIGN, *supra* note 8, at 19 (comparing legalization and decriminalization).

13. See, e.g., YALE GLOB. HEALTH JUST. P'SHIP, *The Harmful Consequences of Sex Work Criminalization on Health and Rights* 1 (2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/consequences_of_criminalization_v2.pdf [<https://perma.cc/J9GL-3KXU>] (arguing for decriminalization of prostitution); *New Guidelines to Better Prevent HIV in Sex Workers*, UNAIDS (Dec. 11, 2010), <https://www.unaids.org/en/resources/presscentre/featurestories/2012/december/20121212sexworkguidance> [<https://perma.cc/SS6M-9H2M>] (discussing public health organizations' recommendations to decriminalize prostitution to control HIV); Margot Boyer-Dry, *What's the Best Way to Protect Sex Workers? Depends on Whom You Ask*, N.Y. TIMES (July 24,

support eliminating criminal penalties for sex workers, while continuing to criminalize clients and third parties who enable prostitution, such as managers and landlords.¹⁴ This approach is called the “Nordic Model”—named for its use in Sweden, Iceland, and Norway.¹⁵ But public health organizations, sex workers, and most activists point out the adverse effects of the Nordic Model—including increased violence towards sex workers—and instead argue for full decriminalization.¹⁶

The Tenth Amendment to the United States Constitution empowers each state to address prostitution’s criminalization as they see fit.¹⁷ Except for ten rural counties in Nevada, prostitution is illegal in the United States.¹⁸ Recent

2021), <https://nyti.ms/32FEvig> [<https://perma.cc/UGW8-7SNV>] (discussing differing perspectives on decriminalization).

14. See *What Is the Nordic Model?*, NORDIC MODEL NOW!, <https://nordicmodelnow.org/what-is-the-nordic-model> [<https://perma.cc/RX44-YR8W>] (advocating for Nordic Model); *Debunking the Entrapment Model, a.k.a. the End Demand Model*, DECRIMINALIZE SEX WORK, <https://decriminalizesex.work/why-decriminalization/briefing-papers/debunking-the-entrapment-model/> [<https://perma.cc/Q7FC-A887>] [hereinafter *Debunking the Entrapment Model*] (noting Nordic Model criminalizes managers and landlords who allow prostitution in their homes).

15. See Susan Nembhard et al., *Partial Decriminalization of Sex Work Could Cause More Harm than Good*, URB. INST.: URB. WIRE (Apr. 15, 2021), <https://urbn.is/3uSK2L4> [<https://perma.cc/LM4S-YQNK>] (describing Nordic Model, its adoption, and adverse effects); Meghan Hynes, *Sex Work and the Law in South Africa, Sweden and New Zealand: An Evidence-Based Argument for Decriminalization*, 5 COLUM. U. J. GLOB. HEALTH 24, 25-27 (2015) (analyzing Nordic Model in Sweden); *Debunking the Entrapment Model*, *supra* note 14 (discussing Nordic Model and negative outcomes). This model is also known as the “Entrapment Model,” “End Demand Model,” or “Equality Model.” See *Debunking the Entrapment Model*, *supra* note 14 (providing alternate names to Nordic Model). This Note uses the term “Nordic Model” when discussing the decriminalization model that criminalizes buyers and third parties but decriminalizes sex workers. See, e.g., *infra* Section II.A.5 (outlining Nordic Model’s impact). France, Ireland, Northern Ireland, and Canada have also adopted the Nordic Model. See *Everything You Ever Wanted to Know About the Swedish Model (aka the Nordic Model)*, SWARM (Dec. 8, 2020), <https://www.swarmcollective.org/blog/the-swedish-model> [<https://perma.cc/L493-ZDCC>] (listing countries utilizing Nordic Model).

16. See *Debunking the Entrapment Model*, *supra* note 14 (describing results of Nordic Model); Nembhard et al., *supra* note 15 (discussing increase in violence towards sex workers after Nordic Model adoption); *Amnesty International Publishes Policy and Research on Protection of Sex Workers’ Rights*, AMNESTY INT’L (May 26, 2016), <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/> [<https://perma.cc/3MWC-KM5F>] [hereinafter *Amnesty International Policy*] (recommending full decriminalization of consensual prostitution).

17. See U.S. CONST. amend. X (implying state police power); *Keller v. United States*, 213 U.S. 138, 144 (1909) (holding Tenth Amendment encompasses punishment for keeping houses of prostitution); *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (recognizing states’ police power includes power to prescribe laws regulating health, peace, and morals); Olivea Myers, *Sex for Sale: The Implications of Lawrence and Windsor on Prostitution in the United States*, 5 TENN. J. RACE, GENDER & SOC. JUST. 94, 107 (2016) (discussing states’ police power over prostitution under Tenth Amendment); see also *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/> [<https://perma.cc/DRF9-N9U4>] (outlining state prostitution laws). The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. CONST. amend. X.

18. See *US Federal and State Prostitution Laws and Related Punishments*, *supra* note 17 (providing prostitution laws and penalties by state); *Nevada*, *supra* note 12 (discussing prostitution laws in Nevada). This Note

legislative efforts to fully decriminalize prostitution or adopt the Nordic Model have failed in multiple states.¹⁹ Nevertheless, efforts towards not prosecuting prostitution and repealing related offenses, such as loitering, have been successful at the local level.²⁰ These efforts mirror the incremental movement to legalize marijuana.²¹

This Note argues for full decriminalization of prostitution in Massachusetts.²² Part II of this Note explores the history of prostitution in the United States, attempts to reform prostitution laws in Massachusetts, and compares the two approaches to decriminalization adopted in Sweden and New Zealand.²³ Part II also discusses the current status of marijuana laws in the United States, reasons for marijuana reform, and success of ballot measures in decriminalizing and legalizing marijuana in Massachusetts.²⁴ Part III begins by arguing against prostitution's criminalization based on its detrimental harm to sex workers before comparing Sweden's results under the Nordic Model to New Zealand's results under full decriminalization and argues for full decriminalization of prostitution in

does not advocate for legalization of prostitution and therefore will not examine Nevada or legalization as an exemplary approach. *See, e.g., infra* Section II.A (discussing decriminalization).

19. *See* H. 1867, 192d Gen. Ct. (Mass. 2021) (repealing laws against prostitution and fully decriminalizing prostitution); S. 940, 192d Gen. Ct. (Mass. 2021) (repealing Massachusetts's laws criminalizing sale of sexual services but not purchase); Anna North, *The Movement to Decriminalize Sex Work, Explained*, VOX (Aug. 2, 2019), <https://www.vox.com/2019/8/2/20692327/sex-work-decriminalization-prostitution-new-york-dc> [<https://perma.cc/DBQ4-6CC8>] (noting efforts to decriminalize in New York); John Notarianni, *Oregon Sex Workers Advocate for Decriminalization, in Their Own Words*, OR. PUB. BROAD. (July 19, 2021), <https://www.opb.org/article/2021/07/19/oregon-paid-sex-legalization-advocacy-hearing/> [<https://perma.cc/J85K-H6BM>] (describing failed bills in Oregon).

20. *See, e.g.,* Rachel Treisman, *A 'Relic' And 'Burden': Manhattan District Attorney to Stop Prosecuting Prostitution*, NPR (Apr. 21, 2021), <https://n.pr/3zgWyao> [<https://perma.cc/QY9Z-L6ET>] (describing various district attorneys' decisions not to prosecute prostitution); Jimmy Vielkind, *New York Repeal of Anti-Prostitution Loitering Statute Is Approved*, WALL ST. J. (Feb. 2, 2021), <https://on.wsj.com/3pKhiEy> [<https://perma.cc/5SXT-R6ZG>] (noting New York repealed anti-loitering law).

21. *See infra* Section II.B (discussing efforts to decriminalize and legalize marijuana); *see also infra* Section III.B (comparing marijuana and prostitution).

22. *See infra* Part IV (arguing Massachusetts should fully decriminalize prostitution).

23. *See infra* Section II.A (detailing approaches to regulating prostitution in United States, Sweden, and New Zealand). On March 18, 2022, Belgium rejected the Nordic Model, becoming the first European country to fully decriminalize prostitution. *See Sex Workers in Belgium Celebrate Historic Vote for Decriminalisation in Parliament*, GLOB. NETWORK OF SEX WORK PROJECTS (Mar. 25, 2022), <https://www.nswp.org/news/sex-workers-belgium-celebrate-historic-vote-decriminalisation-parliament> [<https://perma.cc/8283-GNDL>] [hereinafter *Belgium Sex Workers Celebrate*] (recognizing lawmakers listened to sex workers in adopting full decriminalization). The law went into effect on June 1, 2022, and sex workers and advocates for full decriminalization recognize the impact of decriminalization in Belgium will not be clear for several years. *See How Covid Helped Sex Workers in Belgium Make History*, CYPRUS MAIL (May 31, 2022), <https://cyprus-mail.com/2022/05/31/how-covid-helped-sex-workers-in-belgium-make-history/> [<https://perma.cc/M9PR-4XUK>] [hereinafter *How COVID Helped*] (discussing goals for full decriminalization). Because of the lack of data available, this Note does not analyze full decriminalization in Belgium and instead focuses on full decriminalization in New Zealand. *See infra* Section II.A.6 (analyzing full decriminalization in New Zealand).

24. *See infra* Section II.B (overviewing marijuana reform and ballot measures).

Massachusetts.²⁵ Part III then discusses the similarities between the criminalization of marijuana and prostitution based on their respective harms.²⁶ This Note concludes by suggesting sex workers' advocates place full decriminalization of prostitution on the ballot in Massachusetts.²⁷

II. HISTORY

A. Prostitution

1. History of Prostitution in the United States

Until the nineteenth century, prostitution was legal in the United States, and it was prevalent in large cities, frontier towns, and areas where soldiers gathered.²⁸ The fear of sexually transmitted diseases (STD) during the Civil War drove early efforts to regulate prostitution.²⁹ After the Civil War, many cities allowed licensed brothels to operate if they conducted regular health checks.³⁰ Growing public health hysteria surrounding prostitution and the spread of STDs drove Congress to pass the Chamberlain–Kahn Act during World War I, which allotted funding to the states and authorized them to detain, isolate, and commit those suspected of having a venereal disease to protect American troops.³¹

In addition to public health concerns, anti-immigration sentiment contributed to anti-prostitution legislation, such as the Page Act, which banned importing

25. See *infra* Section III.A (debunking need for criminalization).

26. See *infra* Part III (comparing criminalization of prostitution to marijuana).

27. See *infra* Part IV (suggesting use of ballot measures to fully decriminalize in Massachusetts).

28. See Linda S. Anderson, *Ending the War Against Sex Work: Why It's Time to Decriminalize Prostitution*, 21 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 72, 81-85 (2021) (discussing early history of prostitution in United States); *Prostitution and Sex Work*, 14 GEO. J. GENDER & L. 553, 554 (2013) (summarizing history of prostitution).

29. See Anderson, *supra* note 28, at 82 (stating some Civil War military leaders attempted to restrict prostitution by sending prostitutes away). Prostitutes were only allowed to return after the city conducted health checks and licensing. See *id.* (discussing requirements imposed).

30. See *id.* (noting regulations continued after Civil War).

31. See Chamberlain–Kahn Act, ch. 15, §§ 1–5, 40 Stat. 845 (1918) (allotting funding and directing adoption of measures to protect against venereal diseases); Anderson, *supra* note 28, at 84 (summarizing Congress's passage of Chamberlain–Kahn Act). By World War I, government officials realized venereal diseases posed a significant threat to the military. See Scott Wasserman Stern, *The Long American Plan: The U.S. Government's Campaign Against Venereal Disease and Its Carriers*, 38 HARV. J.L. & GENDER 373, 382-83 (2015) (offering Surgeon General Gorgas's disease calculation). Secretary of War Newton Baker sought to control prostitution and the spread of venereal diseases by dispatching officials to arrest women who might be infected. See *id.* at 383. In response to the lack of federal centralization, Congress passed the Chamberlain–Kahn Act, which centralized all the federal agencies and government actors taking part in the arrest, examination, and quarantine of prostitutes. See *id.* at 385 (naming consolidated federal effort "American Plan"). By 1922, twenty-seven states had laws that deemed prostitutes and their clients as "reasonably suspected" of having venereal diseases and subject to examination and quarantine in prison-like facilities where they experienced solitary confinement, corporal punishment, and eugenics. See *id.* at 388, 403-04 (recognizing prisons sterilized women who failed intelligence tests).

women for prostitution.³² To further limit both immigration and prostitution, Congress passed the Mann Act, which criminalized the interstate and foreign transportation of individuals for the purpose of prostitution and expanded federal law enforcement.³³ The United States Supreme Court ultimately recognized the Mann Act as a valid use of Congress's power under the Commerce Clause.³⁴ Due to its enforcement under the Commerce Clause, the Mann Act significantly expanded the powers of the Interstate Commerce Commission.³⁵

While Congress can regulate prostitution across states lines under the Commerce Clause, the Tenth Amendment grants states the primary authority to regulate intrastate prostitution.³⁶ With the exception of Nevada, all states criminalize both the purchase and the sale of sex, but the category and associated penalties differ across states.³⁷ Even within Nevada, there are only ten rural counties that allow prostitution, and prostitution is only permitted within licensed brothels.³⁸

32. See Page Act of 1875, ch. 141, §§ 1–3, 18 Stat. 477 (repealed 1974) (banning entry for “lewd and immoral purposes” and targeting Chinese and Japanese women); Anderson, *supra* note 28, at 82–83 (discussing anti-immigration legislation and prostitution).

