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## An Ever-Narrowing Divide: Morality and Decriminalizing Sex Work in North Carolina

Mallory Verez

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# AN EVER-NARROWING DIVIDE: MORALITY AND DECRIMINALIZING SEX WORK IN NORTH CAROLINA\*

MALLORY VEREZ\*\*

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\*\* J.D. Candidate, University of North Carolina School of Law & Master of Public Administration Candidate, University of North Carolina School of Government, 2024. I would like to thank the editors and staff of the *North Carolina Civil Rights Law Review* for their dedication to editing this piece and providing such attentive feedback, and Professor Deborah Weissman for her careful review and incredible support. To my mom, Karen Verez, and my friends, thank you for listening to my incessant talk of sex work and morality and for all of your encouragement.

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Note regarding language: The use of the word “prostitution” in this article highlights the entrenched nature of the divide between legal and illegal sex work in everyday language. Even colloquially, society has isolated and shunned physical, in-person sex work, regardless of the act, location, or manner in which it occurred. Various forms of legal sex work, like pornography and webcamming, however, are not lumped into a single term. Sex workers and advocates alike prefer the phrase “sex work,” as it recognizes sex work as work without the negative connotation of criminality and immorality that is attached to the term “prostitution.”<sup>1</sup> Similarly, “sex worker” is preferred to “prostitute,” which is inherently demeaning and stigmatizing.

#### INTRODUCTION

Since the early 1900s, North Carolina’s prostitution laws have remained substantively unchanged. The state legislature has made no effort to decriminalize sex work, despite what we know about the criminalization of sex work today: that criminalization makes sex workers more likely to experience violence and less likely to report such violence, and prevents them from accessing critical services while contributing to the excesses of incarceration and the carceral state.<sup>2</sup>

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1. *Understanding Sex Work in an Open Society*, OPEN SOC’Y FOUND., <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society#:~:text=Why%20use%20the%20term%20%22sex,connotations%20of%20criminality%20and%20immorality> (Apr. 2019).

2. *See, e.g.*, SARAH SAKHA, EMILY GREYAK, & MYA HAYNES, AM. C.L. UNION, *IS SEX WORK DECRIMINALIZATION THE ANSWER? WHAT THE RESEARCH TELLS US* 5, 7 (2020), [https://www.aclu.org/wp-content/uploads/legal-documents/aclu\\_sex\\_work\\_decriminalization\\_research\\_brief.pdf](https://www.aclu.org/wp-content/uploads/legal-documents/aclu_sex_work_decriminalization_research_brief.pdf); S.B. BALDWIN, G. EDWARDS, K. FUENTES, A. LEIBOWITZ, A. MIYASHITA OCHOA, W. SEEGMILLER, & M. SHAH, *HEALTH OUTCOMES ASSOCIATED WITH CRIMINALIZATION AND REGULATION OF SEX TRADE*, CAL. HIV/AIDS POL’Y RSCH. CTRS. 2 (2021), <https://www.chprc.org/health-outcomes-associated-with-criminalization-and-regulation-of-sex-trade/>; Alexandra Sandler, *Making Sex Work Safe: Using a Consensus-*

Paying no mind to the growing consensus that sex workers deserve safe and stable working conditions without criminalization,<sup>3</sup> North Carolina has remained steadfast in its criminalization stance. As the divide between “prostitution” and non-prostitution sex work—like pornography, phone sex, and webcamming—dwindles, the argument for continued criminalization of “prostitution” sex work becomes even more arbitrary.

In 1919, North Carolina criminalized prostitution, defined at the time as “sexual intercourse for hire . . . [or] indiscriminate sexual intercourse without hire.”<sup>4</sup> While “sex for hire” tends to track with how society thinks about prostitution, the inclusion of “without hire” does not.<sup>5</sup> The resulting impression from the phrase “without hire” is that North Carolina was simply criminalizing sex. Although this impression is possibly true, the 1919 statute prefaced “sex” with “indiscriminate.”<sup>6</sup> United States laws originally drew from the British system, and the phrase “indiscriminate sex without hire” is probably the most relevant piece for understanding that criminalization was based mostly on “Christian moral disapproval toward nonprocreative sexual activity,”<sup>7</sup> rather than whether or not it was paid for. This may be attributable to the particular era—Christianity prevailed in government and law; no one was expected to separate religion and morality from governing

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*Based Approach to Create Meaningful Policy for Sex Workers*, 23 CARDOZO J. CONFLICT RESOL. 473, 482 (2022).

3. Margot Boyer-Dry, *What’s the Best Way to Protect Sex Workers? Depends on Whom You Ask*, N.Y. TIMES, <https://www.nytimes.com/2021/07/23/nyregion/sex-workers-nyc.html> (July 24, 2021). The author points out that an anti-criminalization stance for sex work has started to gain mainstream support, which has been followed by the implementation of New York State laws for expunction of records and announcements by district attorneys to stop prosecuting sex workers. *Id.* Even before this article, a survey conducted by Data for Progress and YouGov Blue in 2019 found that “52 percent of voters somewhat or strongly support decriminalizing sex work . . . 64 percent of Democrats, 55 percent of Independents, and 37 percent of Republicans support decriminalization.” NINA LUO, DATA FOR PROGRESS, *DECRIMINALIZING SURVIVAL: POLICY PLATFORM AND POLLING ON THE DECRIMINALIZATION OF SEX WORK* 1, 22 (Jan. 30, 2020), <https://www.filesforprogress.org/memos/decriminalizing-sex-work.pdf>.

4. An Act for the Repression of Prostitution, ch. 215, sec. 2, 1919 N.C. Laws 419, 420.

5. *See id.*

6. *Id.*

7. Anna K. Christensen, *Equality With Exceptions? Recovering Lawrence’s Central Holding*, 102 CAL. L. REV. 1337, 1344 (2014).

principles. Yet, that morality-based legislation lives on in today's anti-prostitution rhetoric and continued criminalization of prostitution.

It seems that perceptions of morality play such a significant role as to isolate physical, in-person sex work from all other sex work, such as exotic dancing, pornography, and phone sex. This dividing line of in-person physicality versus sex from which the consumer is distanced remains the sole distinction between what the law views as unacceptable sex work and sex work not deemed criminal, regardless of the dangerous implications for sex workers. As consensus continues to build for the decriminalization of prostitution, and the divide between legal and illegal sex work continues to narrow, North Carolina's efforts to legislate morality weaken. Continued criminalization of "prostitution" relies on arbitrary distinctions advanced by those who support morality policy. North Carolina should decriminalize prostitution to better protect sex workers and destigmatize in-person sex work in the aggregate of other, more socially accepted, sex work.

This article argues for the decriminalization of prostitution in North Carolina by reviewing the role of morality policy in separating prostitution from other forms of legal sex work. Continued criminalization only serves to stigmatize and endanger sex workers at the behest of neoconservative and religious ideologies. Part I explains the divide between legal and illegal sex work, detailing various forms of sex work and how they share more similarities than differences. Part II delineates the traditional moral arguments against prostitution through an overview of morality legislation and its religious counterpart in the United States, the more specific moral crusade against sex work, and how morality and religion intersect in North Carolina to form the basis of anti-prostitution laws. Part III discusses the potential responses of full decriminalization versus partial decriminalization versus legalization and the increasing public support for decriminalization, despite traditional notions of the commodification of sex. Finally, Part IV concludes with what decriminalization would look like in North Carolina as a means of reducing danger for sex workers, limiting dedicated police resources and exploitation, and ending the inequality of sex work prosecution. It also provides strategies for pursuing the decriminalization of sex work.

## I. THE SEX WORK DIVIDE

The legality of different forms of sex work varies across states. Treatment of prostitution, however, is far more uniform. In every state except Nevada, prostitution is a criminal offense.<sup>8</sup> For many years, various types of transactional sex, as well as some type of non-transactional sex, have been considered both immoral and illegal.<sup>9</sup> North Carolina specifically has had a statute criminalizing prostitution in effect since 1919.<sup>10</sup> At that time, prostitution was defined as “offering or receiving of the body for sexual intercourse for hire . . . [or] for indiscriminate sexual intercourse without hire.”<sup>11</sup> Inclusion of “without hire” can make this law seem encompassing of all sexual activity if the term “indiscriminate” is not properly taken into account for its emphasis on sex that is “aimless” or without critical judgment—a label of wrongfulness. However, even with the term “indiscriminate,” the 1919 statute still encompassed almost any “sexual intercourse” outside of a marriage, or any sex that might be considered non-procreative.<sup>12</sup> Sixty years later, the North Carolina legislature incorporated the phrases “sexual act,” “sexual contact,” and “sexual intercourse” to clarify the laws on prostitution.<sup>13</sup> Use of these phrases emphasizes a physical, in-person nature to prostitution and marks the beginning of the distinction between legal and illegal sex work.

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8. Jacqueline Cooke & Melissa L. Sontag, *Prostitution*, 6 GEO. J. GENDER & L. 459, 481 (2005). Even in Nevada, however, which has a regulated brothel system, prostitution is only legal in certain counties. See Morelia Maravilla, *Consent or Crime: Examining the Perceptions of Prostitution* 1, 1 (2021) (M.S. dissertation, Arizona State University) (ProQuest).

9. See Ine Vanwesenbeeck, *Sex Work Criminalization Is Barking Up the Wrong Tree*, 46 ARCHIVES SEXUAL BEHAV. 1631, 1632 (2017).

10. An Act for the Repression of Prostitution, ch. 215, 1919 N.C. Laws 419.

11. *Id.* sec. 2.

12. 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, 100 (2021).

