

## THE MODEL PENAL CODE & SEX WORK CRIMINALIZATION

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### ABSTRACT

*There is no early colonial common law crime of prostitution, yet societal attitudes today would suggest the criminal suppression of sex work is as old as the United States. Contrary to these assumptions, modern state laws criminalizing prostitution are relatively new and little research has been devoted to understanding these laws' development despite a century-old debate on whether and how to criminalize sex work. The most influential legal authority, Section 251.2 of the Model Penal Code, is one such example. At least twenty jurisdictions have adopted some portion of Section 251.2 in their prostitution-related criminal statutes, but no scholarship has examined its creation. This Article addresses this dearth of knowledge by conducting archival analysis of the drafting process behind Section 251.2 and reviews the four stated rationalizations for criminalizing prostitution: suppressing venereal disease, decreasing organized crime's profit and power, preventing the corruption of government and law enforcement, and maintaining stability of the home and family. After evaluating available social science research, this Article concludes decriminalizing all aspects of sex work—including sex workers, their clients, and non-exploitative third*

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INTRODUCTION

In the nineteenth century, sex work openly operated in the United States. Most cities had “red light” districts where—de jure or de facto—sex work was tacitly allowed to prosper.<sup>1</sup> Brothels were standard businesses in Western settler communities, and madams worked hand in hand with local law enforcement.<sup>2</sup> For many women of the time, sex work remained the best, if not only, opportunity for economic independence and freedom.<sup>3</sup>

At the end of the century, however, the law’s attitude towards sex work began to change. Medical professionals and law enforcement united to develop a “regulationist” movement arguing sex work, “though evil, was necessary” and sought to register sex workers with the state to impose compulsory medical examinations and quarantines for those with sexually

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<sup>1</sup> Peter C. Hennigan, *Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era*, 16 YALE J.L. & HUMAN. 123, 125 (2004).

<sup>2</sup> Noah Berlatsky, *The Law’s Tougher on Sex Workers Today Than It Was in the 19th Century*, PAC. STANDARD, <https://psmag.com/social-justice/what-is-up-with-that> (last updated June 14, 2017).

<sup>3</sup> *Id.*

transmitted infections.<sup>4</sup> A reaction movement, formed from a coalition of feminists, “social purist[s],” and alcohol abstinence associations, challenged the regulationists and instead sought to “abolish” sex work altogether.<sup>5</sup> As public attention shifted to “white slavery,” the early twentieth century progressive movement adopted the abolitionist stance seeing sex work as “a moral problem that symbolized the shaky state of the nation’s soul.”<sup>6</sup>

Progressive abolitionists succeeded in lobbying Congress to pass the Mann Act—also known as the White-Slave Traffic Act—in 1910, which prohibited interstate travel of women for prostitution or other “immoral purposes.”<sup>7</sup> Most reform, however, occurred at the local level where abolitionists weaponized public morality to push against regulationist reforms through a chaotic patchwork of repressive laws.<sup>8</sup> In the end, abolitionists succeeded in removing the legal environment for sex work to operate openly and laws against sex workers have continued to grow increasingly stringent since this period.<sup>9</sup> Today, every U.S. state criminalizes sex work in some manner.<sup>10</sup>

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<sup>4</sup> RUTH ROSEN, *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900–1918*, at 9 (1982).

<sup>5</sup> *Id.* at 11–12. The suffrage movement, including Susan B. Anthony, were also deeply entwined with this abolitionist movement. *See Prostitution and the Suffrage Movement*, DUKE UNIV.: LIBRS., <https://exhibits.library.duke.edu/exhibits/show/theworldsoldestprofession/suffrage> movement (last visited Dec. 10, 2022).

<sup>6</sup> ROSEN, *supra* note 4, at 13. The white slavery panic was a cultural reaction to the growing independence of women, their migration to urban areas, and proliferation of the stereotype that foreigners were trafficking and exploiting impressionable young women. Christopher Diffie, *Sex and the City: The White Slavery Scare and Social Governance in the Progressive Era*, 57 *AM. Q.* 411, 416 (2005).

<sup>7</sup> ROSEN, *supra* note 4, at 19; White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825, 825–26 (1910) (codified as amended at 18 U.S.C. §§ 2421–24); *See generally* Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3014–15 (2006) (criticizing broadly the passage and modern amendments of the Mann Act as inadequately addressing the problems it seeks to address); Lorelei Lee, *The Roots of “Modern Day Slavery”: The Page Act and the Mann Act*, 52 *COLUM. HUM. RTS. L. REV.* 1199, 1228, 1232 (2021).

<sup>8</sup> ROSEN, *supra* note 4, at 16–19.

<sup>9</sup> Berlatsky, *supra* note 2.

<sup>10</sup> *See* Elizabeth Kaigh, *Whores and Other Sex Slaves: Why the Equation of Prostitution with Sex Trafficking in the William Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimination*, 12 *SCHOLAR* 139, 162 n.142 (2009).

A wide range of scholarship exists which proposes, examines, and critiques varying policy approaches to reforming state laws that criminalize prostitution. Less, however, has been written on the history of modern statutory schemes that jurisdictions throughout the United States have developed under their respective criminal codes. Further, no scholarship has examined the most influential source for these statutes: the Model Penal Code (MPC). This Article fills this void by providing a thorough historical account and analysis of the MPC's proposed section on prostitution.

The Article proceeds as follows. Part I reviews the development of the MPC and details the extensive commentary and drafting history behind Section 251.2: Prostitution and Related Offenses. Analysis is categorized by its major components: rationalizations, prostitution, promoting prostitution, patronizing, and special evidentiary rulings. A portion is also exclusively dedicated to the debates approving Section 251.2. In Part II, this Article contrasts the MPC's stated rationalizations for criminalizing prostitution—suppressing venereal disease, decreasing organized crime's profit and power, preventing the corruption of government and law enforcement, and maintaining stability of the home and family—against available domestic and global research about sex work to conclude these rationalizations are untethered to any applicable evidence. This Article concludes that decriminalizing all aspects of sex work, including sex workers, patrons, and non-exploitive third parties, best addresses the concerns used to support Section 251.2 in the first place.

Before proceeding to the substance of this Article, the language used throughout should be clarified. Sex work widely refers to the exchange of sexual services for something of value,<sup>11</sup> while prostitution refers specifically to state-defined criminalized commercial sexual activities. Sex work includes prostitution, but not all sex work is prostitution. A sex worker, therefore, is a person who performs the labor of sex work, which may include

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<sup>11</sup> See, e.g., Derek J. Demeri, *Who Needs Legislators? Discrimination Against Sex Workers Is Sex Discrimination Under Title VII*, 72 RUTGERS U. L. REV. 247, 251–52 (2019) (“This broad definition includes, but is not limited to: prostitution, escorting, domination/submission, sugar babying, adult film performance, exotic dancing, web-camera performance, phone sex operation, and erotic massage.”); The term “sex work” was famously coined by the late activist Carol Leigh in 1978 as a way to broadly described the multitude of ways people engage in erotic labor. See Mattilda Bernstein Sycamore, ‘*Sex Workers Unite*,’ by Melinda Chateauvert, SFGATE (Jan. 10, 2014), <https://www.sfgate.com/books/article/Sex-Workers-Unite-by-Melinda-Chateauvert-5132503.php>.

prostitution.<sup>12</sup> Patrons, as may be inferred, are those who hire sex workers for their services.<sup>13</sup> Contrary to the cultural and legal fixation on the gendered nature of sex work, sex workers and clients are extremely diverse and include people of all genders.<sup>14</sup>

Third parties, on the other hand, are best understood for purposes of this Article as anyone involved in prostitution that is not the sex worker or client and can include “managers, brothel keepers, receptionists, maids, drivers, landlords, hotels who rent rooms to sex workers[,] and anyone else who is seen as facilitating sex work.”<sup>15</sup> Third parties can be categorized into

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<sup>12</sup> After much reflection, this Article will leave unchanged quoted material that refers to sex workers by any other term. By taking this approach, this Article attempts to balance the trauma and inaccuracy associated with these other terms while maintaining faithfulness to the legal and historical context in which this material appears in. *But cf.* Georgie Wolf, *Why the Word ‘Prostitute’ Has to Go*, SYDNEY MORNING HERALD (Sept. 13, 2018), <https://www.smh.com.au/lifestyle/life-and-relationships/why-the-word-prostitute-has-to-go-20180913-p503hj.html>; Kat Muscat, *Why Sex Work Is a Terrible Analogy, and “Pr\*stitute” Is a Slur*, JUNKEE (Oct. 20, 2014), <https://junkee.com/sex-work-analogy-prostitute-slur/43410>.

<sup>13</sup> While client is the preferred term to refer to those who hire sex workers, this Article will use the term “patron” consistent with the legal and historical contexts in which it is used. Unlike the varying terms for sex workers and third parties, the term patron does not have historically traumatizing or misleading connotations associated with it. The same, however, cannot be said for the term “john,” which carries prejudicial societal undertones and inaccurately assumes all clients of sex workers are male-identified.

<sup>14</sup> See, e.g., Kevin L. Nadal et al., *Transgender Women and the Sex Work Industry: Roots in Systemic, Institutional, and Interpersonal Discrimination*, 15 J. TRAUMA & DISSOCIATION 169, 169 (2014); Angela Jones, “It’s Hard Out Here for a Unicorn”: Transmasculine and Nonbinary Escorts, Embodiment, and Inequalities in Cisgendered Workplaces, GENDER & SOC’Y 1, 1 (2020); Christian Grov & Drew A. Westmoreland, *Male Sex Work in North America: Frontier of Change in the United States and Canada*, in THE ROUTLEDGE HANDBOOK OF MALE SEX WORK, CULTURE, AND SOCIETY 365, 365, 379–80 (John Scott et al. eds., 2021); Hilary Caldwell & John de Wit, *Female Clients of Male Sex Workers: Managing Stigma*, in THE ROUTLEDGE HANDBOOK OF MALE SEX WORK, CULTURE, AND SOCIETY 339, 339, 342, 344 (John Scott et al. eds., 2021); Sofia Barrett-Ibarria, *The Sex Workers Helping Their Female Clients to Come Out*, VICE (June 5, 2018), [https://www.vice.com/en\\_us/article/vbqz9y/the-sex-workers-helping-their-female-clients-come-out](https://www.vice.com/en_us/article/vbqz9y/the-sex-workers-helping-their-female-clients-come-out).

<sup>15</sup> GLOBAL NETWORK OF SEX WORK PROJECTS, THE DECRIMINALISATION OF THIRD PARTIES 1 (2016), <https://www.nswp.org/sites/default/files/Policy%20Brief%20The%20Decriminalisation%20of%20Third%20Parties%2C%20NSWP%20-%202016.pdf>. This Article avoids the term “pimp” when referring to third parties involved in sex work unless

varying degrees of involvement and agency control: (1) those who hire sex workers as employees or independent contractors (i.e., a brothel manager), (2) those who work with sex workers (i.e., a venue owner who provides a forum to facilitate meetings between sex workers and their clients, or other non-sex work employees and independent contractors of third parties that hire sex workers), (3) those who are hired by or are agents of sex workers (i.e., a sex worker’s personal security, assistant, or driver), and (4) those who force another to engage in sex work (i.e., a human trafficker).<sup>16</sup> Many times,

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quoting material. Left undefined, the term colloquially often implies—usually with deeply held emotional connotations—that the actor is a Black man who uses force on exploited white, female sex workers. *See, e.g.,* Evelina Giobbe, *An Analysis of Individual, Institutional, and Cultural Pimping*, 1 MICH. J. GENDER & L. 33, 34, 37, 42, 57 (1993); Melissa Petro, *The H-Word: Relationship Violence and the Racist Implications of the Mythical Pimp*, BITCHMEDIA (Nov. 23, 2011), <https://www.bitchmedia.org/post/the-h-word-relationship-violence-and-the-racist-implications-of-the-mythical-pimp>. Rather, this is an inaccurate and racist description that fails to acknowledge the myriad of relationships that sex workers have with third parties without any context for agency.

<sup>16</sup> *See* GLOBAL NETWORK OF SEX WORK PROJECTS, *supra* note 15, at 3; *see also* CHRIS BRUCKERT & TUULIA LAW, BEYOND PIMPS, PROCURERS AND PARASITES: MAPPING THIRD PARTIES IN THE INCALL/OUTCALL SEX INDUSTRY 11 (2013), [https://www.nswp.org/sites/nswp.org/files/ManagementResearch%20\(4\).pdf](https://www.nswp.org/sites/nswp.org/files/ManagementResearch%20(4).pdf) (“[T]hird parties in the incall/outcall sex industry fulfill the same sorts of roles they do in ‘mainstream’ businesses.”). It is important to emphasize the distinction in the first category from the fourth based on the conditions of labor the third party exercises over the sex worker. While sex workers can experience exploitative working conditions while acting as employees/agents of a third party, not all are inherently sex trafficking victims. *See generally* Danah Boyd, *What Anti-Trafficking Advocates Can Learn from Sex Workers: The Dynamics of Choice, Circumstance, and Coercion*, HUFFPOST, [https://www.huffpost.com/entry/what-anti-trafficking-advocates-can-learn-from-sex-workers\\_b\\_1784382](https://www.huffpost.com/entry/what-anti-trafficking-advocates-can-learn-from-sex-workers_b_1784382) (last updated Dec. 6, 2017) (discussing the spectrum of agency in the labor of sex work). Under federal law, severe trafficking of labor is defined as “the use of force, fraud, or coercion,” and lessons in identifying human trafficking in the agricultural sector can and should inform discussions on identifying sex trafficking victims. *See* 22 U.S.C. 7102(11); *Agriculture, NAT’L HUM. TRAFFICKING HOTLINE*, <https://humantraffickinghotline.org/labor-trafficking-venuesindustries/agriculture> (last visited Dec. 12, 2022) (“Farmworkers frequently face abusive and exploitative treatment, but not all labor exploitation constitutes human trafficking.”). This critical distinction has also been described as “freedoms [which] have been deprived over an extended period of time in a systematic and continuous manner.” Derek J. Demeri et al., Krasner for DA: Street Economies & Sex Trade Policy Platform 3 (Sept. 13, 2017) (unpublished report) (on file with author).

sex workers perform non-exploitative third-party roles for other sex workers.<sup>17</sup>

#### I. SECTION 251.2: PROSTITUTION AND RELATED OFFENSES

In 1962, the American Law Institute (ALI) produced the MPC and brought a wave of criminal law reform throughout the country.<sup>18</sup> The ALI, composed of well-respected judges, lawyers, and law professors from around the country, is known to create “Restatements of the Law” on a variety of topics that “become[] persuasive authority for courts and legislatures and commonly is relied upon by courts in interpreting and applying the law.”<sup>19</sup> When it came to states’ criminal law, however, it was “too chaotic and irrational” to create a restatement; instead, the ALI sought to produce a model code that states could use in drafting new criminal codes.<sup>20</sup>

The process originally started in 1931, but after their work was interrupted by inadequate funding and World War II, restarted in 1951.<sup>21</sup> The ALI set up drafting groups on specific subtopics, called reporters and supported by staff members, who would debate amongst themselves and make recommendations to an advisory committee.<sup>22</sup> The advisory committee, after similarly debating on the reporters’ recommendations, would create tentative drafts and present their recommendations to the entire ALI membership during its annual meetings.<sup>23</sup> This process followed until the ALI approved a final draft of the MPC in 1962.<sup>24</sup>

The MPC provision on prostitution was first drafted by reporters in a preliminary draft that was presented to the ALI’s Criminal Law Advisory Group in March 1959.<sup>25</sup> The draft was then revised, included as

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<sup>17</sup> CANADIAN ALLIANCE FOR SEX WORK LAW REFORM, CRIMINALIZING THIRD PARTIES IN THE SEX INDUSTRY: IMPACTS AND CONSEQUENCES 1 (2015), <http://sexworklawreform.com/wp-content/uploads/2017/05/Third-Parties.pdf>.

<sup>18</sup> Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320 (2007).

<sup>19</sup> *Id.* at 323.

<sup>20</sup> *Id.* Indeed, before the MPC, most state criminal laws existed primarily in common law rather than under a comprehensive criminal code. *Id.* at 329–30.

<sup>21</sup> *Id.* at 323.

<sup>22</sup> *Id.* at 323–24.

<sup>23</sup> *Id.* at 324.

<sup>24</sup> *Id.*

<sup>25</sup> See Am. L. Inst., Preliminary Draft I (Mar. 25, 1959) (unpublished draft) (on file with HeinOnline ALI Library). As printed with this draft:

Section 207.12 in Tentative Draft No. 9 under its article on “Sexual Offenses and Offenses Against the Family,” and first debated at the ALI’s 1959 annual meeting.<sup>26</sup> After resolving conflicts raised during the 1959 meeting, ALI membership approved the provision on prostitution and related offenses in 1962.<sup>27</sup>

The effect of the MPC on the criminal justice system in the United States cannot be understated. Between adoption of the final draft and 1983, thirty-four states codified their criminal laws based, in part, on the MPC.<sup>28</sup> By way of example, the MPC recommended decriminalizing same-sex relations, and Illinois became the first state to repeal sodomy laws in 1961 when it adopted the MPC.<sup>29</sup> Twenty-two states followed suit in repealing sodomy laws when adopting the MPC between 1971 and 1983.<sup>30</sup>

Indeed, at least twenty states and territories in the United States have prostitution statutes influenced, at least in part, by the MPC.<sup>31</sup> The

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This material was distributed by the [ALI] to a limited group of individuals as part of the [ALI’s] process for consideration of drafts prior to publication and distribution to its membership. As such[,] it is not deemed to have had the imprimatur of the [ALI] . . . These materials are now being made available for historical purposes to such individuals as may find them useful in their research efforts.

*Id.* at ii.

<sup>26</sup> 9 MODEL PENAL CODE: TENTATIVE DRAFT (1959); *see infra* Part I.E.

<sup>27</sup> 39 AMERICAN LAW INSTITUTE PROCEEDINGS 223 (1962).

<sup>28</sup> Robinson & Dubber, *supra* note 18, at 326.

<sup>29</sup> Jordan Blair Woods, *LGBT Identity and Crime*, 105 CAL. L. REV. 667, 696 (2017). The MPC, however, did recommend criminalizing loitering “in or near any public place for the purpose of soliciting or being solicited to engage in deviate sexual relations” because, like female sex workers, gay, bisexual, and queer men are “also a source of annoyance to, and harassment of, members of the public who do not wish to become involved.” MODEL PENAL CODE § 251.3 cmt. at 476 (AM. L. INST., Proposed Official Draft 1962); *see also* People v. Superior Court (*Caswell*), 758 P.2d 1046, 1053 (Cal. 1988) (comparing a California statute to the MPC’s “deviate sexual relations” loitering provision to conclude the statute constitutional).

<sup>30</sup> Woods, *supra* note 29, at 696–97.

<sup>31</sup> Those statutes and corresponding MPC sections are as follows: FLA. STAT. § 796.07(2) (promoting prostitution); 9 GUAM CODE ANN. § 28.10 cmt. 1978, 28.20, 28.25 (2022) (promoting prostitution); IDAHO CODE §§ 18-5613, 5614 (2022) (prostitution & patronizing); 720 ILL. COMP. STAT. ANN. 5/11-18 (West 2015) (patronizing); KAN. STAT. ANN. §§ 21-6420, 6421 (2022) (promoting prostitution & patronizing); ME. STAT. ANN. tit. 17, § 851(2) (West 2022) (promoting prostitution); MINN. STAT. ANN. § 609.321(7) (West 2022) (promoting prostitution); MO. ANN. STAT. §§ 567.060, .070 (West 2022) (promoting prostitution); MONT. CODE ANN. §§ 45-5-602, 603, 604 (West 2019) (promoting prostitution, upgraded promoting



proposed federal code sections on prostitution and Black's Law Dictionary definition of prostitution even adopted language from the MPC.<sup>32</sup> Further, courts in thirteen states have cited the MPC's section on prostitution in interpreting their own statutes, even if their legislatures did not adopt its language.<sup>33</sup> The influence of the MPC raises the question: what would current

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prostitution, evidence for houses of prostitution); N.J. STAT. ANN. § 2C:34-1 (West 2013) (effectively implementing the entire MPC section); N.M. STAT. ANN. §§ 30-9-3, 4, 7 (West 2022) (patronizing, promoting prostitution, & evidence for houses of prostitution); N.Y. PENAL LAW § 230.05 cmt. (McKinney 2016) (patronizing); N.C. GEN. STAT. § 14-205.2(a) (West 2018) (patronizing); N.D. CENT. CODE ANN. §§ 12.1-29-03, 04, 05 (West 2021) (prostitution & testimony of spouses); OHIO REV. CODE ANN. § 2907.26(A), (D) (West 2022) (explaining evidence for houses of prostitution & testimony of spouses); OR. REV. STAT. ANN. § 167.012, .027 (West 2022) (promoting prostitution & evidence for houses of prostitution); 18 PA. STAT. AND CONS. STATS. ANN. § 5902 (West 2022) (effectively implementing the entire MPC section); S.D. CODIFIED LAWS §§ 22-23-2, 8 (West 2022) (upgraded promoting prostitution & promoting prostitution); TENN. CODE ANN. § 39-13-512 (West 2016) (prostitution & promoting prostitution); UTAH CODE ANN. §§ 76-10-1301, 1302(1), 1303(1), 1304(1)(a), 1305(1) (West 2022) (prostitution, patronizing & promoting prostitution).