33. See White-Slave Traffic (Mann) Act, ch. 395, §§1–6, 36 Stat. 825 (1910) (current version at 18 U.S.C. §§ 2421–2424) (criminalizing transportation of persons for prostitution); Jessica R. Pliley, *Sex Surveillance and Moral Quarantines: A History of Anti-Trafficking*, OPENDEMOCRACY (Apr. 27, 2015), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/sexual-surveillance-and-moral-quarantines-history-of-antitrafficking/> [<https://perma.cc/Z8WJ-C44D>] (discussing background and purpose of Mann Act).

34. See *Hoke v. United States*, 227 U.S. 308, 321, 323 (1913) (holding federal government could not regulate prostitution per se but can regulate interstate commerce). Under the Commerce Clause, Congress has the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” U.S. CONST. art. I, § 8, cl. 3.

35. See Mara L. Keire, *The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907–1917*, 35 J. SOC. HIST. 5, 18 (2001) (overviewing Mann Act’s history). Congressman James R. Mann framed the Act using the Commerce Clause because commercialized vice was an organized, interconnected business that exceeded the bounds of local police powers. See *id.* (explaining rationale behind Mann Act’s authority under Commerce Clause). Nevertheless, local laws supplementing the Mann Act were more effective in fighting prostitution than the Act itself. See *id.* (comparing efficacy of local laws to Mann Act). State legislators modeled local laws after contract labor laws, which allowed the expansion of enforcement to include pimps, madams, and procurers. See *id.* at 18–19 (distinguishing enforcement under state laws versus Mann Act).

36. See U.S. CONST. amend. X; *Hoke*, 227 U.S. at 321–22 (asserting Congress can regulate prostitution through interstate commerce, but only states may control intrastate prostitution); *Keller v. United States*, 213 U.S. 138, 144 (1909) (holding punishment of prostitution falls within state police power under Tenth Amendment); *United States v. Wolf*, 787 F.2d 1094, 1097 (7th Cir. 1986) (declaring Mann Act merely prohibits transportation across state lines and does not police sexual misconduct); see also *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (recognizing states’ police power includes power to enact laws regulating health, peace, and morals).

37. See *US Federal and State Prostitution Laws and Related Punishments*, *supra* note 17 (summarizing prostitution penalties by state).

38. See NEV. REV. STAT. § 201.354 (1987) (enacting exception to criminalization for licensed brothels); *Nevada*, *supra* note 12 (discussing prostitution in Nevada). Prostitution outside of the twenty-one licensed brothels remains illegal. See *Nevada*, *supra* note 12 (noting limited scope of legalization).

2. Prostitution in Massachusetts

Massachusetts's prostitution laws criminalize both the sale and purchase of sexual conduct.³⁹ Like some other liberal states, progressives have campaigned—unsuccessfully—for decriminalization by proposing new reforms to Massachusetts's prostitution laws.⁴⁰ Over the past few years, legislators have proposed both full decriminalization and the Nordic Model.⁴¹ One failed bill would have decriminalized solicitation and the purchase and sale of sex between consenting adults, repealed prostitution-related convictions, and expunged state records for prostitution.⁴² Two other failed bills would have adopted a form of the Nordic Model by decriminalizing the sale of sex but keeping the purchase criminalized.⁴³ In addition, legislators proposed a bill that would have repealed

39. See MASS. GEN. LAWS ch. 272, § 53A(a) (2022) (criminalizing sale or offer to sell sexual conduct); § 53A(b) (criminalizing purchase or offer to purchase sexual conduct); § 8 (criminalizing solicitation or compensation for solicitation). The purchase or offer to purchase sexual conduct is subject to imprisonment for up to two and one-half years, a fine, or both, even if sexual conduct does not occur. See § 53A(b).

40. See *Black and Pink MA Launches Bold Legislative Agenda*, RAINBOW TIMES (Apr. 5, 2021), <http://www.therainbowtimesmass.com/black-and-pink-ma-launches-bold-legislative-agenda/> [<https://perma.cc/3VZ4-Y-TWG>] (outlining support for decriminalization in Massachusetts); Jesse McKinley, *Could Prostitution Be Next to Be Decriminalized?*, N.Y. TIMES (May 31, 2019), <https://nyti.ms/2ELYF1d> [<https://perma.cc/Q7E5-46ZY>] (noting some Democratic lawmakers introduced decriminalization legislation); North, *supra* note 19 (describing legislative efforts in New York and District of Columbia); Notarianni, *supra* note 19 (discussing decriminalization movement in Oregon).

41. See H. 1867, 192d Gen. Ct. (Mass. 2021) (attempting to repeal laws criminalizing sale and purchase of sex); S. 940, 192d Gen. Ct. (Mass. 2021) (seeking to amend Massachusetts law criminalizing sale of sex but not purchase); H. 3499, 190th Gen. Ct. (Mass. 2017) (proposing decriminalization of sale only).

42. See Mass. H. 1867 (repealing laws criminalizing sale and purchase of sex); *Black and Pink MA Launches Bold Legislative Agenda*, *supra* note 40 (describing objective of bill). This bill was a result of efforts by DecrimMA co-led by Black and Pink Massachusetts, a prison abolition group of currently and formerly incarcerated LGBTQIA+ individuals, and Whose Corner Is It Anyways, a group led by street-based sex workers. See *Black and Pink MA Launches Bold Legislative Agenda*, *supra* note 40 (stating DecrimMA coalition spearheaded bill); Grant, *supra* note 11 (defining organizers of DecrimMA).

43. See Mass. H. 3499 (repealing laws criminalizing sale of sex but criminalizing purchase of sex); Mass. S. 940 (removing laws criminalizing sale while still criminalizing purchase and calling sex workers “prostituted persons”). Representative Kay Kahn, the drafter of the 2017 legislation, stated her goal was to focus law enforcement’s attention on buyers and pimps and to protect women trapped in the sex industry by providing them with the means to start a new life. See Andy Metzger, *Prostitution Bill Would Legalize Sex Work, Sponsor Says*, SALEM NEWS (Nov. 28, 2017), https://www.salemnews.com/news/state_news/prostitution-bill-would-legalize-sex-work-sponsor-says/article_07773578-d498-11e7-91dc-274bea5b3802.html [<https://perma.cc/Z56K-SX4W>] (discussing Representative Kahn’s goals for legislation). Representative Kahn’s legislation essentially adopts the Nordic Model, viewing sex workers as victims of trafficking who are revictimized by criminalization. See *id.* (suggesting legislation adopts Nordic Model). The Nordic Model, rebranded under the name the “Equality Model,” has gained traction in Massachusetts. See, e.g., *The Equality Model*, EMMA COALITION, <https://equalitymodelma.org/the-equality-model> [<https://perma.cc/JM7D-X93L>] (supporting Equality Model in Massachusetts). Advocates for this model, such as Representative Kahn, Senator Harriette Chandler, and the nonprofit LIFT, argue for its adoption to eradicate prostitution, which they view as inherently violent towards women. See *LIFT Is Ending the Sex Trade*, LIVING IN FREEDOM TOGETHER (LIFT), <https://www.liftworchester.org/vision> [<https://perma.cc/5JB4-G69V>] (providing mission under Nordic Model to end prostitution); *What Is the Equality Model?*, LIVING IN FREEDOM TOGETHER (LIFT), <https://www.liftworchester.org/about-the-equality-model> [http-

parts of Massachusetts’s criminal code that allows police to target “common night walkers” and “common street walkers.”⁴⁴ The common night walking law is particularly harmful to the transgender community, as police may stop, search, and arrest transgender individuals on suspicion of sex work merely for “walking while trans.”⁴⁵

3. Arguments for Criminalization

Social reformers during the Progressive Era justified prostitution’s criminalization with societal concerns of moral decay, changes in family structure and women’s roles, and public health hysteria.⁴⁶ Today, advocates justify continued criminalization with five concerns.⁴⁷ Although there is evidence to the contrary, they argue that prostitution causes an increase in crime.⁴⁸ Viewing all sex workers as victims of sex trafficking, criminalization advocates contend that

[s://perma.cc/2KZA-7S3N](https://perma.cc/2KZA-7S3N)] (labeling prostitution “inherently violent” and advocating for Nordic Model); *The Argument: Should Massachusetts Remove Criminal Penalties for Prostitutes?*, BOS. GLOBE (Feb. 15, 2020), <https://www.bostonglobe.com/2020/02/15/metro/argument-should-massachusetts-remove-criminal-penalties-prostitutes/> [<https://perma.cc/8CBD-CQUR>] [hereinafter *The Argument*] (discussing Representative Kahn’s goal for Nordic Model in Massachusetts). By criminalizing clients and pimps and providing exit opportunities to sex workers, Massachusetts supporters of the Nordic Model believe they can decrease the demand for prostitution and eventually eradicate prostitution. See, e.g., *The Argument, supra* (noting model will focus on restorative justice and rehabilitation); *The Equality Model, supra* (stating prostitution’s existence “not inevitable”); *What Is the Equality Model, supra* (describing goals for Nordic Model in Massachusetts).

44. See S. 992, 192d Gen. Ct. (Mass. 2021) (removing “common night walkers” and “common street walkers” from criminal code).

45. See Bennett H. Klein, *Testimony of GLBTQ Legal Advocates & Defenders in Support of H 1800 and S 992, An Act to Stop Profiling Transgender People and Low-Income Women*, GLAD LEGAL ADVOC. & DEFS. (June 15, 2021), <https://www.glad.org/cases/stop-profiling-transgender-people-and-low-income-women/> [<https://perma.cc/4MLA-CCUK>] (expressing support for removal of “common night walkers” and “common street walkers” from criminal code); Grant, *supra* note 11 (stating bill would repeal criminal code analogous to “walking while trans” ban). Advocates and legislators argue repealing this law is necessary because police disproportionately utilize it to profile and arrest low-income women and transgender women of color merely for standing outside on the street. See Jamie Eldridge, *Pride Month: Empowering and Protecting LGBTQ+ People & Intersectionality with Sex Worker Reform*, OFF. OF STATE SENATOR JAMIE ELDRIDGE (June 16, 2021), <https://www.senatoreldridge.com/blogposts/pride-month-empowering-and-protecting-lgbtq-people-and-intersectionality-with-sex-worker-reform> [<https://perma.cc/FVG3-TUEY>] (discussing hearing on proposed legislation).

46. See Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN’S L.J. 47, 52-55 (1995) (providing background to prostitution’s criminalization); Benitez et al., *supra* note 2, at 332 (stating groups concerned with morality crusaded against prostitution); *supra* notes 29-31 and accompanying text (discussing public health concerns leading to regulations and Chamberlain–Kahn Act). During the Progressive Era, prostitution was attributed to rising divorce rates, falling birth rates, increases in working women, and the rise in feminism. See Lucas, *supra*, at 53 (describing morality and family structure concerns).