13. H.R. 800, 1979 Gen. Assemb., Reg. Sess. (N.C. 1979).

A. *Legal Sex Work*

Although “sex work” is used today to refer to those “who work in all aspects of the sex trades,”<sup>14</sup> legal sex work is that which is free from criminalization, taking the form of pornography, exotic dancing, erotic massages, internet and phone sex, and so on.<sup>15</sup> One key commonality in legal sex work is the physical separation between those doing the work and those engaging with the worker. Where people are consumers of legal, commercialized sex work that does not involve actual physical contact between worker and consumer, it is easy for the consumer to feel removed from the situation, that those involved in sex work are simply “having consensual sex that the viewing public just happens to be privy to observing.”<sup>16</sup> When it comes to morality, it is this detached view—the idea of engaging with sex without physically participating—that has led to the commercialization of sex work becoming a multi-billion dollar industry.<sup>17</sup> There is a larger market than ever before for “pornography, sex toys, escort websites, strip clubs,” and commercial webcamming.<sup>18</sup> Most of this market expansion and commercialization occurred with the rise of the internet, unmatched in its ability to act as “a new frontier to provide and advertise sexual goods and services.”<sup>19</sup> But even if ignoring the new internet age, commercial sexual activities like exotic dancing and phone sex would remain legal, despite disdain from some parts of society.<sup>20</sup>

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14. Lindsey H. Jemison, *Feminist Theory and Sex Work Regulation: Comparing Regulatory Models and Implementation of Theoretical Policy*, 21 J.L. IN SOC’Y 163, 166 (2021).

15. Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CAL. L. REV. 1195, 1207 (2015) (drawing a distinction between purchases of “actual sex,” which is criminalized, and “legal” sex acts that are filmed and distributed, performed on customers (lap dances), or that do not involve touching due to screens or phones acting as buffers).

16. Annamarie Forestiere, *To Protect Women, Legalize Prostitution*, HARVARD C.R.-C.L. L. REV., AMICUS BLOG (Oct. 1, 2019), <https://journals.law.harvard.edu/crcl/to-protect-women-legalize-prostitution/>.

17. See Maravilla, *supra* note 8, at 1.

18. See Ronald Weitzer, *The Campaign Against Sex Work in the United States: A Successful Moral Crusade*, 17 SEXUALITY RSCH. & SOC. POL’Y 399, 399 (2020).

19. Taylor Comerford, *Pornography Isn’t the Problem: A Feminist Theoretical Perspective on the War Against Pornhub*, 63 B.C. L. REV. 1177, 1197 (2022).

20. Anderson, *supra* note 12, at 75.

Though people may differ in their view of what constitutes pornography, many would likely agree that pornography involves people engaging in sexual conduct on camera for some form of compensation.<sup>21</sup> Arguably, the sole distinction here is the presence of a camera. People who engage in pornographic acting are paid to engage in sexual activity, even though the same activity in any other setting for pay is illegal.<sup>22</sup> Therefore, the difference in legality between pornography and prostitution, to a certain extent, is merely the act of recording the sexual activity. Otherwise, pornographic actors would simply be engaging in sexual intercourse for hire—the very act that North Carolina outlawed in 1919.<sup>23</sup>

Webcamming provides very similar services to pornography but does so via web cameras on social media and webcamming-specific platforms.<sup>24</sup> It involves operating a webcam to engage in “sexually explicit behavior in real-time in return for financial compensation.”<sup>25</sup> The industry began in the mid-1990s and has allowed “camgirls” to operate without production company oversight, taking advantage of maximum profits for the performer due to a high demand for adult entertainment.<sup>26</sup> Webcamming has, to a certain degree, capitalized on the increased awareness of sex work as work—engaging with the public to share the idea that it empowers sexuality, individuality, and independence.<sup>27</sup> Webcam performers are able to establish boundaries in their work, “making the decision of what they will or will not do on camera.”<sup>28</sup> Moreover, webcam performers could be understood as “actively subverting traditional notions of sexuality by wresting control away from men [in] its entirety; the experiences of predominantly male audiences are mediated by female performers who have the option to withdraw their services at any time and for any reason.”<sup>29</sup> Webcamming encourages a parting of ways from the “classist, elitist mindset that only

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21. *See id.* at 74–75.

22. *Id.* at 75.

23. *See* discussion *supra* Part I.

24. Maravilla, *supra* note 8, at 2.

25. Paul Bleakley, “500 Tokens to Go Private”: *Camgirls, Cybersex and Feminist Entrepreneurship*, 18 *SEXUALITY & CULTURE* 892, 893 (2014).

26. *See id.* at 895, 899.

27. Maravilla, *supra* note 8, at 33–34.

28. Bleakley, *supra* note 25, at 902.

29. *Id.*



certain work is valuable,” highlighting, instead, that sex workers are “free-thinking individuals with agency.”<sup>30</sup>

Legal sex work, like pornography and webcamming, is considered to be entirely distinct from prostitution.<sup>31</sup> However, both webcamming and pornography share commonalities with prostitution. Like prostitution, webcamming often involves direct communication with a client, personal connections between sex worker and client, and payment to the sex worker in exchange for specific services.<sup>32</sup> For the most part, the difference is that with webcamming, “the presence of a computer screen as buffer removes most legal restrictions in terms of providing payment for sexual activity.”<sup>33</sup> In pornography, people engage in sexual activity for compensation, like prostitution, but do so with the safeguard of a camera between the pornographic actors and the media consumer. Both pornography and webcamming manage to avoid the criminalization of prostitution, despite bearing a striking resemblance to the sexual activity for hire that defines prostitution, because clients are removed from the physicality of the act. These forms of legal sex work do not bear the same burden of moral ideology that physical, in-person sexual activity for compensation does. The following “folk theories” of sexuality help to explain this reallocation of morality.

There is a distinction between acts and thoughts or fantasies, with acts carrying a much greater moral weight.<sup>34</sup> Pornography and webcamming are not seen as involving the same commitment, or responsibility and liability, as prostitution because they use a visual representation rather than physical contact and do not pose the same “threat of taint and corruption” to the consumer.<sup>35</sup> These “threats” include disease contraction, moral degradation, and diminished social standing.<sup>36</sup> Pornography and webcamming, with the help of a virtual buffer, do not propose engagement in “conduct incompatible with

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30. Olivia R. Cox, *The “Whorearchy”: Webcamming and Prostitution, Society and Politics*, 84 ALB. L. REV. 509, 518 (2021).

31. See Anders Kaye, *Why Pornography is Not Prostitution: Folk Theories of Sexuality in the Law of Vice*, 60 ST. LOUIS U. L.J. 243, 245–47 (2016).

32. Bleakley, *supra* note 25, at 900; Cox, *supra* note 30, at 511.

33. Bleakley, *supra* note 25, at 901.

34. Kaye, *supra* note 31, at 288.

35. *Id.* at 287.

36. *Id.*

avored social roles,” nor do they threaten the sanctity of marriage and traditional family in the way that prostitution does.<sup>37</sup> Considering the common justifications for continued criminalization of prostitution,<sup>38</sup> maybe these folk theories have done more than just assign moral weight. Pornography is not considered to be “a fatal offense against a marriage”<sup>39</sup> in the way that prostitution is, and pornography is a legal industry. Webcamming builds more of a relationship between sex worker and client, bearing a likeness to prostitution,<sup>40</sup> but does not threaten to “infect the . . . consumer’s physical body,”<sup>41</sup> and webcamming remains legal. In essence, if the sex work in question poses a lesser threat to the traditional idea of family, procreation, and sexuality,<sup>42</sup> then it will not be criminalized.

*B. Illegal Sex Work (“Prostitution”)*

Prostitution, or the “purchase of actual sex,”<sup>43</sup> is the most common form of illegal sex work. Attitudes surrounding prostitution determine its legality, but the legality itself also influences attitudes toward it.<sup>44</sup> Prostitution can be understood as the “private consensual exchange of sexual activity for money,” although state laws vary in their descriptions of the specific illegal activities.<sup>45</sup> Even the Department of Justice has acknowledged that out of all similar forms of commercial sex work, only prostitution is deemed criminal.<sup>46</sup> Still, prostitution remains criminalized while laws restricting similar types of conduct have eroded.<sup>47</sup> The negative connotation associated with the term “prostitution,” demonstrative of efforts to demean and stigmatize the

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37. *Id.* at 289.

38. *See infra* Section II.B (discussing some common justifications for criminalizing sex work).

39. Kaye, *supra* note 31, at 289.

40. Cox, *supra* note 30, at 511.

41. Kaye, *supra* note 31, at 287.

42. Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 542 (2000).

43. Davis, *supra* note 15, at 1207.

44. Maravilla, *supra* note 8, at 2.

45. Anderson, *supra* note 12, at 76.

46. *Id.* at 130.

47. *Id.* at 93.

profession and those who engage in it,<sup>48</sup> must be part of the reason that prostitution is still criminalized. After all, the research makes clear that criminalization does not serve as a deterrent for individuals from buying and selling sex.<sup>49</sup>

Instead, the commercial sex trade has flourished.<sup>50</sup> Although difficult to pinpoint the exact size and scope of the commercial sex trade in the United States, one study suggested that the sex work industry generated roughly \$14 billion in 2013 with one to two million sex workers in the United States,<sup>51</sup> and another study put the annual industry revenue at \$5.7 billion.<sup>52</sup> What is clear, however, is that all states have some variation of prostitution “being practiced within their borders by consenting adults.”<sup>53</sup> Despite both buyers and sellers causing the industry to flourish, criminalization has served to identify the people selling sex as the party responsible for prostitution, with sellers facing higher arrests rates and legal sanctions than those who do the buying.<sup>54</sup> Furthermore, sex workers are regularly subjected to violent interactions, including physical and sexual assault, in part because their work is criminalized.<sup>55</sup>

One might ask why sex workers do not simply ask police for help when they are forced into threatening situations, but the answer is clear. Sex workers do not have the luxury of utilizing law enforcement to ensure their safety. Police, like many others, mistreat sex workers through acts of sexual violence and sexual harassment, and sex workers

48. Maravilla, *supra* note 8, at 33.

49. Sandler, *supra* note 2, at 482.

50. Ane Mathieson, Easton Branam, & Anya Noble, *Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. FOR SOC. JUST. 367, 426 (2015).