<sup>32</sup> See NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT §§ 1841-43, 1848, 1849 (1971), <https://www.ndcourts.gov/Media/Default/Legal%20Resources/legal-research/criminal-code/FinalReport.pdf>; *Prostitution*, BLACK'S LAW DICTIONARY (5th ed. 1979).

<sup>33</sup> See, e.g., *Bell v. State*, 668 P.2d 829, 834-35 (Alaska Ct. App. 1983) (discussing promoting prostitution); *State v. Allen*, 203 A.2d 248, 250 (Con. Cir. Ct. 1964) (discussing prostitution); *State v. Lopez*, 570 P.2d 259, 265-66, 268 (Idaho 1976) (Shepard, J., concurring) (discussing prostitution); *State v. Clark*, 406 N.W.2d 802, 804 (Iowa Ct. App. 1987) (discussing rationalizations); *Commonwealth v. King*, 372 N.E.2d 196, 201 n.5, 201 n.6 (Mass. 1977) (discussing rationalizations and prostitution); *State v. Sadowski*, 329 N.W.2d 583, 585 n.1 (N.D. 1983) (discussing prostitution); *Ford v. State*, 262 P.3d 1123, 1126, 1129-30 (Nev. 2011) (discussing prostitution and promoting prostitution); *State v. Chandonnet*, 474 A.2d 578, 580 (N.H. 1984) (discussing patronizing); *People v. Freaney*, 108 A.D.2d 228, 230 (N.Y. App. Div. 1985) (discussing rationalizations, prostitution & promoting prostitution); *People v. Bailey*, 432 N.Y.S.2d 789, 794-95 (N.Y. Crim. Ct. 1980) (discussing patronizing); *Cleveland v. Howard*, 532 N.E.2d 1325, 1326 (Ohio Mun. Ct. 1987) (discussing loitering); *Commonwealth v. Danko*, 421 A.2d 1165, 1168-71 (Pa. Super. Ct. 1980) (discussing prostitution); *Commonwealth v. Dodge*, 429 A.2d 1143, 1149-50 (Pa. Super. Ct. 1981) (discussing rationalizations); *Commonwealth v. Mita*, 14 Phila., 607, 610-14 (Pa. 1986) (discussing patronizing); *Turley v. State*, 597 S.W.3d 30, 33 n.2 (Tex. Ct. App. 2020) (discussing promoting prostitution); *Seattle v. Jones*, 488 P.2d 750, 753 (Wash. 1971) (discussing loitering).

laws criminalizing prostitution look like today if the ALI took a different approach to the topic?

### A. Rationalizations

Article 251 of the MPC addressed “public indecency” and included provisions on open lewdness, prostitution, loitering to solicit deviate sexual relations, and obscenity.<sup>34</sup> As the introductory note to this article stated, its goal was to “protect against the open flouting of community standards regarding sexual or related matters” but specified the MPC did not “attempt to *enforce* private morality.”<sup>35</sup> Instead of “regulat[ing] sexual behavior generally,” the reporters maintained that provisions of this article were “limited to the affront to public sensibilities occasioned by public or commercial sexual misconduct.”<sup>36</sup> As later described by Louis B. Schwartz,<sup>37</sup> the MPC’s chief author, the provisions on prostitution “reflect the policy of penalizing not sin but commercial exploitation of a human weakness, or serious affront to public sensibilities.”<sup>38</sup> By framing its section on prostitution in this light, the reporters—intentionally or unintentionally—could further justify deviating from their preference to decriminalize consensual sexual activity.

The reporter’s commentary to the tentative draft of Section 251.2 attempted to address why men patronize sex workers and why women become sex workers.<sup>39</sup> Among the reporters’ speculated reasons that men patronize included: (1) “insufficient sexual outlet elsewhere,” (2) “crav[ing] variety in sexual relations,” (3) “feel[ing] that he is less likely to contract venereal disease from a girl in an organized house,” (4) “find[ing] it easier to

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<sup>34</sup> MODEL PENAL CODE § 251 cmt. at 447 (AM. L. INST., Proposed Official Draft 1962).

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> *Id.*

<sup>37</sup> Schwartz was Professor of Law at the University of Pennsylvania Law School and, after his work on the MPC, became director of the National Commission on the Reform of Federal Criminal Law. See Paul Lewis, *Louis B. Schwartz, Legal Scholar, Dies at 89*, N.Y. TIMES (Feb. 9, 2003), <https://www.nytimes.com/2003/02/09/us/louis-b-schwartz-legal-scholar-dies-at-89.html>.

<sup>38</sup> Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 681 (1963).

<sup>39</sup> Female patrons of sex workers and male sex workers were not discussed, nor was there an appreciation for sex workers and patrons of other genders. See *supra* text accompanying note 13.

secure a sexual partner commercially than to spend time in courting and wooing,” (5) “feel[ing] that intercourse with a prostitute is cheaper in the long run than intercourse with an ‘amateur,’” and (6) “hav[ing] the pleasures of sex without responsibility.”<sup>40</sup> The reporters also opined that “[t]he demand for prostitutes is also said to be partially a result of deliberate cultivation by those who profit from the business.”<sup>41</sup> When it came to reasons that women become sex workers, the reporters theorized the following: poverty, wanting a better life, “escap[ing] from an unhappy situation at home,” low intelligence, youth, “infantile sexual urges,” insecurity, or “to satisfy lesbian desires through contact with other prostitutes.”<sup>42</sup> These paragraphs were ultimately dropped from Section 251.2’s final commentary.

As finalized, the reporters addressed some of the rationales in favor of criminalizing prostitution.<sup>43</sup> Among the reasons in favor, the reporters found “[r]eligious and moral ideals no doubt provided the chief impetus for suppression.”<sup>44</sup> However, the reporters identified four “utilitarian[.]”<sup>45</sup>

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<sup>40</sup> 9 AM. L. INST., *supra* note 26, at 169–70 (citing ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 606–07 (1949)). The Kinsey report on male sexuality, and its corresponding study on female sexuality, created a cultural revolution and opened the door to the academic study of human sexuality in the United States. *See, e.g.*, Shannon Dininny, *50 Years After the Kinsey Report*, CBS NEWS (Jan. 27, 2003), <https://www.cbsnews.com/news/50-years-after-the-kinsey-report/>. These studies, however, failed to examine the sexuality of the sex workers they hired. *See* MELINDA CHATEAUVERT, SEX WORKERS UNITE: A HISTORY OF THE MOVEMENT FROM STONEWALL TO SLUTWALK 45 (2013) (“Alfred Kinsey and his students hired prostitutes to study male sexual response, and wrote only about the men. They had no controls for female sexual expertise, nor did they collect data on the sexual response of the prostitutes they employed.”).

<sup>41</sup> 9 AM. L. INST., *supra* note 26, at 170.

<sup>42</sup> *Id.* (citing HARRY ELMER BARNES & NEGLEY K. TEETERS, NEW HORIZONS IN CRIMINOLOGY 97 (2d ed. 1951); P. Lionel Goitein, *The Potential Prostitute*, 3 J. CRIM. PSYCHOPATHOLOGY 359 (1942); F. Wengraf, *Fragment of an Analysis of a Prostitute*, 5 J. CRIM. PSYCHOPATHOLOGY 247 (1943)).

<sup>43</sup> The ALI has not officially adopted any of the MPC commentary but nonetheless published it in 1985 to track the work of the reporters. MODEL PENAL CODE xiii–xiv (AM. L. INST., Proposed Official Draft 1962) (“As in other legislative projects of the [ALI], the explanatory commentary has a different status. The [ALI] has authorized its publication as a useful exposition but its content rests for its authority solely on the scholarship and competence of the [r]eporters.”).

<sup>44</sup> *Id.* at 456.

<sup>45</sup> Utilitarianism and retributivism are widely deemed the traditional justifications for criminal punishment. Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 4 (2010) (citing PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES & CONTROVERSIES 83 (2005)). Broadly,

reasons to criminalize prostitution: (1) it is an “important factor in the spread of venereal disease,”<sup>46</sup> (2) it is “a source of profit and power for organized crime,”<sup>47</sup> (3) it is “a major source of corrupt influence on government generally and of law enforcement in particular,”<sup>48</sup> and (4) it promotes “social disorganization by undermining fidelity to home and family.”<sup>49</sup> Notably, none of these rationalizations address sex work’s alleged affront to public sensibilities that the reporters originally framed Section 251.2 as addressing.

Examining opposing rationales, the reporters looked at reasons why prostitution should *not* be criminalized. This included: (1) “prostitution cannot be eliminated by law,” (2) “sumptuary laws that are not enforced generally lend themselves to arbitrary and episodic prosecution and encourage extortion,” (3) “failure to provide professional outlet for male sexuality would result in more rape and other sexual crimes,”<sup>50</sup> (4) “venereal

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utilitarianism considers criminal punishment justified because it makes society safer through deterrence, rehabilitation, or incapacitation while retributivism considers criminal punishment justified because the offender deserves punishment. *Id.*

<sup>46</sup> MODEL PENAL CODE § 251.2 cmt. at 456 (AM. L. INST., Proposed Official Draft 1962) (citing MORRIS PLOSCOWE, *SEX AND THE LAW* 264 (1951)). The reporters also noted material to the contrary suggesting that there might be “a declining significance of prostitution in the spread of venereal disease.” *Id.* (citing CHARLES WINICK & PAUL M KINSIE, *THE LIVELY COMMERCE: PROSTITUTION IN THE UNITED STATES* 64 (1971)).

<sup>47</sup> *Id.* (citing BARNES & TEETERS, *supra* note 42, at 95).

<sup>48</sup> *Id.* (citing POLLY ADLER, *A HOUSE IS NOT A HOME passim* (Rachel Rubin) (1954)). Ms. Adler is considered one of the most well-known brothel owners in U.S. history. See Karen Abbott, *The House that Polly Adler Built*, SMITHSONIAN (Apr. 12, 2012), <https://www.smithsonianmag.com/history/the-house-that-polly-adler-built-65080310/>.

<sup>49</sup> MODEL PENAL CODE § 251.2 cmt. at 456 (AM. L. INST., Proposed Official Draft 1962) (citing SOCIAL PROTECTION DIVISION, FEDERAL SECURITY AGENCY, *CHALLENGE TO COMMUNITY ACTION* 7–18 (1945)).

<sup>50</sup> As a counterpoint, the reporters cited Congressional testimony of Watson B. Miller, an administrator with the Federal Security Agency, who reported that removing “tolerated houses” near armed services camps during World War II led to a reduction of “sex offenses” in those communities compared to a rise in other communities. MODEL PENAL CODE § 251.2 cmt. at 457 n.9 (AM. L. INST., Proposed Official Draft 1962) (statement of Watson B. Miller, Administrator, Federal Security Agency, in Hearings on H.R. 5232 Before Subcommittee No. 3 of the House Committee on the Judiciary, 79th Cong., 2d Sess. 39 (1946)). Miller testified his “interest in control of the venereal diseases and the repression of prostitution antedates by several years [his] connection with the Federal Security Agency” and that his claim that repressing prostitution leads to a decrease in sex offenses came from “chiefs of police and crime reports.” Statement of Watson B. Miller,

disease would be less likely to be spread by prostitutes subject to registration and periodic health inspection than by the promiscuous and unregulated amateur,” (5) “legalized prostitution would offer less opportunity for official corruption than does an unrealistic effort at total repression,” and (6) “confinement of prostitution to designated neighborhoods would facilitate police surveillance and promote the safety of the general community.”<sup>51</sup>

To bolster these opinions, the reporters quoted at length the Wolfenden Committee “Report on Homosexual Offences and Prostitution,” a report that eventually led to the decriminalization of same-sex activity in the United Kingdom.<sup>52</sup> Relevant here, the Wolfenden Report stated:

Prostitution is a social fact deplorable in the eyes of moralists, sociologists and, we believe, the great majority of ordinary people. But it has persisted in many civilizations throughout many centuries, and the failure of attempts to stamp it out by repressive legislation shows that it cannot be eradicated through the agency of the criminal law . . . It also remains true that there are women who, even when there is no economic need to do so, choose this form of livelihood. For so long as these propositions continue to be true there will be prostitution, and no amount of legislation directed towards its abolition will abolish it.<sup>53</sup>

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Administrator, Federal Security Agency, in Hearings on H.R. 5232 Before Subcommittee No. 3 of the House Committee on the Judiciary, 79th Cong., 2d Sess. 33, 35 (1946). *But see infra* note 58.

<sup>51</sup> MODEL PENAL CODE § 251.2 cmt. at 456–57 (AM. L. INST., Proposed Official Draft 1962).

<sup>52</sup> See 1957: *Homosexuality ‘Should Not Be a Crime,’* BBC: ON THIS DAY, [http://news.bbc.co.uk/onthisday/hi/dates/stories/september/4/newsid\\_3007000/3007686.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/september/4/newsid_3007000/3007686.stm) (last visited Dec. 12, 2022).

<sup>53</sup> MODEL PENAL CODE § 251.2 cmt. at 457 (AM. L. INST., Proposed Official Draft 1962) (quoting REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 79–80 (1957)). The report ultimately concluded prostitution itself should not be criminalized but that penalties for “street offences”—the analog of subsection (1)(b) under Section 251.2—should remain and be increased, especially for repeat offenders. *Id.* at 116. As a result of this, the U.K. Parliament passed the Street Offences Act of 1959 which focused on criminalizing the visible aspects of prostitution. Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 554 n.170 (2000). Today, the approach in the United Kingdom largely remains the same as the exchange of sex for money is not itself a crime but, as summarized by sex workers, “anything that sex workers do to contact a client is

After considering both arguments in favor and against criminalizing prostitution, the reporters indicated that the MPC should “continue[] the basic American policy of repressing commercialized sexual activity.”<sup>54</sup> In reaching this conclusion, the reporters were unable to resolve “disputed issues” because of a lack of evidence and their general policy to defer to prevailing custom otherwise.<sup>55</sup> However, the reporters found that criminalizing prostitution was necessary because of the “perceived relationship between prostitution and venereal disease”—particularly syphilis and gonorrhea.<sup>56</sup> The reporters, citing congressional testimony from the first half of the twentieth century, noted that the American Medical Association recommended “the elimination of commercialized prostitution” to control venereal disease.<sup>57</sup> The reporters found the American Medical Association’s conclusion was supported by a study that found closing brothels near army bases during World War II “reduced the incidence of venereal disease in those areas.”<sup>58</sup>

### *B. Prostitution*

As finalized, Section 251.2(1) addressed prostitution itself as follows:

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criminalised.” *Laws, ENGLISH COLLECTIVE OF PROSTITUTES*, <https://prostitutescollective.net/laws/> (last visited Dec. 12, 2022).

<sup>54</sup> MODEL PENAL CODE § 251.2 cmt. at 458 (AM. L. INST., Proposed Official Draft 1962).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* The American Medical Association also resolved, by vote during that time period, that medical examinations of sex workers under a regulated system are “untrustworthy and inefficient” and that, since prostitution is criminalized, physicians that knowingly examine sex workers to provide them with medical certificates in the course of business would be violating “principles of accepted professional ethics.” Statement of Dr. Walter Clarke, Executive Director, American Social Hygiene Association, in Hearings on H.R. 5234 Before Subcommittee No. 3 of the House Committee on the Judiciary, 79th Cong., 2d Sess. 29–30 (1946).

<sup>58</sup> MODEL PENAL CODE § 251.2 cmt. at 459 (AM. L. INST., Proposed Official Draft 1962) (citing, e.g., Thomas B. Turner, *The Suppression of Prostitution in Relation to Venereal Disease Control in the Army*, April–June 1943, at 8). *But see* CHATEAUVERT, *supra* note 40, at 103 (“When brothels were closed during World War II, syphilis and gonorrhea skyrocketed because ‘non-professionals’ did not use condoms and did not understand alternative prophylaxis methods.”).

A person is guilty of prostitution, a petty misdemeanor, if he or she: (a) is an inmate of a house of prostitution *or* otherwise engages in sexual activity as a business; *or* (b) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

“Sexual activity” includes homosexual and other deviate sexual relations. A “house of prostitution” is any place where prostitution or promotion of prostitution is regularly carried on by one person under the control, management or supervision of another. An “inmate” is a person who engages in prostitution in or through the agency of a house of prostitution. “Public place” means any place to which the public or any substantial group thereof has access.<sup>59</sup>

Commenting on the definition of sexual activity, reporters in the final commentary interpreted it not to require intercourse between a patron and sex worker but anything that would include “an exhibition of autoeroticism or of sexual acts with a third person.”<sup>60</sup> Unlike some state laws at the time, sexual activity was meant to apply regardless of gender.<sup>61</sup> This definition changed from the tentative draft, however, which originally defined it as “carnal knowledge, deviate sexual intercourse, and sexual contact, as these terms are defined in Sections 207.4(6),<sup>62</sup> 207.5(6)[,]<sup>63</sup> and

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<sup>59</sup> MODEL PENAL CODE § 251.2(1) (AM. L. INST., Proposed Official Draft 1962) (emphasis added).

<sup>60</sup> *Id.* at 460.

<sup>61</sup> *Id.* at 459 n.15 (noting that, in some jurisdictions, “only females can be prostitutes”).

<sup>62</sup> Under the tentative draft for rape and related offenses, carnal knowledge was defined as “sexual intercourse, including intercourse per os or per anum, with some penetration however slight of the female by the male sex organ. Emission is not required.” 4 AM. LAW INST., MODEL PENAL CODE: TENTATIVE DRAFT 90 (1955).

<sup>63</sup> Under the tentative draft for sodomy and related offenses, deviate sexual intercourse was defined as “penetration by the male sex organ into any opening of the body of a human being or animal, other than carnal knowledge . . . and any sexual penetration of the vulva or anus of a female by another female or by an animal.” *Id.* at 93.

207.6(4),<sup>64</sup> or any lewd act as defined in Section 207.9,<sup>65</sup> whether or not it is openly done as required in that Section.”<sup>66</sup>

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<sup>64</sup> Under the tentative draft for sexual assault, sexual contact was defined as “contact, other than intercourse covered by [carnal knowledge] and [deviate sexual intercourse], for the purpose of arousing or gratifying sexual desire of the actor or the victim, but does not include acts commonly expressive of familial or friendly affection.” *Id.* at 94–95.

<sup>65</sup> Section 207.9 was never drafted but Section 251.1 of the final MPC stated a person commits a lewd act when they “know[] [the act] is likely to be observed by others who would be affronted or alarmed.” MODEL PENAL CODE § 251.1 (AM. L. INST., Proposed Official Draft 1962).

<sup>66</sup> 9 MODEL PENAL CODE: TENTATIVE DRAFT 169 (1959). The ALI commentary and proceeding transcripts do not indicate why the definition of sexual activity was changed but likely reflects deemphasizing a technical definition of sexual activity and creating a broader definition that eases a prosecutor’s burden. This change, however, led to further litigation in some states.

In Idaho, the Supreme Court was asked to review whether “sexual activity as a business” in their MPC-influenced prostitution statute was unconstitutionally vague, but it declined to answer that question instead finding the criminal complaint against the defendant procedurally defective. *State v. Lopez*, 570 P.2d 259, 260 (Idaho 1976). Justice Allan G. Shepard agreed in concurrence but concluded the statute’s language was unconstitutional and noted the change in the MPC tentative to final draft “cause[d] . . . ambiguity in the present law.” *Id.* at 266. Particularly, Justice Shepard contemplated how “legitimate pursuits” such as “a business involving the breeding of any form of animal life or the production of seminal fluid for medical purposes such as analysis or uterine implant” could fall under this definition of sexual activity as a business. *Id.*

In Pennsylvania, a trial court was asked whether “the masturbation of a naked man by a nude or seminude woman constitute[d] ‘sexual activity’” as used in the state statute and adopted from the MPC. *Commonwealth v. Israeloff*, 8 Pa. D. & C.3d 5, 6 (1978). The court rejected the defendant’s argument that masturbation was not included finding that, although “the definition of sexual activity appearing in the final draft [of the MPC] is narrower [sic] than the definition appearing in earlier drafts,” nothing in the language or comments suggest masturbation would not be included. *Id.* at 8–10; *see also* *Commonwealth v. Potts*, 460 A.2d 1127, 1135 (Pa. Super. Ct. 1983) (reviewing the same statute and stating it “is not broad enough to proscribe noncommercial sexual activity, such as the exchange of sexual acts as a part of social companionship,” and rejecting the argument that it is “a vague attempt to regulate sexual conduct in general”). Although it is clear the MPC intended to include acts such as masturbation under the definition of sexual activity, the *Israeloff* court’s finding that the change in the definition of sexual activity from the tentative draft to final commentary was more restrictive is untenable. Rather, the *Israeloff* court failed to appreciate the broadening effect of this change, which moved away from the technical requirements that the tentative draft imposed to an all-encompassing definition.