47. See Anderson, *supra* note 28, at 107 (outlining five modern justifications for criminalization).

48. See *Why Prostitution Shouldn’t Be Legal*, DEMAND ABOLITION, <https://www.demandabolition.org/research/evidence-against-legalizing-prostitution/> [<https://perma.cc/2VTJ-82KE>] (arguing legalizing and decriminalizing prostitution promotes crime). But see, e.g., Anderson, *supra* note 28, at 108 (stating no cause-and-effect relationship between prostitution and crime). Because prostitution is generally criminalized, sex workers need to avoid detection and interaction with the police, leading them to seek protection from organized crime. See Anderson, *supra* note 28, at 108 (discussing relationship between criminalization of prostitution and organized crime).

prostitution is a form of gender-based violence.⁴⁹ Using this victimization narrative, they argue that prostitution commodifies, degrades, and objectifies sex workers.⁵⁰ Rooted in concerns established during the Progressive Era, criminalization advocates maintain that prostitution violates religious values and traditional family values.⁵¹ Finally, they insist that prostitution increases the spread of STDs.⁵²

4. Arguments for Full Decriminalization

The movement to fully decriminalize prostitution primarily focuses on the adverse impacts of criminalization.⁵³ Public health organizations contend that criminalization increases the prevalence of STDs and decreases sex workers' access to healthcare due to the resulting stigma.⁵⁴ Advocates for full

49. See Anderson, *supra* note 28, at 113-14 (detailing exploitation rationale); *Why Prostitution Shouldn't Be Legal*, *supra* note 48 (equating prostitution to gender-based violence and trafficking). Proponents of criminalization suggest that because most prostitutes are either female or transgender and most buyers are male, this dynamic is a form of gender-based violence. See *Why Prostitution Shouldn't Be Legal*, *supra* note 48 (stating women prostitutes face exceptional threat of murder and violence by male buyers). Sex workers, scholars, and supporters of full decriminalization do not dispute that some sex workers are exploited—regardless of their gender—but do not agree that all sex workers are exploited. See, e.g., Anderson, *supra* note 28, at 113-14 (proffering exploitation narrative ignores some sex workers' conscious choice to engage in prostitution).

50. See David A. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1220 (1979) (discussing moral arguments supporting criminalization); Anderson, *supra* note 28, at 112-13 (articulating objectification and commodification rationale).

51. See Richards, *supra* note 50, at 1220-21 (discussing moral objections to commercialized sex); Lucas, *supra* note 46, at 53 (overviewing Progressive Era concerns regarding prostitution's influence on changing family structure and women's roles); Anderson, *supra* note 28, at 107 (noting religious and family justifications for criminalization). But see Anderson, *supra* note 28, at 115-17 (arguing imposing private morality or virtuous behavior on another violates basic human rights). Some legal scholars argue that laws regulating private morality attempt to control behavior that often does not impact others but instead is merely a result of societally-imposed opinions about personal behavior that violate freedom of choice. See Anderson, *supra* note 28, at 115-16 (rebutting morality arguments supporting criminalization).

52. See *supra* notes 29-31 and accompanying text (discussing public health concerns leading to regulations and Chamberlain-Kahn Act); Lucas, *supra* note 46, at 54-55 (summarizing concerns for spread of venereal diseases and prostitution); Anderson, *supra* note 28, at 110 (reviewing public health concerns).

53. See North, *supra* note 19 (interviewing sex workers and discussing their harmful experiences with criminalization). The sex workers' rights movement, as it exists today, originated with the 1973 founding of the sex workers' rights group, Call Off Your Old Tired Ethics (COYOTE). See *id.* (suggesting COYOTE's founding sparked modern sex workers' rights movement); see also *COYOTE Founded in California*, GLOB. NETWORK OF SEX WORK PROJECTS, <https://www.nswp.org/fr/node/2359> [<https://perma.cc/PSU8-G3HT>] (stating COYOTE called for decriminalization and provided legal and medical services to sex workers). Today's advocates view decriminalization "as part of a larger decades-long liberalization of American mores, like shifting Sunday bans on selling alcohol and legalizing marijuana." McKinley, *supra* note 40. Advocates additionally frame decriminalization as "a tacit admission that modern law enforcement and age-old moral indignation has done little to stem the practice," comparing the criminalization of prostitution to the criminalization of marijuana. See *id.* "We've learned this lesson many times with the prohibition of alcohol, or criminalization of abortion, or even the criminalization of marijuana: The black market creates dark circumstances and provides cover for a lot of violence and exploitation. . . ." *Id.*

54. See Ine Vanwesenbeeck, *Sex Work Criminalization Is Barking Up the Wrong Tree*, 46 ARCHIVE OF SEXUAL BEHAV. 1631, 1632-35 (2017) (noting criminalization increases transmission of diseases and decreases

decriminalization point to qualitative and quantitative evidence demonstrating that any form of criminalization—including the Nordic Model—increases violence towards sex workers mainly due to unequal protection under the law and the stigma associated with engaging in illegal activity.⁵⁵ Full decriminalization

access to healthcare); Platt et al., *supra* note 4, at 42–43 (finding any form of criminalization increases prevalence of HIV and STDs); North, *supra* note 19 (discussing organizational support for full decriminalization); *Amnesty International Policy*, *supra* note 16 (recommending full decriminalization of consensual prostitution based on evidence criminalization harms sex workers); GLOB. COMM’N ON HIV & L., *supra* note 2, at 9–10 (calling for governments to fully decriminalize consensual sexual behavior to reduce spread of HIV); *New Guidelines to Better Prevent HIV in Sex Workers*, *supra* note 13 (affirming support for decriminalization to better protect sex workers and reduce STDs). Studies show that full decriminalization could avert up to 46% of HIV infections when coupled with sex-worker-led intervention and community empowerment. See Vanwesenbeeck, *supra*, at 1633 (noting projected reduction in HIV). Additionally, studies indicate that the risk of HIV and STDs increases up to four times among sex workers with criminalization-related experiences, such as arrest, prison, or interactions with the police. See *id.* (observing criminalization-related experiences amplify risk of HIV and STDs); see also Platt et al., *supra* note 4, at 42 (recognizing causal link between criminalization’s resulting police practices and increase risk of STDs and HIV). Rhode Island inadvertently decriminalized indoor prostitution in 1980, and the statewide incidence of gonorrhea diminished by 40%. See Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health*, 85 *REV. ECON. STUD.* 1683, 1684 (2018) (noting decriminalization’s effect of reducing gonorrhea statewide). The stigma resulting from criminalization impacts the quality and accessibility of healthcare, leading to unmet medical treatment and insufficient access to condoms to prevent disease. See Vanwesenbeeck, *supra*, at 1635 (observing impact of stigmatization on healthcare).

55. See Platt et al., *supra* note 4, at 42–44 (linking partial and full criminalization with increased risk of STDs and violence from clients); Kathleen N. Deering et al., *A Systematic Review of the Correlates of Violence Against Sex Workers*, *AM. J. PUB. HEALTH*, May 2014, at e42 (stressing any form of criminalization creates climate of tolerance of violence, thus perpetuating violence); Armstrong, *supra* note 7, at 1292 (discussing stigma, violence, and criminalization). Extensive qualitative synthesis of research illustrates that stigma and violence toward sex workers are institutionalized and legitimized. See Platt et al., *supra* note 4, at 42–43 (outlining research demonstrating criminalization’s impact on sex workers). Research also shows that when sex workers report crimes towards them, the police criminalize, blame, and ignore them. See *id.* at 43 (summarizing research discussing police and society’s response). Further, research suggests a strong association between rushed negotiations and client-perpetrated violence because sex workers cannot effectively screen violent clients. See ACLU, *IS SEX WORK DECRIMINALIZATION THE ANSWER? WHAT THE RESEARCH TELLS US 5-6* (2020), https://www.aclu.org/sites/default/files/field_document/aclu_sex_work_decrim_research_brief_new.pdf [<https://perma.cc/QX2F-3DD8>] (discussing association between rushed negotiations and client violence); Vanwesenbeeck, *supra* note 54, at 1634 (stating Nordic Model led to increase in violence due to hurried negotiations and screenings). Research demonstrates that any form of criminalization, including the Nordic Model, leads to physical or sexual coercion by police through threats of detention, extortion, and violence—including rape. See ACLU, *supra*, at 6–7 (indicating 78% of 250 sex workers surveyed experienced at least one violent encounter with police). Notably, studies from Britain, India, Russia, and Canada demonstrate that street-based sex workers face a much greater risk of experiencing violence—both by police and clients—than others. See Deering et al., *supra*, at e48 (recognizing street-based sex workers face high risk of violence). As one study demonstrates, street-based sex workers are six times more likely to encounter client violence than indoor sex workers. See *id.* (highlighting research indicating increased prevalence of violence in street-based sex work). After New Zealand adopted full decriminalization, the risk of violence toward sex workers decreased, and sex workers are now more likely to report violence towards them. See N.Z. PROSTITUTES’ COLLECTIVE, *CEDAW SHADOW REPORT 4-5* (2018), https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/NZL/INT_CEDAW_NGO_NZ-L_31455_E.pdf [<https://perma.cc/BK6F-ARKL>] (acknowledging significant decline in violence and exploitation after full decriminalization); see also *infra* notes 87–89 and accompanying text (discussing full decriminalization’s impact on violence and reporting in New Zealand).

advocates support their argument with evidence demonstrating that criminal records for prostitution increase barriers to social services and public benefits, leading to food and housing insecurity.⁵⁶ Women of color, especially Black cis-gender and transgender women, are particularly vulnerable to the resulting harms of criminalization because they are subject to disproportionate policing and pervasive harassment and violence.⁵⁷ Social workers and advocates for full decriminalization argue that full decriminalization assists with identifying and protecting victims of sex trafficking because criminalization drives nontrafficked, voluntary sex workers underground to avoid arrest, making it difficult for authorities to distinguish between consensual sex workers and trafficked victims.⁵⁸

Legal scholars argue there are insufficient rationales for prostitution's continued criminalization, categorizing prostitution's criminalization as legislation based on private morality derived from the majority sentiment that commercialized sex is morally wrong.⁵⁹ Scholars differentiate private-morality legislation—

56. See YALE GLOB. HEALTH JUST. P'SHIP, *supra* note 13, at 1 (discussing socioeconomic impact of criminalization). While proponents of criminalization argue it “saves” sex workers from prostitution, scholars point out criminalization actually increases recidivism, making it even more difficult for sex workers who want to exit the profession. See Vanwesenbeeck, *supra* note 54, at 1635 (recognizing criminalization leads to difficulty obtaining employment, housing, and government benefits).

57. See *Race, Sex Work, and Stereotyping*, DECRIMINALIZE SEX WORK, <https://decriminalizesex.work/why-decriminalization/briefing-papers/race-sex-work-and-stereotyping/> [<https://perma.cc/2XJQ-AZXZ>] (noting racial disparities in arrest and sentencing of sex workers); *From Margin to Center: Sex Work Decriminalization Is a Racial Justice Issue*, AMNESTY INT'L (Dec. 12, 2016), https://www.amnestyusa.org/from-margin-to-center-sex-work-decriminalization-is-a-racial-justice-issue/#_ftn1 [<https://perma.cc/CP5C-SQ9K>] [hereinafter *Sex Work Decriminalization Is a Racial Justice Issue*] (discussing racial disparities in enforcement and policing of prostitution). In 2015, across the United States, Black individuals comprised nearly 40% of adults arrested for prostitution and 60% of minors arrested for prostitution. See *Sex Work Decriminalization Is a Racial Justice Issue*, *supra* (providing statistics demonstrating disparity in arrests). Between 2008 and 2018, 55% of individuals convicted for prostitution in New York City were Black—despite only comprising 33% of sex workers. *Race, Sex Work, and Stereotyping*, *supra*, at fig.1. Advocates argue that laws regulating prostitution and drugs—including marijuana—both serve as vehicles for criminalizing Black communities, pointing out the similarities in disparities between arrests of Black drug users and Black sex workers. See *Sex Work Decriminalization Is a Racial Justice Issue*, *supra* (arguing United States treats policing of prostitution and drugs similarly); Noah Berlatsky, *The Imagined Sex Worker*, PAC. STANDARD (June 14, 2017), <https://psmag.com/social-justice/black-female-sex-work-prostitution-police-arrest-jail-lapd-daniele-watts-90974> [<https://perma.cc/JP3L-G2ST>] (recognizing similarities in policing of prostitution and drug use).

58. See Benitez et al., *supra* note 2, at 361 (stating decriminalization would lead to more sex workers reporting sex trafficking).