51. Danielle A. Sawicki, Brienna N. Meffert, Kate Read, & Adrienne J. Heinz, *Culturally Competent Health Care for Sex Workers: An Examination of Myths that Stigmatize Sex Work and Hinder Access to Care*, 34 SEXUAL & RELATIONSHIP THERAPY 355, 356 (2019) (discussing the size of the sex work industry via individuals who provide in-person sex services, “full-service sex workers,” and the difficulty in determining the actual size of the sex worker population given the common occurrence of research into this industry relying on samples of convenience).

52. DEMAND ABOLITION, WHO BUYS SEX? UNDERSTANDING AND DISRUPTING ILLICIT MARKET DEMAND 5 (2018), <https://www.demandabolition.org/wp-content/uploads/2019/07/Demand-Buyer-Report-July-2019.pdf>.

53. Nicole A. Hough, *Sodomy and Prostitution: Laws Protecting the “Fabric of Society”*, 3 PIERCE L. REV. 101, 117 (2004).

54. Mathieson, Branam, & Noble, *supra* note 50, at 372–73.

55. Anderson, *supra* note 12, at 108–09.

risk arrest by bringing police attention to their work.<sup>56</sup> Sex workers face real threats and instances of incarceration for simply doing their job.<sup>57</sup> Research has found that sex workers experience “verbal and sexual harassment with the expectation of free sexual services” from their interactions with police,<sup>58</sup> as well as intimidation and false arrests.<sup>59</sup> One study using data from the United States Transgender Survey found that “89.2% of sex workers who reported ever interacting with the police reported at least one incidence of harassment and/or violence with police while doing sex work in their lifetimes.”<sup>60</sup> Why, then, continue criminalizing prostitution when it does not seem to end the practice and, in fact, regularly puts sex workers in a dangerous position?<sup>61</sup>

It is questionable at best whether the government should have the power to punish people for engaging in personal conduct they consider to be immoral just because it purportedly serves the legitimate state interest of preventing harm to others—particularly where criminalization ineffectively accomplishes that objective.<sup>62</sup> Conservative moralists and others who support the idea of shared public morality for purposes of maintaining social goods, such as public health and family, tend to believe that regulation of the public on the basis of morality is a good thing.<sup>63</sup> The concern, however, is what might happen when blanket acceptance of morality as the reason for legal action

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56. Law, *supra* note 42, at 533.

57. SAKHA, GREYTAK, & HAYNES, *supra* note 2, at 6–7.

58. Susan G. Sherman, Katherine Footer, Samantha Illangesekare, Erin Clark, Erin Pearson, & Michele R. Decker, “What Makes You Think You Have Special Privileges Because You are a Police Officer?” *A Qualitative Exploration of Police’s Role in the Risk Environment of Female Sex Workers*, 7 AIDS CARE 473, 477 (2015) (discussing the interactions between sex workers and police in Maryland in 2012 as part of an effort to evaluate the role of police in generating risk for the health and well-being of sex workers).

59. Melissa Ditmore & Catherin Poulcallec-Gorden, *Human Rights Violations: The Acceptance of Violence Against Sex Workers in New York*, 6 RSCH. FOR SEX WORK 20, 20 (2003) (describing the responses of thirty street-based sex workers when asked about their interactions with law enforcement officers).

60. Madeline R. Stenersen, Kathryn Thomas, & Sherry McKee, *Police Harassment and Violence Against Transgender & Gender Diverse Sex Workers in the United States*, 71 J. HOMOSEXUALITY, 828, 833 (2024).

61. See Mathieson, Branam, & Noble, *supra* note 50, at 376.

62. See Raymond Ku, *Swingers: Morality Legislation and the Limits of State Police Power*, 12 ST. THOMAS L. REV. 1, 12–13 (1999).

63. Hough, *supra* note 53, at 103.

becomes oppressive,<sup>64</sup> or is used to inflict pain and suffering when it seems that a general statement of disapproval would otherwise be sufficient.<sup>65</sup>

## II. THE MORALITY ARGUMENT AGAINST PROSTITUTION

Prostitution and other sex-based crimes in many states have been codified under titles, subchapters, and parts that reference morality. These include headings such as “Offenses Against Public Morality and Decency,”<sup>66</sup> “Offenses Against Public Health and Morals,”<sup>67</sup> and “Crimes Against the Public Morals.”<sup>68</sup> By categorizing sex work as crimes that offend morality, legislators have left no question as to the rationale for these laws. Sex work has been, and continues to be, touted as a threat to family, traditional sexual roles, public health, and more.<sup>69</sup> There remains a stigma attached to sex work that is targeted by legislation rooted in the “moral disgust toward nonprocreative sex.”<sup>70</sup>

### A. *A Broad Look at Legislating Morality in the United States*

In the past, courts have determined that even when individual actions do not cause a direct harm to anyone, governmental control over the actions may be appropriate if the actions somehow indirectly cause harm “to the fabric of our society.”<sup>71</sup> It is because of this determination that morality may play a part in judicial review.<sup>72</sup> The idea of moral

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64. Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 156–57 (2012).

65. Ku, *supra* note 62, at 20.

66. N.C. GEN. STAT. § 14-204 (2013) (under Article 27 “Prostitution” in Subchapter VII “Offenses Against Public Morality and Decency”).

67. ALA. CODE § 13A-12-120 (2019) (under Article 3 “Prostitution Offenses” in Chapter 12 “Offenses Against Public Health and Morals”); N.Y. PENAL LAW § 230.00 (McKinney 2023) (under Article 230 “Prostitution Offenses” in Title M “Offenses Against Public Health and Morals”).

68. KAN. STAT. ANN. § 21-6419 (2013) (under Article 64 “Crimes Against the Public Morals”).

69. Weitzer, *supra* note 18, at 412.

70. Christensen, *supra* note 7, at 1357.

71. Hough, *supra* note 53, at 103 (internal quotation omitted).

72. *Id.* (citing Eric A. Johnson, *Harm to the “Fabric of Society” as a Basis for Regulating Otherwise Harmless Conduct: Notes on a Theme from Ravin v. State*, 27

behavior has largely been understood as acting in accordance with common principles of right and wrong.<sup>73</sup> But this begs the question of right and wrong according to whom? Laws frequently attempt to reflect society's views about morality, but moral legislation is often based on a small segment of society's values rather than the protection of human rights or basic moral rights.<sup>74</sup> Attempting to regulate private morality based on these societal opinions about virtue tends to conflict with respect for individual autonomy.<sup>75</sup> Still, it may be nearly impossible to separate law from concepts of morality.<sup>76</sup>

Morality policies can be understood as “those which seek to regulate social norms or which evoke strong moral responses from citizens for some other reason.”<sup>77</sup> These policies often instigate debates over principles that result in uncompromising clashes of values, such as which sexual practices are inherently sinful, whether abortion should be allowed, and if there is a right to free speech.<sup>78</sup> Issues of this nature, those that implicate personal values and affect individual practices, are often lower in technical complexity and more widely acknowledged, so a wider range of people have relatively informed opinions about these policies and may care enough to speak out.<sup>79</sup> In this sense, and because these policies can threaten the deeply held values of certain groups, elected officials looking to keep their positions regularly attempt to reflect general constituency opinion.<sup>80</sup> When it comes to the enactment or continuation of morality policies, this general constituency opinion acts as the pivotal point. Over the years, many activities that were prohibited due to opinions of morality have now become mostly socially acceptable.<sup>81</sup> These newly acceptable activities include gambling,

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SEATTLE U. L. REV. 41, 43 (2003)) (arguing that courts' consideration of harm to the fabric of our society as a justification for governmental control reintroduces morality into judicial review).

73. Piar, *supra* note 64, at 141.

74. Anderson, *supra* note 12, at 116.

75. *Id.*

76. Piar, *supra* note 64, at 144.

77. Christopher Z. Mooney & Mei-Hsein Lee, *Legislative Morality in the American States: The Case of Pre-Roe Abortion Regulation Reform*, 39 AM. J. POL. SCI. 599, 600 (1995).

78. *Id.*

79. *Id.*

80. *Id.* at 603, 615.

81. Hough, *supra* note 53, at 104.

alcohol consumption, and “sodomy,”<sup>82</sup> even if the Supreme Court decriminalized one of these practices only 20 years ago.<sup>83</sup>

### 1. Historical Morality Policies

Alcohol consumption is a practice that was once prohibited but is now socially acceptable. Through the Eighteenth Amendment, the United States instituted a national prohibition of alcohol.<sup>84</sup> However, this prohibition “never reflected a majority of the public’s opposition to the use of intoxicating beverages” but, instead, was based in religious temperance groups’ opinions of immorality and “the evils of excessive alcohol use.”<sup>85</sup> In a similar fashion to prostitution-based morality policies, prohibition emerged from roots of “evangelical protestant moralism.”<sup>86</sup> Prohibition advocates argued that a ban on alcohol would promote health, reduce crime, and advance the public interest, among other familiar aspirations.<sup>87</sup>

This attempt to regulate social norms was quite costly, as morality policies tend to be, and did not hold up under public scrutiny.<sup>88</sup> The federal government spent millions of dollars enforcing the ban, lost over a billion dollars in tax revenues, and failed to actually curb alcohol consumption by the population as a whole.<sup>89</sup> In fact, prohibition led to an “organized black market” and criminalized something that many people did not consider to be wrong, and law enforcement focused almost entirely on the sellers rather than buyers.<sup>90</sup> Barely a decade after the Eighteenth Amendment was ratified, public opinion shifted so substantially that even political support for prohibiting the consumption

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82. *Id.*

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

84. U.S. CONST. amend. XVIII (repealed 1933).

85. Charles H. Whitebread, “Us” and “Them” and the Nature of Moral Regulation, 74 S. CAL. L. REV. 361, 363–64 (2000).

86. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 15 (2006).

87. *Id.* at 15–16.