Further, the “as a business” requirement in subsection (1)(a), was not originally included in the tentative draft and added only after ALI membership debate.<sup>67</sup> The reporters indicated that the provision required prosecutors to prove “a course of behavior” because they intended for “isolated private transaction[s]” to be insufficient for the prosecution of prostitution.<sup>68</sup> Specifically, the reporters sought to exclude “a mistress [who is] being supported by her lover or that of a person who on an isolated occasion engages in intercourse in return for a promised gift or reward.”<sup>69</sup>

Turning to the definition of “inmate,” the reporters explained only those “connected with the house as prostitutes” were meant to be covered rather than anyone broadly found in a house of prostitution.<sup>70</sup> Unlike having

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<sup>67</sup> 9 MODEL PENAL CODE: TENTATIVE DRAFT 167 (1959); *see infra* text accompanying notes 151–54.

<sup>68</sup> MODEL PENAL CODE § 251.2 cmt. at 461 (AM. L. INST., Proposed Official Draft 1962).

<sup>69</sup> *Id.* This point did not reach Pennsylvania where its appeals court in the seminal case of *Commonwealth v. Danko* interpreted the “as a business” requirement under its prostitution statute. *Commonwealth v. Danko*, 421 A.2d 1165, 1168 (Pa. Super. Ct. 1980). In *Danko*, the defendant argued the addition of the “as a business” requirement “reflect[ed] an intention to make it a crime only to engage in sexual activity as a business, as distinguished from offering or agreeing to do so.” *Id.* at 1169.

In rejecting the defendant’s argument, the *Danko* court concluded the changes from tentative draft to the final draft “were not intended to effect any change in focus . . . [but] at most, the changes were intended to eliminate any possibility, however slight, that a private mistress would be convicted of prostitution.” *Id.* at 1170. The court went on to find the business requirement was a “restatement” of the tentative draft’s for hire requirement because “one cannot engage in a ‘business’ without offering or agreeing to sell one’s product or services.” *Id.* As such, the statute did not require the woman to “engage[] in sexual intercourse with any particular person.” *Id.*

While answering the defendant’s inchoate interpretation question, the *Danko* court’s analysis here misinterprets the “as a business” requirement under the MPC. The reporters’ explanation of “as a business” explicitly rejected finding that all for-hire transactions were included, which was a significant deviation from the language of the tentative draft. Contrary to the *Danko* court’s findings, the addition of the business requirement came about due to debate and compromise as a concession to a segment of the ALI which sought to limit Section 251.2 to only public solicitation. *See* discussion *infra* Part I.E. In effect, the court’s interpretation here substantially eased a prosecutor’s burden in showing a violation of Pennsylvania’s prostitution statute by eliminating the need to establish a course of behavior.

<sup>70</sup> MODEL PENAL CODE § 251.2 cmt. at 462 (AM. L. INST., Proposed Official Draft 1962).

to show engaging in sexual activity as a business, associating with a house of prostitution “constitute[s] a general representation of one’s availability for sexual hire.”<sup>71</sup> The reporters further clarified that, since association is loosely defined, being an inmate does not require living in a house of prostitution or even performing sexual activity in the house.<sup>72</sup> They specifically envisioned covering “call girl[s]” who work out of their own apartment but whose patrons are arranged through an agency.<sup>73</sup> In that scenario, the agency would be a house of prostitution and the call girl would be considered an inmate.<sup>74</sup>

With regard to the justification for loitering under subsection (1)(b), the reporters found loitering for the purpose of prostitution a public nuisance and, therefore, an “independent” basis for criminal liability.<sup>75</sup> Unlike engaging in sexual activity as a business or being an inmate of a house of prostitution, a violation of this subsection does not require one to engage in sexual activity as a business and would cover isolated business transactions. The loitering provision, however, was only added after ALI membership debated the tentative draft.<sup>76</sup>

On punishment, the reporters found petty misdemeanors were appropriate for sex workers because of its deterrent effect and noted “probation [was] the best and cheapest way of encouraging reformation.”<sup>77</sup> They concluded that even if prostitution itself was not criminalized, the “most undesirable aspects of it”—that is, “the appearance of persons desiring to engage in prostitution in areas frequented by families, children, or other groups likely to be disturbed by such appearances”—could be mitigated by states.<sup>78</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* For further discussion of sex work loitering laws, see generally Kate Mogulescu, *Your Cervix Is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk*, 74 UNIV. MIAMI L. REV. CAVEAT 68, 70 (2020); see also *supra* text accompanying note 29 (discussing how loitering laws also historically targeted men who have sex with other men).

<sup>76</sup> 9 MODEL PENAL CODE: TENTATIVE DRAFT 167 (1959); see *infra* text accompanying note 151. The tentative draft originally stated one committed prostitution if they “enter[] this state or any political subdivision thereof to engage in prostitution.” 9 MODEL PENAL CODE: TENTATIVE DRAFT 167 (1959). By changing this to the loitering provision, the ALI narrowed its focus to those only in public spaces as opposed to those merely existing in a state for purposes of prostitution.

<sup>77</sup> MODEL PENAL CODE § 251.2 cmt. at 470 (AM. L. INST., Proposed Official Draft 1962).

<sup>78</sup> *Id.* at 471 n.63.

Remarkable to the modern reader, the reporters repeatedly emphasized throughout the commentary that the MPC did not address “non-commercial promiscuity.”<sup>79</sup> Unlike contemporary understandings of the term prostitution, the term historically refers to all promiscuous women regardless of the exchange of sexual activity for money.<sup>80</sup> The reporters reasoned states largely punished sexual activity for hire but that there was “substantial disagreement” among states on whether prostitution statutes should include “promiscuous intercourse whether or not for hire.”<sup>81</sup> A portion of the reporters advocated for the inclusion of promiscuity without hire because they believed “most promiscuity is accompanied by hire” and that it would aid law enforcement in enforcing prostitution laws.<sup>82</sup>

From the list of reasons to criminalize prostitution, the reporters found that the threat of spreading sexually transmitted infections was the only rationale that could justify criminalizing promiscuity, but concluded promiscuity without hire was “less dangerous” than for hire because only for hire promiscuity involved “intercourse with a great many strangers daily.”<sup>83</sup>

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<sup>79</sup> *Id.* at 462.

<sup>80</sup> See *United States v. Bitty*, 208 U.S. 393, 401 (1908) (holding that there could “be no doubt” that prostitution referred to “women who for hire *or without hire* offer their bodies to indiscriminate intercourse with men” (emphasis added)). Etymologically, the term “prostitute” first appeared in the 1520s meaning “to offer to indiscriminate sexual intercourse’ (usually in exchange for money)” and came from Latin phrases meaning to “expose publicly.” *Prostitute*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/prostitute> (last visited Dec. 13, 2022).

<sup>81</sup> MODEL PENAL CODE § 251.2 cmt. at 462–63 (AM. L. INST., Proposed Official Draft 1962).

<sup>82</sup> Schwartz, *supra* note 38, at 682. The reporters prepared language in the tentative draft to add the following language to subsection (1) in case ALI membership agreed with this view: “or in any public place [promiscuously] solicits engagement in sexual activity.” 9 MODEL PENAL CODE: TENTATIVE DRAFT 176 (1959) (alteration in original). In the end, however, the MPC only sought to attach criminal liability to public promiscuity without hire in connection to men who have sex with men and the LGBTQ+ community. See *supra* note 29.

<sup>83</sup> MODEL PENAL CODE § 251.2 cmt. at 463 (AM. L. INST., Proposed Official Draft 1962). This of course assumes all sex workers engage in penile-vaginal intercourse every day full-time with a large quantity of patrons, which is often not the case. See, e.g., *What Types of Sexual Services Are There?*, TOUCHING BASE, INC., <https://www.touchingbase.org/clients/faqs/what-types-of-sexual-services-are-there/> (last visited Dec. 13, 2022) (describing varying types of sexual services that fall under the MPC’s definition of prostitution that do not necessarily include intercourse, such as erotic massage, “hand relief,” oral sex, and bondage); Jennifer Savin, *Why These Women Are Part Time Sex Workers*, COSMOPOLITAN (Dec. 4,

The reporters reasoned this would also contradict their policy on “illicit extramarital relations.”<sup>84</sup> They also surmised promiscuity without hire lacked the “serious evils” associated with for hire promiscuity such as “the means and necessity to corrupt law enforcement, the incentive to recruit new prostitutes and coerce their continued performance, and the maintenance of criminal organizations whose resources and personnel may be turned to other illicit uses as well.”<sup>85</sup>

The tentative draft commentary went further and rationalized that coverage of all promiscuity would make it easier to prosecute solicitation by sex workers in public spaces who “make[] no reference to payment.”<sup>86</sup> However, the reporters feared “defin[ing] the offense so broadly that it would cover a *private*, non-promiscuous solicitation merely because it occurred in a particular locale which would be classified as public.”<sup>87</sup> Rather, the “proposal . . . was [ultimately] rejected because of the indefiniteness” of the word promiscuous.<sup>88</sup> This concern, however, related only to men as the reporters indicated in preliminary notes that they were concerned this provision would include “males who seek sexual gratification indiscriminately” and feared this contradicted their “policies on illicit extramarital relations generally.”<sup>89</sup>

### *C. Promoting Prostitution*

Section 251.2(2), in turn, defined promoting prostitution as:

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2018), <https://www.cosmopolitan.com/uk/love-sex/sex/a25289927/part-time-sex-workers/> (reporting that in the United Kingdom “45% of escorts balance sex work with a civilian job”).

<sup>84</sup> See MODEL PENAL CODE § 213.6 cmt. at 436, 463 (AM. L. INST., Proposed Official Draft 1962) (“The Advisory Committee approved [a section of the MPC criminalizing fornication and adultery], but the [ALI Council] voted to delete the section and thus to remove [it] completely from the area of criminality.”).

<sup>85</sup> *Id.* at 463.

<sup>86</sup> 9 MODEL PENAL CODE: TENTATIVE DRAFT 176 (1959).

<sup>87</sup> *Id.* (emphasis added). As described by Schwartz, the reporters found it was “not worth risking the possibility of arbitrary police intrusion into dance halls, taverns, corner drug stores, and similar resorts of unattached adolescents, on suspicion that some of the girls are promiscuous, though not prostitutes in the hire sense.” Schwartz, *supra* note 38, at 683.

<sup>88</sup> 9 MODEL PENAL CODE: TENTATIVE DRAFT 176 (1959).

<sup>89</sup> Am. L. Inst., Article 207–Sexual Offenses and Offenses Against the Family 169 (Jan. 16, 1956) (unpublished draft) (on file with HeinOnline ALI Library).

A person who knowingly promotes prostitution of another commits a misdemeanor or felony as provided in Subsection (3). The following acts shall, without limitation of the foregoing, constitute promoting prostitution:

(a) owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business; or (b) procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate; or (c) encouraging, inducing, or otherwise purposely causing another to become or remain a prostitute; or (d) soliciting a person to patronize a prostitute; or (e) procuring a prostitute for a patron; or (f) transporting a person into or within this state with purpose to promote that person's engaging in prostitution, or procuring or paying for transportation with that purpose; or (g) leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means; or (h) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this Subsection.<sup>90</sup>

The MPC graded promoting prostitution as a misdemeanor except for four scenarios where it became a crime of the third degree.<sup>91</sup> First, the offense is upgraded if promoting prostitution is done under the first three

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<sup>90</sup> MODEL PENAL CODE § 251.2(2) cmt. at 454 (AM. L. INST., Proposed Official Draft 1962). Subsection (2) originally included an additional paragraph stating, "being employed in a house of prostitution," but it was dropped after the ALI membership debate. 9 MODEL PENAL CODE: TENTATIVE DRAFT 167 (1959); *see infra* text accompanying notes 123–29. The final commentary notes this provision would have been consistent with several state laws at the time, which were meant to include "purveyors of food, drink, and non-sexual entertainment and even menial servants" so as to "make it more difficult for houses of prostitution to obtain ordinary services or as a pragmatic recognition of the difficulty of identifying the particular role played by persons associated with a house of prostitution." MODEL PENAL CODE § 251.2 cmt. at 466 (AM. LAW INST., Proposed Official Draft 1962). After "reflection," the reporters found this imposed unnecessary criminal liability and instead sought to focus liability based on "general principles of complicity," which required proving a purpose to promote prostitution. *Id.*

<sup>91</sup> MODEL PENAL CODE § 251.2(3) cmt. at 471 (AM. L. INST., Proposed Official Draft 1962).

paragraphs listed in subsection (2).<sup>92</sup> Second, if one “compels” another to engage in prostitution.<sup>93</sup> Third, if one promotes prostitution of someone under the age of sixteen, regardless of the actor’s knowledge of their age.<sup>94</sup> Fourth, if one promotes prostitution of their “wife, child, ward or any person for whose care, protection or support he is responsible.”<sup>95</sup> The reporters purposefully structured punishment “according to the degree of their involvement in the commercial enterprise” and to “generally increase with the offender’s rank in the business organization.”<sup>96</sup>

Further, the MPC included a presumption that, if someone “other than the prostitute or the prostitute’s minor child or other legal dependent incapable of self-support . . . is supported in whole or substantial part by the proceeds of prostitution,” then they are “presumed to be knowingly promoting prostitution.”<sup>97</sup> The reporters noted in the final commentary that states like California created statutes so that “even where evidence of soliciting or any other actual complicity in [promoting] prostitution was lacking, conviction could be had on proof that a prostitute supported him ‘in whole or in part.’”<sup>98</sup> This legislation, the reporters found, was “unsupportable

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<sup>92</sup> *Id.* § 251.2(3)(a). The reporters explained these paragraphs were designed to describe “activities [that] are characteristic of persons who play a supervisory or managerial role in the business of prostitution.” *Id.* at 464.

<sup>93</sup> *Id.* § 251.2(3)(b). Compel is not defined in the MPC, but dictionaries around this time defined it as “moved by force.” *Compelled*, *BALLENTINE’S LAW DICTIONARY* (3d ed. 1969).

<sup>94</sup> MODEL PENAL CODE § 251.2(3)(c).

<sup>95</sup> *Id.* § 251.2(3)(d). Child is not defined in this Section and is unclear whether it means under the age of majority, sixteen as used in Section 251.2(3)(c), or with any age limitation at all. Moreover, in the preliminary draft, this provision originally read “any person for whose care or education he is responsible.” Am. L. Inst., *supra* note 25, at 5. Although subtle, the change from education to protection and support suggests the reporters’ desire to include any legal dependent rather than just minor children.

<sup>96</sup> MODEL PENAL CODE § 251.2 cmt. at 459, 469–70 (AM. L. INST., Proposed Official Draft 1962). This structure presumes, perhaps willfully, that third parties always maintain control over the sex worker. *See supra* text accompanying note 17; Schwartz, *supra* note 38, at 683 (“[T]he higher penalties applicable to [the one promoting prostitution] do not depend on whether he is the instigator of the relationship; if a prostitute persuades someone to manage her illicit business or to accept her in a house of prostitution, it is he, not she, who incurs the higher penalty.”).

<sup>97</sup> MODEL PENAL CODE § 251.2(4) (AM. L. INST., Proposed Official Draft 1962).

<sup>98</sup> *Id.* § 251.2 cmt. at 467. The California statute read at the time:

*Pimping.* Any male person who, knowing a female person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of her prostitution, or from money loaned or

in principle” as “[i]n no other instance is criminal liability based on the bare fact of receiving support from someone engaged in an illicit occupation.”<sup>99</sup> As such, the MPC eliminated automatic liability under these circumstances but retained the presumption of promoting prostitution.

In the preliminary draft, this subsection was originally drafted to include acts that “promote or facilitate” prostitution, rather than just promote.<sup>100</sup> The reporters explained in the final commentary that the subsection sought to “incorporate[] many different acts of collaboration with prostitutes or exploitation of them” and avoid the “traditional” state approach of having separate convictions for the same criminal transaction.<sup>101</sup> Despite a wide range among states for the punishment of promoting prostitution, the reporters concluded it was following prior law by grading promoting prostitution worse than prostitution itself.<sup>102</sup>

Commenting on paragraph (f), transportation, the reporters noted the federal Mann Act and other state laws provided “severe penalties” for transporting sex workers and that they only sought to address intrastate transportation as the federal Mann Act already covered interstate prostitution.<sup>103</sup> They questioned whether severe penalties were appropriate unless “participation in transportation reliably identified the actor as being

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advanced to or charged against her by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for her, is guilty of pimping, a felony.

*Id.* (emphasis added) (citing Cal. Penal Code § 266(h)).

<sup>99</sup> *Id.* Notwithstanding this acknowledgment, the reporters did not include any examples of *presumed* criminal liability based on similar circumstances either.

<sup>100</sup> Am. L. Inst., *supra* note 25, at 4. As relevant during the time period, facilitate was defined as “[t]o make easy or less difficult . . . ; [t]o lessen the labor of; to assist; aid” while promote was defined as “[t]o contribute to the growth, enlargement, or prosperity of (something in course); to forward; further; encourage; advance.” *Facilitate*, WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1951); *Promote*, WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1951). These contrasting definitions show the term promote requires more active contribution by the actor than the term facilitate and, therefore, shows the reporters’ intent to require more than merely making the labor of prostitution easier to be guilty of promoting prostitution under subsection (2).

<sup>101</sup> MODEL PENAL CODE § 251.2 cmt. at 463 (AM. L. INST., Proposed Official Draft 1962).

<sup>102</sup> *Id.* at 472.

<sup>103</sup> *Id.* at 473; *see supra* text accompanying note 7. The preliminary draft originally included interstate transportation but was removed from the tentative draft. *See* Am. L. Inst., *supra* note 25, at 4.

responsibly engaged in recruiting prostitutes,” and rejected the “assumption” that this theory of recruitment “holds even for interstate transportation.”<sup>104</sup>

The reporters concluded most state laws merely required a transporter, such as a cab driver, to know or have reason to know their transportation was for prostitution. They opined that this level of liability went “entirely too far in demanding that a relatively disinterested person curtail normal business relations because of what [they] know[] about another’s illicit purpose.”<sup>105</sup> In validating its grading of this offense at the level of misdemeanor, the reporters considered the crime “of little independent criminologic significance.”<sup>106</sup>

On paragraph (g), landlord liability, the preliminary draft originally had a broader “failure to abate” standard, but the reporters narrowed the standard in the tentative draft to “failure to make *reasonable effort* to abate.”<sup>107</sup> They commented in the final commentary that the provision followed prior states’ laws but did not seek to go as far as some states by “impos[ing] on the landlord a duty of inquiry or mak[ing] him liable for negligent failure to discover the wrongful use of the leased premises.”<sup>108</sup>

#### *D. Patrons & Evidentiary Rules*

The next subdivision, Section 251.2(5), was subject to “much debate” among the ALI membership and reporters.<sup>109</sup> As approved, the MPC defined the crime of patronizing prostitution, a violation,<sup>110</sup> as when a person “hires

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<sup>104</sup> MODEL PENAL CODE § 251.2 cmt. at 473 (AM. L. INST., Proposed Official Draft 1962) (“A man who procures a ‘call-girl’ and who thereby commits a misdemeanor under Subsection (2)(e) should not be classed as a felon merely because he then drove her to the place of assignation in violation of Subsection (2)(f).”). Such logic follows the proposition that liability under promoting prostitution applies only to third parties, not the sex worker or patron. *See supra* text accompanying notes 15–17.

<sup>105</sup> MODEL PENAL CODE § 251.2 cmt. at 465 (AM. L. INST., Proposed Official Draft 1962).

<sup>106</sup> *Id.* at 473.

<sup>107</sup> Am. L. Inst., *supra* note 25, at 4; 9 MODEL PENAL CODE: TENTATIVE DRAFT 168 (1959) (emphasis added).

<sup>108</sup> MODEL PENAL CODE § 251.2 cmt. at 465 (AM. L. INST., Proposed Official Draft 1962).

<sup>109</sup> *Id.* at 468.