59. See, e.g., Anderson, *supra* note 28, at 102, 115-17 (noting criminalization justified merely on private morality rarely sufficient reason to uphold); Michele Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward a Reformation of Drug and Prostitution Regulation*, 78 UMKC L. REV. 101, 103-06, 113-14, 123 (2009) (arguing criminalization based on private morals ineffective and harmful towards sex workers); Phil Hubbard et al., *Prostitution Policy, Morality and the Precautionary Principle*, 16 DRUGS & ALCOHOL TODAY 194, 194-95 (2016) (labeling laws criminalizing prostitution “masquerading” public health and harm reduction initiatives). As the United States Supreme Court recognized, “the fact that a governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. . . . The State cannot demean [petitioners’] existence or control their destiny by making their private sexual conduct a crime.” *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

laws aiming to enforce society's perception of virtuous behavior even though the behavior does not harm others—from public-morality legislation—laws aiming to protect society by preventing people from harming others.⁶⁰ They argue prostitution's criminalization is private-morality legislation because there is no threat to the public when individuals consensually choose to exchange sex for money, which differentiates it from other crimes, such as homicide, where the goal is to protect the general public from harm.⁶¹ Scholars note that prostitution has survived for thousands of years because the decision to engage in consensual commercial sex is a highly personal choice based on an individual's circumstances.⁶² Analogizing prostitution with the protected right to engage in sodomy and homosexuality, legal scholars further support decriminalization by arguing criminalization infringes on an individual's liberty interest by constraining when one can engage in consensual sexual activity.⁶³

5. Sweden's Adoption of the Nordic Model

Sweden currently utilizes the Nordic Model—which places legal penalties only on buyers, not sex workers, classifying all sex workers as victims—with the goal of decreasing and eventually eradicating prostitution.⁶⁴ The Swedish government believes that if prostitution exists, gender equality will remain unattainable because human traffickers and male buyers profit from economically, socially, legally, and politically oppressing women and children.⁶⁵ Nevertheless, after over twenty years of the Nordic Model in Sweden, there is no indication of a decrease in prostitution or sex trafficking.⁶⁶

60. See Anderson, *supra* note 28, at 115-17 (contrasting private and public morality).

61. See, e.g., Anderson, *supra* note 28, at 115-16 (differentiating laws prohibiting killing from prostitution when discussing private and public morality); Alexandre, *supra* note 59, at 104-06 (arguing prostitution's criminalization fails to accomplish its goals).

62. See, e.g., Alexandre, *supra* note 59, at 103-06, 109-10, 113-14 (contending prostitution fails to cause "concrete harm" and calling morality-based criminalization "logically flawed").

63. See Anderson, *supra* note 28, at 98-102 (arguing criminalization implicates liberty interests); see also *Lawrence*, 539 U.S. at 577 (recognizing constitutional liberty interest creates right to engage in private sexual conduct without government intervention).

64. See Hynes, *supra* note 15, at 25 (noting Nordic Model drafters victimized sex workers in adopting legislation); MINISTRY OF INDUS., EMP. & COMMC'NS, PROSTITUTION AND TRAFFICKING IN HUMAN BEINGS 1-2 (2005), <https://eurcenter.net/wp-content/uploads/2020/09/Prostitution-and-Trafficking-in-Human-Beings.pdf> [<https://perma.cc/5ULB-42PG>] (stating prostitution form of violence against women and children); Nembhard et al., *supra* note 15 (discussing classification of sex workers under Nordic Model); BARNETT & CASAVANT, *supra* note 11, at 13 (acknowledging Sweden's goal of eradicating all gender inequality, including prostitution). Legislators passed the Nordic Model without consulting sex workers; and when sex workers raised concerns, they were ignored and accused of having "false consciousness." See Hynes, *supra* note 15, at 25.

65. See MINISTRY OF INDUS., EMP. & COMMC'NS, *supra* note 64, at 1-2 (recognizing prevalence of poverty, homelessness, and drug dependency for women who engage in prostitution).

66. See Jay Levy & Pye Jakobsson, *Sweden's Abolitionist Discourse and Law: Effects on the Dynamics of Swedish Sex Work and on the Lives of Sweden's Sex Workers*, 14 CRIMINOLOGY & CRIM. JUST. 593, 597 (2014) (finding no evidence of decrease in prostitution since law's adoption); Hynes, *supra* note 15, at 27 (stating no decrease in sex trafficking after Sweden adopted Nordic Model); Sarah Kingston & Terry Thomas, *No Model in*

Sex workers and advocates for sex workers' rights instead report several consequences the Nordic Model has on the safety of sex workers, such as making sex workers more vulnerable to exploitation and violence, and making trafficking victims more reluctant to report exploitation.⁶⁷ Under the Nordic Model, police primarily focus on street-based prostitution, which results in a sharp decrease in clients willing to buy sex on the street due to fear of prosecution.⁶⁸ This reduction in clients creates more competition among street-based sex workers, requiring them to accept clients they would have previously rejected—due to violence or unsafe sexual requests—for lower rates.⁶⁹ And because clients fear arrest and prosecution, street-based sex workers must engage in rushed negotiations, depriving them of the ability to assess the safety of a client or transaction and leading to increased violence towards sex workers.⁷⁰ This fear of prosecution also makes it difficult for sex workers to report abusive clients and prevent future violence because fewer clients provide sex workers with identifying information.⁷¹

Sex workers and advocates for sex workers' rights argue the Nordic Model has several repercussions on sex workers' health and harm-reduction initiatives.⁷² Advocates for sex workers' rights note the difficulty in promoting safe sex because the Nordic Model discourages state-sponsored service providers from distributing condoms, as Sweden views providing condoms as tacitly endorsing prostitution.⁷³ Additionally, social workers and healthcare providers

Practice: A 'Nordic Model' to Respond to Prostitution, 71 CRIME L. & SOC. CHANGE 423, 429 (2018) (acknowledging trafficking victims less likely to report exploitation post-Nordic Model).

67. See Hynes, *supra* note 15, at 26 (discussing consequences including difficulty promoting safe sex and increased risks to sex workers); GLOB. NETWORK OF SEX WORK PROJECTS, THE REAL IMPACT OF SWEDISH MODEL ON SEX WORKERS ADVOCACY TOOLKIT 2:1 (2018), <https://www.nswp.org/sites/default/files/The%20Real%20Impact%20of%20the%20Swedish%20Model%20on%20Sex%20Workers%20Advocacy%20Toolkit%20-%20November%202015.pdf> [<https://perma.cc/G7ZY-53CQ>] (noting sex workers face increasing difficulties); Kingston & Thomas, *supra* note 66, at 429 (stating trafficking victims less likely to report due to reprisal and inherent distrust in police).

68. See GLOB. NETWORK OF SEX WORK PROJECTS, *supra* note 67, at 2:2 (recognizing decrease in clients after passage leading to greater competition).

69. See *id.* at 2:3, 2:5 (summarizing consequences of legislation on negotiations); Petra Östergren, *Sex Workers Critique of Swedish Prostitution Policy*, http://www.petraostergren.com/Files.aspx?f_id=115326 [<https://perma.cc/GQV9-67GQ>] (stating sex workers find it harder to assess clients and must accept lower prices). With less demand and less time to negotiate, street-based sex workers are forced to accept riskier clients and engage in high-risk sexual services, leading to poor self-esteem and exposure to infection. See Östergren, *supra* (recognizing street-based sex workers no longer able to refuse “perverted” clients).

70. See GLOB. NETWORK OF SEX WORK PROJECTS, *supra* note 67, at 2:3 (noting sex workers have less time to assess risks of clients); Hynes, *supra* note 15, at 26 (recognizing uptick in violence).

71. See GLOB. NETWORK OF SEX WORK PROJECTS, *supra* note 67, at 2:3 (stating fewer clients provide identifying information impacting who sex workers can report).

72. See Hynes, *supra* note 15, at 26 (recognizing difficulty in promoting safe sex); Levy & Jakobsson, *supra* note 66, at 600 (discussing lack of state-sponsored harm reduction initiatives).

73. See GLOB. NETWORK OF SEX WORK PROJECTS, *supra* note 67, at 3:3 (describing law's impact on sex workers' ability to procure condoms). In Sweden, the purchase of sex is considered a form of violence; thus, distributing condoms is viewed as providing the tools to commit a violent offense, and not as a means to promote

voice concerns about their decreased ability to track and assist sex workers and the diversion of outreach funds to prosecute clients.⁷⁴ When sex workers seek assistance from state-sponsored service providers, such as the National Coordinator Against Trafficking and Prostitution and Stockholm's Prostitution Unit, those providers expect sex workers to disavow their work as a condition of receiving assistance.⁷⁵ For those sex workers who can move off-street to continue working, the hidden nature of their work decreases their ability to receive health and social services.⁷⁶

Further, relationships between police and sex workers have deteriorated since Sweden adopted the Nordic Model, with reports that the legislation incites significant abuse and violence by police.⁷⁷ Sex workers report feeling "hunted" by police, and some even report police videotaping them having sex with clients to collect evidence and being strip-searched for condoms.⁷⁸ Additionally, the increase in police surveillance under the Nordic Model impacts sex workers' living conditions, as police harass sex workers at home and threaten to prosecute their landlords for living off the proceeds of prostitution.⁷⁹ As a result of this abuse, distrust, and fear of eviction and homelessness, sex workers—and sex trafficking

health and harm reduction. *See id.* (explaining Swedish views on providing condoms). Because sex workers are unable to enforce regular use of condoms and other safe sexual practices, they are especially vulnerable to STDs, including HIV. *See* GLOB. NETWORK OF SEX WORK PROJECTS, THE REAL IMPACT OF THE SWEDISH MODEL ON SEX WORKERS 9 (2015), <https://www.nswp.org/sites/nswp.org/files/Swedish%20Model%20Advocacy%20Toolkit%20Community%20Guide%2C%20NSWP%20-%20November%202015.pdf> [<https://perma.cc/N7YK-YR7-Q>] (discussing effect of inconsistent condom use and safe sex on HIV). Further, research found that 30% of sex workers interviewed in Sweden have experienced barriers getting an HIV test after the Nordic Model. *See id.* (quantifying insufficient access to health services).

74. *See* Hynes, *supra* note 15, at 26 (voicing providers' concerns surrounding outreach).

75. *See* Levy & Jakobsson, *supra* note 66, at 601-02 (noting sex workers must victimize themselves to receive services); WORLD AIDS CAMPAIGN, *supra* note 8, at 11 (recognizing when sex workers seek assistance, police do not help but instead view them suspiciously). Regarding sex workers who choose to remain in the profession, the National Coordinator Against Trafficking and Prostitution stated, "I don't spend my energy on this group of people." *See* Levy & Jakobsson, *supra* note 66, at 601-02 (quoting interview with National Coordinator Against Trafficking and Prostitution). A sex worker who visited the Stockholm Prostitution Unit reported the Unit would only assist her if she ceased selling sex for three months. *See id.* at 602 (summarizing sex worker's experience with Stockholm Prostitution Unit).

76. *See* GLOB. NETWORK OF SEX WORK PROJECTS, *supra* note 67, at 2:2, 2:5 (acknowledging sex workers who moved off-street increased their distance from health and social services). Because the Nordic Model implicitly forces sex workers to sell in more hidden spaces, the opportunity for intervention and protection by health and social services providers decreases. *See* Levy & Jakobsson, *supra* note 66, at 598-99 (noting law's impact on displacement). Sex workers selling on the street are often resource-poor and, thus, face difficulties selling from indoor spaces due to lack of internet or phone access. *See id.* at 599 (observing most vulnerable sex workers experience more hardship due to law).

77. *See* Hynes, *supra* note 15, at 26 (observing declining relationship with police).

78. *See* Östergren, *supra* note 69 (describing sex workers' feelings surrounding police); Hynes, *supra* note 15, at 26 (detailing police actions towards sex workers).

79. *See* Hynes, *supra* note 15, at 26 (summarizing impact on sex workers' living conditions).

victims—are less likely to report violence to keep their identities hidden and avoid reprisal.⁸⁰

6. *New Zealand's Implementation of Full Decriminalization*

Unlike Sweden, New Zealand fully decriminalized prostitution with the Prostitution Reform Act of 2003 (PRA).⁸¹ In passing the PRA, New Zealand intended to create a decriminalization framework that safeguards sex workers' human rights, protects them from exploitation, and promotes sex workers' welfare, health, and safety.⁸² Under the PRA, the New Zealand government monitors the effects of decriminalization through the Prostitution Law Review Committee (PLRC) and regulates prostitution by prescribing occupational and health standards.⁸³ Advocates argue New Zealand's full decriminalization serves as an example for other countries because the PRA has notably decreased violence toward sex workers, improved relationships with police, and lowered the risk of STDs.⁸⁴

The New Zealand government, advocates for sex workers' rights, and sex workers all report better working conditions and increased health and safety since the PRA's enactment.⁸⁵ Sex workers express an increased ability to successfully

80. See *id.* (stating sex workers struggle to keep identities hidden to avoid abuse); Kingston & Thomas, *supra* note 66, at 429 (acknowledging trafficked victims less likely to report due to reprisal and inherent distrust in police). The law significantly impacts nonresident sex workers because the government immediately deports them if they are found to engage in prostitution. See Don Kulick, *Sex in the New Europe: The Criminalization of Clients and Swedish Fear of Penetration*, 3 ANTHROPOLOGICAL THEORY 199, 205 (2003) (indicating nonresident sex workers' hesitance to report violence).