88. Whitebread, *supra* note 85, at 364.

89. *Id.*

90. Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 239–40 (2000).

of alcohol eroded.<sup>91</sup> Individual states began reversing their own laws regarding alcohol bans, drastically reducing state enforcement of the national prohibition,<sup>92</sup> and the Twenty-first Amendment repealing prohibition was ratified in 1933.<sup>93</sup> Prohibition may have begun because of moral panic by the public minority, but it ended because of the public majority.<sup>94</sup> Alcohol prohibition is one of the of the most widely known examples of morality policy, but it was not the last. Courts have continued to legislate on the basis of morality, despite the lessons provided by history regarding cost, crime, and change in public opinion.

As an example of historical non-procreational sex prohibitions, access to birth control offers a compelling story. In the nineteenth century, birth control was relatively stigmatized, but also widely used.<sup>95</sup> For the most part, stigmatization arose from religion, with religious authorities opposing contraception because of the idea that “interference with the procreative function of sex was immoral.”<sup>96</sup> Passed in 1873, the Comstock Act<sup>97</sup> banned the manufacture, sale, advertisement, and importation of, among other things, contraceptives.<sup>98</sup> Lawmakers cited obscenity, fear of sexually transmitted infections, and protecting purity as reasons to oppose contraception.<sup>99</sup> State and federal criminalization of access to birth control remained in effect until “the pill” was made widely available in the 1960s,<sup>100</sup> and social acceptance for contraception had changed.<sup>101</sup> Because access to birth control has been decriminalized, women and people with uteruses are able to take better care of themselves and their families, support themselves financially, complete

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91. Herbert E. Tucker, *Back to the Future: How the Legalization of Marijuana Echoes the Prohibition Era*, 44 COLO. LAW. 87, 88 (2015).

92. *Id.* at 88–89.

93. U.S. CONST. amend. XXI, § 1.

94. Whitebread, *supra* note 90, at 235–36; Tucker, *supra* note 91, at 88.

95. Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, 47 CONN. L. REV. 971, 980 (2015).

96. *Id.*

97. Comstock Act, ch. 258, 17 Stat. 598 (1873) (codified as amended at 18 U.S.C. § 1461).

98. *Id.* at 981.

99. *Id.* at 982–84.

100. See Leah A. Plunkett, *Contraceptive Sabotage*, 28 COLUM. J. GENDER & L. 97, 102 (2014).

101. Smith, *supra* note 95, at 986.



an education, and get or maintain a job.<sup>102</sup> Not only did public perceptions of moral behavior regarding birth control and non-procreative sex change, but so did the health, financial security, and happiness of people accessing birth control.<sup>103</sup> These examples are merely other instances of shifting societal values and the historical influence of morality on the law.

When courts do strike down morality-based laws, they limit the scope of or justify their decisions to “preserve traditional mores.”<sup>104</sup> Furthermore, if the courts have not delivered a stance on the morality of a certain practice, regulation and policy still can. One important influence on state policy and legislation is the “general political ideology of a state’s citizens, usually measured along some liberal-conservative continuum.”<sup>105</sup> Citizens on the liberal side of the continuum are typically opposed to ideological laws that control individual behavior.<sup>106</sup> The conservative end of the continuum includes citizens who may be traditionally liberal on certain social and economic issues, like religious groups supporting the poor or homeless, but are more conservative when it comes to these moral ideologies, as can be seen in their support for abortion regulation as a morality policy.<sup>107</sup> This level of support has acted as a determinant for laws that can, and do, prohibit certain activities as is deemed “necessary in order to prevent the moral downfall of society.”<sup>108</sup>

The use of laws to encourage and enforce morally correct or desirable behavior is often rooted in certain societal beliefs that specific actions should be prohibited.<sup>109</sup> Moral arguments for legal restrictions are considered appropriate when what is being barred is thought of as bad for all of society.<sup>110</sup> This justification may seem well and good,

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102. ADAM SONFIELD, KINSEY HASSTEDT, MEGAN L. KAVANAUGH, & RAGNAR ANDERSON, *THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN’S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN*, GUTTMACHER INSTITUTE 1, 29 (2013), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/social-economic-benefits.pdf>.

103. *Id.*

104. Piar, *supra* note 64, at 140.

105. Mooney & Lee, *supra* note 77, at 611.

106. *See, e.g., id.* at 612 (explaining that those on the liberal side of the continuum tend to oppose abortion regulation).

107. *See id.*

108. Hough, *supra* note 53, at 121.

109. Piar, *supra* note 64, at 144.

110. Hough, *supra* note 53, at 103.

appealing to the utilitarian side of most people, but it claims enforcement of morality for the preservation of society, when “society” is actually just the status quo.<sup>111</sup> An example of one such restriction for the preservation of society is the former criminalization of sodomy, which was largely due to people viewing sodomy as a “moral evil[], because sex has often been linked to sin and, therefore, to immorality and guilt.”<sup>112</sup> Morality-based action, from the courts or legislature, at the state or federal level, may be supported by the majority, but it would come as no surprise that the action might also improperly disadvantage certain minorities.<sup>113</sup> It might protect what we have come to know as “society’s” moral interests, but it also undermines individual autonomy—“the right to make individual choices, whether rational or irrational, morally desirable or morally wrong.”<sup>114</sup>

*B. Moral Campaigns and Laws Against Sex Work*

People often disagree with prostitution because they consider it to be immoral or unacceptable, as it involves “(mostly) women selling their bodies for financial gain.”<sup>115</sup> Still, national polls of the population’s opinions have cast doubt on the pervasiveness of this belief purportedly justifying laws preventing engagement in prostitution.<sup>116</sup> What links the moral arguments against sex work to modern moral crusades is the likening of sex work’s immorality to utilitarian claims—the idea that correct actions benefit the majority and incorrect actions harm the majority—about the personal or social harm associated with it.<sup>117</sup> Laws prohibiting prostitution are simply an example of morality policies attempting to regulate social norms and evoking strong moral responses.<sup>118</sup> In fact, most laws prohibiting sex work were enacted to “prohibit non-procreational sex in general, along the same lines as laws prohibiting fornication, adultery, access to birth control, and

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111. Ku, *supra* note 62, at 18.

112. Hough, *supra* note 53, at 101.

113. Piar, *supra* note 64, at 167.

114. Anderson, *supra* note 12, at 117.

115. Forestiere, *supra* note 16.

116. Maravilla, *supra* note 8, at 34.

117. Weitzer, *supra* note 18, at 401.

118. Mooney & Lee, *supra* note 77, at 600.

abortion.”<sup>119</sup> Independent lawmakers have gone so far as to cite suppressing organized crime and protecting the integrity of family as reasons for criminalizing prostitution.<sup>120</sup> Advocates, however, have framed the issue as a problem of marginalized communities being denied their basic human rights, rather than one of morality or public order and decency.<sup>121</sup>

As with other non-procreational sex prohibitions,<sup>122</sup> laws prohibiting prostitution often rely on public health justifications, framing the prohibition of prostitution as a legitimate state interest.<sup>123</sup> Arguments for continued criminalization tend to revolve around increased risks of STIs and sexual violence.<sup>124</sup> Proponents of maintaining criminalization have emphasized not only the “immoral” qualities of sex workers, but also the spread of disease,<sup>125</sup> with the notion of “corruption through sexual contact” enduring as a common trope used to associate sex workers with ideas of the undeserving and diseased.<sup>126</sup> Even the Model Penal Code has emphasized disease prevention as the primary goal.<sup>127</sup> However, research suggests that it is really criminalization which leads to increased risks for STIs, HIV, condomless sex, and violence.<sup>128</sup> Evidence has demonstrated that sex workers are actually more likely than others to use condoms and engage in safe sex practices, ultimately preventing the transmission of diseases.<sup>129</sup> Furthermore, no research findings indicate an increased risk of infection from sexual contact with sex workers.<sup>130</sup>

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119. Anderson, *supra* note 12, at 100.

120. Stephanie Javarauckas, *My Body, My Choice, Now Give Me a Voice: Legal Protections for Prostitutes and Porn Stars*, 41 WOMEN’S RTS. L. REV. 78, 83 (2019).

121. Chi Adanna Mgbako, *The Mainstreaming of Sex Workers’ Rights as Human Rights*, 43 HARV. J.L. & GENDER 91, 99 (2020).

122. See *supra* Section notes 91–94 and accompanying text.

123. BALDWIN, EDWARDS, FUENTES, LEIBOWITZ, MIYASHITA OCHOA, SEEGMILLER, & SHAH, *supra* note 2, at 1.

124. *Id.* at –2.

125. Neelam Patel, Sophia Blake, Sarah Finely, & Rachel Hutton, *Sex Work*, 23 GEO. J. GENDER & L. 325, 353 (2022).

126. Kaye, *supra* note 31, at 282.

127. Javarauckas, *supra* note 120, at 83.

128. BALDWIN, EDWARDS, FUENTES, LEIBOWITZ, MIYASHITA OCHOA, SEEGMILLER, & SHAH, *supra* note 2, at 2.

129. Law, *supra* note 42, at 550.

130. Hough, *supra* note 53, at 108.

Public perception also plays a role in traditional moral campaigns against sex work. Prostitution remains stigmatized, as people feel uncomfortable with what makes them vulnerable, like intimacy, the naked body, or “breaking free of the Christian mold forbidding premarital sex.”<sup>131</sup> Despite this, research shows that public perceptions have changed throughout history and that there is an increase in public favor for the ability of people to sell sexual services.<sup>132</sup> One study in Arizona found that a majority of participants did not think prostitution should be illegal, concluding that individuals have become more accepting of prostitution.<sup>133</sup> Nationally, public opinion polls have demonstrated that people are willing to tolerate, and maybe even embrace, the existence of sexual materials being available at large.<sup>134</sup>

These justifications and value-laden arguments reveal a crucial drawback of moral crusades: “[I]deology comes to substitute for evidence, with moral certainty precluding critical self-assessment.”<sup>135</sup> Targets of these crusades are considered “totally evil with no qualifications,” and those in support of the crusades are vehement in their beliefs.<sup>136</sup> Crusade supporters may only be a specific subset of the population, but when values are so deeply held, the debate becomes one of symbolic affirmation.<sup>137</sup> Even if the general consensus was that the justifications and arguments offered for continued criminalization of prostitution were valid, non-rebuttable, or of the highest priority for the criminal legal system, such consensus would not mean that further punishment of the offense is necessarily justified.<sup>138</sup> It would just mean that, like at other times when these laws have been passed, enough people rallied in support of criminalizing the behavior they found distasteful and immoral.<sup>139</sup> As the categorizations of criminality are subjective, ideas of distastefulness or immorality should not be the sole influence on criminalization. Although immorality may be considered a

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131. Javarauckas, *supra* note 120, at 80–81.