<sup>110</sup> In ascending order of seriousness, offenses under the MPC include: violations, petty misdemeanors, misdemeanors, third-degree felony, second-degree



a prostitute to engage in sexual activity with him, or if he enters or remains in a house of prostitution for the purpose of engaging in sexual activity.”<sup>111</sup> The reporters commented that only a handful of states criminalized patronizing at the time and concluded severe penalties against patrons would be “unrealistic” because “[p]rosecutors, judges, and juries would be prone to nullify severe penalties in light of the common perception of extra-marital intercourse as a widespread practice.”<sup>112</sup> As such, the reporters graded this offense a violation, which only carried a fine, because the lenient treatment of patrons would keep attention “toward the merchandizers of sexual activity”—i.e., sex workers.<sup>113</sup> The reporters also reasoned this provision would facilitate police in a raid of a house of prostitution by “reliev[ing them] of the task of distinguishing among patrons, promoters, and others involved in the operation.”<sup>114</sup>

Finally, the MPC provided two unique evidentiary rules for use in Section 251.2 cases, which the reporters found were “not innovations.”<sup>115</sup>

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felony, and first-degree felony. *Id.* §§ 1.04, 6.01. This would mean, of course, that patrons received less punishment under the MPC than sex workers.

<sup>111</sup> *Id.* § 251.2(5).

<sup>112</sup> *Id.* at 468.

<sup>113</sup> *Id.* A Pennsylvania court reviewing its MPC-adopted provision on patronizing prostitution concluded “[a] review of the subject matter and legislative history have demonstrated an *absence* of any sense of moral delinquency or wrongdoing or even guilt directed toward *the client*” and that a prosecutor did not have to prove a defendant’s criminal intent to prove a violation of the statute. *Commonwealth v. Mita*, 14 Phila. 643, 647–48 (Pa. 1986). In so holding, it found a would-be patron who solicited an undercover officer for prostitution did not violate the statute because the undercover officer was not a sex worker. *Id.* at 650. The court noted the Pennsylvania and other state statutes that adopted the MPC required one to “hire[] a prostitute” compared to New York and other state statutes that more broadly required one to solicit “another person” for prostitution. *Id.* at 649–50; *see also* *People v. Bailey*, 432 N.Y.S.2d 772, 784–85 (N.Y. Crim. Ct. 1980) (criticizing the MPC’s language here as a “pitfall”).

<sup>114</sup> MODEL PENAL CODE § 251.2 cmt. at 468–69 (AM. L. INST., Proposed Official Draft 1962). In the tentative draft, this subsection on patronizing prostitution included a presumption which stated “[a] person in a house of prostitution is presumed to be there for the purpose of violating this subsection.” 9 MODEL PENAL CODE: TENTATIVE DRAFT 169 (1959). The final commentary noted this presumption was removed because ALI members objected to this provision as “unnecessary and . . . potentially counter[productive] if invoked defensively by a promoter of the criminal enterprise.” MODEL PENAL CODE § 251.2 cmt. at 469 (AM. L. INST., Proposed Official Draft 1962).

<sup>115</sup> MODEL PENAL CODE § 251.2 cmt. at 469 (AM. L. INST., Proposed Official Draft 1962).

First, it specified the following evidence was admissible to establish whether a place was a house of prostitution: “[the house’s] general repute; the repute of the persons who reside in or frequent the place; the frequency, timing and duration of visits.”<sup>116</sup> Second, the MPC stated testimony by persons against their spouse are allowed for Section 251.2 crimes, thus creating an exception to the common law privilege of spousal immunity.<sup>117</sup> The reporters concluded abrogating spousal immunity was useful when “prosecuting a pimp who, as is not infrequently the case, is married to the prostitute.”<sup>118</sup>

### *E. ALI Membership Debates*

In May 1959, a few months after the advisory group reviewed the preliminary draft on prostitution and related offenses, the tentative draft went before the wider ALI membership for discussion.<sup>119</sup> Schwartz<sup>120</sup> spoke on behalf of the reporters identifying core issues needing ALI’s immediate attention: (1) “whether hire should be required in all cases,” (2) “whether it should be an offense to solicit sexual engagement publicly or in a public place,” (3) “whether patrons should be guilty of an offense,” and (4) “what to do about . . . those who are proved to be living off the earnings of a prostitute.”<sup>121</sup>

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<sup>116</sup> *Id.* § 251.2(6).

<sup>117</sup> *Id.* As described by the ALI’s Model Code of Evidence, since the development of the English common law, “a spouse is disqualified to testify for the other spouse, and certainly one spouse could not testify against the other over the latter’s objection.” MODEL CODE OF EVIDENCE Rule 215 cmt. a (AM. L. INST. 1942). The preliminary draft to this subsection originally included language stating “but no person shall be compelled to testify against his or her spouse,” but recommended against this bracketed language because “there is likely to be little jury prejudice in favor of prostitutes who may be complaining witnesses” because “such women generally [are] not . . . considered in the category of ‘[v]ictims.’” Am. L. Inst., *supra* note 25, at 6; Am. L. Inst., Article 207—Sexual Offenses and Offenses Against the Family 180 (Jan. 16, 1956) (unpublished draft) (on file with HeinOnline ALI Library).

<sup>118</sup> MODEL PENAL CODE § 251.2 cmt. at 469 (AM. L. INST., Proposed Official Draft 1962).

<sup>119</sup> This information comes from the ALI proceeding records. As described by a former director of the ALI: “Proceedings of a meeting . . . are probably not things to be picked up and read avidly upon their receipt. But they do prove valuable on many occasions. Time and time again people go back to the discussions to see what was said and by whom on a given occasion.” 36 AM. L. INST. PROCEEDINGS vi (1959).

<sup>120</sup> See *supra* text accompanying note 37.

<sup>121</sup> 36 AM. L. INST. PROCEEDINGS 283–84 (1959).

The first objection to the tentative draft was raised by Frederick M. Myers<sup>122</sup> who found a presumption about patrons in houses of prostitution from the tentative draft too “strong.”<sup>123</sup> Laurence H. Eldredge<sup>124</sup> then objected to the inclusion of a paragraph that made any employment with a house of prostitution a form of promoting prostitution.<sup>125</sup> Particularly, Eldredge hypothesized a front-door polisher working for a house of prostitution who could not find other work, like the character in *H.M.S. Pinafore*,<sup>126</sup> and is accordingly unjustly arrested for promoting prostitution.<sup>127</sup> Judge Learned Hand<sup>128</sup> joined Eldredge in convincing Schwartz to concede that the paragraph on employment in houses of prostitution should be dropped.<sup>129</sup>

Bethuel M. Webster<sup>130</sup> then opened discussion on the most contentious topic on Section 251.2 by motioning “to strike the entire section

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<sup>122</sup> Myers was known as “a prototypical New Englander, committed to excellence, succinct in speech, spare and no-nonsense in manner, dismissive of frills and adornment, and quietly dignified.” *In Memoriam: Frederick M. Myers, Jr., Our Founder, Mentor, and Dear Friend*, CAIN HIBBARD, <https://cainhibbard.com/in-memoriam-frederick-m-myers-jr-our-founder-mentor-and-dear-friend/> (last visited Dec. 13, 2022).

<sup>123</sup> 36 AM. L. INST. PROCEEDINGS 284 (1959); *see supra* text accompanying note 114.

<sup>124</sup> Eldredge was born in Southern New Jersey and built his law practice in Philadelphia where he was regarded as a “civic leader” and deeply involved in shaping Pennsylvania law. *Laurence H. Eldredge Papers*, PENN LIBRS: UNIV. ARCHIVES & RECS. CTR., <https://archives.upenn.edu/collections/finding-aid/upt50e372#biographical-note> (last visited Dec. 13, 2022).

<sup>125</sup> 36 AM. L. INST. PROCEEDINGS 285 (1959); *see supra* text accompanying note 90.

<sup>126</sup> *H.M.S. Pinafore* is a comedy opera that originally debuted in 1879. *See H.M.S. Pinafore*, PLAYBILL, <https://www.playbill.com/production/h-m-s-pinaforebroadway-manhattan-theatre-1879> (last visited Dec. 13, 2022).

<sup>127</sup> 36 AM. L. INST. PROCEEDINGS 285 (1959).

<sup>128</sup> Judge Hand “is generally considered to have been a greater judge than all but a few of those who have sat” on the U.S. Supreme Court and was honored by the ALI during its 1959 meeting. *Learned Hand*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Learned-Hand> (Aug. 14, 2022); 36 AM. L. INST. PROCEEDINGS 449 (1959). Judge Hand contributed as an ALI member and as a representative of the Second Circuit. 36 AM. L. INST. PROCEEDINGS 18 (1959).

<sup>129</sup> 36 AM. L. INST. PROCEEDINGS 285–86 (1959).

<sup>130</sup> Webster grew his legal career out of New York City where he was president of the city’s bar association and advisor to former Mayor John V. Lindsay. Susan Heller Anderson, *Bethuel M. Webster, 88, Founder of a Law Firm*, N.Y. TIMES (Apr. 2, 1989), <https://www.nytimes.com/1989/04/02/obituaries/bethuel-m->

and to recommit the problem . . . to bring in a provision which would be along the lines of the present English law, namely, that prostitution should be criminal only when it takes the form of a nuisance on the public streets.”<sup>131</sup> On the motion, Will R. Wilson<sup>132</sup> opposed it noting “laws against prostitution . . . have made enormous gains in the United States in the last ten years” and that “[i]t is a social evil that can and should be eliminated by law enforcement.”<sup>133</sup> Judge Hand voiced that prostitution “is a whole subject which ought not to be dealt with by law at all” but felt “half a loaf is better than no bread.”<sup>134</sup> As such, Judge Hand argued it should remain a criminal matter but recommended “to limit it as far as [they] can.”<sup>135</sup>

“Mr. Daub,”<sup>136</sup> in turn, motioned to remove subsection (5), patronizing prostitution, entirely.<sup>137</sup> The ALI membership, however, felt there was not enough time in the meeting to fully discuss the issues and Judge Hand motioned to table the entire matter for reconsideration by the reporter.<sup>138</sup> For further consideration, Judge Charles D. Breitel<sup>139</sup> expressed his dissent from the concerns raised by Webster and Judge Hand because “organized prostitution is a very big and very profitable business, and it does

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webster-88-founder-of-a-law-firm.html. Webster was also general counsel to the Federal Radio Commission—predecessor to the Federal Communications Commission—from 1929 to 1930 and known for his role in “establishing the supremacy of public over private interests on the airways,” which were later used over televisions as well. *Id.*

<sup>131</sup> 36 AM. L. INST. PROCEEDINGS 286 (1959); *see supra* text accompanying note 53.

<sup>132</sup> Wilson was a former Texas Supreme Court Justice, Attorney General of Texas at the time of this ALI membership meeting, and later served as Assistant Attorney General of the U.S. Department of Justice under the Nixon Administration. *Will R. Wilson, Sr. (1969-1971)*, U.S. DEP’T. JUST., <https://www.justice.gov/criminal/history/assistant-attorneys-general/will-r-wilson> (last updated Feb. 4, 2016).

<sup>133</sup> 36 AM. L. INST. PROCEEDINGS 286–87 (1959).

<sup>134</sup> *Id.* at 287.

<sup>135</sup> *Id.*

<sup>136</sup> A person by the name of Daub was not listed in the ALI’s 1959 membership list and no historical information about this figure could be found. *See id.* at 5.

<sup>137</sup> *Id.* at 287.

<sup>138</sup> *Id.* at 288.

<sup>139</sup> Judge Breitel was the Chief Judge of New York State’s highest court from 1974 to 1978. James W.B. Benkart, *Charles David Breitel*, HIST. SOC’Y N.Y. CTS., <https://history.nycourts.gov/biography/charles-david-breitel/> (last visited Dec. 14, 2022). Judge Breitel described his politics during the ALI discussion as “a libertarian type of liberal.” 36 AM. L. INST. PROCEEDINGS 289 (1959).

not involve many of these niceties.”<sup>140</sup> Particularly, Judge Breitel voiced his support for the section as written and cited the presence of “men and gangs” involved in organized prostitution as reason to reject “treat[ing prostitution] as if this were merely one of the lighter aspects of sexual deviations.”<sup>141</sup>

William L. Marbury<sup>142</sup> voiced his support for Judge Breitel’s commentary and rejected Webster’s proposal because organized prostitution “is connected with all kinds of racketeering and with all gambling.”<sup>143</sup> Frank A. Ross,<sup>144</sup> however, noted his support of the Webster proposal concluding “discreet” prostitution and organized prostitution are separate things to be addressed by law.<sup>145</sup> Judge Edward J. Dimock<sup>146</sup> countered Judge Breitel’s position arguing organized crime was only involved because

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<sup>140</sup> 36 AM. L. INST. PROCEEDINGS 288 (1959). Judge Breitel referred to Webster and Judge Hand’s comments as relating to “the fiction book kind of prostitution.” *Id.* at 289.

<sup>141</sup> *Id.*

<sup>142</sup> Marbury was a decedent of slaveowners, and his father was a dedicated “[p]rogressive segregationist[.]” from Maryland who advocated for eugenicist policies and argued before the U.S. Supreme Court that states were allowed to openly discriminate against Black citizens in voting because the Fifteenth Amendment was unconstitutional. Garrett Power, *Eugenics, Jim Crow & Baltimore’s Best*, 49 MD. BAR J. 1, 6, 8 (2016). Following in these footsteps as a Baltimore-based lawyer in 1937, Marbury defended the constitutionality of Baltimore County denying high school education to Black teenagers and won against Thurgood Marshall, then lawyer for the National Association for the Advancement of Colored People and later Supreme Court Justice. *Id.* at 14. After gaining legal notoriety, he purportedly “had a change of heart” and became a “peace-maker in civil rights disputes of the 1950s”; however, in the 1960s he sought to convince the American Bar Association to censure a federal civil rights bill that prevented racial discrimination in jury selection because it “would lower the standards for jurors.” *Id.*; *Lawyers Rebuff Marbury, Support Reform of Juries*, HARV. CRIMSON (Aug. 12, 1966), <https://www.thecrimson.com/article/1966/8/12/lawyers-rebuff-marbury-support-reform-of/>.

<sup>143</sup> 36 AM. L. INST. PROCEEDINGS 290 (1959).

<sup>144</sup> Ross was a lawyer from Madison, Wisconsin and actively involved in local legal aid. *Frank A. Ross, Madison Attorney*, WIS. HIST. SOC’Y, <https://www.wisconsinhistory.org/Records/Image/IM46896> (last visited Dec. 15, 2022).

<sup>145</sup> 36 AM. L. INST. PROCEEDINGS 290 (1959).

<sup>146</sup> Judge Dimock, born in New Jersey, was a judge appointed to the Southern District of New York by President Harry S. Truman. *Edward J. Dimock, 96, A Senior Federal Judge*, N.Y. TIMES (Mar. 19, 1986), <https://www.nytimes.com/1986/03/19/obituaries/edward-j-dimock-96-a-senior-federal-judge.html>.

of its illegal nature.<sup>147</sup> Clarifying his position, Judge Breitel expressed his perspective that “organized prostitution provides an opportunity for recruiting many, many young women, many of them mental incompetents . . . and of economic disadvantage, so that they can be exploited.”<sup>148</sup> Judge Breitel compared prostitution laws to laws that prohibit “human beings [from] permit[ing] themselves to be objects of having baseballs thrown at them.”<sup>149</sup> After discussion, the ALI membership voted in favor of tabling Webster’s proposal but the presiding officer recognized for the record that there was “substantial amount of support” for the proposal and so directed the reporters to create a draft of the prostitution section that incorporated this philosophy.<sup>150</sup>

Three years later, Schwartz returned for final approval of the section after integrating feedback from the 1959 meeting. Schwartz announced during the 1962 ALI membership meeting that he and the reporters “made very slight concessions to Mr. Webster’s point of view.”<sup>151</sup> He noted the changes were meant to take two types of transactions out of the scope of the provision: (1) “the mistress who is supported regularly” and (2) “the occasional private bargain” because neither scenario is engaged in sexual activity as a business.<sup>152</sup> Expressing that the revised version sought to suppress “prostitution as a business,” Schwartz stated he “doubt[ed] whether that w[ould] evoke opposition here, if Mr. Webster [wa]sn’t here.”<sup>153</sup> The minutes reflect that “[n]o one rose to speak” from that comment.<sup>154</sup>

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<sup>147</sup> 36 AM. L. INST. PROCEEDINGS 290–91 (1959).

<sup>148</sup> *Id.* at 291.

<sup>149</sup> *Id.* Judge Breitel noted “New York State law prohibits that kind of thing which used to be found in Coney Island, among other places.” *Id.* This reference was likely to the patently racist “pastime” at carnivals and fairs throughout the country known as “African Dodger” in which people would throw baseballs at Black people posing as “targets” to win a prize. Franklin Hughes, *The African Dodger-October 2012*, FERRIS ST. UNIV.: JIM CROW MUSEUM (2012), <https://www.ferris.edu/HTMLS/news/jimcrow/question/2012/october.htm> (noting African Dodger “was as commonplace in local fairs, carnivals, and circuses as Ferris wheels and roller coasters are today” and continued well into the 1940s).

<sup>150</sup> 36 AM. L. INST. PROCEEDINGS 292 (1959).

<sup>151</sup> 39 AM. L. INST. PROCEEDINGS 220 (1962). Many unexplained changes from the tentative draft to the final MPC can be attributed to the reporters’ concession to the Webster view that criminal law should focus on the “public nuisance” aspect of prostitution.

<sup>152</sup> *Id.* at 221; *see supra* text accompanying note 69.

<sup>153</sup> 39 AM. L. INST. PROCEEDINGS 221 (1962).

<sup>154</sup> *Id.*

Schwartz started to move on from the provision on prostitution, but Harris B. Steinberg<sup>155</sup> rose to object to the subsection on patronizing and motioned to eliminate it.<sup>156</sup> Steinberg rationalized that criminalizing patrons ran counter to the MPC's elimination of fornication and adultery as crimes and that "bad law makes bad law enforcement."<sup>157</sup> Particularly, he was concerned the provision would make "the man a victim of shake-downs by either vice cops or prostitutes with little hope of getting convictions."<sup>158</sup>

In response, Schwartz explained that the theory behind criminalizing patrons was that they were soliciting the commission of a crime and that it would help police who raid houses of prostitution.<sup>159</sup> Judge Breitel made a defense of the subsection arguing prostitution "involved culpability on the part of both sexes and not one" and that the ALI should "stamp a stigma also on those males who participate in this form of activity, which provides a fertile ground for other criminals."<sup>160</sup> Eldredge added the provision on prostitution "has been considered and reconsidered and re-reconsidered" and noted he would "hate" to see the subsection on patrons eliminated "because we are practically all men."<sup>161</sup> ALI voted on Steinberg's motion and rejected it, approving the entirety of Section 251.2 as written.<sup>162</sup> Indeed, Section 251.2 was one of the last outstanding matters before the ALI approved the MPC in its entirety.<sup>163</sup>

## II. CONTEMPORARY ANALYSIS OF SECTION 251.2 RATIONALIZATIONS

As indicated, the MPC reporters listed four utilitarian reasons to criminalize sex work: (1) controlling the spread of venereal disease, (2) decreasing power and profit of organized crime, (3) limiting corrupt influence on government and law enforcement, and (4) increasing stability

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<sup>155</sup> Steinberg was a nationally recognized white-collar defense attorney and dedicated civil libertarian. *Harris B. Steinberg Dies at 57: Noted Criminal Defense Lawyer: Civil Libertarian and Advocate of Judicial Reform Assisted 'White Collar' Defendants*, N.Y. TIMES, June 5, 1969, at 47.

<sup>156</sup> 39 AM. L. INST. PROCEEDINGS 221-22 (1962).

<sup>157</sup> *Id.* at 221.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 222. Schwartz clarified, however, that "if you strike it out it will not evoke tears from me." *Id.*

<sup>160</sup> *Id.* at 223.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 227.

of the home and family.<sup>164</sup> Despite recognizing at points conflicting evidence supporting their rationalizations, the reporters choose to continue prevailing policy because of an “inability to resolve many of the disputed issues on the basis of available evidence.”<sup>165</sup> This section will review contemporary evidence in relation to these rationalizations and demonstrate—with reasonable certainty—that these rationalizations cannot be used to support the criminalization of prostitution today.

### A. Comparative Models

In evaluating the rationalizations offered to support the criminalization of prostitution, a point of comparison must be used. The reporters relied on comparing criminalized suppression against early twentieth century systems in Europe that legalized but heavily regulated prostitution.<sup>166</sup> This analysis, however, will compare the complete criminal suppression of prostitution against three types of models that exist internationally: decriminalization, legalization, and the Nordic model.

Under the decriminalization model, as advocated for by sex workers themselves, all criminal and civil penalties aimed towards adult<sup>167</sup> sex workers, their patrons, and non-exploitative third parties are removed, and

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<sup>164</sup> MODEL PENAL CODE § 251.2 cmt. at 456 (AM. L. INST., Proposed Official Draft 1962).