81. See Prostitution Reform Act 2003, pt. 1, s 3 (N.Z.) (decriminalizing prostitution); *supra* note 64 and accompanying text (acknowledging Sweden's use of Nordic Model); PARLIAMENTARY LIBR., PROSTITUTION LAW REFORM IN NEW ZEALAND 1 (2012), <https://www.parliament.nz/resource/enNZ/00PLSocRP12051/c62a0-0e57bd36e84aed237e357af2b7381a39f7e> [<https://perma.cc/9QN3-35SR>] (discussing passage and aspects of PRA). Migrant sex workers, however, remain criminalized under the PRA. See Prostitution Reform Act 2003, pt. 2, s 19 (N.Z.) (continuing to criminalize migrant sex workers).

82. See Prostitution Reform Act 2003, pt. 1, s 3 (N.Z.) (setting forth PRA's purpose). Prostitution remains illegal for persons under eighteen years. *Id.* at pt. 2, ss 20-23 (prohibiting minors from engaging in prostitution).

83. See Prostitution Reform Act 2003, pt. 4, s 43 (N.Z.) (creating PLRC to review legislation's results); *id.* at pt. 2, s 8 (establishing health and safety requirements); Platt et al., *supra* note 4, at 4-5 (noting New Zealand regulates prostitution through occupational and health standards).

84. See Gillian M. Abel, *A Decade of Decriminalization: Sex Work 'Down Under' but Not Underground*, 14 CRIMINOLOGY & CRIM. JUST. 580, 581-82 (2014) (acknowledging decriminalization in New Zealand brought positive changes and suggesting adoption in other countries); *infra* notes 86-89 and accompanying text (outlining positive impact of full decriminalization in New Zealand). Scholars also propose that the PRA is a model for other nations because sex workers were involved in its creation; therefore, it better reflects their needs. See Abel, *supra*, at 582 (noting sex workers' involvement in creation of PRA). A 2007 report found 95.9% of sex workers felt they have legal rights after the adoption of the PRA. See GILLIAN ABEL ET AL., THE IMPACT OF THE PROSTITUTION REFORM ACT ON THE HEALTH AND SAFETY PRACTICES OF SEX WORKERS 139 tbl.7.1 (2007).

85. See ABEL ET AL., *supra* note 84, at 12-13, 15-16 (concluding positive impacts of PRA). The PLRC is required to review the PRA's impact on sex workers and report its findings to the New Zealand Minister of Justice. See Prostitution Reform Act 2003, pt. 4, s 42(1)(b)(ii) (N.Z.) (requiring PLRC to assess PRA's impact on sex workers).

negotiate safer sex because the PRA mandates that sex workers, brothel managers, and clients adopt safe sexual practices like the use of protective barriers to protect sex workers and clients from HIV and other STDs.⁸⁶ As a result of the PRA, sex workers can better recognize dangerous clients with the increased information sharing and feel more empowered to refuse clients due to sex workers' legal status and a supportive police presence.⁸⁷ More than half of sex workers who were working before the PRA report improved relationships with police, creating a higher likelihood sex workers will report violence towards them.⁸⁸ Violence toward and exploitation of nonmigrant sex workers have also significantly decreased post-PRA.⁸⁹ Notably, New Zealand's immigration service has not reported any incidents of sex trafficking post-PRA.⁹⁰

86. See Prostitution Reform Act 2003, pt. 2, s 8(1)(a) (N.Z.) (requiring use of protective barrier for sexual services to protect against STDs); MINISTRY OF JUST., REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT OF 2003 at 46, 50 (2008), <https://prostitutescollective.net/wp-content/uploads/2016/10/report-of-the-nz-prostitution-law-committee-2008.pdf> [<https://perma.cc/6RDL-UEY7>] (discussing sex workers' increased ability to refuse clients and negotiate safe sexual practices); WORLD AIDS CAMPAIGN, *supra* note 8, at 3 (stating PRA protects sex workers from HIV). If sex workers do not use protection, they are subject to a fine. See Prostitution Reform Act 2003, pt. 2, s 8(2) (N.Z.). A 2007 report conducted by the PLRC found nearly 78% of sex worker respondents reported using a condom for protection with clients. See ABEL ET AL., *supra* note 84, at 124 tbl.6.7. When clients have deliberately removed condoms during sex, sex workers have contacted the police, and the police have investigated these claims. See WORLD AIDS CAMPAIGN, *supra* note 8, at 20 (summarizing PRA's impact on safe sex). Public health organizations point to the importance of consistent use of protective measures to reduce the spread of STDs. See, e.g., *New Guidelines to Better Prevent HIV in Sex Workers*, *supra* note 13 (noting increased condom use leads to reduction in HIV and STDs).

87. See Hynes, *supra* note 15, at 27 (noting information sharing allows sex workers to avoid dangerous clients and lowers risk of violence); ABEL ET AL., *supra* note 84, at 116 tbl.6.2, 118 (highlighting 64.8% of sex workers felt better able to refuse clients); Platt et al., *supra* note 44, at 35 (recognizing respectful police presence and information sharing with police contributed to improvement in safety); ABEL ET AL., *supra* note 84, at 168 (stating sex workers now feel more protected from violent attacks). Post-PRA, sex workers report an increased inclination to share information on "bad clients," with sex workers citing the "Ugly Mugs" book kept by some branches of the New Zealand Prostitutes' Collective to recognize dangerous clients. See ABEL ET AL., *supra* note 84, at 122-23 (discussing sources of information); Hynes, *supra* note 15, at 27 (linking reduction in violence to sharing of information).

88. See ABEL ET AL., *supra* note 84, at 162-64, 167-68 (discussing improvement in relationship with police since PRA and greater likelihood of reporting violence); Platt et al., *supra* note 4, at 37 (recognizing improved relationships with police, greater access to justice, and increased confidence to report violence). Specifically, 57% of sex workers surveyed reported police attitudes improving post-PRA and over 50% reported at least some police were concerned for their safety. See ABEL ET AL., *supra* note 84, at 164 tbl.7.5 (quantifying perception of police).

89. See N.Z. PROSTITUTES' COLLECTIVE, *supra* note 55, at 5 (reporting notable decline in violence and exploitation to United Nations). Prior to the PRA, 41% of sex workers surveyed reported they were physically assaulted compared to 13.4% surveyed post-PRA. See *id.* Additionally, prior to the PRA, 27% of sex workers reported being raped compared to 5.3% post-PRA. See *id.*

90. See MINISTRY OF JUST., *supra* note 86, at 167 (declaring lack of identified sex trafficking in New Zealand). *But see* OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, 2021 TRAFFICKING IN PERSONS REPORT: NEW ZEALAND, <https://www.state.gov/reports/2021-trafficking-in-persons-report/new-zealand/> [<https://perma.cc/CH9V-94NR>] (evaluating New Zealand's efforts to combat trafficking and finding it did not meet minimum standards). While the PLRC was satisfied with the Immigration Service's

B. Marijuana

1. Marijuana in the United States

Like prostitution, there are varying legislative approaches to regulating marijuana.⁹¹ As of May 2022, twenty-seven states have either fully or partially decriminalized small amounts of marijuana for recreational use.⁹² As of February 2022, thirty-seven states and three territories have legalized marijuana for medical use.⁹³ Following the November 2022 midterm elections, twenty-one states and the District of Columbia have legalized small amounts of marijuana for adult recreational use.⁹⁴ Despite the movement toward legalization on the state level, marijuana remains criminalized as a Schedule I Controlled Substance under federal law.⁹⁵

findings, the Immigration Service only monitors indoor prostitution—not street-based prostitution. See MINISTRY OF JUST., *supra* note 86, at 167 (noting constraints of Immigration Service’s findings).

91. Compare *Types of Marijuana Policy Reform Laws*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/issues/legislation/types-of-marijuana-policy-reform-laws> [<https://perma.cc/W7US-HTZA>] (overviewing legislative approaches to marijuana in United States), with YALE GLOB. HEALTH JUST. P’SHP, *supra* note 8, at 1-2 (outlining approaches to prostitution laws and implications). Today, more than 70% of Americans live in states with laws that either decriminalize or legalize marijuana. See *Types of Marijuana Policy Reform Laws*, *supra* (recognizing most states have reformed marijuana laws).

92. See *Cannabis Overview*, NAT’L CONF. STATE LEGISLATURES (last updated May 31, 2022), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/BW2N-XMLW>] (providing decriminalization enactments by year); *Decriminalization*, NORML, <https://norml.org/laws/decriminalization/> [<https://perma.cc/U8JQ-L32E>] (indicating states subsequently legalized marijuana for personal use). States that have decriminalized marijuana have removed criminal penalties for possessing small amounts of marijuana for personal consumption and instead treat these offenses as local infractions. See *Decriminalization*, *supra* (defining decriminalization of marijuana).

93. See *State Medical Cannabis Laws*, NAT’L CONF. STATE LEGISLATURES (Sept. 12, 2022), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/3E2L-4AN6>] (summarizing state-by-state medical marijuana laws). States that have legalized marijuana for medical use have removed criminal penalties for using marijuana for medical purposes. See *id.* (listing commonly adopted criteria for comprehensive medical marijuana laws). In 1996, California voters passed Proposition 215 as a ballot measure, officially titled the Compassionate Use Act of 1996, legalizing medical marijuana. See Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (1996) (legalizing marijuana where physician deems use appropriate in addressing illness); Y. Lu, *Medical Marijuana Policy in the United States*, HUNTINGTON’S OUTREACH PROJECT FOR EDUC. AT STAN. (May 15, 2012), <https://hopes.stanford.edu/medical-marijuana-policy-in-the-united-states/> [<https://perma.cc/DH93-A2WY>] (discussing passage of Proposition 215).

94. See *Marijuana Laws and Ballot Measures in the United States*, BALLOTPEDIA (2022), https://ballotpedia.org/Marijuana_laws_in_the_United_States [<https://perma.cc/UD5V-BPC3>] (listing states with legalization and methods used to legalize). States that have legalized marijuana have removed criminal penalties associated with marijuana and replaced them with laws regulating its use, production, and distribution. See Brian A. Ford, *From Mountains to Molehills: A Comparative Analysis of Drug Policy*, 19 ANN. SURV. INT’L COMP. L. 197, 198 n.3 (2013) (defining legalization). Maryland’s legalization of recreational marijuana will go into effect July 1, 2023. See Paige Hopkins, *Here’s What You Need to Know About Recreational Weed in Maryland*, AXIOS (Nov. 14, 2022), <https://www.axios.com/local/washington-dc/2022/11/14/recreational-weed-maryland-laws> [<https://perma.cc/Y9HL-UXJF>] (discussing Maryland’s recent vote to legalize marijuana for recreational use).

95. See 21 U.S.C. § 802(6), (16) (defining controlled substance and defining marijuana); 21 U.S.C. § 812(c) (declaring marijuana Schedule I Controlled Substance).

2. Arguments for Legalization of Marijuana

Currently, most U.S. adults support some form of marijuana legalization, as public perception of marijuana has shifted over the past several years from a risky drug to a substance with health and lifestyle benefits.⁹⁶ One of the most frequently cited reasons for legalization is the medical benefits of marijuana use.⁹⁷ As a nation, the United States benefits from marijuana's legalization because states where marijuana is legal for medicinal use to treat pain have experienced a reduction in fatal opioid overdoses.⁹⁸ And, unlike other legalized substances such as alcohol and prescription opioids, it is almost impossible to lethally overdose on marijuana.⁹⁹

Criminal justice reform advocates argue marijuana's criminalization detrimentally impacts the criminal justice system.¹⁰⁰ Black individuals are more likely to be arrested and prosecuted for marijuana-related crimes, resulting in

96. See Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Recreational or Medical Use*, PEW RSCH. CTR. (Nov. 22, 2022), <https://pewrsr.ch/3qLOY3H> [<https://perma.cc/B5RN-XGZB>] (stating number of supporters for legalization more than doubled from 2009 to 2019); JOHN HUDAK & CHRISTINE STENGLEIN, BROOKINGS INST., *PUBLIC OPINION AND AMERICA'S EXPERIMENTATION WITH CANNABIS REFORM* 16 (2019), https://www.brookings.edu/wp-content/uploads/2019/08/9780815737896_ch1.pdf [<https://perma.cc/8DMF-CK3E>] (noting less than 5% of Americans surveyed thought marijuana more dangerous than other drugs).