132. Maravilla, *supra* note 8, at 13.

133. *Id.* at 32, 34.

134. India Thusi, *Reality Porn*, 96 N.Y.U. L. REV. 738, 745 (2021).

135. Janie A. Chuang, *Rescuing Trafficking From Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1721 (2010).

136. Weitzer, *supra* note 18, at 400.

137. Mooney & Lee, *supra* note 77, at 603.

138. Ku, *supra* note 62, at 17.

139. Anderson, *supra* note 12, at 74.

necessary condition—no criminalization unless the act is immoral—it does not offer a sufficient reason for criminalization. An immoral act is not enough to justify criminality, as can be seen by society’s unwillingness to criminalize lying to friends or cheating on a significant other. Immorality alone should not be conflated with illegality.

### C. *Morality in North Carolina*

Many of the laws criminalizing sexual activity and those who participate in it are derived from the objection to and condemnation of non-procreative sex.<sup>140</sup> Early anti-sodomy laws were “based on Christian moral disapproval toward nonprocreative sexual activity,”<sup>141</sup> and even later cases like *Bowers v. Hardwick*<sup>142</sup> were considered valid on the basis of moral beliefs alone.<sup>143</sup> Some scholars have argued that by allowing moral legislation, particular moral behavior will result.<sup>144</sup> Although many people might not agree with the patriarchal and religious positions that have led to morality policies, “[t]raditional conservative moral ideas about families and gender roles are alive and strong in contemporary U.S. society.”<sup>145</sup>

#### 1. The Morality-Religion Tie

To an extent, morality has often been thought of as an off-shoot of religion—a way of understanding one’s religious ideologies, moral policies, or the reasons for either. One view of this morality-religion link is that religion is married to morality—that moral attitudes and behaviors flow from religious beliefs.<sup>146</sup> Studies have suggested that a “devotional religious orientation can operate as a mechanism of social control in a modern context.”<sup>147</sup> This “social control” is the idea of practicing what one preaches—acting on these beliefs in interpersonal

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140. Christensen, *supra* note 7, at 1344.

141. *Id.*

142. *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986).

143. Christensen, *supra* note 7, at 1346.

144. Piar, *supra* note 64, at 157.

145. Law, *supra* note 42, at 543.

146. S. Philip Morgan, *A Research Note on Religion and Morality: Are Religious People Nice People?*, 61 *SOC. FORCES* 683, 683 (1983).

147. *Id.* at 690.

relations and maybe even at the ideological level for humanitarian stances.<sup>148</sup> By acting as a social control, having a strong religious orientation would suggest that the person believes in acting on the tenets of their religion and is traditionally liberal on humanitarian stances, such as supporting the poor or homeless.<sup>149</sup> This is juxtaposed, however, by a retreat from that “liberal” position when it comes to government and law or the ways in which individual behavior may be controlled.<sup>150</sup>

Neoconservatives and Evangelical Christian groups, sects commonly associated with devotional religious orientations,<sup>151</sup> are frequently at the helm of the fight to further criminalize sex work and, more specifically, prostitution.<sup>152</sup> Their views often center around the ultimate goal of abolishing prostitution through a religious or morality based lens.<sup>153</sup> A main component of their beliefs is the idea that prostitution “contradicts ‘traditional social values rooted in heterosexual, patriarchal marriage and family,’ which is the only place to express sexuality.”<sup>154</sup> Sexual commerce is considered by the religious right to be “perverse and sinful, a source of moral decay in society, and a threat to marriage and the family.”<sup>155</sup> The wrong lays not necessarily in the act of prostitution or another form of sex work itself, but in the departure from the traditional social values, where sexuality is expressed only within the confines of heterosexual marriage.<sup>156</sup> Neoconservative ideology suggests that moral social issues require the oversight of an “interventionist government” for the stability and good of greater society.<sup>157</sup> Still, even North Carolina and its legislature have demonstrated an ability to change their stance on a moral issue, legalizing the historically frowned-upon practice of sports gambling and

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148. *See Id.* at 690–91.

149. *See supra* notes 100–03 and accompanying text in Section II.A regarding political ideology as a determinant of state policy and legislation.

150. Morgan, *supra* note 146, at 691.

151. Nicole Kaufman, *Governing Through Partnerships: Neoconservative Governance and State Reliance on Religious NGOs in Drug Policy*, 29 CRITICAL CRIMINOLOGY 589, 593 (2021).

152. Anderson, *supra* note 12, at 88.

153. *Id.*

154. *Id.* at 89.

155. Weitzer, *supra* note 18, at 401.

156. Chuang, *supra* note 135, at 1665.

157. Mathieson, Branam, & Noble, *supra* note 50, at 373.

consequently removing the oversight of the interventionist government to meet the needs and demands of the public.<sup>158</sup>

## 2. Religion in North Carolina

Because of the emphasis placed on morality by the religious right, the religious landscape in North Carolina is relevant in addressing the moral argument that has traditionally formed the basis for anti-prostitution legislation. Even North Carolina courts have expressed the rhetoric seen in ideology of neoconservatives and Evangelical Christian groups.<sup>159</sup> This is relatively unsurprising considering the religious demographics of citizens in the state. A study of religion in North Carolina found that 77% of adults in the state identify as Christian, with the largest subcategory of Christian being Evangelical Protestant at 35%.<sup>160</sup> Furthermore, 41% of adults in the state say they look to religion for guidance on right and wrong.<sup>161</sup> In the same study, 40% of adults identified as conservative, 32% moderate, and 23% liberal.<sup>162</sup> This delineation of political ideology in the broader group of all adults in North Carolina is simply exaggerated in the smaller group of Christians in the state. Among Christians, 47% identified as conservative, 31% moderate, and 17% liberal.<sup>163</sup> It is here that we see a retreat from a

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158. In 1992, the United States federal government banned sports gambling as sponsored, operated, advertised, or promoted by a governmental entity or person. Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992), *invalidated by* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453 (2018). Over 25 years later, the Supreme Court declared the law unconstitutional. *Murphy*, 584 U.S. at 486. The federal prohibition against sports betting dates back to the 1950s when the primary focus was “sports gambling as a means of revenue generation for organized crime.” John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U.L. REV. 329, 334 (2019). North Carolina’s history dates back even further, however, to an understanding of gambling as a “nuisance against public morals.” See *Carpenter v. Boyles*, 213 N.C. 432, 432, 196 S.E. 850, 857 (1938). Despite this history and ongoing judgment of morality, the North Carolina legislature legalized gambling for sports and horse racing in June 2023. H.R. 347, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023) (to be codified in scattered sections of N.C. Gen. Stat. §§ 14, 18C, 105, and 143B).

159. See *infra* notes 162–64, 172, and accompanying text.

160. *Religious Landscape Study: Christians Who Are in North Carolina*, PEW RSCH. CTR. (2014) <https://www.pewresearch.org/religion/religious-landscape-study/state/north-carolina/christians/christian/>.

161. *Id.*

162. *Id.*

163. *Id.*

traditional “liberal” humanitarian ideology of devotional religious orientations toward a conservative political ideology as politics tend to be associated with government and control of individual behavior.<sup>164</sup>

The laws criminalizing prostitution remain housed in the North Carolina General Statutes under Subchapter VII, “Offenses Against Public Morality and Decency,” Article 27, “Prostitution.”<sup>165</sup> However, prostitution is doubly criminalized: prostitution and other similarly frowned upon conduct is proscribed in another statute, as well. North Carolina has a “Crime Against Nature” statute under Subchapter VII, but this statute is in Article 26, also entitled “Offenses Against Public Morality and Decency.”<sup>166</sup> This statute states that “[i]f any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon.”<sup>167</sup> The legislature intended specifically “to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality.”<sup>168</sup> Courts have clarified that what constitutes a “crime against nature” includes prostitution, anal or oral sex, and non-consensual or coercive sexual acts.<sup>169</sup>

Terrible undertakings of non-consensual sexual acts and conduct involving minors cannot be considered in the same context as non-procreative or non-heterosexual acts. However, the courts’ and legislature’s attempt to lump sex work with these other crimes is not without precedent; courts have made similar sweeping, inappropriate groupings before, all of which tend to bolster the argument of the religious right. For example, the North Carolina Supreme Court, in a 1964 crime against nature case, noted two acts of “unnatural intercourse” as anal and oral sex.<sup>170</sup> To group anal and oral sex under the same umbrella as non-consensual sexual acts and conduct involving minors is to compare apples to oranges, and such comparison ignores the inherent dissimilarities. Furthermore, use of phrases like “unnatural

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164. See discussion *supra* Section II.C.1.

165. N.C. GEN. STAT. § 14-204 (2013).

166. N.C. GEN. STAT. § 14-177 (1994).

167. *Id.*

168. *State v. Stubbs*, 266 N.C. 295, 298, 145 S.E.2d 899, 902 (1966).

169. See, e.g., *State v. Joyner*, 295 N.C. 55, 66, 243 S.E.2d 367, 374 (1978); *State v. Whiteley*, 172 N.C. App. 772, 775–76, 616 S.E.2d 576, 579, 581 (2005).

170. *State v. O’Keefe*, 263 N.C. 53, 55, 138 S.E.2d 767, 769 (1964) (using the Latin terms “per os” for oral sex and “per anum” for anal sex).



and indecent methods” only serves to uplift the traditional values of heterosexual, patriarchal marriage as the sole purpose of sexual expression—relegating all other forms of intimate sexual conduct to the status of being against public decency and morality.