<sup>165</sup> *Id.* at 458.

<sup>166</sup> *Id.* at 456 (citing ABRAHAM FLEXNER, PROSTITUTION IN EUROPE 121–64 (1914)); see also Yannick Ripa, *Prostitution (19th-21st Centuries)*, DIGIT. ENCYC. EUR. HIST., <https://ehne.fr/en/node/12445> (detailing the “European regulationist consensus” on prostitution) (last visited Dec. 16, 2022).

<sup>167</sup> For nuanced policy discussions addressing those under the age of eighteen who trade sex, see *Girls Do What They Have to Do to Survive: Illuminating Methods used by Girls in the Sex Trade and Street Economy to Fight Back and Heal*, YOUNG WOMEN’S EMPOWERMENT PROJECT, <https://ywepchicago.files.wordpress.com/2011/06/girls-do-what-they-have-to-do-to-survive-a-study-of-resilience-and-resistance.pdf>; Meredith Dank et al., *Surviving the Streets of New York: Experiences of LGBTQ Youth, YMSM, AND YWSW ENGAGED IN SURVIVAL SEX*, (Feb. 2015), <https://www.urban.org/research/publication/surviving-streets-new-york-experiences-lgbtq-youth-ymsm-and-ywsw-engaged-survival-sex>; *Young Sex Workers*, GLOB. NETWORK SEX OF WORK PROJECTS, (Dec. 12, 2016) <https://www.nswp.org/sites/nswp.org/files/Policy%20Brief%20Young%20Sex%20Workers%20-%20NSWP%2C%202016.pdf>.



sex work is assimilated under existing labor and employment laws.<sup>168</sup> Comparatively, the legalization model as employed by European countries in the early twentieth century and that Nevada, the Netherlands, and others adopt today is a system where prostitution is allowed only through specified conditions but is otherwise criminalized.<sup>169</sup> Lastly, under the Nordic system, sex workers are decriminalized—in theory<sup>170</sup>—but patrons and third parties remain criminalized under the assumption that all sex workers are inherently sex trafficking victims.<sup>171</sup>

Globally, New Zealand remains the only country to fully adopt a decriminalization approach, which it did in 2003 with passage of the Prostitution Reform Act (PRA).<sup>172</sup> Among the prohibitions on prostitution

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<sup>168</sup> See generally *Decriminalisation*, GLOB. NETWORK SEX OF WORK PROJECTS, (Nov. 20, 2020), [https://www.nswp.org/sites/nswp.org/files/decriminalisation\\_cg.pdf](https://www.nswp.org/sites/nswp.org/files/decriminalisation_cg.pdf) (explaining implementation of the decriminalization model); Janet Duran, *I'm a N.J. Sex Worker: Decriminalizing Prostitution Would Help Everyone*, NJ.COM, [https://www.nj.com/opinion/2016/10/im\\_a\\_nj\\_sex\\_worker\\_decriminalizing\\_prostitution\\_wo.html](https://www.nj.com/opinion/2016/10/im_a_nj_sex_worker_decriminalizing_prostitution_wo.html) (last updated Oct. 28, 2016); Christa Daring, *SWOP-USA Suggested Policy Position on Sex Work & Decriminalization*, SEX WORKERS OUTREACH PROJECT (Mar. 25, 2018), <https://swopusa.org/blog/2018/03/25/swop-usa-suggested-policy-position-on-sex-work-decriminalization/>.

<sup>169</sup> See, e.g., NEV. REV. STAT. § 201.354 (2021); Che Post et al., *Regulation of Prostitution in the Netherlands: Liberal Dream or Growing Repression?*, EUR. J. CRIM. POL'Y RES. 99, 108–12 (2019). From a historical perspective, Nevada's system today is undoubtedly a relic from the nineteenth century, western settler communities that never ended. See *supra* note 2.

<sup>170</sup> While sex workers may not be criminally charged with prostitution under this system, governments under the Nordic model have employed a “stress method” of leveraging various legal institutions to intentionally worsen the lives of sex workers in an effort to eradicate prostitution. See, e.g., Melissa Gira Grant, *Amnesty International Calls for an End to the 'Nordic Model' of Criminalizing Sex Workers*, NATION (May 26, 2016), <https://www.thenation.com/article/archive/amnesty-international-calls-for-an-end-to-the-nordic-model-of-criminalizing-sex-workers/> (“In Oslo, [Norway,] Amnesty [International] found that police ‘used sex workers’ reports of violence to facilitate their eviction and/or their deportation.”).

<sup>171</sup> See, e.g., *What Is the Equality Model?*, EQUAL. MODEL U.S., <https://www.equalitymodelus.org/why-the-equality-model/> (last visited Dec. 23, 2022).

<sup>172</sup> See generally *Prostitution Reform Act 2003 (N.Z.)*. The Australian states of Northern Territory, New South Wales, and Victoria have also adopted this decriminalization model. See Lauren Roberts & Jacqueline Breen, *NT Decriminalises Sex Work as Attorney-General Natasha Fyles Pushes Through Change*, ABC NEWS, <https://www.abc.net.au/news/2019-11-26/northern-territory-sex-industry-bill-passed/11739820> (last updated Nov. 26, 2019); *Decriminalisation*

that remained after the PRA was passed included: advertising commercial sexual services through the radio, television, non-classified sections of newspapers or periodicals, or the public cinema; compelling another to provide commercial sexual services; granting visas to work in prostitution; and providing, hiring, or benefiting from the commercial sexual services of those under the age of eighteen.<sup>173</sup> The PRA also mandated that localities could regulate—but not outright ban—the location of brothels; that one could at any time refuse to perform sexual services, even if the sex worker and patron entered a valid contract;<sup>174</sup> that entitlement to public benefits was not affected based on whether one refused to work or continue working in sex work; and that an “operator of a business of prostitution”<sup>175</sup> must receive a certificate of license to legally operate.<sup>176</sup>

In the United States, Rhode Island came the closest to adopting the decriminalization model. In 1980, the Rhode Island Legislature amended its prostitution statute in response to a lawsuit initiated by celebrated sex worker

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Since 1995, AUSTRALIAN SEX WORKERS ASS'N, <https://scarletalliance.org.au/laws/nsw/> (last updated May 10, 2016); *Decriminalising Sex Work in Victoria*, VIC. GOV., <https://www.vic.gov.au/review-make-recommendations-decriminalisation-sex-work#> (last visited Nov. 20, 2022). At the time of this Article's publication, South Africa's political leadership initiated steps to make South Africa the second country in the world to decriminalize sex work. See Skye Wheeler, *South African Leadership Makes Moves to Decriminalize Sex Work*, HUM. RTS. WATCH (Dec. 14, 2022), <https://www.hrw.org/news/2022/12/14/south-african-leadership-makes-moves-decriminalize-sex-work>.

<sup>173</sup> Prostitution Reform Act 2003, §§ 11, 16, 19, 20, 21, 22, 23 (N.Z.).

<sup>174</sup> As an example of how decriminalization assimilates prostitution into existing laws, the effect of the PRA was to make contracts between sex workers and patrons legally enforceable, thus subjecting them to the authority of the country's Disputes Tribunal. See *What the Tribunal Can Help with*, MINISTRY JUST., <https://www.disputes Tribunal.govt.nz/can-help-with/#can> (last updated May 17, 2021) (noting the Disputes Tribunal's purpose is to “settle disputes without going to court” and has jurisdiction over disputes involving contracts and the sale of services); Catherine Healy et al., *It's Work, It's Working: The Integration of Sex Workers and Sex Work in Aotearoa/New Zealand*, 31 WOMEN'S STUD. J. 50, 56–57 (2017) (highlighting how sex workers in New Zealand have utilized the Disputes Tribunal).

<sup>175</sup> Operators were defined under the PRA as essentially anyone who supervises the work conditions of sex workers unless in a business that is “small owner-operated.” Prostitution Reform Act 2003, §§ 4–5. In turn, small owner-operated businesses were defined as either brothels that employ four or fewer sex workers or a brothel where the sex worker “retains control over his or her individual earnings.” *Id.* § 4.

<sup>176</sup> *Id.* at §§ 14, 17, 18, 34.

rights activist Margo St. James and the organization COYOTE (Call Off Your Old, Tired Ethics),<sup>177</sup> which argued the state's prostitution statute was so broad it "prohibit[ed] sex between unmarried adults."<sup>178</sup> The result of the amendment, as described at the time by the District Court of Rhode Island, decriminalized "purely private sexual activity" between a sex worker and patron but left public solicitation criminalized.<sup>179</sup> Convictions for "indoor" prostitution continued, however, until a defense attorney successfully argued in 2003 that people who solicit prostitution indoors did not violate the amended 1980 statute.<sup>180</sup> In 2009, the legislature re-criminalized indoor prostitution after years of intense anti-prostitution lobbying.<sup>181</sup>

In 1976, the American Bar Association House of Delegates defeated a resolution recommending the decriminalization of sex work by a razor-thin margin of only two votes.<sup>182</sup> Legislative efforts to introduce the decriminalization model have also increased in recent years with members of the legislature in New Hampshire, New York, Oregon, Vermont, and Washington, D.C. all introducing bills to adopt this model in their respective

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<sup>177</sup> For a historical account of Margo St. James and COYOTE's groundbreaking activism, see CHATEAUVERT, *supra* note 40, at 47–82.

<sup>178</sup> Lynn Arditi, *How R.I. Opened the Door to Prostitution*, PROVIDENCE J. (Nov. 14, 2014), <https://www.providencejournal.com/article/20141114/NEWS/311149994>; see also *Coyote v. Roberts*, 502 F.Supp. 1342, 1350 (D.R.I. 1980) ("Prior to May 1980, R.I.G.L. § 11–34–5 . . . purported to outlaw all extramarital sexual intercourse, and all 'unnatural' methods of copulation regardless of whether the participants were married.").

<sup>179</sup> *Coyote*, 502 F.Supp. at 1348; see also *State v. DeMagistris*, 714 A.2d 567, 573 (R.I. 1998) ("[W]e believe that the Legislature enacted [the 1980 amendments] primarily to bar prostitutes from hawking their wares in public . . ."). The private/public distinction of these laws is what is also referred to among sex worker advocates as the difference between indoor and outdoor sex work.

<sup>180</sup> See Arditi, *supra* note 178.

<sup>181</sup> Elana Gordon, *Prostitution Decriminalized: Rhode Island's Experiment*, WHYY (Aug. 3, 2017), <https://whyy.org/articles/prostitution-decriminalized-rhode-islands-experiment/>; see also P.L. 2009, ch. 185, § 1 (R.I. 2009); P.L. 2009, ch. 186, § 1 (R.I. 2009).

<sup>182</sup> *A Close Vote on Prostitution*, LODI NEWS-SENTINEL (Feb. 17, 1976), [https://news.google.com/newspapers?nid=2245&dat=19760217&id=\\_JMzAAAAIBAJ&sjid=MjIHAAAAIBAJ&pg=7039,4011609&hl=en](https://news.google.com/newspapers?nid=2245&dat=19760217&id=_JMzAAAAIBAJ&sjid=MjIHAAAAIBAJ&pg=7039,4011609&hl=en).

jurisdictions.<sup>183</sup> According to polling conducted in November 2019, 52% of U.S. voters supported decriminalizing sex work.<sup>184</sup>

In the legalization system adopted by Nevada, counties with populations less than 700,000 can authorize brothels to apply for licenses.<sup>185</sup> To perform prostitution legally, the sex worker must work through heavily regulated, licensed brothels and submit to regular mandatory sexual health testing, which until 2010 purposefully excluded cisgender men, transgender women, and anyone else without a cervix.<sup>186</sup> Local licensing requirements have varied widely and historically prohibited sex workers, through brothel workplace policies, from owning cars, leaving their place of work, or even allowing their children to live in the same county where they work.<sup>187</sup>

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<sup>183</sup> See H.B. 1614, 2016 Leg. Sess. (N.H. 2016); S. 6419, Leg. Sess. (N.Y. 2019); H.B. 3088, 81st Leg. Assemb., Reg. Sess. (Or. 2021); H. 569, Leg. Sess. (Vt. 2020); Community Safety and Health Amendment Act, B.23–0318 (D.C. 2019); *see also* Recognizing that the United States has a Moral Obligation to Meet its Foundational Promise of Guaranteed Justice for All, H.R. Res. 702, 116th Cong. § 2(A)(ii) (2019).

<sup>184</sup> Nina Luo, *Memo: Decriminalizing Survival: Policy Platform and Polling on the Decriminalization of Sex Work*, FILES FOR PROGRESS (Jan. 30, 2020), <https://www.filesforprogress.org/memos/decriminalizing-sex-work.pdf>.

<sup>185</sup> NEV. REV. STAT. § 244.345(8).

<sup>186</sup> See NEV. REV. STAT. § 201.354(1); NEV. ADMIN. CODE § 441A.800; R089–10 Nev. Reg. Admin. Regs. 5085 (Oct. 16, 2010); Ken Ritter, *George Flint, Nevada Brothel Lobbyist, Says Male Prostitution ‘Repugnant’*, HUFFPOST, [https://www.huffpost.com/entry/george-flint-nevada-broth\\_n\\_391213](https://www.huffpost.com/entry/george-flint-nevada-broth_n_391213) (last updated May 25, 2011) (describing the Nevada Brothel Owners Association’s strong opposition to allowing non-cisgender female sex workers to work in the industry). Nevada’s sexual health testing requirements are in stark contrast to New Zealand’s system which treats the issue as a workplace safety matter and does not utilize the coercive power of the criminal justice system to mandate health and safety measures for sex workers. See *A Guide to Occupational Health and Safety in the New Zealand Sex Industry*, 31–60 (June 2004), <http://espu-usa.com/espu-ca/wp-content/uploads/2008/02/nz-health-and-safety-handbook.pdf>.

<sup>187</sup> See, e.g., Melissa Ditmore, *Sex and Taxes*, GUARDIAN (Apr. 16, 2009), <https://www.theguardian.com/commentisfree/cifamerica/2009/apr/03/nevada-prostitution-tax>. Many of these formal local regulations have disappeared, but brothel managers have voluntarily continued strict restrictions on the movements of the sex workers they employ. See Barbara G. Brents & Kathryn Hausbeck, *Violence and Legalized Brothel Prostitution in Nevada Examining Safety, Risk, and Prostitution Policy*, 20 J. INTERPERSONAL VIOLENCE 270, 284 (2005) (“The vast majority of brothels do not allow women to leave the premises while they are on contract to work, even if they are not on shift . . . Most brothels identify specific days when women can go to the store or run errands; some do not even allow that.”).

Legalization systems, such as Nevada's, produce a two-tiered system in which a guarded boundary between legal and non-legal prostitution is strictly enforced and prioritizes granting legal status to those with resources and certain social privileges—i.e., those able to comply with strict regulations.<sup>188</sup> When legalization systems leverage criminal or civil sanctions to enforce prostitution regulations, researchers have noticed a power shift away from sex workers in favor of third parties and an increase in the monopolization of the industry by larger management companies.<sup>189</sup> Because these systems inherently leave so many sex workers outside of legal prostitution, many of the realities related to criminalization carry over to sex workers working in non-legal prostitution under the legalization model.<sup>190</sup>

In contrast, the Nordic model was first adopted in Sweden in 1999 and has since broadened to Canada, Ireland, Northern Ireland, Iceland, France, Israel, and Norway.<sup>191</sup> This system is sometimes intentionally and

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<sup>188</sup> See, e.g., *Juno Mac: How Does Stigma Compromise the Safety of Sex Workers?*, NPR (Feb. 23, 2018), <https://www.npr.org/transcripts/587937751>; Lucy Platt et al., *Associations Between Sex Work Laws and Sex Workers' Health: A Systematic Review and Meta-Analysis of Quantitative and Qualitative Studies*, 15 PLOS MED. 1, 3, 4, 12, 32 (2018) (reviewing forty quantitative and ninety-four qualitative studies globally to conclude “policing within all . . . regulation frameworks exacerbated existing marginalisation” and “leave the most marginalised, and typically the majority of, sex workers outside of the law”).

<sup>189</sup> Eelco van Wijk & Peter Mascini, *The Responsibilization of Entrepreneurs in Legalized Local Prostitution in the Netherlands*, 16 REGUL. & GOVERNANCE 875, 881–82, 887 (2019) (“[T]he new regulatory regime has decreased sex-workers’ independence by intensifying surveillance by entrepreneurs, even though increasing their independence is proclaimed to be at the heart of municipal governing ambitions.”).

<sup>190</sup> In many respects, migrant sex workers in New Zealand fall under this category because they do not benefit from the protections of the PRA. See Lynzi Armstrong, *Decriminalisation and the Rights of Migrant Sex Workers in Aotearoa/New Zealand: Making a Case for Change*, 31 WOMEN'S STUD. J. 69, 71–74 (2017). Despite colloquial—and this own Article's—insinuation that New Zealand is a pure decriminalization model, the PRA's failure to accommodate migrant sex workers in their rights-based approach to prostitution reform looks different in the context of the United States. Here, the political fight to decriminalize sex work is primarily (but not exclusively) at the state level while the debate over sex work and migration must be directed at Congress to amend federal immigration laws.

<sup>191</sup> See Proposition [Prop.] 1997/1998:55 Kvinnofrid [government bill] 104 (Swed.); Protection of Communities and Exploited Persons Act, S.C. 2014, c 36 (Can.); Criminal Law (Sexual Offences) Act 2017 (Act No. 2/2017) (Ir.), <http://www.irishstatutebook.ie/eli/2017/act/2/enacted/en/html>; Human Trafficking

misleadingly referred to as partial decriminalization or, more recently, the “equality model.”<sup>192</sup> In the United States, the Manhattan District Attorney’s Office effectively adopted this position in April 2021 when it declined to continue prosecuting sex workers but made no changes in how it prosecuted patrons and third parties.<sup>193</sup> A significant portion of prominent organizations in the United States dedicated to eradicating sex trafficking have adopted the Nordic model and its conflation of trafficking with prostitution.<sup>194</sup>

In Canada, where “[i]t is not a crime . . . to sell sex for money,” three current and former sex workers challenged the constitutionality of the Canadian counterparts of Section 251.2 paragraphs (1)(b) (loitering in public), (1)(a) (inmate of a house of prostitution), (2)(a) (keeping a house of prostitution), (4) (living off the proceeds of prostitution), and (5) (patron

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and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 c. 2; Act No. 54/2009 (Iceland); LOI 2016-444 du 13 avril 2016 visant à renforcer la lutte contre le système prostitutionnel et à accompagner les personnes prostituées (Fr.); *Israel: Law Prohibiting Consumption of Prostitution Services Goes into Effect*, LIBR. CONG., <https://www.loc.gov/item/global-legal-monitor/2020-07-22/israel-law-prohibiting-consumption-of-prostitution-services-goes-into-effect/#:~:text=Article%20Israel%3A%20Law%20Prohibiting%20Consumption,entered%20into%20force%20in%20Israel.> (last updated July 23, 2020); THE NORWEGIAN GENERAL CIVIL PENAL CODE [Sex Code Act] §§ 315–16 (Nor.) <https://prosentret.no/en/om-prostitusjon/jeg-vil-vite-mer-om-prostitusjon/lovverk/>.

<sup>192</sup> See e.g., *What Is the Equality Model?*, *supra* note 171.

<sup>193</sup> *D.A. Vance Ends Prosecution of Prostitution and Unlicensed Massage, A First in New York State*, MANHATTAN DIST. ATT’Y OFF. (Apr. 21, 2021), <https://www.manhattanda.org/d-a-vance-ends-prosecution-of-prostitution-and-unlicensed-massage/>. This policy continues a growing trend among prosecutors to decline enforcing laws criminalizing sex work. See, e.g., OFF. OF THE PROSECUTING ATT’Y, WASHTENAW CNTY., POLICE DIRECTIVE 2021-08: POLICY REGARDING SEX WORK (2021), <https://www.washtenaw.org/DocumentCenter/View/19157/Sex-Work-Policy>; Dan Lampariello, *Policies Adopted by State’s Attorney in Baltimore Follow Other Like-Minded Prosecutors*, FOX 5 NEWS (May 11, 2021), <https://foxbaltimore.com/features/operation-crime-justice/policies-adopted-by-states-attorney-in-baltimore-follow-other-like-minded-prosecutors>; John Ferrannini, *Advocates Push Sex Work Law Reform*, BAY AREA REP. (Mar. 31, 2021), <https://www.ebar.com/news/news//303497>.