97. See Jeffrey M. Jones, *In U.S., Medical Aid Top Reason Why Legal Marijuana Favored*, GALLUP (June 12, 2019), <https://news.gallup.com/poll/258149/medical-aid-top-reason-why-legal-marijuana-favored.aspx> [<https://perma.cc/38LF-9FNK>] (noting 86% of supporters of legal marijuana support legalization for medical reasons); Bryn Nelson & David B. Kaminsky, *New Momentum in Exploring Marijuana's Medical Benefits*, 129 *CYTOSOURCE: CURRENT ISSUES FOR CYTOPATHOLOGY* 575-76 (2021) (explaining marijuana's medical benefits). Research has found that marijuana effectively prevents and treats chemotherapy-induced side effects, significantly reduces symptoms of chronic pain for patients with multiple sclerosis, effectively alleviates some forms of epileptic seizures, and helps to manage chronic pain. See Nelson & Kaminsky, *supra*, at 575-76 (overviewing research on marijuana's health benefits).

98. See Marcus A. Bachhuber et al., *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010*, 174 *JAMA INTERNAL MED.* 1668, 1668 (2014) (finding states with medical marijuana laws experienced 24.8% reduction in fatal opioid overdoses); KERRY WADDELL & MICHAEL G. WILSON, *RAPID SYNTHESIS: EXAMINING THE IMPACT OF DECRIMINALIZING OR LEGALIZING CANNABIS FOR RECREATIONAL USE* 7-8 (2017) <https://www.mcmasterforum.org/docs/default-source/product-documents/rapid-responses/examining-the-impact-of-decriminalizing-or-legalizing-cannabis-for-recreational-use.pdf?sfvrsn=10> [<https://perma.cc/FVE6-FSG6>] (observing mortality rate improved over time with 33% reduction six years after medical legalization).

99. See Melia Robinson, *Here's How Much Marijuana It Would Take to Kill You*, INDEPENDENT (Nov. 8, 2017), <https://www.independent.co.uk/news/health/how-much-marijuana-take-to-kill-you-fatal-weed-a804385-6.html> [<https://perma.cc/7A54-HUHC>] (recognizing no fatal overdoses of marijuana despite widespread use); Matt Schneiderman, *Opioids vs. Marijuana: Which Is More Dangerous?*, HEALTHLINE (Sept. 7, 2018), <https://www.healthline.com/health-news/opioids-vs-marijuana#Marijuana-health-effects> [<https://perma.cc/4Q-KG-43Y-M>] (comparing marijuana's risks with prescription opioid's risks); *Marijuana Is Safer Than Alcohol: It's Time to Treat It That Way*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/special/marijuana-is-safer/> [<https://perma.cc/W7N3-VSS9>] (overviewing studies and noting marijuana's mortality rate 114 times lower than alcohol).

100. See, e.g., Cody Jorgensen, *How Marijuana Legalization Would Benefit the Criminal Justice System*, BOISE STATE UNIV.: THE BLUE REV. (Jan. 13, 2020), <https://www.boisestate.edu/bluereview/how-marijuana-legalization-would-benefit-the-criminal-justice-system/> [<https://perma.cc/66BK-PBQX>] (stating marijuana criminalization harms criminal justice system's legitimacy and credibility).

grave racial disparities.¹⁰¹ Criminal justice reformers point out that the harms of criminalization—including barriers to employment, deportation, and loss of public housing and government benefits—are far greater than the harm caused by marijuana’s consumption and serve to further exacerbate these racial disparities.¹⁰² Advocates for reform emphasize that criminalization prevents police from focusing on more serious crimes and wastes money because most marijuana arrests are for possession only, rather than distribution.¹⁰³ Not only are the monetary costs associated with policing marijuana wasteful, but reformers argue that by keeping marijuana criminalized, states lose out on the benefits of legalization—including the reduction of violence and drug trafficking.¹⁰⁴

Moreover, moral arguments that criminalization infringes on personal autonomy and individual choice have gained traction in recent years.¹⁰⁵ These arguments focus on the fundamental right to control one’s body, freedom of thought, freedom from invasion of privacy, and participation in the pursuit of happiness—

101. See, e.g., ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 5 (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_0323-2021.pdf [<https://perma.cc/6BH4-95W8>] (discussing racial disparities in marijuana possession arrests); *Racial Disparity in Marijuana Arrests*, NORML, <https://norml.org/marijuana/fact-sheets/racial-disparity-in-marijuana-arrests/> [<https://perma.cc/3LSB-4NBA>] (compiling data demonstrating disparities in marijuana arrests). On average, Black individuals are 3.64 times more likely to be arrested for marijuana possession than white individuals, despite comparable use. See ACLU, *supra*, at 5.

102. See Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 107-08 (2018) (noting fewer than 10% of users suffer from cannabis use disorder); ACLU, *supra* note 101, at 42 (recognizing racial disparities in marijuana enforcement when discussing collateral consequences of criminalization). Marijuana use disorder is the clinical term for addiction and constitutes an individual’s problematic continued use of marijuana despite developing health and social problems. See *Addiction (Marijuana or Cannabis Use Disorder)*, CTR. FOR DISEASE CONTROL & PREVENTION (Oct. 19, 2020), <https://www.cdc.gov/marijuana/health-effects/addiction.html> [<https://perma.cc/H6Z5-6CTL>] (defining cannabis use disorder).

103. See Jorgensen, *supra* note 100 (noting costs anywhere from \$1,000 to \$5,000 per arrest); Jesse Wegman, *The Injustice of Marijuana Arrests*, N.Y. TIMES (July 28, 2014), <https://nyti.ms/3EKkV1z> [<https://perma.cc/4QY-88Y3C>] (stating between 2001 and 2010 police arrested 8.2 million people for marijuana). Most marijuana-related arrests in the United States are for possession only—suggesting law enforcement is primarily arresting recreational users and not dealers. See Jorgensen, *supra* note 100 (observing possession accounted for 91% of marijuana arrests in 2018).

104. See Jorgensen, *supra* note 100 (recognizing criminalization empowers drug cartels and gangs who resort to violence to solve conflicts); DAVID J. BIER, HOW LEGALIZING MARIJUANA IS SECURING THE BORDER: THE BORDER WALL, DRUG SMUGGLING, AND LESSONS FOR IMMIGRATION POLICY, CATO INST. 7-8 (2018), <https://www.cato.org/policy-analysis/how-legalizing-marijuana-securing-border-border-wall-drug-smuggling-lessons> [<https://perma.cc/FJZ5-MFHE>] (noting state-level legalization decreases amount of drug smuggling into United States).

105. See, e.g., Jason Lemon, *Republicans Push for Federal Legalization of Marijuana to Ensure ‘Individual Liberty’*, NEWSWEEK (May 5, 2021), <https://www.newsweek.com/republicans-push-federal-legalization-marijuana-ensure-individual-liberty-1591296> [<https://perma.cc/Q6UW-3TQ9>] (noting Republican lawmakers introduced legislation for federal legalization to ensure individual liberty); Will Yakowicz, *Billionaire Charles Koch on Why Cannabis Should Be Legal*, FORBES (July 27, 2021), <https://www.forbes.com/sites/willyakowicz/2021/07/27/billionaire-charles-koch-on-why-cannabis-should-be-legal/?sh=63cb2b924a73> [<https://perma.cc/9RCK-KB24>] (discussing libertarian donor Charles Koch’s financial support for legalization); Eric Blumenson & Eva Nilsen, *Liberty Lost: The Moral Case for Marijuana Law Reform*, 85 IND. L.J. 279, 281-82 (2010) (presenting libertarian case against marijuana criminalization based on individual liberty).

which scholars maintain are all impacted by marijuana's criminalization.¹⁰⁶ Scholars contend that when there are no sufficiently compelling grounds for the government to dictate what individuals can and cannot do, individuals have the right to decide how to live their lives.¹⁰⁷

3. *Ballot Measures*

A majority of states that have legalized marijuana for recreational use have used ballot measures.¹⁰⁸ Ballot measures allow citizens to engage in direct democracy by voting on laws or questions that appear on state-wide or local ballots.¹⁰⁹ In 2008, Massachusetts voters decriminalized possession of marijuana through a ballot measure; shortly thereafter, in 2012, voters again used a ballot measure to legalize marijuana for medical use.¹¹⁰ In 2016, Massachusetts voters approved a ballot measure, known as Question 4, legalizing marijuana for adult recreational use.¹¹¹

106. See Blumenson & Nilsen, *supra* note 105, at 291-92 (arguing criminalization implicates individual rights, requiring more justification than collective cost-benefit analysis).

107. See Blumenson & Nilsen, *supra* note 105, at 283-89, 296 (arguing marijuana does not present compelling grounds for prohibition); see also Todd, *supra* note 102, at 108 (recognizing low incidents of Marijuana Use Disorder); Robinson, *supra* note 99 (noting lack of fatal overdoses of marijuana, unlike other legal substances).

108. See *Marijuana Laws and Ballot Measures in the United States*, *supra* note 94 (noting twelve states and District of Columbia legalized marijuana through ballot measures or initiatives). Scholars note that vice-related ballot measures—such as those relating to drugs and prostitution—are highly susceptible to emotional appeals, social justice, and civil rights claims. See Kenneth Leon & Ronald Weitzer, *Legalizing Recreational Marijuana: Comparing Ballot Outcomes in Four States*, 2 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 193, 196 (2014) (discussing vice-related ballot measures). Some of the factors identified to predict the success of vice-related ballot measures include whether: (1) evidence that legalization or decriminalization will produce less harm than criminalization exists; (2) authorities can control the vice; (3) young people can be shielded from the vice; (4) the vice can be confined to the private sphere; and (5) the vice can be subject to regular review and modification by an oversight body. See *id.* at 196-97 (listing factors enhancing odds of decriminalization of vice-related issues).

109. See *Ballot Measure*, BALLOTPEDIA, https://ballotpedia.org/Ballot_measure [<https://perma.cc/KC6W-93M6>] (defining ballot measures). After receiving the threshold number of signatures, the initiative can go directly on the ballot for citizen vote (known as a direct initiative), or head to the state or local legislature which may elect to pass the initiative before it may go to the voters (known as an indirect initiative) depending on the state procedure. See *The Petition Process and Ballot Initiatives Explained*, DEMOCRACY DOCKET (Sept. 20, 2022), <https://www.democracydocket.com/explainers/the-petition-process-and-ballot-initiatives-explained/> [<https://perma.cc/P29S-XTJ6>] (noting twenty-six states have ballot measures at state level). The initiative process in Massachusetts is indirect, which means that petitioners must submit their ballot measure to the legislature before placing it on the statewide ballot; if the legislature declines to pass the measure, the citizens can place it on a ballot after obtaining more signatures. See *Massachusetts 2022 Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Massachusetts_2022_ballot_measures [<https://perma.cc/7NRU-3ZCP>] (stating Massachusetts utilizes indirect initiatives); *The Initiative Petition Process*, MASS.GOV, <https://www.mass.gov/info-details/the-initiativepetition-process> [<https://perma.cc/UWR3-UH8Q>] (outlining ballot measure process in Massachusetts).

110. See *Massachusetts*, MARIJUANA POL'Y PROJECT (Sept. 15, 2021), <https://www.mpp.org/states/massachusetts/> [<https://perma.cc/9TUL-3BFP>] (sequencing marijuana's reform in Massachusetts).

111. See *id.* (noting activists mobilized voter outreach ultimately passing Question 4 with 53.6%).

III. ANALYSIS

A. *The Case for Full Decriminalization*1. *How Criminalization Defeats Its Own Purpose*

While society's views on sex have evolved since the Progressive Era when prostitution was first criminalized, prostitution remains criminalized in the United States.¹¹² In the Progressive Era, proponents of criminalization focused on prostitution's societal harm to incite public hysteria surrounding the spread of diseases and the rise in the feminist movement to garner support for prostitution's criminalization.¹¹³ Today, arguments in support of criminalization transcend prostitution's impact on the general public to include concerns for the well-being of sex workers, such as asserting that prostitution is a form of gender-based violence and that all sex workers are victims of sex trafficking.¹¹⁴

Nevertheless, research and real-world experiences demonstrate that criminalization causes more harm to society and sex workers than good—defeating its advocates' professed rationales.¹¹⁵ For example, qualitative and quantitative research debunks the argument that criminalization reduces STDs.¹¹⁶ Research demonstrates that criminalization has the opposite effect by increasing the incidence of STDs, including HIV, and serving as a barrier to necessary healthcare due to the stigmatization.¹¹⁷ Additionally, criminalization does not achieve its intended goal of reducing sex trafficking; by pushing the market underground, criminalization prevents police from identifying and protecting victims of sex trafficking.¹¹⁸ Criminalization also proliferates violence towards sex workers—by both police and clients—and creates a climate tolerating pervasive

112. See Anderson, *supra* note 28, at 74-75 (discussing evolution of views towards sex).

113. See Lucas, *supra* note 46, at 52-55 (overviewing Progressive Era's concern for changing women's behavior and attitudes, and spread of disease); *supra* note 31 and accompanying text (describing public health hysteria leading to prostitution's criminalization).