Following the U.S. Supreme Court’s decision in *Lawrence v. Texas*,<sup>171</sup> North Carolina was forced to reconsider the constitutionality of its “crime against nature” statute, which the North Carolina Supreme Court previously upheld as neither vague nor overbroad.<sup>172</sup> *Lawrence* held that a Texas statute, which prohibited two members of the same sex from engaging in certain sexual conduct, violated the Due Process Clause.<sup>173</sup> In doing so, the U.S. Supreme Court limited states’ ability to infringe on private and intimate acts between consenting adults.<sup>174</sup> North Carolina was left with no choice but to find the “crime against nature” statute unconstitutional when used to criminalize protected acts within private relationships.<sup>175</sup>

However, the ruling in *Lawrence* was not limitless: the U.S. Supreme Court did not hold that *any* form of sexual conduct was constitutionally protected, and it specifically did not permit public conduct, prostitution, coercion, or involvement with minors.<sup>176</sup> This specification enabled North Carolina to uphold its “crime against nature” statute as constitutional when involving “legitimate” state interests in prohibiting prostitution, non-consensual acts, and public conduct.<sup>177</sup> Despite being unconstitutional as applied to protected acts within private relationships, the “crime against nature” statute remains on the books in North Carolina and continues to be referenced in case decisions describing sexual practices “contrary to the order of nature” and “against public decency and morality.”<sup>178</sup> Although engagement in sexual conduct for a fee or compensation could be considered an act within a private relationship, prostitution continues to be looked upon as

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171. 539 U.S. 558 (2003).

172. *Whiteley*, 172 N.C. App. at 775–76, 616 S.E.2d at 579.

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

174. *Whiteley*, 172 N.C. App. at 776, 616 S.E.2d at 579.

175. *Id.* at 778–79, 616 S.E.2d at 580–81.

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

177. *Whiteley*, 172 N.C. App. at 775–79, 616 S.E.2d at 579–81.

178. *See, e.g., In re D.K.*, No. COA17-1338, 2018 WL 4201063, at \*4–5 (N.C. Ct. App. Sept. 4, 2018); *State v. Gentle*, 817 S.E.2d 833, 839 (N.C. Ct. App. 2018).

unworthy of the protection given to other acts within private relationships.

As prostitution is criminalized in two separate articles under Subchapter VII of the North Carolina General Statutes,<sup>179</sup> both of which reside under, and are specifically named for, offenses considered to be against public morality and decency, the legislature’s intent is clear. The Supreme Court’s decision in *Lawrence* forbade states from criminalizing some behavior based on moral arguments—that which falls within the liberty interest protecting personal relations—but not all.<sup>180</sup> This carveout begs the question of whether, despite regular references to it, states have actually heeded the words of Justice Stevens in his dissenting opinion in *Bowers*.<sup>181</sup> Justice Stevens argued “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>182</sup> To actually act on that advice, North Carolina would need to protect sex workers through decriminalization instead of touting protection via criminalization.

### III. THE RESPONSE OF FULL DECRIMINALIZATION

Supporters of decriminalization argue that prostitution is a personal choice; it involves women’s empowerment and concerns an agreement between consenting adults.<sup>183</sup> The campaigns for decriminalization have grown mainly out of the sex workers’ rights movement,<sup>184</sup> and both current and former “prostitutes” agree that decriminalization is a step forward in guaranteeing civil rights and promoting safety for sex workers.<sup>185</sup> As a structural intervention,<sup>186</sup>

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179. N.C. GEN. STAT. § 14-204 (2013) (under Article 27 “Prostitution” in Subchapter VII “Offenses Against Public Morality and Decency”); N.C. GEN. STAT. § 14-177 (1994) (under Article 26 “Offenses Against Public Morality and Decency” in Subchapter VII “Offenses Against Public Morality and Decency”).

180. *Lawrence*, 539 U.S. at 558.

181. *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

182. *Id.*

183. Mathieson, Branam, & Noble, *supra* note 50, at 378.

184. Patel, Blake, Finely, & Hutton, *supra* note 125, at 329.

185. Belkys Garcia, *Reimagining the Right to Commercial Sex: The Impact of Lawrence v. Texas on Prostitution Statutes*, 9 N.Y.C. L. REV. 161, 181 (2005).

186. BALDWIN, EDWARDS, FUENTES, LEIBOWITZ, MIYASHITA OCHOA, SEEGMILLER, & SHAH, *supra* note 2, at 3.

decriminalization has its advantages for allowing unionizing, workplace protections, fair wages, and the ability to report violence without fear of arrest or other criminal legal consequences.<sup>187</sup>

*A. Full Decriminalization vs. Partial vs. Legalization*

There are three distinct approaches to reforming sex work bans: decriminalization, partial decriminalization, and legalization. As this section explains, full decriminalization is the only human rights-based approach and, thus, the clear choice.

Decriminalization involves removing all laws and penalties associated with sex work,<sup>188</sup> giving sex workers the ability to work and run their businesses free from government interference and criminal sanctions.<sup>189</sup> Evidence from over 80 studies on decriminalization and criminalization of sex work have indicated that full decriminalization would improve conditions for people engaged in sex work, especially those who are marginalized.<sup>190</sup> This practice of removing criminal consequences from the act of engaging in prostitution, like permitting people over the age of 18 to sell sexual services and to do so on the street or from their own homes,<sup>191</sup> would allow “prostitution” sex work to emerge from the shadows of criminal and “immoral” behavior.<sup>192</sup> Studies have shown that sexual violence against women and transmission of STIs have decreased in places that pursued decriminalization.<sup>193</sup> If decriminalized, sex workers would have avenues toward legal recourse for crimes committed against them that might actually deter theft, rape, and violence against sex workers,<sup>194</sup> providing protection in a way that criminalization has only claimed to do.

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187. Patel, Blake, Finely, & Hutton, *supra* note 125, at 356–57.

188. Mathieson, Branam, & Noble, *supra* note 50, at 379.

189. Hough, *supra* note 53, at 113–14.

190. SAKHA, GREYTAK, & HAYNES, *supra* note 2, at 15.

191. Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 WM. & MARY J. WOMEN & L. 47, 59 (2016) (discussing the New Zealand Prostitution Reform Act and its success).

192. BALDWIN, EDWARDS, FUENTES, LEIBOWITZ, MIYASHITA OCHOA, SEEGMILLER, & SHAH, *supra* note 2, at 2.

193. *See id.* at 2 (“Legalized brothels in Nevada report low levels of violence and STIs compared to illegal markets in other states due to worker safety regulations.”).

194. Garcia, *supra* note 185, at 179.

Partial decriminalization, also known as the “Nordic” model, criminalizes the buyers of prostitution, the people “with power who demand the prostitution transaction.”<sup>195</sup> However, this clearly penalizes the seller as well. When buyers are criminalized, they are more nervous and reluctant to patronize a sex worker, which forces sex workers to rush negotiations, pushes the sex work industry into a more clandestine market, and decreases the reliability of sex workers’ incomes.<sup>196</sup> Furthermore, a study in Northern Ireland found that when buyers were criminalized, harassment and abusive behaviors by buyers toward sellers increased.<sup>197</sup> As with criminalization, Nordic models also have a negative impact on the economic stability of sex workers because sellers cannot be selective about their rates or clients since fewer clients are willing to risk the penalization.<sup>198</sup> Additionally, partial decriminalization has been accompanied by providing women with “meaningful exit opportunities,”<sup>199</sup> which may help those who want to leave the industry,<sup>200</sup> but not everyone does. Many just want the autonomy that comes from a worker-run and -led industry.<sup>201</sup>

Legalization occurs when the government actively regulates prostitution through labor laws<sup>202</sup> and embeds sex work into the state or county’s market structure.<sup>203</sup> Although legalization may serve to normalize the idea of sexual consumerism, it is not clear whether it reduces crime and violence against women in the way intended.<sup>204</sup>

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195. Mathieson, Branam, & Noble, *supra* note 50, at 396–97.

196. Marshall, *supra* note 191, at 61–62 (“[S]ex workers are more at risk because there is greater competition among women for fewer clients . . .”).

197. SAKHA, GREYTAK, & HAYNES, *supra* note 2, at 5.

198. *Id.* at 10–11.

199. McKay Lewis, *Dirty Johns: Prosecuting Prostituted Women in Pennsylvania and the Need for Reform*, 125 DICK. L. REV. 199, 221 (2020) (“[A] Nordic Model regime is usually accompanied by state-sponsored social services that aim to remove the prostituted woman from her work and provide her with meaningful exit opportunities. These social services generally include job training, educational services, and mental health services.”).

200. Sandler, *supra* note 2, at 497.

201. Anderson, *supra* note 12, at 131–32.

202. Mathieson, Branam, & Noble, *supra* note 50, at 379.

203. *Id.*

204. *See* Lewis, *supra* note 199, at 216 (“The legalization of prostitution has also not reduced crime and violence against women as it was designed to do.”); *But see* SAKHA, GREYTAK, & HAYNES, *supra* note 2, at 6 (“Several studies . . . indicate that legalization entails higher regulation and scrutiny, resulting in a decreased risk of violence due to greater oversight, regulated negotiation systems, greater peer support from social networks, and more positive relations with law enforcement.”).

Instead, legalization may perpetuate disparities that already exist for marginalized people, restrict market access to those approved by the people with power, and encourage continued surveillance and sanctions.<sup>205</sup> Considering the harms and violence committed against sex workers by police in an already heightened surveillance state of criminalization,<sup>206</sup> it is not exactly encouraging that increased scrutiny and surveillance would accompany legalization.