<sup>194</sup> See, e.g., Anne Elizabeth Moore, *Special Report: Money and Lies in Anti-Human Trafficking* NGOS, TRUTHOUT (Jan. 27, 2015), <https://truthout.org/articles/special-report-money-and-lies-in-anti-human-trafficking-ngos/>; see also Chris Hall, *Is One of the Most-Cited Statistics About Sex Work Wrong?*, ATLANTIC (Sept. 5, 2014), <https://www.theatlantic.com/business/archive/2014/09/is-one-of-the-most-cited-statistics-about-sex-work-wrong/379662/>.

liability for being in a house of prostitution) of the MPC.<sup>195</sup> In 2013, the Canadian Supreme Court, in the landmark case of *Canada v. Bedford*, found those laws violated sex workers' right to security of person as embedded in the Canadian Charter of Rights and Freedoms.<sup>196</sup> While leaving open the possibility of other types of regulations that the legislature could impose on prostitution and acknowledging its "power to regulate against nuisances," the court concluded this could not come "at the cost of the health, safety[,] and lives of prostitutes."<sup>197</sup> In response, the Canadian Parliament redrafted laws that same year and adopted the Nordic model to target patrons and third parties; at the time of writing, a constitutional challenge to those redrafted laws was continuing its way through the courts.<sup>198</sup>

With this understanding of the decriminalization, legalization, and Nordic model legal regimes with respect to prostitution, discussion will now turn to the ALI reporters' four rationalizations for recommending Section 251.2.

### B. Venereal Disease

Stopping the spread of "venereal disease"—or sexually transmitted infections (STIs) as it is medically referred to today—has been cited by governments seeking to suppress prostitution since at least the sixteenth century.<sup>199</sup> Contrary to the early twentieth century findings relied upon by the reporters, however, evidence even at the time the MPC commentary was published showed a "declining significance of prostitution in the spread of venereal disease."<sup>200</sup>

Overwhelmingly, most research today finds laws that criminalize prostitution, patrons, and non-exploitative third parties have an active

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<sup>195</sup> *Canada v. Bedford*, [2013] S.C.R. 1101, paras. 1, 4 (Can.).

<sup>196</sup> *Id.* at para. 165.

<sup>197</sup> *Id.* at para. 136.

<sup>198</sup> See Protection of Communities and Exploited Persons Act, S.C. 2014, c 25 (Can.); Aidan Macnab, *Coalition of Sex Work Law Reform Advocates Bring Charter Challenge of Sex Work Prohibitions*, L. TIMES (Apr. 7, 2021), <https://www.lawtimesnews.com/practice-areas/litigation/coalition-of-sex-work-law-reform-advocates-bring-charter-challenge-of-sex-work-prohibitions/354741>.

<sup>199</sup> See John Frith, *Syphilis—Its Early History and Treatment Until Penicillin, and the Debate on its Origins*, 20 J. MIL. & VETERANS' HEALTH 49, 51–52 (2012) (noting European governments, in response to a Syphilis outbreak, started seeking to suppress non-marital sexual relations and prostitution starting in the 1520s).

<sup>200</sup> MODEL PENAL CODE § 251.2 cmt. at 456 (AM. L. INST., Proposed Official Draft 1962) (citing WINICK & KINSIE, *supra* note 46, at 64).

*detriment* to addressing public health. In a groundbreaking study, the Lancet Medical Journal reported that decriminalizing sex work would decrease the spread of the human immunodeficiency virus (HIV) by 33 to 46% among sex workers and their patrons over a decade “through its iterative effects on violence, policing, safer work environment, and HIV transmission.”<sup>201</sup> As one researcher described it, “[c]riminalisation leads to violence; police harassment; increased HIV and STI risk; reduced access to services; psychological disease; drug use; poor self-esteem; loss of family and friends; work-related mortality; and restrictions on travel, employment, housing, and parenting.”<sup>202</sup>

By way of example, Canadian researchers found that enforcing prohibitions on prostitution and drug use increased the burdens on street-based sex workers’ ability to negotiate condom use, increased likelihood of risky drug injection practices (i.e., needle sharing), and negatively disrupted social safety networks.<sup>203</sup> This link between police practices targeting sex workers and HIV risk has also been observed in Baltimore, Maryland.<sup>204</sup> While condoms continue to be used as evidence of prostitution-related offenses around the country<sup>205</sup>—thus targeting one of the best ways for sex workers to prevent the spread of STIs—the practice globally has also led to

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<sup>201</sup> Chris Beyrer et al., *An Action Agenda for HIV and Sex Workers*, 385 LANCET 287, 287–88, 291 (2015) (defining decriminalization similar to the New Zealand model and reporting data based on surveys of low-, middle-, and high-income countries).

<sup>202</sup> Michael L. Rekart, *Sex-Work Harm Reduction*, 366 LANCET 2123, 2124 (2005).

<sup>203</sup> Kate Shannon et al., *Structural and Environmental Barriers to Condom Use Negotiation with Clients Among Female Sex Workers: Implications for HIV-Prevention Strategies and Policy*, 99 AM. J. PUB. HEALTH 659, 662 (2009).

<sup>204</sup> See Katherine H. A. Footer et al., *The Development of the Police Practices Scale: Understanding Policing Approaches Towards Street-Based Female Sex Workers in a U.S. City*, 15 PLOS ONE 1, 1 (2020).

<sup>205</sup> See, e.g., Derek J. Demeri, Opinion, *Transgender People Are Being Profiled as Sex Workers. AG’s Directive Fails to Address the Issue.*, NJ.COM (Dec. 17, 2019), <https://www.nj.com/opinion/2019/12/transgender-people-are-being-profiled-as-sex-workers-ags-directive-fails-to-address-the-issue-opinion.html> (noting a Black transgender HIV outreach worker was threatened with a promoting prostitution charge for handing out condoms in Newark, New Jersey); Derek J. Demeri, *Policing of People in the Sex Trades in Compton: Analysis of Section 653.22 Clients*, L. Off. of L.A. Cnty. Pub. Def., Summer 2019, at 14 (detailing that possession of condoms were used to establish probable cause for engaging in prostitution in 71.7% of active cases represented by the Compton, California public defenders).



detering third parties from offering condoms as to avoid promoting prostitution-type charges.<sup>206</sup>

Even under the Nordic model, similar problems remain. In reviewing a decision by the Vancouver Police Department to target patrons and third parties rather than sex workers, one study found that the change caused “a significant increase in reports of rush[ed] client negotiation” among female sex workers who use drugs and was “associated with client-perpetrated violence and other markets of vulnerability.”<sup>207</sup> As detailed by another study on the Vancouver policy:

Policing of clients thus directly undermines sex workers’ ability to *screen potential clients* including checking ‘bad date’ sheets for past violent perpetrators, detecting possible weapons or intoxication; and *negotiating the terms of the sexual transactions*,

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<sup>206</sup> See, e.g., ASIA CATALYST, THE CONDOM QUANDARY: A STUDY OF THE IMPACT OF LAW ENFORCEMENT PRACTICES ON EFFECTIVE HIV PREVENTION AMONG MALE, FEMALE, AND TRANSGENDER SEX WORKERS IN CHINA 50–51 (2016), [https://asiacatalyst.org/wp-content/uploads/2014/09/The-Condom-Quandary-Report\\_en.pdf](https://asiacatalyst.org/wp-content/uploads/2014/09/The-Condom-Quandary-Report_en.pdf) (finding the practice among venue managers in China); SCOTTISH GOV’T, EXPLORING AVAILABLE KNOWLEDGE AND EVIDENCE ON PROSTITUTION IN SCOTLAND VIA PRACTITIONER-BASED INTERVIEWS 52 (2016), <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2017/02/exploring-available-knowledge-evidence-prostitution-scotland-via-practitioner-based-interviews/documents/00514437-pdf/00514437-pdf/govscot%3Adocument/00514437.pdf> (noting the practice among Scottish sauna managers may have led to increase in local STIs); BRUCKERT & LAW, *supra* note 16, at 53 (describing the practice among Canadian third parties).

<sup>207</sup> Adina Landsberg et al., *Criminalizing Sex Work Clients and Rushed Negotiations Among Sex Workers Who Use Drugs in a Canadian Setting*, 94 J. URB. HEALTH 563, 563 (2017) (“These findings lend further evidence that criminalizing the purchase of sexual services does not protect the health and safety of sex workers.”); GRAHAM ELLISON ET AL., A REVIEW OF THE CRIMINALISATION OF PAYING FOR SEXUAL SERVICES IN NORTHERN IRELAND 13 (2019), <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/report-criminalisation-paying-for-sex.pdf> (finding Northern Ireland’s adoption of the Nordic model led to “more requests . . . for unsafe sexual practices or for those sexual practices that [sex workers] are not willing to perform”); see also DEP’T OF JUST., ASSESSMENT OF REVIEW OF OPERATION OF ARTICLE 64A OF THE SEXUAL OFFENCES ORDER (NORTHERN IRELAND) 2008: OFFENCE OF PURCHASING SEXUAL SERVICES ¶ 15 (2019), <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/assessment-of-impact-criminalisation-of-purchasing-sexual-services.pdf> (concluding that Northern Ireland’s adoption of the Nordic Model “contributed to a climate whereby sex workers feel further marginalised and stigmatised”).

including where the date will take place, the fee and types of sexual services and use of condoms, before entering a vehicle. These practices of screening and negotiating the terms of transactions have been well documented as critical to sex workers' ability to control their health and safety, including protections from violence, abuse and HIV/STIs.<sup>208</sup>

Unsurprisingly, evidence indicates increased violence against sex workers is correlated with increased exposure to HIV and other STIs.<sup>209</sup> In France, 42% of sex workers reported an increase in violence after the country adopted the Nordic model.<sup>210</sup> When the City of Oslo commissioned a report on the consequences of Norway adopting the Nordic model, they found a “noticeable increase” in violence against sex workers and further described the imbalance that the law created:

There is an agreement that the number of customers in street prostitution, and parts of the indoor market, has decreased somewhat. If you look at the relationship between supply and demand you will see a trend towards a shift in the market where supply is greater than the demand. This means that it is a customers/buyers market. This in turn leads to changes in the power relationship between those that sell and those that buy sex. There is also greater competition between sellers over the remaining customers. This means customers to a greater degree than previously can set the terms for what sexual services they wish to buy, price, where the act of prostitution will be conducted,

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<sup>208</sup> A Krüsi et al., *Criminalisation of Clients: Reproducing Vulnerabilities for Violence and Poor Health Among Street-Based Sex Workers in Canada—A Qualitative Study*, 4 *BMJ OPEN* 1, 6 (2014) (citing Shannon, *supra* note 203; A Krüsi et al., *Negotiating Safety and Sexual Risk Reduction with Clients in Unsanctioned Safer Indoor Sex Work Environments: A Qualitative Study*, 102 *AM. J. PUB. HEALTH* 1154, 1154 (2012); Kate Shannon et al., *Prevalence and Structural Correlates of Gender Based Violence Among a Prospective Cohort of Female Sex Workers*, 339 *BMJ OPEN* 442, 442 (2009); see also Amy Prangnell et al., *Workplace Violence Among Female Sex Workers Who Use Drugs in Vancouver, Canada: Does Client Targeted Policing Increase Safety?*, 39 *J. PUB. HEALTH POL'Y* 86, 92 (2018).

<sup>209</sup> See, e.g., INTERNATIONAL HIV/AIDS ALLIANCE & FRONTIERS PREVENTION PROJECT, *SEX WORK, VIOLENCE AND HIV* 5–7 (2008), <http://catalogue.safaid.net/sites/default/files/publications/Sex%20Work,%20Violence%20and%20HIV.pdf>.

<sup>210</sup> HÉLÈNE LE BAIL ET AL., *WHAT DO SEX WORKERS THINK ABOUT THE FRENCH PROSTITUTION ACT? A STUDY ON THE IMPACT OF THE LAW FROM 13 APRIL 2016 AGAINST THE 'PROSTITUTION SYSTEM' IN FRANCE* 89 (2019).

and condom usage. This leads to an increased vulnerability among those that sell sex.

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The consequences of a reduction in the total amount of customers, and fewer “nice” customers while the amount of “mean” customers stays constant, is that the “mean” customers make up a greater proportion of the customer base for many of the women than previously.<sup>211</sup>

In New Zealand, the PRA’s explicitly stated purpose was to “to create a framework that . . . promotes the welfare and occupational health and safety of sex workers . . . [and] is conducive to public health.”<sup>212</sup> In fact, lobbying for the PRA started with the New Zealand Prostitutes’ Collective, which was funded by the government as part of its national response to the HIV/AIDS epidemic.<sup>213</sup> Several years after the PRA’s passage, the New Zealand government commissioned a study examining the effects of the PRA on the lives of sex workers and found “two thirds of participants . . . reported

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<sup>211</sup> ULLA BJØRND AHL OSLO, DANGEROUS LIAISONS: A REPORT ON THE VIOLENCE WOMEN IN PROSTITUTION IN OSLO ARE EXPOSED TO 11, 32 (2012). The report defined “mean” customers as “customers who do not stick to the boundaries of the agreement, tries to haggle, do not wish to use a condom, show a lack of respect for the women by treating them in a derogatory manner, are violent/threatening, are intoxicated, are psychologically unstable/ill or who seek the women out with the intention to humiliate them—not just to buy sexual services.” *Id.* at 32; *see also* Jay Levy & Pye Jakobsson, *Sweden’s Abolitionist Discourse and Law: Effects on the Dynamics of Swedish Sex Work and on the Lives of Sweden’s Sex Workers*, 14 CRIMINOLOGY & CRIM. JUST. 593, 598–602 (2014).

<sup>212</sup> Prostitution Reform Act 2003, s 3 (N.Z.).

<sup>213</sup> *Prostitution Law Reform in New Zealand*, N.Z. PARLIAMENT (July 10, 2012), <https://www.parliament.nz/mi/pb/research-papers/document/00PLSocRP12051/prostitution-law-reform-in-new-zealand/>. Amazingly, sex workers in the United States continue to be excluded from national HIV policy initiatives. *See* Michele R. Decker et al., *Ending the Invisibility of Sex Workers in the US HIV/AIDS Surveillance and Prevention Strategy*, 28 AIDS 2325, 2325 (2014); Penelope Saunders et al., *SILENCE Is Still Death for Sex Workers: The National HIV/AIDS Strategy Implementation Plan*, BEST PRACTS. POL’Y PROJECT (Dec. 2, 2015), <http://www.bestpracticespolicy.org/2015/12/02/silence-is-still-death-for-sex-workers-the-nhas-implementation-plan/>. *See generally* DEP’T OF HEALTH & HUM. SERVS., NATIONAL STRATEGIC PLAN: A ROADMAP TO END THE EPIDEMIC FOR THE UNITED STATES 2021–2025, at 41–42 (2021) (mentioning sex work only twice and without any policy directives addressing the health needs of sex workers).

that it was easier to refuse to have sex with a client since the law had changed” and that having “legal rights, made them more empowered in their negotiations with clients.”<sup>214</sup> It also concluded workers employed under managed brothels were “significantly more likely to report refusing to do a client” than under criminalized prostitution.<sup>215</sup>

The Supreme Court of Canada in *Bedford* relied heavily on the effect criminalization laws had on the health of sex workers in its decision. Specifically, the court found that the restrictions relating to houses of prostitution—or bawdy houses as called under Canadian law—“interfere[d] with [sex workers’] provision of health checks and preventive health measures.”<sup>216</sup> Further, the court noted “[b]y prohibiting communicating in public for the purpose of prostitution, the law prevent[ed] prostitutes from screening clients and setting terms for the use of condoms or safe houses.”<sup>217</sup>

One study reviewing the period in Rhode Island when indoor prostitution was decriminalized concluded “decriminalization could have potentially large social benefits for the population at large—not just sex market participants.”<sup>218</sup> These researchers “estimate[d] the causal impact of decriminalization . . . and f[ou]nd robust evidence that decriminalization caused . . . gonorrhea incidence [among all women] to decrease by over 40%.”<sup>219</sup> The researchers hypothesized that “[d]ecriminalization likely caused gonorrhea to decrease by diluting the ‘core group’ through the selection of lower risk sex workers into the network and by reducing risky sex among indoor sex workers.”<sup>220</sup> When indoor prostitution was re-criminalized, they found the evidence “suggest[ed] there might be a slight increase in . . . gonorrhea cases.”<sup>221</sup> In response to these findings, the Rhode

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<sup>214</sup> GILLIAN ABEL ET AL., *THE IMPACT OF THE PROSTITUTION REFORM ACT ON THE HEALTH & SAFETY PRACTICES OF SEX WORKERS: REPORT TO THE PROSTITUTION LAW REVIEW COMMITTEE* 116, 118 (2007).

<sup>215</sup> *Id.* at 133.

<sup>216</sup> *Canada v. Bedford*, [2013] S.C.R. 1101, para. 64 (Can.).

<sup>217</sup> *Id.* at para. 71.

<sup>218</sup> Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health*, 85 *REV. ECON. STUD.* 1683, 1701 (2018).

<sup>219</sup> *Id.* at 1684. The report also estimated “decriminalization caused reported rape offences to decrease by 30%.” *Id.*

<sup>220</sup> *Id.* at 1699.

<sup>221</sup> *Id.* at 1704. On this point, the researchers concluded “there [was] no statistically significant impact of re-criminalization on gonorrhea incidence” but noted data was only included up to two years after re-criminalization and that the effects from decriminalization on gonorrhea took up to four years to be fully realized. *Id.* at 1705–07.

Island General Assembly passed a resolution in July 2021 to create a special legislative commission to “study and provide recommendations on the health and safety impact of revising laws related to commercial sexual activity.”<sup>222</sup>

In 2016, Amnesty International issued a formal policy position supporting the New Zealand model of decriminalization, which was based on the “culmination of extensive worldwide consultations, a considered review of substantive evidence and international human rights standards and first-hand research, carried out over more than two years.”<sup>223</sup> Their research, which specifically looked at the Nordic model as used in Norway, also concluded “that criminalization interferes with and undermines sex workers’ right to health services and information, in particular the prevention, testing[,] and treatment of sexually transmitted infections (STIs) and HIV.”<sup>224</sup> Human Rights Watch came to an identical conclusion on the effects of decriminalization after “conduct[ing] research on sex work around the world, including in Cambodia, China, Tanzania, the United States, and . . . South Africa” and which involved “extensive consultations with sex workers and organizations that work on the issue.”<sup>225</sup>

Based on the voluminous body of evidence regarding criminalization laws on the health and safety of sex workers, the Joint United Nations Programme on HIV and AIDS (UNAIDS) issued a position in 2009 that “States should move away from criminalising sex work or activities

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<sup>222</sup> H.R. Res. 5250, 2021 Gen. Assemb., Reg. Sess. (R.I. 2021).

<sup>223</sup> *Amnesty International Publishes Policy and Research on Protection of Sex Workers’ Rights*, AMNESTY INT’L (May 26, 2016), <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/>.

<sup>224</sup> AMNESTY INTERNATIONAL POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS 10 (2016); *see also* AM. CIV. LIBERTIES UNION, IS SEX WORK DECRIMINALIZATION THE ANSWER? WHAT THE RESEARCH TELLS US 8–10 (2020).

<sup>225</sup> *Why Sex Work Should be Decriminalized*, HUM. RTS. WATCH (Aug. 7, 2019), <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized>.

Another human rights organization dedicated to ending human trafficking similarly adopted the decriminalization model as a necessary measure to improve the health of sex workers. *See GAATW-IS Comment: Amnesty International Calls for the Decriminalisation of Sex Work*, GLOB. ALL. AGAINST TRAFFIC WOMEN (Oct. 14, 2015), <https://www.gaatw.org/resources/e-bulletin/2-uncategorised/819-gaatw-is-comment-amnesty-international-calls-for-the-decriminalisation-of-sex-work> (explaining “GAATW has documented extensively the harmful impacts of anti-trafficking initiatives on the rights of (migrant) sex workers around the world and the limitations of simplistic ‘end demand’ approaches to human trafficking”).

associated with it.”<sup>226</sup> The World Health Organization (WHO) followed suit in 2012 adopting a position in favor of the New Zealand decriminalization model on the basis of public health.<sup>227</sup> The Global Commission on HIV and the Law, an independent body formed as an outgrowth of the United Nations Development Programme, also concluded in 2012 that government responses to the HIV epidemic required removing laws that criminalize sex workers, their patrons, and non-exploitative third parties.<sup>228</sup> More recently, 250 scientists who study prostitution called on President Joseph R. Biden and his administration to “examine and evaluate the United States’ policies regarding sex work, sex trafficking, and the sex trade” as necessary to promote public health.<sup>229</sup>

In summary, despite rhetoric dating back centuries, government efforts to suppress prostitution contradict stated concerns of seeking to suppress STIs. If the stated goal is public health, then the optimal response, undoubtedly, lies with decriminalizing all aspects of sex work.