114. See *supra* notes 49-50 and accompanying text (detailing violence and trafficking rationale).

115. See *infra* notes 116-120 and accompanying text (refuting arguments supporting criminalization and detailing criminalization's harms).

116. Compare Anderson, *supra* note 28, at 110-12 (discussing concerns for STDs), with Cunningham & Shah, *supra* note 54, at 1684 (recognizing Rhode Island's decriminalization led to 40% decrease in gonorrhea), and Vanwesenbeeck, *supra* note 54, at 1633 (noting decriminalization's anticipated impact on reducing spread of HIV).

117. See, e.g., Cunningham & Shah, *supra* note 54, at 1684 (recognizing decriminalization's significant impact reducing STDs in Rhode Island); Vanwesenbeeck, *supra* note 54, at 1633 (overviewing studies illustrating criminalization increases HIV and STDs, while decriminalization reduces risk).

118. Compare *Why Prostitution Shouldn't Be Legal*, *supra* note 48 (arguing for criminalization because prostitution creates sex trafficking), and Anderson, *supra* note 28, at 113-14 (detailing exploitation rationale behind criminalization), with MINISTRY OF JUST., *supra* note 86, at 167 (noting lack of identified sex trafficking in New Zealand after decriminalization), and Benitez et al., *supra* note 2, at 361 (stating decriminalization may lead to sex workers reporting sex trafficking).

harassment.¹¹⁹ While proponents of criminalization argue it “saves” sex workers from prostitution, criminalization is actually an obstacle for sex workers who want to exit the profession, which therefore increases recidivism.¹²⁰ Thus, the criminalization of prostitution acts against its proponents’ purported goals of eradicating prostitution and protecting sex workers because it leaves sex workers with few choices but to remain in the profession, suffering harm while they do so.¹²¹

Because of criminalization’s known harms and its lack of any tangible benefit, morality is the only remaining justification for prostitution’s continued criminalization.¹²² Derived from religious values and moral convictions that extramarital sex is sinful, legislators unsuccessfully attempt to eliminate prostitution through criminalization; nevertheless, compelling evidence demonstrates that criminalization is ineffective at reducing prostitution, causes detrimental harm to sex workers, and hinders efforts to prosecute sex trafficking.¹²³ There is a stark difference between using the criminal code to prevent people from harming others when there is a real threat to society and trying to force individuals to behave in a manner society deems virtuous when the behavior is private in nature and does not harm others.¹²⁴ In contrast to the criminalization of sex trafficking, which serves a valid purpose of protecting individuals from forced sexual slavery, prostitution’s criminalization only prohibits a private, consensual sexual relationship between adults.¹²⁵

119. See ACLU, *supra* note 55, at 6-7 (indicating 78% of sex workers experienced at least one violent encounter with police); Hynes, *supra* note 15, at 26 (recognizing Nordic Model led to increase in client violence); Armstrong, *supra* note 7, at 1292 (discussing criminalization, stigma, and violence); Platt et al., *supra* note 4, at 42-43 (analyzing research demonstrating criminalization’s institutional acceptance of violence towards sex workers).

120. See Vanwesenbeeck, *supra* note 54, at 1635 (arguing criminalization creates revolving door in and out of prison). When the government fines, arrests, or incarcerates sex workers for engaging in prostitution, sex workers encounter difficulties in obtaining legal employment, housing, and government benefits due to their criminal records—making it more difficult to leave the profession. See *id.* (providing consequences of criminalization for sex workers’ quality of life and overall perspectives).

121. See *id.* (recognizing criminalization creates consequences it claims to fight); *supra* notes 116-120 and accompanying text (discussing harms caused by criminalization).

122. See Alexandre, *supra* note 59, at 103-06, 123 (arguing criminalization fails to eliminate prostitution while harming sex workers); Anderson, *supra* note 28, at 102 (recognizing secular reasons for criminalization no longer exist).

123. See Hubbard et al., *supra* note 59, at 194-95 (calling criminalization laws modern “moral crusades” and “evangelical attempts” to save sex workers from sin); Alexandre, *supra* note 59, at 106 (arguing moral precepts underlying prostitution’s criminalization logically flawed and harmful towards sex workers); Benitez et al., *supra* note 2, at 361 (recognizing decriminalization may lead to sex workers reporting sex trafficking and describing criminalization’s harms); see also Levy & Jakobsson, *supra* note 66, at 597 (noting Swedish government’s inability to discern decrease in prostitution and sex trafficking under Nordic Model).

124. See, e.g., Anderson, *supra* note 28, at 115-17 (discussing private and public morality legislation).

125. See GLOB. COMM’N ON HIV & L., *supra* note 2, at 39 (distinguishing prostitution from sex trafficking); Alexandre, *supra* note 59, at 110 (recognizing sex trafficking to remain criminalized under full decriminalization of prostitution). See generally *supra* note 2 (restricting use of term “prostitution” to commercial sex between consenting adults). The full decriminalization of prostitution does not remove criminal penalties for engaging in

When made between consenting adults, the choice to engage in sexual activity for pay is a decision that does not impact any person outside of that sexual exchange and thus does not require societal intervention.¹²⁶ By criminalizing prostitution when there is no tangible impact to those outside of the sexual relationship, society is unjustifiably infringing on a person's ability to choose what they do with their body—a constitutionally protected choice that the state arbitrarily rips away when individuals exchange money.¹²⁷ Society has made progress in abolishing laws infringing on an individual's choice to engage in other private sexual behavior by removing laws criminalizing sodomy and homosexuality; yet prostitution remains criminalized, despite compelling evidence demonstrating criminalization's harm and futility.¹²⁸ It is time society takes the next step in this progression by fully decriminalizing prostitution because criminalizing it does nothing but harm the individuals it intends to "save."¹²⁹

2. Massachusetts Should Fully Decriminalize Prostitution

Under the Tenth Amendment's implied police powers, Massachusetts has the power to fully decriminalize intrastate prostitution.¹³⁰ Although Massachusetts legislators and residents increasingly recognize the harms of criminalization, prostitution remains criminalized.¹³¹ Massachusetts's best solution to fix the damages of criminalization is to fully decriminalize prostitution.¹³²

commercial sex with minors or sex trafficking, and this Note does not argue for removal of such penalties. See Alexandre, *supra* note 59, at 109 (acknowledging sex trafficking remains criminalized); *infra* Part IV (advocating for full decriminalization of prostitution).

126. See Anderson, *supra* note 28, at 99, 102, 115-17, 119 (admonishing prostitution's private-morality-based criminalization for infringing on individual liberty without valid justification).

127. See *id.* at 98-102, 115-17 (arguing right to engage in prostitution protected liberty interest); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (stating "State cannot . . . control [petitioners'] destiny by making private sexual conduct a crime").

128. See Anderson, *supra* note 28, at 92, 98, 100 (analogizing prostitution's criminalization to now-protected right to engage in sodomy and homosexuality); *supra* notes 116-120 and accompanying text (analyzing harmful implications of criminalizing prostitution); Alexandre, *supra* note 59, at 110 (stressing criminalization's futility in reducing prostitution).

129. See Alexandre, *supra* note 59, at 103-06, 110, 123 (arguing failure of criminalization); Vanwesenbeeck, *supra* note 54, at 1635 (asserting criminalization's fails its goal of "saving" saving sex workers because it makes them vulnerable); see also Amnesty International Policy, *supra* note 16 (detailing criminalization's harms to sex workers and recommending full decriminalization for sex workers' safety).

130. See *supra* note 17 and accompanying text (summarizing Tenth Amendment and state police powers); *supra* notes 36-37 and accompanying text (overviewing states' power to enforce anti-prostitution laws and noting varying penalties across states).

131. See, e.g., Black and Pink MA Launches Bold Legislative Agenda, *supra* note 40 (supporting decriminalization based on criminalization's harms); Grant, *supra* note 11 (discussing movement in Massachusetts to reform prostitution laws led by DecrimMA coalition); *supra* note 39 and accompanying text (outlining Massachusetts's prostitution laws).

132. See, e.g., Amnesty International Policy, *supra* note 16 (recommending full decriminalization based on harms of criminalization); Abel, *supra* note 84, at 581-82 (suggesting adoption of full decriminalization in other countries based on New Zealand's success).

Massachusetts legislators and residents who support a form of decriminalization are divided on the approach, with some supporting full decriminalization and others the Nordic Model.¹³³ Massachusetts advocates of the Nordic Model support it because they believe it will end prostitution, reduce exploitation, and protect sex workers—whom they view as inherently victimized regardless of their conscious choice to engage in the profession.¹³⁴ As demonstrated by Sweden’s results—increased violence and exploitation by police and clients, decreased visibility to identify trafficking victims and assist sex workers, and a lack of overall reduction in prostitution and sex trafficking—the Nordic Model does not accomplish its advocates’ goals.¹³⁵

Representative Kay Kahn, a prominent advocate of the Nordic Model in Massachusetts, also argues its adoption in Massachusetts will assist with restorative justice and rehabilitation.¹³⁶ In labeling all sex workers as victims and conditioning governmental support on leaving the profession, however, the Nordic Model is counterproductive to Representative Kahn’s goals to rehabilitate and build trust with sex workers.¹³⁷ Thus, if advocates for the Nordic Model in Massachusetts truly intend to assist sex workers and combat sex trafficking, they must reevaluate their position on the Nordic Model.¹³⁸

In reevaluating their position, Massachusetts supporters of the Nordic Model must compare its results in Sweden to the success of full decriminalization in New Zealand.¹³⁹ Under full decriminalization in New Zealand, nonmigrant sex workers experience a significant reduction in violence and exploitation, which is

133. See *supra* notes 41-43 and accompanying text (discussing proposed legislation adopting Nordic Model and legislation adopting full decriminalization).

134. See *The Equality Model*, *supra* note 43 (advocating for Nordic Model in Massachusetts and stating prostitution’s existence “incompatible with progressive values”); *The Argument*, *supra* note 43 (discussing some of Representative Kahn’s goals for Nordic Model in Massachusetts); Metzger, *supra* note 43 (stating Representative Kahn’s goal to provide new lives for women wrapped up in sex industry); *LIFT Is Ending the Sex Trade*, *supra* note 43 (providing mission to end prostitution through Nordic Model in Massachusetts).

135. Compare *supra* Section II.A.5 (overviewing impact of Nordic Model in Sweden), with *supra* note 43 (discussing goals of Nordic Model in Massachusetts).

136. See *The Argument*, *supra* note 43 (noting Representative Kahn’s goal for restorative justice under Nordic Model).

137. See *supra* note 64 and accompanying text (acknowledging Sweden’s victimization of sex workers under Nordic Model); *supra* note 75 and accompanying text (noting sex workers in Sweden must disavow profession to receive support); *supra* note 134 and accompanying text (providing goals of Massachusetts Nordic Model supporters).

138. Compare *supra* note 134 and accompanying text (providing goals of Massachusetts Nordic Model supporters), with *supra* Section II.A.5 (summarizing negative repercussions of Nordic Model in Sweden, including increase in violence towards sex workers).

139. Compare *supra* Section II.A.5 (summarizing Nordic Model’s harmful effects to sex workers in Sweden), with *supra* notes 86-89 and accompanying text (outlining positive impact of full decriminalization in New Zealand).

a goal of Massachusetts supporters of the Nordic Model.¹⁴⁰ Full decriminalization's success with repairing relationships between New Zealand police and sex workers would also help accomplish Representative Kahn and other Massachusetts Nordic Model supporters' goals of utilizing a new legislative framework as a method of restorative justice.¹⁴¹ Because decriminalization removes criminal penalties from prostitution, Massachusetts sex workers will hopefully experience the same empowerment and increased ability to reject and report dangerous clients as sex workers in New Zealand have reported.¹⁴² Results from New Zealand demonstrate that if Massachusetts were to adopt full decriminalization, it would empower and support sex workers, changing the narrative and the reality from the oversimplified and harmful view that all sex workers are victims in need of saving.¹⁴³

Thankfully, some Massachusetts legislators and residents recognize the harms of prostitution's criminalization.¹⁴⁴ Massachusetts residents and legislators must consider the detrimental results of the Nordic Model in Sweden and the success of full decriminalization in New Zealand.¹⁴⁵ They should also consider the recent decision by Belgium to reject the Nordic Model in favor of full decriminalization, even though the results of that decision are still outstanding.¹⁴⁶ In evaluating both approaches, it is clear that New Zealand's full decriminalization is

140. See, e.g., N.Z. PROSTITUTES' COLLECTIVE, *supra* note 55, at 5 (reporting to United Nations notable decline in violence and exploitation after full decriminalization); *The Equality Model*, *supra* note 43 (advocating for Nordic Model in Massachusetts to stop exploitation and violence).