In the current system, those most affected by the criminalization of prostitution are the most marginalized groups. Criminalization applies the label of “criminal” or “morally corrupt” and makes it more difficult to get help from law enforcement,<sup>207</sup> threatens the safety of sex workers,<sup>208</sup> and may even cause human rights abuses against sex workers.<sup>209</sup> Women of color are disproportionately arrested and punished for crimes of prostitution,<sup>210</sup> and women of color and transgender women, regardless of whether they actually participate in sex work, report that they are targeted by police who engage in racist and homophobic harassment.<sup>211</sup> Sex workers in the LGBTQ+ community are further impacted by the scrutiny toward their sexual behavior and gender identities, the stigmatization of which can lead to homelessness, poverty, and depression.<sup>212</sup>

To continue criminalizing prostitution is to maintain subjugation of those already marginalized,<sup>213</sup> whether by their gender, race, sexual orientation, immigrant status, socio-economic status, or another intersecting identity that is co-opted to keep people on the fringes of society. The movement for decriminalization, however, would combat this continued harm of marginalized communities as the “only human rights-based legal approach to sex work.”<sup>214</sup> Decriminalization is human rights-based because it addresses the “human rights abuses linked to the

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205. SAKHA, GREYTAK, & HAYNES, *supra* note 2, at 16 (explaining that through legalization, regulatory policies like zoning and licensing can restrict market access, while enforcement of regulations offers another reason for continued surveillance).

206. *See* Patel, Blake, Finely, & Hutton, *supra* note 125, at 327.

207. Comerford, *supra* note 19, at 1214.

208. SAKHA, GREYTAK, & HAYNES, *supra* note 2, at 5.

209. Mgbako, *supra* note 121, at 109.

210. Lewis, *supra* note 199, at 206–07.

211. Patel, Blake, Finely, & Hutton, *supra* note 125, at 355.

212. *Id.* at 359.

213. Garcia, *supra* note 185, at 163.

214. Mgbako, *supra* note 121, at 122.

criminalization of sex work,” such as police abuse, arbitrary detention, physical and sexual violence, eviction, forced STI testing, and poor health outcomes—all of which undermine “rights to security of person, housing and health.”<sup>215</sup> Decriminalization as a human rights-based approach demands recognition of and belief in the agency of marginalized communities and elimination of the unjust application of laws and regulations against sex workers.<sup>216</sup>

*B. Commodification of Sex*

In response to the call for decriminalization, some feminists have argued that all forms of sex work, legal or illegal, commodify sex and should be criminalized.<sup>217</sup> This argument is partially grounded in the idea that prostitution turns sex workers’ bodies into commodities.<sup>218</sup> However, this argument robs sex workers of their agency; “what matters ultimately is who controls the meaning of the purchase.”<sup>219</sup> Couldn’t sex workers, in another light, be viewed as “examples of female sexual agency”<sup>220</sup> since they decide what the interaction means and whether it occurs? If people object to commodification because sex is important, special, and meant to exist in the confines of traditional marriage, it becomes simply another argument for finding moral significance in what has become a relatively common practice.<sup>221</sup>

Adult and sexually-based content has spread into businesses that previously had no connection to the sex industry.<sup>222</sup> Webcamming models sell sexual services on social media platforms,<sup>223</sup> pornography and exotic dancing remain legal,<sup>224</sup> and the market for sex toys and escort services on the internet is expanding.<sup>225</sup> Pornography actors and producers are even afforded legal rights on both the state and federal

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215. *Id.* at 123–26.

216. *See id.* at 122.

217. Thusi, *supra* note 134, at 742.

218. Hough, *supra* note 53, at 119.

219. Chuang, *supra* note 135, at 1701.

220. Law, *supra* note 42, at 541.

221. *See* Kaye, *supra* note 31, at 265.

222. Weitzer, *supra* note 18, at 399.

223. Maravilla, *supra* note 8, at 2.

224. Forestiere, *supra* note 16.

225. Weitzer, *supra* note 18, at 399.

level.<sup>226</sup> This legal protection is why choosing how to label a specific sexual act, like pornography versus prostitution, or even webcamming versus prostitution, alters the legal status of said act.<sup>227</sup> Criminalization can center around whether there is payment for sexual conduct that results in sexual gratification, but the activity involved is the same, regardless of whether money changes hands.<sup>228</sup> Still, when the sexual conduct is commercialized in a private transaction, like prostitution, it is criminalized; when it is commercialized through broadcasting for mass consumption, like pornography and webcamming, it is not.<sup>229</sup>

In sum, there has been a clear increase in the public's desire for sexual engagement and participation in the sex industry, but laws prohibiting certain sexual acts remain.<sup>230</sup> Furthermore, some people engage in sex work because of their desire to explore and express sexuality.<sup>231</sup> Although some feminist theorists argue that sex work is merely an industry of violence, this refusal to acknowledge sex workers' agency as anything more than "the freedom to be subjugated[,] transfers the stigma of being a 'whore' to being a victim that is incapable of advocating for themselves."<sup>232</sup> Other feminist theorists highlight the empowerment and bodily autonomy of sex workers when sex work is viewed as a legitimate trade.<sup>233</sup> Many people no longer have the same lingering qualms about sex and the sex work industry as have been seen in the past.<sup>234</sup> Even so, in order to secure adequate rights protection, we must remove the remaining social stigma around sex, its commodification, and the sex worker.<sup>235</sup>

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226. Javarauckas, *supra* note 120, at 90–91.

227. Thusi, *supra* note 134, at 744.

228. *Id.* at 743, 794.

229. *Id.* at 798.

230. Maravilla, *supra* note 8, at 2.

231. Sandler, *supra* note 2, at 478.

232. Jemison, *supra* note 14, at 170.

233. *Id.*

234. See e.g., Maravilla, *supra* note 8, at 1, 13; Weitzer, *supra* note 18, at 399; Bleakley, *supra* note 25, at 902–03; Patel, Blake, Finely, & Hutton, *supra* note 125, at 326–27.

235. See Garcia, *supra* note 185, at 166.

#### IV. WHAT DECRIMINALIZATION WOULD LOOK LIKE IN NORTH CAROLINA

This section explains how the many benefits of decriminalization would be realized in North Carolina and argues for decriminalization as a means of reducing danger for sex workers, limiting dedicated police resources and exploitation, and ending the inequality of sex work prosecution. In addition, this section offers insight into strategies North Carolina could take to implement decriminalization.

##### A. *Reduced Danger*

Evidence shows that criminalization makes sex work more dangerous, driving sex workers into isolated locations and making it risky to report violence to law enforcement.<sup>236</sup> Furthermore, criminalization reduces access to healthcare and deepens income inequality.<sup>237</sup> Criminalization may actually lessen sex workers' financial security and income stability because sex work is not seen as legitimate employment.<sup>238</sup> Decriminalization, however, maximizes legal protection and legal recognition, which, in turn, maximizes dignity and equality.<sup>239</sup> Research has also suggested that decriminalization can improve physical and mental health.<sup>240</sup> Without the stigma and consequences of criminalization, sex workers are better able to exercise their rights to justice and health care.<sup>241</sup> Where prostitution has been decriminalized, health outreach workers have had greater access to sex workers, which increased access to health screenings, and sex workers were better able to negotiate with clients about health protections like condom use, which reduces rates of sexually transmitted infections.<sup>242</sup>

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236. Sandler, *supra* note 2, at 482.

237. *Id.*

238. SAKHA, GREYTAK, & HAYNES, *supra* note 2, at 10.

239. *Why Sex Work Should Be Decriminalized, Questions and Answers*, HUM. RTS. WATCH. (Aug. 7, 2019, 3:31 AM), <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized>.

240. *See* SAKHA, GREYTAK, & HAYNES, *supra* note 2, at 8.

241. HUM. RTS. WATCH, *supra* note 239.

242. Marshall, *supra* note 191, at 64.



*B. Limiting Dedicated Police Resources and Exploitation*

By decriminalizing sex work, fewer resources would be devoted to the patrol for and ultimate prosecution of those engaging in what has previously been understood as prostitution. This sort of surveillance and subsequent legal consequence of commercial sex can consume extremely large amounts of police resources.<sup>243</sup> Consequently, decriminalization is good for the budgets of state and local government. “The enforcement of anti-sex work statutes costs money and wastes city/state resources.”<sup>244</sup> Proponents for decriminalization also suggest that decriminalization would turn police focus and resources away from arrest and prosecution of sex workers, and toward discouraging people who take advantage of sex workers, thus decreasing crime.<sup>245</sup>

Research has also shown that in heavily criminalized contexts, “sex workers are often physically or sexually coerced by police through threat of detention, violence (including rape), or extortion.”<sup>246</sup> In this sense, law enforcement officers frequently contribute to the exploitation of sex workers.<sup>247</sup> Historical discrimination by and mistrust of police, and the potential risk of being arrested for engaging in sex work, has led sex workers to report crimes at lower rates,<sup>248</sup> despite the fact that they frequently suffer sexual and physical violence.<sup>249</sup> Even when sex workers do report the violence or crime that they experience, “police systematically ignore their complaints.”<sup>250</sup> Sex workers are humiliated, turned away, and refused protection or even basic assistance.<sup>251</sup> This suggests that despite criminalization having common and regularly cited justifications like protecting those engaged in sex work, criminalizing sex work actually has the opposite effect.

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243. Law, *supra* note 42, at 608.

244. John Hirsch & Sarah Francois, *Why Comprehensive Police Reform Must Include Decriminalizing Sex Work*, 64 *HOW. L.J.* 375, 404 (2021).