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<sup>226</sup> UNAIDS, UNAIDS GUIDANCE NOTE ON HIV AND SEX WORK 6 (2009). The International Labor Organization also adopted Recommendation 200 in 2010 stating “HIV and AIDS should be recognized and treated as a workplace issue . . . with full participation of organizations of employers and workers.” Int’l Lab. Conf., 99th Sess., Rec. 200, ¶ 3(b) (June 17, 2010). The Committee Report to this recommendation noted that sex workers were explicitly thought to be included but that governments declined to comment on preferred legal approaches. Int’l Lab. Conf., 99th Sess., Prov. Rec. 13 at ¶¶ 192–210 (June 3, 2010).

<sup>227</sup> See WORLD HEALTH ORGANIZATION ET AL., PREVENTION AND TREATMENT OF HIV AND OTHER SEXUALLY TRANSMITTED INFECTIONS FOR SEX WORKERS IN LOW- AND MIDDLE-INCOME COUNTRIES 8 (2012) (“All countries should work toward decriminalization of sex work and elimination of the unjust application of non-criminal laws and regulations against sex workers.”). WHO does not define decriminalization, but subsequent discussions point to the Lancet’s report that decriminalization would substantially decrease HIV among sex workers and patrons, thus indicating support for decriminalization as adopted in New Zealand. See, e.g., *Sex Workers*, WORLD HEALTH ORG., <https://www.who.int/teams/global-hiv-hepatitis-and-stis-programmes/populations/sex-workers> (last visited Dec. 25, 2022).

<sup>228</sup> GLOBAL COMMISSION ON HIV AND THE LAW: RISKS, RIGHTS & HEALTH 43 (2012) [hereinafter GCHL]; see also GLOBAL COMMISSION ON HIV AND THE LAW: RISKS, RIGHTS & HEALTH SUPPLEMENT 9 (2018) (“Governments must refrain from adopting laws based on the ‘end-demand’ model of sex work control and repeal such laws where they exist.”).

<sup>229</sup> Letter from Barbara G. Brents, Prof., Univ. of Nevada, et al., to Joseph R. Biden, President, United States of America, and Kamala D. Harris, Vice President, United States of America (Mar. 3, 2021), <https://drive.google.com/file/d/1CDIqWYvX4WVYg2pc0LXQb1FFzjN6GHQZ/view>.

### C. Organized Crime

Unlike the role that the law on prostitution plays on public health, the link between organized crime and sex work is often discussed, yet rarely studied. Nonetheless, there is compelling reason to believe this rationale in support of criminalization is ill-founded. Indeed, the MPC reporters cited material indicating that, even while criminalized, prostitution played “a small and declining role in organized crime’s operations.”<sup>230</sup>

Logically, criminalizing commercial activities creates an illicit market for organized crime to be involved in. Judge Dimock pointed this out during the ALI membership debate on Section 251.2: “[T]he reason th[at] prostitution is the basis of the activity of these hoodlums, the Mafia, is because it is illegal. If it were not, these illegal operators would not be in it.”<sup>231</sup> The failure of alcohol prohibition is this country’s greatest historical example of this point.<sup>232</sup>

Despite a lack of evidence and logic, the MPC reporters graded punishment for promoting prostitution “according to the degree of their involvement in the commercial enterprise,” indicating their belief that anyone promoting prostitution is more involved in organized crime than sex workers themselves.<sup>233</sup> Of course, this logic assumes sex workers are always under the control and direction of third parties and fails to acknowledge the multitude of ways that these third parties may actually be under the direction and control of sex workers or other third parties.<sup>234</sup>

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<sup>230</sup> MODEL PENAL CODE § 251.2 cmt. at 456 n.5 (AM. L. INST., Proposed Official Draft 1962) (quoting PRESIDENTIAL COMM’N ON LAW ENF’T & THE ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 189 (1967)).

<sup>231</sup> 36 AM. L. INST. PROCEEDINGS 290–91 (1959).

<sup>232</sup> See generally Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613, 636 (1994) (discussing prohibition’s effects on organized crime). The role of organized crime in LGBTQ+ night clubs during the criminal enforcement of cross-dressing and sodomy laws is another example. See C. Alexander Hortis, *The Gay Rights Movement and the Mob*, MOB MUSEUM (June 24, 2019), <https://themobmuseum.org/blog/the-gay-rights-movement-and-the-mob-stonewall-50/> (noting that, after the Stonewall Riots, an activist graffitied the area stating “GAY PROHIBITION CORUPTS\$ COP\$ FEED\$ MAFIA”).

<sup>233</sup> MODEL PENAL CODE § 251.2 cmt. at 459 (AM. L. INST., Proposed Official Draft 1962).

<sup>234</sup> See, e.g., BRUCKERT & LAW, *supra* note 16, at 30–82 (describing in detail the broad array of relationships that exist between sex workers and third parties ranging

Other policy makers have run with this tautology as well. Former New York City Police Commissioner Patrick Murphy, for example, allied with New York Times reporter Murray Schumach in 1971 to produce a number of stories linking “prostitutes, pimps and pornography.”<sup>235</sup> Murphy stated in an interview that pimps were “hardened criminals” who were “trying to move up in the world of organized crime.”<sup>236</sup> Despite having no evidence, Murphy was “convinced” that all “major pimps” were “likely” connected to organized crime.<sup>237</sup> In a 1971 study of the anti-pornography movement, 87% of those involved believed people working in the adult film industry (i.e., third parties involved in sex work) were connected to organized crime, but a presidential Commission on Obscenity and Pornography found no evidence to support this speculation.<sup>238</sup> Still, in the same year of the presidential Commission’s findings, Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO), which defined “racketeering activity” to include any indictable activity “relating to white slave traffic,” or promoting prostitution as prohibited by the Mann Act.<sup>239</sup>

The assumption that prostitution is connected to organized crime has reshaped itself in contemporary discussions linking prostitution with human trafficking, which often note that sex traffickers are part of well-

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from strong to no control over the labor of sex work); *supra* text accompanying notes 15–17. The wide categorization of all third parties being brought under the provision on promoting prostitution has led to sex worker rights organizations being unable to provide even basic services for its members. *See, e.g.*, CHATEAUVERT, *supra* note 40, at 77 (“Assisting women who wanted better working conditions was a greatly needed service, but COYOTE could not risk ‘pandering’ charges . . . . The chilling effect nixed some organizing projects and services for hookers to help hookers.”).

<sup>235</sup> CHATEAUVERT, *supra* note 40, at 29–30.

<sup>236</sup> Murray Schumach, *Price Unit Aims at Curbing Pimps*, N.Y. TIMES (July 12, 1971), <https://www.nytimes.com/1971/07/12/archives/police-unit-aims-at-curbing-pimps-murphy-is-hoping-to-collect.html>.

<sup>237</sup> *Id.*

<sup>238</sup> CHATEAUVERT, *supra* note 40, at 30 (citing Louis Zurcher Jr. et al., *The Anti-Pornography Campaign: A Symbolic Crusade*, 19 SOC. PROBLEMS 217 (1971)). President Nixon, ironically, criticized this presidential commission as being “morally bankrupt” and for being written by a commission appointed by President Lydon B. Johnson. Richard Nixon, *Statement About the Report of the Commission on Obscenity and Pornography*, AM. PRESIDENCY PROJECT (Oct. 24, 1970), <https://www.presidency.ucsb.edu/documents/statement-about-the-report-the-commission-obscurity-and-pornography>.

<sup>239</sup> 18 U.S.C. § 1961(1)(b) (citing 18 U.S.C. §§ 2421–2424); *see also* United States v. McLaurin, 557 F.2d 1064, 1072–73 (5th Cir. 1977).



organized criminal establishments.<sup>240</sup> One modern “study” used the perceived linkage between the brothel industry in Bristol, United Kingdom and organized crime as evidence to increase policing of the brothel industry.<sup>241</sup> Another research paper approved by the Naval Postgraduate School concluded that international terrorist organizations were linked to prostitution simply because “it would seem illogical and unreasonable if it were not.”<sup>242</sup>

Cannabis legalization, like prostitution, shares the same resistance based on a perceived inherent connection to organized crime,<sup>243</sup> but repeated studies have shown these assumptions are questionable at best.<sup>244</sup> Prior to

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<sup>240</sup> See, e.g., Sarah Shannon, *Prostitution and the Mafia: The Involvement of Organized Crime in the Global Sex Trade*, 3 TRANSNATIONAL ORGANIZED CRIME 119, 141 (1997) (“[I]t is clear criminal organizations frequently traffic women and children for forced prostitution, and that these organizations provide security, support, or liaison services to pimps, brothel owners, and other mafia groups.”); *Human Trafficking and Transnational Organized Crime: Assessing Trends and Combat Strategies: Hearing Before the Comm’n on Sec. & Cooperation in Eur.*, 112th Cong. 30 (2011) (statement of Sen. Benjamin L. Cardin, Co-Chair, Comm’n on Sec. & Cooperation in Eur.) (“[O]rganized criminal gangs are engaging in prostitution rings using the internet to recruit and exploit women and children into a life of sexual slavery.”).

<sup>241</sup> See MICHAEL SKIDMORE ET AL., *THE ROLE AND IMPACT OF ORGANISED CRIME IN THE LOCAL OFF-STREET SEX MARKET* 2, 5 (2016) (“The business-like structures required to manage brothels so they are profitable and avoid police attention are strong grounds to *presume* a link to organised crime.” (emphasis added)).

<sup>242</sup> Richard J. DiGiacomo, *Prostitution as a Possible Funding Mechanism for Terrorism* (June 1, 2010) (unpublished M.A. thesis, Naval Postgraduate School).

<sup>243</sup> Advocates of sex work decriminalization follow a fundamentally different approach and use different terminology than those who have sought to legalize cannabis through regulatory frameworks. See, e.g., DRUG POLICY ALLIANCE, *MARIJUANA DECRIMINALIZATION AND LEGALIZATION* 1–2 (2018) (defining decriminalization of cannabis as reducing criminal penalties for possession or replacing criminal penalties with civil fines). As noted, sex work decriminalization is the removal of *all* criminal and civil penalties associated with sex workers, patrons, and non-exploitive third parties. See *supra* text accompanying note 168.

<sup>244</sup> See, e.g., Jane Wells, *Stop the “Green Rush”*, POLITICO (Oct. 14, 2019), <https://www.politico.com/agenda/story/2019/10/14/marijuana-cannabis-legal-000986/> (“[O]rganized crime has gained strength because of its new safe harbor in Colorado.”). This claim was falsely concluded based on an increase in the number of court filings under the Colorado Organized Crime Control Act between 2012 and 2017. See COLO. DEP’T OF PUB. SAFETY, *IMPACTS OF MARIJUANA LEGALIZATION IN COLORADO: A REPORT PURSUANT TO SENATE BILL 13-283*, at 2, 31 (2018). It should have gone without saying that the number of court filings by prosecutors with

cannabis legalization, one study predicted that legalizing cannabis in Colorado, Washington, and Oregon would reduce Mexican cartel profits from border trafficking by as much as 30%.<sup>245</sup> When Italy adopted a “mild form of [cannabis] liberalization” in 2016, researchers concluded revenues of organized crime in the country were reduced by €159 to 273 million annually.<sup>246</sup>

Even accepting the premise that “forced prostitution” is inherently linked to organized crime, evidence indicates that criminalization—whether of the sex worker, the patron, or non-exploitative third party—increases sex workers’ dependence on exploitative third parties.<sup>247</sup> This is particularly true for migrant sex workers because “[i]mmigration restrictions . . . make migrant sex workers dependent upon intermediaries.”<sup>248</sup> For example, police in San Francisco reported a 170% increase in human trafficking after passage of the federal Fight Online Sex Trafficking Act, a bill that criminalizes website hosts for promoting prostitution.<sup>249</sup>

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discretionary enforcement power does not translate to a statistical sample of the activity that is criminalized.

<sup>245</sup> *Study: U.S. Marijuana Legalization Would Hurt Mexican Cartels*, CBS NEWS (Oct. 31, 2012), <https://www.cbsnews.com/news/study-us-marijuana-legalization-would-hurt-mexican-cartels/>.

<sup>246</sup> Vincenzo Carrieri et al., *Light Cannabis and Organized Crime: Evidence from (Unintended) Liberalization in Italy*, 113 EUR. ECON. REV. 63, 75 (2019).

<sup>247</sup> See, e.g., Ine Vanwesenbeeck, *Sex Workers’ Rights and Health: The Case of the Netherlands*, in GLOBAL PERSPECTIVES ON PROSTITUTION AND SEX TRAFFICKING: EUROPE, LATIN AMERICA, NORTH AMERICA, AND GLOBAL 3, 14 (Rochelle L. Dalla et al. eds., 2011); Alison Murray, *Debt-Bondage and Trafficking: Don’t Believe the Hype*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 51, 60 (Kamala Kempadoo & Jo Doezema eds., 1998) (“It is the prohibition of prostitution and restrictions on travel which attract organized crime and create the possibilities for large profits, as well as creating the prostitutes’ need for protection and assistance . . .”); see also *supra* note 189.

<sup>248</sup> Vanwesenbeeck, *supra* note 247, at 6; see also BUTTERFLY (ASIAN AND MIGRANT SEX WORKERS SUPPORT NETWORK), UNDERSTANDING MIGRANT SEX WORKERS: MIGRATION + SEX WORK ≠ TRAFFICKING 2 (2018), <https://static1.squarespace.com/static/5e4835857fcd934d19bd9673/t/5e8902eb7de63058bf1fa6c6/1586037486472/Understanding+Migrant+Sex+workers.pdf>.

<sup>249</sup> *New Laws Forced Sex Workers Back on SF Streets, Caused 170% Spike in Human Trafficking*, CBS NEWS (Feb. 3, 2019), <https://sanfrancisco.cbslocal.com/2019/02/03/new-laws-forced-sex-workers-back-on-sf-streets-caused-170-spike-in-human-trafficking/>; Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115–164, 132 Stat. 1253; see also KRISTEN DIANGELO & RACHEL ANDERSON, SEX WORK AND HUMAN TRAFFICKING IN THE SACRAMENTO VALLEY; A NEEDS ASSESSMENT 1, 12–13 (2015),

Contrary to stated goals then,<sup>250</sup> laws targeting prostitution may be inflaming conditions that allow human trafficking to thrive.<sup>251</sup> In New Zealand, for example, the government's study of the PRA concluded that "management systems [were] . . . more supportive and less coercive" after decriminalization.<sup>252</sup> To address sex workers' mistreatment by traffickers, organized crime, or any other exploitative third party, policy makers must therefore promote schemes that center their labor rights and promote agency.

#### *D. Corrupting Government & Law Enforcement*

Rather than cite any empirical evidence for the proposition that criminalizing prostitution is necessary to prevent corruption among government officials and law enforcement, the ALI's reporters merely cited Polly Adler's autobiography as a successful brothel owner.<sup>253</sup> Because Adler operated her businesses under criminalized settings, any anecdotes about corruption among government officials would at best only logically show how criminalization led to corruption and not the other way around. In fact, the assumption that "sex perverts" are inherently linked to public corruption

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<https://survivorsagainstsesta.files.wordpress.com/2018/03/sex-worker-need-analysis-sacramento-valley.pdf> (noting the FBI's seizure of an online website host for sex workers led to an increase in street-based sex work and further exploitation).

<sup>250</sup> See, e.g., DEP'T OF JUST., *supra* note 207, at ¶ 18 ("There is no clear evidence presented in the report to suggest that [Northern Ireland's adoption of the Nordic model] has had an impact on the levels of trafficking for sexual exploitation."); AM. CIV. LIBERTIES UNION, *supra* note 224, at 13–14.

<sup>251</sup> Erin Albright & Kate D'Adamo, *Decreasing Human Trafficking Through Sex Work Decriminalization*, 19 AMA J. ETHICS 122, 123 (2017); WHITMAN-WALKER INSTITUTE ET AL., *IMPROVING LAWS AND POLICIES TO PROTECT SEX WORKERS AND PROMOTE HEALTH AND WELLBEING: A REPORT ON CRIMINALIZATION OF SEX WORK IN THE DISTRICT OF COLUMBIA* iii (2020), <https://whitmanwalkerimpact.org/wp-content/uploads/2020/12/Sex-Worker-Law-and-Policy-Report-FINAL.pdf> ("[C]riminalization of sex work allows exploiters to use the threat of arrest to control and traffic their victims.").

<sup>252</sup> ABEL ET AL., *supra* note 214, at 133 ("There were still some reports of unsupportive management, but these reports were in the minority."); see also Gillian Abel & Melissa Ludeke, *Brothels as Sites of Third-Party Exploitation? Decriminalisation and Sex Workers' Employment Rights*, 10 SOC. SCIS. 3, 12 (2020) ("It is now possible for sex workers to experience safer and more supportive work environments than they otherwise might, where they can (and sometimes do) contest managerial control.").

<sup>253</sup> MODEL PENAL CODE § 251.2 cmt. at 456 (AM. L. INST., Proposed Official Draft 1962) (citing ADLER, *supra* note 6); see *supra* text accompanying note 48.

is an old troupe that led to the Lavender Scare between the 1940s and 60s and the expulsion of LGBTQ+ individuals from the federal government under the suspicion they were vulnerable to blackmail.<sup>254</sup>

Since the MPC was drafted, the corrupting influence caused by power imbalances when certain persons engage in sexual activity has garnered the attention of the law. Almost all states and the federal government have criminalized sexual contact between correctional officers and those who are incarcerated, regardless of perceived consent.<sup>255</sup> The same theory underpins the development of laws prohibiting or mitigating sexual activity between an employer and employee, educator and student, or medical practitioner and patient.<sup>256</sup> In all these situations, the law intervenes because there is an abuse of authority by the person in a position of power.<sup>257</sup>

Similarly, and contrary to the assumption that prostitution inherently corrupts public officials, criminalization laws as will be shown result in an inherent power imbalance between law enforcement and sex workers, which invites corruption. The source of power that law enforcement holds over sex workers has been widely researched as their ability to leverage threats of arrest as a license to harass and extort sex workers.<sup>258</sup> The effect of this imbalance is particularly salient for communities over-policed and profiled as sex workers, especially transgender women of color.<sup>259</sup>

Sex workers around the country have described in community needs assessments how law enforcement abuse their authority and perpetrate sexual

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<sup>254</sup> Judith Adkins, “*These People Are Frightened to Death*”: *Congressional Investigations and the Lavender Scare*, NAT’L ARCHIVES (Summer 2016), <https://www.archives.gov/publications/prologue/2016/summer/lavender.html> (citing EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. REP. NO. 81-241 (1950)).

<sup>255</sup> Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 45, 46 (2007).

<sup>256</sup> Galia Schneebaum, *What Is Wrong with Sex in Authority Relations? A Study in Law and Social Theory*, 105 J. CRIM. L. & CRIMINOLOGY 345, 346 (2015).

<sup>257</sup> *Id.* at 347, 349.

<sup>258</sup> See, e.g., Susan G. Sherman et al., “*What Makes You Think You Have Special Privileges Because You’re a Police Officer?*” *A Qualitative Exploration of Police’s Role in the Risk Environment of Female Sex Workers*, 27 AIDS CARE 473, 474 (2015); Chi Adanna Mgbako et al., *The Case for Decriminalization of Sex Work in South Africa*, 44 GEO. J. INT’L L. 1423, 1426 (2013); AMNESTY INT’L, *supra* note 223, at 10.

<sup>259</sup> See, e.g., AM. CIV. LIBERTIES UNION, *supra* note 224, at 11–12 (noting available research concludes criminalization laws have a disproportionate impact on transgender women of color, other members of the LGBTQ+ community, women of color, and immigrants).

violence against them. In New York City, 17.1% of sex workers reported that police “asked for a bribe” during an arrest, which some interpreted to mean sexual extortion.<sup>260</sup> In the Sacramento region of California, 27% of sex workers surveyed “reported they had been harmed by a law enforcement officer with several women reporting they had been raped by an officer of the law at least once.”<sup>261</sup> Among sex workers in the District of Columbia, approximately one in five who had been approached by police reported local law enforcement asking for or extorting sexual services.<sup>262</sup> In an informal meeting among street-based sex workers based in the Kensington neighborhood of Philadelphia, 60% indicated “they have been harassed, solicited[,] or assaulted by police.”<sup>263</sup> Nationally, 9.2% of transgender people who have ever engaged in sex work reported being sexually assaulted by police.<sup>264</sup>

These reports by sex workers are corroborated by a multitude of stories where this systemic practice has been uncovered. The Department of Justice, while investigating the Baltimore Police Department, discovered in 2016 multiple and intentionally uninvestigated “allegations . . . that officers coerced sex in exchange for immunity from arrest.”<sup>265</sup> Despite this

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<sup>260</sup> THE PROS NETWORK & SEX WORKERS PROJECT, PUBLIC HEALTH CRISIS: THE IMPACT OF USING CONDOMS AS EVIDENCE OF PROSTITUTION IN NEW YORK CITY 26 (2012), <https://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf> (“Undoubtedly more experiences of sexual exploitation might have been reported if the survey had asked this question more specifically.”).