141. See *The Argument*, *supra* note 43 (noting Representative Kahn's goal for restorative justice under Nordic Model). Compare ABEL ET AL., *supra* note 84, at 162-64, 167 (discussing improvement in sex workers' relationships with police and greater likelihood of reporting violence), and Platt et al., *supra* note 4, at 37 (noting improved relationships with police makes sex workers feel safer and more confident with clients), with Hynes, *supra* note 15, at 26 (observing decline in relationships between police and sex workers in Sweden).

142. See *supra* note 87 and accompanying text (discussing law's impact on sex workers' empowerment and ability to identify and reject dangerous clients); ABEL ET AL., *supra* note 84, at 139 tbl.7.1 (acknowledging 95.9% of sex workers surveyed feel protected under PRA).

143. See *supra* notes 86-89 and accompanying text (summarizing positive impact of full decriminalization on sex workers' lives); ABEL ET AL., *supra* note 84, at 139 tbl.7.1 (recognizing sex workers feel protected under PRA); *supra* note 134 and accompanying text (overviewing Massachusetts Nordic Model supporters' victim narrative). Notably, unlike Sweden's Nordic Model, sex workers in New Zealand were consulted in drafting the PRA, thus better reflecting sex workers' needs. Compare Hynes, *supra* note 15, at 25 (noting Swedish sex workers accused of "false consciousness" when they raised concerns about Nordic Model), with Abel, *supra* note 84, at 582 (acknowledging sex workers' involvement in creation of PRA).

144. See *supra* notes 41-43 and accompanying text (discussing proposed legislation in Massachusetts to decriminalize).

145. Compare *supra* Section II.A.5 (overviewing Nordic Model's detrimental effects in Sweden), with *supra* notes 86-89 and accompanying text (outlining full decriminalization's positive results on New Zealand sex workers' health and safety).

146. See *Belgium Sex Workers Celebrate*, *supra* note 23 (outlining Belgium's proposed legislation); see also *How COVID Helped*, *supra* note 23 (noting differing approaches in Europe). Belgium serves as an example for Massachusetts of how a government can depart from the legislative approaches to prostitution adopted in nearby jurisdictions. See *Belgium Sex Workers Celebrate*, *supra* note 23 (recognizing Belgium's historic departure).

the best model for Massachusetts and is the most effective remedy to criminalization's harms.¹⁴⁷

B. Ballot Measures Used for Marijuana's Reform as a Model for Full Decriminalization of Prostitution

Massachusetts's success in reforming its marijuana laws through ballot measures serves as a model for decriminalizing prostitution.¹⁴⁸ Recently, society has recognized the harms of marijuana's criminalization, resulting in a successful movement to reform marijuana laws.¹⁴⁹ On a smaller but growing scale, the United States is experiencing a similar reckoning with the harms of prostitution's criminalization, as demonstrated by the movement to reform prostitution laws and policing.¹⁵⁰

The criminalization of prostitution and marijuana are analogous because their respective criminalization results in similar harms.¹⁵¹ By pushing the activity underground, criminalization creates a black market that results in violence, trafficking, and exploitation.¹⁵² Similar to marijuana's policing, which mainly focuses on recreational possession, prostitution's criminalization prevents law enforcement from focusing on more serious crimes, such as sex trafficking.¹⁵³ As society has recognized with marijuana's criminalization, law enforcement disproportionately and unjustly arrests sex workers of color, contributing to the mass incarceration of individuals of color.¹⁵⁴ Criminal records for marijuana and

147. Compare *supra* Section II.A.5 (summarizing harmful impact of Nordic Model in Sweden), with *supra* notes 86-89 and accompanying text (summarizing New Zealand's results with full decriminalization), and YALE GLOB. HEALTH JUST. P'SHIP, *supra* note 13, at 1-2 (outlining harms of prostitution's criminalization and recommending full decriminalization).

148. See *infra* notes 152-155, 157 and accompanying text (comparing marijuana and prostitution); *supra* notes 110-111 and accompanying text (discussing ballot measures used to decriminalize and legalize marijuana in Massachusetts); see also Leon & Weitzer, *supra* note 108, at 196 (grouping marijuana and prostitution together in discussing vice-related decriminalization).

149. See, e.g., Van Green, *supra* note 96 (noting from 2009 to 2019 number of supporters for legalization of marijuana more than doubled); HUDAK & STENGLEIN, *supra* note 96, at 16 (recognizing support from marijuana reform result of lower perception of risks).

150. See *supra* notes 19-20 and accompanying text (overviewing efforts across United States to reform prostitution and prostitution-related laws); *supra* notes 40-45 and accompanying text (discussing state efforts to reform prostitution laws).

151. See *infra* notes 152-155, 157 and accompanying text (analogizing marijuana and prostitution).

152. See, e.g., McKinley, *supra* note 40 (recognizing criminalization of marijuana and prostitution creates black market, inciting violence and exploitation); Benitez et al., *supra* note 2, at 361 (noting criminalization drives sex workers underground making it difficult to recognize trafficking); Jorgensen, *supra* note 100 (stating criminalization empowers drug cartels and gangs who use violence to solve conflicts).

153. See Jorgensen, *supra* note 100 (recognizing overwhelming majority of marijuana arrests in 2018 for recreational possession only); Benitez et al., *supra* note 2, at 361 (noting enforcing anti-prostitution laws inhibit law enforcement's efforts to combat sex trafficking).

154. See *Racial Disparity in Marijuana Arrests*, *supra* note 101 (compiling data demonstrating racial disparities); ACLU, *supra* note 101, at 5 (stating police 3.64 times more likely to arrest Black individuals for possession); *Race, Sex Work, and Stereotyping*, *supra* note 57 (noting sex workers of color disproportionately

prostitution create the same residual harms, leading to food and housing insecurity, among other problems.¹⁵⁵ Because individuals of color are overpoliced for both prostitution and marijuana, they are particularly vulnerable to these residual harms.¹⁵⁶ The bipartisan argument that marijuana's criminalization violates individual liberty and bodily autonomy by denying freedom of choice also applies to prostitution's criminalization; and due to the extensive harms of prostitution's criminalization, there are no compelling grounds for its continued criminalization.¹⁵⁷

Based on the similar harms of criminalization and the success of ballot measures to reform Massachusetts's marijuana laws, advocates for full decriminalization in Massachusetts should propose full decriminalization of prostitution as a ballot measure.¹⁵⁸ Because the decision to use marijuana and the decision to engage in prostitution are both personal, individual choices implicating the right to control one's body, marijuana's success is a positive indicator that full decriminalization of prostitution could achieve a similar victory if placed on the ballot.¹⁵⁹ While some Massachusetts legislators have signaled an interest in decriminalizing prostitution by proposing legislation, these efforts have been unsuccessful.¹⁶⁰ Advocates should not wait for the legislature to change the laws because full decriminalization of prostitution is vital to protect the health and safety of sex workers.¹⁶¹

Several factors identified by scholars to predict the success of vice-related ballot measures support the potential success of full decriminalization on a ballot

arrested); *Sex Work Decriminalization Is a Racial Justice Issue*, *supra* note 57 (discussing racial disparities in policing of prostitution).

155. See Vanwesenbeeck, *supra* note 54, at 1635 (arguing prostitution's criminalization leads to difficulty obtaining legal employment, housing, and government benefits); YALE GLOB. HEALTH JUST. P'SHIP, *supra* note 13, at 1 (discussing socioeconomic impact); Todd, *supra* note 102, at 107-08 (explaining residual harms of marijuana's criminalization).

156. See *supra* notes 154-155 and accompanying text (discussing racial disparities and harms).

157. See, e.g., Blumenson & Nilsen, *supra* note 105, at 282, 292, 296 (discussing individual liberty argument against criminalization and arguing marijuana's continued criminalization requires more compelling justification); Anderson, *supra* note 28, at 92 (arguing prostitution's continued criminalization infringes on constitutional right to individual liberty without justifiable rationale); see also YALE GLOB. HEALTH JUST. P'SHIP, *supra* note 13, at 1-2 (summarizing harms of prostitution's criminalization and recommending full decriminalization).

158. See *supra* notes 152-155, 157 and accompanying text (comparing marijuana and prostitution based on similar harms of criminalization and discussing individual liberty); *supra* notes 110-111 and accompanying text (discussing ballot measures used to decriminalize and legalize marijuana in Massachusetts).

159. See *supra* notes 110-111 and accompanying text (providing information on ballot measures and success of marijuana on ballot in Massachusetts); *supra* notes 152-155, 157 and accompanying text (arguing similarities between criminalization of marijuana and prostitution).

160. See *supra* notes 41-43 and accompanying text (discussing proposed legislation).

161. See, e.g., *Amnesty International Policy*, *supra* note 16 (recommending full decriminalization of consensual prostitution based on evidence of criminalization's harm to sex workers); *supra* notes 116-120 and accompanying text (arguing prostitution's criminalization causes more harm than good); see also *supra* notes 41-43 and accompanying text (discussing failed legislation).

measure in Massachusetts.¹⁶² Evidence from New Zealand indicates that prostitution's full decriminalization will produce less harm to society and sex workers than criminalization.¹⁶³ As demonstrated by New Zealand's successes, Massachusetts authorities can regulate prostitution by mandating occupational and health standards.¹⁶⁴ While a valid concern, full decriminalization will not harm minors because prostitution with persons under eighteen and sex trafficking will remain illegal, as it is in New Zealand.¹⁶⁵ Massachusetts authorities can also oversee the effects of full decriminalization by creating a committee similar to the PLRC.¹⁶⁶

IV. CONCLUSION

Society has categorized all sex workers as victims while simultaneously treating those who willingly engage in prostitution as disposable and unworthy of respect. Sex workers are not disposable bodies—they deserve the same respect, protection, and safety as any other profession. Sex workers are people who make a conscious choice to engage in their profession. Society should respect and not punish this choice.

As with marijuana's criminalization, some Massachusetts residents and legislators have begun to recognize the harms of prostitution's criminalization. This reckoning has created a platform for change, but unfortunately, two opposing approaches have emerged: the Nordic Model and full decriminalization. While advocates for both approaches agree reform is necessary, Massachusetts sex worker advocates must not be fooled into thinking the Nordic Model is a compromise that will lead to better results for sex workers and protection of sex trafficking victims. Based on evidence from its use in Sweden, sex workers would face increased harm to their health and safety and efforts to protect and identify sex trafficking victims would not be improved if Massachusetts adopted the Nordic Model. Rather, Massachusetts sex worker advocates must look to New

162. See Leon & Weitzer, *supra* note 108, at 196-97 (outlining factors predicting success of vice decriminalization, including prostitution and drugs).

163. See Leon & Weitzer, *supra* note 108, at 197 (noting reduction-in-harm factor to predict success). Compare *supra* notes 116-120 and accompanying text (arguing against criminalization based on its harms), with *supra* notes 86-89 and accompanying text (analyzing full decriminalization's positive results on New Zealand sex workers' health and safety).

164. See Leon & Weitzer, *supra* note 108, at 196-97 (providing feasibility of regular review and modification of vice to predict success of ballot measure); Prostitution Reform Act 2003, pt. 2, s 8 (N.Z.) (establishing health and safety requirements).

165. See Leon & Weitzer, *supra* note 108, at 197 (noting ability shield minors from vice contributes to prediction of ballot measure's success); Prostitution Reform Act 2003, pt. 2, ss 20-23 (N.Z.) (prohibiting minors from engaging in prostitution).

166. See Leon & Weitzer, *supra* note 108, at 197 (stating ability to oversee vice contributes to success); Prostitution Reform Act 2003, pt. 4, s 43 (N.Z.) (creating PLRC to review results).

Zealand's success with full decriminalization and move to fully decriminalize prostitution in Massachusetts.

Because the legislature is so divided on the approach to decriminalization and has failed to pass legislation, Massachusetts sex worker advocates cannot wait for the legislature to act. The harms from criminalization are too severe. Massachusetts successfully decriminalized and legalized marijuana through ballot measures, and based on the similarities between prostitution and marijuana, it is likely Massachusetts will have the same success with prostitution's full decriminalization. Massachusetts advocates should look to marijuana reform for guidance on the next steps and place full decriminalization of prostitution on the ballot. Sex workers deserve better. Massachusetts deserves better.