245. Patel, Blake, Finely, & Hutton, *supra* note 125, at 355–56.

246. SAKHA, GREYTAK, & HAYNES, *supra* note 2, at 6.

247. Mathieson, Branam, & Noble, *supra* note 50, at 376.

248. SAKHA, GREYTAK, & HAYNES, *supra* note 2, at 7.

249. Mathieson, Branam, & Noble, *supra* note 50, at 377.

250. Law, *supra* note 42, at 581.

251. Patel, Blake, Finely, & Hutton, *supra* note 125, at 355.

C. *Ending the Inequality of Sex Work Prosecution*

Police resources are typically aimed at prosecuting only the people who sell sex rather than those who purchase it.<sup>252</sup> This disparity should not lead us to conclude that buyers of sex should be prosecuted more frequently; criminalizing both the sex worker and the buyer has proven to be ineffective.<sup>253</sup> This is only to demonstrate the inequitable manner in which law enforcement prosecute people for the crimes associated with illegal sex work. There are ancillary effects beyond the trauma of prosecution and incarceration that harm sex workers and create inequality. When sex workers are repeatedly incarcerated, and arrests are added to their criminal records, severe economic disadvantages follow.<sup>254</sup> Sex workers' ability to access education, loans, and even legal employment if they choose to leave the industry are all impacted by their history with law enforcement and prosecution.<sup>255</sup> Furthermore, research indicates that sex workers in marginalized communities are most at risk for the harmful impacts of criminalization—specifically LGBTQ+ people, people of color, immigrants (particularly undocumented immigrants), and those living at the intersections of these identities.<sup>256</sup>

Case studies in major North Carolina cities have demonstrated that law enforcement's focus on outdoor "street" prostitution in Charlotte, Durham, and Raleigh results in Black women being arrested at higher rates than their White counterparts.<sup>257</sup> Increases in age, rising unemployment rates, and being female increased the odds that the person arrested in connection with sex work was Black.<sup>258</sup> Black women, and people of color more generally, are disproportionately arrested and punished for activities related to sex work.<sup>259</sup>

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252. Law, *supra* note 42, at 566.

253. Mathieson, Branam, & Noble, *supra* note 50, at 426.

254. *Id.* at 377.

255. *Id.*

256. SAKHA, GREYTAK, & HAYNES, *supra* note 2, at 11.

257. Shana M. Judge & Mariah Wood, *Panel Paper: Racial Disparities in the Enforcement of Prostitution Laws*, Global Challenges, New Perspectives Conference, Ass'n for Pub. Pol. Analysis & Mgmt. (Nov. 16, 2014, 3:05 PM), <https://appam.confex.com/appam/2014/webprogram/Paper11163.html>.

258. *Id.*

259. *See discussion supra* Section III.A.; Lewis, *supra* note 199, at 206–07.

Members of Congress have acknowledged the widespread discrimination against the LGBTQ+ community, the frequency with which people exchange sex for resources, and the lack of safety for sex workers in the United States.<sup>260</sup> They have also acknowledged the evidence that members of the sex work community are being harmed.<sup>261</sup> Still, there has been little to no change. Physical, in-person sales of sex are currently illegal in all states except Nevada, where it is allowed, but highly regulated, in specific counties.<sup>262</sup> “Any change in the status of sex work will likely have to come first from state legislatures.”<sup>263</sup> The North Carolina legislature can begin to change the status of sex work by decriminalizing it, which ultimately puts a stop to the inequality of sex work prosecution and limits police resources that result in the exploitation of and harm to sex workers within the state.

*D. Strategy for Implementing Decriminalization in North Carolina*

While the previous three sections outlined the benefits of decriminalization, this section focuses on how North Carolina can successfully decriminalize sex work. One potential method for gathering support for decriminalization is through moral re-framing. This means attempting to appeal to the values of other parties, which can be effective for acceptance of specific policies that were previously opposed, especially for value reasons.<sup>264</sup> For instance, appealing to loyalty, authority, and sanctity foundations<sup>265</sup> could help flip the script on the typical justifications offered for continued criminalization. Taking into account the morality-religion tie and religious composition of both North Carolina and the front line against decriminalization, it makes sense to appeal to principles of individual autonomy and liberty—both of which are directly impeded when legislating individual choices about behavior.<sup>266</sup> In North Carolina, the majority of adults identify as Christian (with the largest subcategory being Evangelical

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260. SAFE SEX Workers Study Act, H.R. 5448, 116th Cong. (2019).

261. *Id.*

262. Maravilla, *supra* note 8, at 1.

263. Patel, Blake, Finely, & Hutton, *supra* note 125, at 358.

264. Sandler, *supra* note 2, at 506.

265. *Id.*

266. Anderson, *supra* note 12, at 116.

Protestant) and almost half identify as conservative.<sup>267</sup> Evangelical Christians and neoconservatives alike, those who commonly lead the charge for sex work criminalization,<sup>268</sup> argue for individual liberty and religious principles.<sup>269</sup> If criminalization was framed as a loss of autonomy and individual liberty, as “the decision about under what conditions one will engage in sexual activity with another consenting adult is a decision central to personal dignity and autonomy and the liberty interest protected by the Fourteenth Amendment,”<sup>270</sup> the religious right might form more of a connection to the cause. By appealing to values of liberty and individual autonomy to garner support for decriminalization, neoconservatives and Evangelical Christians are more likely to be persuaded on moral and political issues like sex work.<sup>271</sup>

Another act that may help increase support is simultaneously strengthening services for sex workers, like access to public benefits and social safety nets, and ensuring safe working conditions.<sup>272</sup> If the goal of anti-prostitution advocates is to convince people, or provide them with the ability, to leave the sex work industry, providing social services is a good place to start, as early indicators have pointed to an increased number of people accepting the services and leaving the industry.<sup>273</sup> Furthermore, workers in illegal industries, such as sex work, lack fair or safe working conditions.<sup>274</sup> Continued criminalization actually contributes to unsafe and unhealthy working conditions to which sex workers are subjected.<sup>275</sup> Recognizing the right to work and choose an occupation through decriminalization, however, can improve the minimal labor and employment protections in place that leave sex

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267. See discussion *supra* Section II.C.2.

268. *Id.*

269. Jeffrey R. Bibbee, *The Inseparability of Religion and Politics in the Neoconservative Critique of Biotechnology*, 7 AM. J. BIOETHICS 18, 18–19 (2007).

270. Anderson, *supra* note 12, at 98.

271. Sandler, *supra* note 2, at 506.

272. HUM. RTS. WATCH, *supra* note 239.

273. Lewis, *supra* note 199, at 225.

274. Comerford, *supra* note 19, at 1223.

275. Michelle A. Kovach, *Let's Talk About Voluntary Sex Work, Baby: How U.S. Policy on Sex Work Violates International Legal Norms*, 53 U. TOL. L. REV. 315, 339 (2022).

workers in abusive working conditions, without the consequences that come from further state surveillance under legalization.<sup>276</sup>

“Legal recognition of sex workers and their occupation maximizes their protection, dignity, and equality.”<sup>277</sup> Human rights approaches demand that policy reflect the needs and desires of directly affected communities.<sup>278</sup> UNAIDS has stressed that decriminalization has to include removal of criminal laws and penalties for the purchase and sale of sex, as well as all other activities related to sex work.<sup>279</sup> There is no evidence that criminalization deters individuals from buying or selling sex, but there is evidence that it makes the entire engagement more dangerous.<sup>280</sup> If legislating and punishing based on morality is actually instrumental in preserving the society that people want, then there should be concrete historical examples in which this was the case.<sup>281</sup> Instead, there are concrete historical examples of states rolling back and eliminating laws that prohibited certain conduct based on the view that they were immoral, and the loosening of these moral norms did not destroy the states.<sup>282</sup>

#### CONCLUSION

Despite sharing many similarities, like sexual acts for compensation and personal connections between the sex worker and client, the law has distinguished physical, in-person sex work from every other type of sex work. Some claim that “prostitution” threatens public health, family, traditional sexual roles, and the purpose of sex for procreation. In doing so, they superimpose their ideas of morality and regulate individual behavior for the “good” of all, when in actuality, they only appeal to a subset of the population. Although this reasoning arose primarily from early Christian principles, neoconservatives and Evangelical Christians have continued the crusade against sex work for its departure from so-called traditional values. North Carolina courts

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276. Mgbako, *supra* note 121, at 105.

277. HUM. RTS. WATCH, *supra* note 239.

278. Mgbako, *supra* note 121, at 135.

279. *Id.* at 122.

280. Sandler, *supra* note 2, at 482.

281. Ku, *supra* note 62, at 17.

282. *Id.* at 18.

and legislators have also participated in the crusade, attempting to reflect both the political and religious ideologies within the state.

Moral certainty has been used to avoid facing the consequences of sex work criminalization, ignoring that criminalization stigmatizes sex workers, disproportionately punishes people of color, allows for violence against sex workers, and ultimately maintains subjugation of those already marginalized. It has never been a secret that morality has formed the basis for these anti-prostitution laws, but it should not constitute a sufficient reason for continued prohibition of a practice that many participate in and that an increasing number of people support. The divide between legal and illegal sex work practices has dwindled, existing now as merely an arbitrary distinction based on personal moral ideology. The fight to protect sex workers and their choice of occupation, however, is not about morality or decency—it is about people being denied human rights and protection from abuse at the hands of clients, police, and the criminal justice system.

The only way to fully address these issues is through full decriminalization of prostitution. While good in theory, partial decriminalization and legalization pose significant continued harm to sex workers. Full decriminalization acknowledges the increased public desire for a commercial sex industry and improves conditions for those engaged in sex work. It maximizes legal protection for sex workers, limits police resource expenditures, decreases the frequency with which sex workers must interact with police, and ends the inequality of sex work prosecution wherein people who sell sex are prosecuted with much more frequency than those who buy sex.

To undertake full decriminalization, North Carolina must act strategically in gathering support. Appealing to the values of those who have traditionally led the fight against prostitution, strengthening services for sex workers, and ensuring safe working conditions are all incremental acts that may persuade anti-prostitution advocates while still protecting and improving conditions for sex workers. It will be a challenge to pursue decriminalization, as moral ideologies are deeply held and not easily altered. Removing the legal consequences of sex work undermines morality as a basis for many prohibitory laws, and “threatens to subvert the binary structures on which dichotomies—such

as active versus passive, public versus private, and virgin versus whore—rely.”<sup>283</sup> However, decriminalization is the only human rights based approach which affirms the humanity of sex workers and fights back against the dehumanization that sex workers experience.<sup>284</sup>

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283. Garcia, *supra* note 185, at 162.

284. Mgbako, *supra* note 121, at 105.