<sup>261</sup> DIANGELO & ANDERSON, *supra* note 249, at 15.

<sup>262</sup> ALLIANCE FOR A SAFE & DIVERSE DC, MOVE ALONG: POLICING SEX WORK IN WASHINGTON, D.C. 1–2 (2008), <https://dctranscoalition.files.wordpress.com/2010/05/movealongreport.pdf>.

<sup>263</sup> Demeri, *supra* note 16, at 14. In a subsequent community needs assessment, more than 60% of Kensington-based sex workers reported “bad experience[s]” with Philadelphia law enforcement and less than half believed law enforcement would take reports of crime committed against them seriously. *See* PROJECT SAFE, NOT WELCOME ANYWHERE: EXCLUSION AND INACCESSIBILITY OF LEGAL, MEDICAL AND SOCIAL SERVICES FOR PEOPLE WHO TRADE SEX AND USE DRUGS (2021), [publication status pending] <https://projectsafe.dreamhosters.com/programs/advocacy/>.

<sup>264</sup> ERIN FITZGERALD ET AL., MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE 5 (2015), [https://transequality.org/sites/default/files/Meaningful%20Work-Full%20Report\\_FINAL\\_3.pdf](https://transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf). Another 64.1% reported mistreatment by the police. *Id.*

<sup>265</sup> U.S. DEP’T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 150 (2016),

investigation, a peer-reviewed study of street-based, female sex workers' experiences in Baltimore, and published four years after the Department of Justice investigation, reported that 38.4% of sex workers experienced physical or sexual violence from police and 18.1% had "sex with police out of fear of arrest."<sup>266</sup>

In Oakland, California, more than a dozen officers exchanged sex for information on planned police raids with one sex worker, some of which occurred when she was a minor.<sup>267</sup> Although never published, preliminary results from one study of street-based prostitution in Chicago concluded that 3% of all "tricks" performed by sex workers who worked independently were "freebies" given to the police in exchange for immunity from arrest.<sup>268</sup> Several state legislatures have found it necessary to adopt laws that explicitly outlaw law enforcement from having sexual contact with sex workers during investigations.<sup>269</sup>

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<https://www.justice.gov/crt/file/883296/download>; see also Sherman et al., *supra* note 258.

<sup>266</sup> Anne E. Fehrenbacher et al., *Exposure to Police and Client Violence Among Incarcerated Female Sex Workers in Baltimore City, Maryland*, 110 *AJPH* S152, S156 (2020); see also Katherine H. A. Footer et al., *Police-Related Correlates of Client-Perpetrated Violence Among Female Sex Workers in Baltimore City, Maryland*, 109 *AJPH* 289 (2019). Further research focused on the Baltimore Police Department's perceptions of street-based female sex workers reported "[t]he majority of officers appeared to view violence towards [sex workers] as an inescapable part of the street existence, as opposed to crimes against vulnerable women that properly deserve police attention." Katherine H. A. Footer et al., "An Ethnographic Exploration of Factors that Drive Policing of Street-Based Female Sex Workers in a U.S. Setting-Identifying Opportunities for Intervention", 20 *BMC INT'L HEALTH & HUM. RTS.* 1, 7 (2020).

<sup>267</sup> See James Queally, *Accuser in Oakland Police Sex Abuse Scandal Settles Claim for Nearly \$1 Million*, *L.A. TIMES* (May 31, 2017), <https://www.latimes.com/local/lanow/la-me-ln-oakland-sex-scandal-settlement-20170531-story.html>.

<sup>268</sup> Steven D. Levitt & Sudhir Alladi Venkatesh, *An Empirical Analysis of Street-Level Prostitution* 2, 5 (Sept. 1, 2007) (unpublished manuscript), available at [https://international.ucla.edu/media/files/levitt\\_venkatesh.pdf](https://international.ucla.edu/media/files/levitt_venkatesh.pdf) ("A prostitute is more likely to have sex with a police officer than to get officially arrested by one."). The researchers noted that this rate was lower for sex workers who had "pimps"—a term left undefined in their research. *Id.* at 15.

<sup>269</sup> See, e.g., Eliana Dockterman, *Hawaii Police Won't Get to Have Sex with Prostitutes Anymore*, *TIME* (Mar. 26, 2014), <https://time.com/38444/hawaii-police-prostitutes-sex/>; Stateside Staff, *Michigan Only State that Allows Police to Have Sex with Prostitutes During Investigations (Updated)*, *MICH. RADIO*, <https://www.michiganradio.org/post/michigan-only-state-allows-police-have-sex->

Globally, these practices among law enforcement remain consistent. For example, violence by police and other law enforcement agents against sex workers has been documented in South Africa, where sex work remains criminalized.<sup>270</sup> Even in a legalized setting, like that in Senegal, heavy regulation is shown to increase sex workers' contact with law enforcement—thereby exacerbating existing power dynamics—and can lead to an increase in police violence against sex workers.<sup>271</sup>

While there is little research on sexual assault committed by law enforcement under Nordic model countries, Amnesty International documented in detail how police in Norway, nonetheless, leverage the vulnerable status of sex workers created by criminalization laws to enforce “low-level offences as ‘stress methods’ to disrupt, destabilize and increase the pressure on” sex workers, including targeting landlords with promoting prostitution-type charges so sex workers are forced evicted.<sup>272</sup> A study of sex workers in France after adoption of the Nordic model also found that about 70% of those interviewed observed either “no improvement or [a] deterioration of their relations with [the] police.”<sup>273</sup>

Evidence from New Zealand's study on decriminalization, however, show improved relations between sex workers and law enforcement. After passage of the PRA, researchers found “[m]ore than half of survey participants who had been working prior to [decriminalization] thought that police attitudes [towards them] had changed for the better.”<sup>274</sup>

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prostitutes-during-investigations-updated (last updated Jan. 14, 2019); cf. Sam Eifling, *Above the Law, Under the Sheets: Undercover Cops Can't Legally Have Sex with Prostitutes, but They Get Awfully Close*, NEW REPUBLIC (Jan. 28, 2015), <https://newrepublic.com/article/120879/can-police-legally-have-sex-prostitutes-only-michigan>. A bill in Alaska was defeated after local police lobbied for the “right” to have sexual contact with sex workers before arresting them. See Lilly Dancyger, *Alaska Cops Defend Their ‘Right’ to Sexual Contact with Sex Workers Before Arresting Them*, GLAMOUR (July 10, 2017), <https://www.glamour.com/story/alaska-cops-defend-sexual-contact-sex-workers-arrests>.

<sup>270</sup> Svinurai Anesu et al., *You Cannot Be Raped When You Are a Sex Worker’: Sexual Violence Among Substance Abusing Sex Workers in Musina, Limpopo Province*, 16 J. SOC. SCI. & HUMANITIES 1, 8–10 (2019). *But see supra* note 172.

<sup>271</sup> See Seiro Ito et al., *The Effect of Sex Work Regulation on Health and Well-Being of Sex Workers: Evidence from Senegal*, 27 HEALTH ECON. 1627, 1639 (2018).

<sup>272</sup> AMNESTY INT’L, *THE HUMAN COST OF ‘CRUSHING’ THE MARKET: CRIMINALIZATION OF SEX WORK IN NORWAY* 28–30 (2016).

<sup>273</sup> LE BAIL ET AL., *supra* note 210, at 89, 93.

<sup>274</sup> ABEL ET AL., *supra* note 214, at 162 (“Street-based workers and private workers were significantly more likely than managed workers to report this.”); see also Carolina Villacampa & Nuria Torres, *Effects of the Criminalizing Policy of Sex*

Sex workers' attitudes of police, however, "showed . . . little change" with many having "little faith in police from previous interactions with them" and others were "fearful of disclosing their occupations to police" because of fear of stigmatization.<sup>275</sup>

The government's findings on the PRA were confirmed in a subsequent study, which concluded "decriminalizing sex work can benefit relationships between police and street-based sex workers."<sup>276</sup> Particularly, the research indicated decriminalization "reduce[d] the power police have over sex workers by removing the threat of arrest" and "empower[ed] sex workers through the provision of rights."<sup>277</sup> The research noted, however, that "it would be naive to suggest [decriminalization] had equalized the power relationship" between law enforcement and sex workers and that it did "not eliminate[] violence against sex workers."<sup>278</sup> Rather, decriminalization "offer[s] . . . an environment in which [violence and police corruption] can be much more readily addressed" and increases "the likelihood of perpetrators being held to account" for their acts of violence.<sup>279</sup>

As all these findings indicate, criminalization breeds corruption by fueling power imbalances between sex workers and law enforcement. Indeed, the MPC reporters acknowledged this fact when hypothesizing reasons to oppose criminalizing prostitution but parried the issue altogether by simply proclaiming the opposite.<sup>280</sup> While decriminalization is a necessary step towards equalizing this imbalance, historical legacies of oppression will not be resolved overnight.<sup>281</sup>

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*Work in Spain*, 41 INT'L J. L., CRIME & JUST. 375, 387 (2013) (finding cities in Spain that adopted ordinances criminalizing street-based sex workers led to a change among law enforcement from that of "providing protection" to "control and persecution"). Street-based workers in New Zealand noted an increase in police presence after decriminalization but found officers who were "specialised" in their issues were particularly helpful. ABEL ET AL., *supra* note 214, at 164.

<sup>275</sup> ABEL ET AL., *supra* note 214, at 120, 167.

<sup>276</sup> Lynzi Armstrong, *From Law Enforcement to Protection? Interactions Between Sex Workers and Police in a Decriminalized Street-Based Sex Industry*, 57 BRIT. J. CRIMINOLOGY 570, 583 (2017).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 582, 584.

<sup>279</sup> *Id.* at 582–84 ("Although such incidents are possible regardless of the laws surrounding sex work, what can be controlled is whether such abuses of power can be challenged, and how the police as an institution respond to reports of this behaviour.").

<sup>280</sup> See *supra* text accompanying notes 50–51.

<sup>281</sup> See, e.g., Armstrong, *supra* note 276, at 577 ("The findings of this research show that whilst the legacy of criminalization represented a long shadow of police



*E. Stability of Home & Family*

As evidence that prostitution is “a significant factor in encouraging social disorganization by undermining fidelity to home and family,” the ALI reporters cited a 1945 report produced by the Federal Security Agency’s Social Protection Division, a branch of the federal government involved in efforts to “combat[e] prostitution, promiscuity[,] and venereal disease.”<sup>282</sup> This report, quoting uncited material from the American Social Hygiene Association, concluded prostitution “strikes at the home and family, breeds deceit and disloyalty, degrades the marriage relation, [and] undermines character and self-control of men and women.”<sup>283</sup>

In 1908, the Supreme Court similarly declared:

The lives and example of [sex workers] are in hostility to “the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.”<sup>284</sup>

The concern for marital relations between spouses, however, has served as a primary foundation in the Supreme Court’s modern development of the constitutional right to privacy.<sup>285</sup> Since the MPC was first published, the government’s ability to intervene in the privacy of marital decisions has

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power over the women, they felt more respected by police since the law had changed.”).

<sup>282</sup> MODEL PENAL CODE § 251.2 cmt. at 456 (AM. L. INST., Proposed Official Draft 1962); SOCIAL PROTECTION DIVISION, *supra* note 49, at ii. The Social Protection Division—like many others of the time—conflated prostitution with women’s non-commercial promiscuity noting “the line between ‘prostitution’ and ‘promiscuity’ is very hard, perhaps impossible, to draw.” *Id.* at 2; *see supra* text accompanying note 80.

<sup>283</sup> SOCIAL PROTECTION DIVISION, *supra* note 49, at 7.

<sup>284</sup> *United States v. Bitty*, 208 U.S. 393, 401 (1908) (quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)).

<sup>285</sup> *See* Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 620 (2001) (“[T]he right to privacy [recognized by the Supreme Court] is influenced, if not dictated, by a decided concern for promoting and maintaining the integrity of the traditional nuclear family.”).

been substantially restricted.<sup>286</sup> Considering this development in the law, it is unclear whether criminalizing prostitution because patrons and sex workers might also be married withstands constitutional muster.<sup>287</sup> The New Jersey Supreme Court has ignored this rationalization all together when discussing the MPC and the State’s own legislative purposes for criminalizing prostitution—likely for this very reason.<sup>288</sup>

Constitutional concerns notwithstanding, these considerations assume prostitution only occurs through acts of deception to spouses. Rather, some sex workers perform their work with the consent (or involvement) of their spouses.<sup>289</sup> Some patrons hire sex workers with the consent (or involvement) of their spouses.<sup>290</sup> In either scenario, the bonds between

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<sup>286</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding a state law criminalizing use of contraception violated marital right to privacy); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overturning a state statute criminalizing sodomy because, in part, “individual decisions by married persons, concerning the intimacies of their physical relationship . . . are a form of ‘liberty’ protected by the Due Process Clause”); *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) (voiding bans on same-sex marriage and recognizing “it would be contradictory ‘to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society’” (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978))); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 859 (1992) (“[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage . . . [and] family relationships . . . .’” (internal quotation marks omitted) (quoting *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977))). This expansion in the doctrinal right to privacy also led to the collapse of laws criminalizing adultery. See Ephraim Heiliczzer, *Dying Criminal Laws: Sodomy and Adultery from the Bible to Demise*, 7 VA. J. CRIM. L. 48, 108 (2019).

<sup>287</sup> The argument here being that this rationalization is an unconstitutional government interference in a marital decision to engage, or not engage, in sexual activity with a non-spousal partner. In this sense, criminalizing prostitution would be no different than criminalizing adultery based on the activity and identity of their non-spousal partner.

<sup>288</sup> See *Maimone v. City of Atl. City*, 903 A.2d 1055, 1062 (N.J. 2006).

<sup>289</sup> See, e.g., Brittany Wong, *They’ve Been Married a Decade. She’s a Sex Worker. Here’s What It’s Like.*, HUFFPOST (Feb. 12, 2018), [https://www.huffpost.com/entry/married-to-sex-worker\\_n\\_5a7dd4f4b044b3821ce35b](https://www.huffpost.com/entry/married-to-sex-worker_n_5a7dd4f4b044b3821ce35b); Jimmy McCloskey, *Married Prostitutes ‘Are Only Couple in US Who Both Work in Same Brothel’*, METRO (May 16, 2019), <https://metro.co.uk/2019/05/16/married-prostitutes-couple-us-work-brothel-9578957/>.

<sup>290</sup> See, e.g., Rebecca Flood, *THRICE AS NICE Woman Says Threesome with Husband and Sex Worker in Brothel Was an ‘Empowering’ Experience*, U.S. SUN

spouses actually may be strengthened because of the trust that is developed.<sup>291</sup>

The ALI reporters' rationalization here also assumes that criminalizing prostitution would somehow prevent spouses from breaking marital vows. Outlets for spouses to cheat exist regardless of whether prostitution is criminalized,<sup>292</sup> and non-cheating spouses may prefer their cheating spouses to hire sex workers rather than use other outlets.<sup>293</sup> Using the criminal code to target infidelity in this way directly contradicts one of the major components of the MPC—to avoid criminalizing “illicit extramarital relations.”<sup>294</sup>

Additionally, the concern over prostitution's role in destabilizing families has little foundation in reality as criminalizing prostitution creates more instability in homes and family life than its perceived stability in idealized notions of the traditional nuclear family. In the most obvious sense, arresting and incarcerating people for prostitution-related offenses—be it sex workers, patrons, or non-exploitative third parties—violently tears people away from their families and can cause both short and long-term disruptions to those intra-familial relationships.<sup>295</sup> Criminalization also leads to alienation in many cases, contributing to an environment where those who

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(Nov. 3, 2019), <https://www.the-sun.com/lifestyle/19979/woman-says-threesome-with-husband-and-sex-worker-in-brothel-was-an-empowering-experience/>.

<sup>291</sup> See, e.g., Mark Hay, *The Couples Market for Brothels Heats Up*, FORBES (Nov. 28, 2018), <https://www.forbes.com/sites/markhay/2018/11/28/the-couples-market-for-brothels-heats-up/?sh=7253493536b6>.

<sup>292</sup> For example, spouses can meet other potential romantic or sexual partners—commercial or not—through work, bars, gyms, places of worship, public parks, walking down the street, classified advertisements, dating apps, online forums, or any other way people connect socially. See, e.g., Jeremy Nicholson, *How and Where to Meet Women or Men*, PSYCH. TODAY (Aug. 31, 2014), <https://www.psychologytoday.com/us/blog/the-attraction-doctor/201408/how-and-where-meet-women-or-men>.

<sup>293</sup> See Norbert Meskó et al., *The Effect of Prostitution on the Stability of Romantic Relationships. Empirical Testing of an Evolutionary Model*, 27 PSYCHIATRIA HUNG. 48, 48 (2012) (“[W]omen living in long-term relationship are adaptively interested in their partner's cheating on them with a prostitute (rather than engaging in other kinds of sexual relations), because this finance based external sexual liaison is the least threatening for the stability of the long-term relationship.”).

<sup>294</sup> MODEL PENAL CODE § 213.6 cmt. at 430 (AM. L. INST., Proposed Official Draft 1962).

<sup>295</sup> See generally Joseph Murray, *The Effects of Imprisonment on Families and Children of Prisoners*, in THE EFFECTS OF IMPRISONMENT 442 (Alison Liebling et al. eds., 2005).

violate prostitution-related offenses are unable to be honest with romantic partners or their children.<sup>296</sup>

Although there are no reliable statistics on how many sex workers broadly are parents, undoubtedly, many are.<sup>297</sup> Indeed, many women enter sex work to support their families.<sup>298</sup> For some, sex work is an ideal parenting job because of flexibility in working hours and the economic independence it can create.<sup>299</sup> For others, it may be the only available job due to structural barriers to other forms of employment, such as discrimination or migration status.<sup>300</sup>

When prostitution is criminalized, however, barriers to successful parenting become more pronounced. As a consequence of criminalization

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<sup>296</sup> See, e.g., Christine M. Sloss et al., *Street Sex Work and Mothering*, 6 J. ASS'N RESEARCH MOTHERING 102, 107 (2004) (“Other [sex workers] observed that their work had resulted in them being dishonest with their children. When possible, many women chose not to discuss their sex work involvement because of feeling ashamed, believing that their children were too young, or fearing the consequences.”).

<sup>297</sup> See, e.g., Stephen LaConte, *Children of Sex Workers Are Anonymously Sharing Their Stories, and They Held Nothing Back*, BUZZFEED (Apr. 20, 2021), <https://www.buzzfeed.com/stephenlaconte/sex-workers-children-share-stories-reddit>; Emme Witt, *I'm a Parent Who's Also a Sex Worker*, MEDIUM (Nov. 16, 2019), <https://medium.com/sugarcubed/im-a-parent-who-s-also-a-sex-worker-29fdb2a279aa>; Sloss et al., *supra* note 296, at 102 (“[O]f 43 current and former street sex workers in a Midwestern U.S. city, 88 percent had children, averaging 2.4 children each, and 51 percent had been pregnant while working the street. Among 91 women currently involved in sex trading at the street level in Chicago, 91 percent had children, averaging 3.4 children each, and 74 percent had experienced pregnancy following their initiation to sex trading. Finally, in a sample of 1,963 street sex traders in New York, 69 percent had children, averaging 2.25 children each.” (citations omitted)). See generally RED UMBRELLA BABIES, <https://www.redumbrellababies.com> (last visited Dec. 27, 2022) (“Sex work & Parenting, an anthology.”).

<sup>298</sup> Putu Duff et al., *Sex Work and Motherhood: Social and Structural Barriers to Health and Social Services for Pregnant and Parenting Street and Off-Street Sex Workers*, 36 HEALTH CARE WOMEN INT'L. 1039, 1040 (2015) (citing Amber Basu & Mohan J Dutta, *We Are Mothers First': Localocentric Articulation of Sex Worker Identity as a Key in HIV/AIDS Communication*, 51 WOMEN HEALTH 106 (2011); Jesus Bucardo et al., *A Qualitative Exploration of Female Sex Work in Tijuana, Mexico*, 33 ARCHIVES SEXUAL BEHAV. 343, 346 (2004).

<sup>299</sup> Sloss et al., *supra* note 296, at 105 (“When asked about the effects of their street sex work on their parenting, a few informants noted positive effect, such as being able to give their children more time and money due to their work’s flexibility and financial remuneration.”).

<sup>300</sup> Duff et al., *supra* note 298, at 1040.

increasing stigma against sex workers,<sup>301</sup> one's status as a former or current sex worker is sometimes used in child custody hearings as evidence of a sex worker's inability to care for their child.<sup>302</sup> As noted, criminalization and stigmatization contribute to violence against sex workers,<sup>303</sup> and this acts as its own barrier to parenting.<sup>304</sup>

Moreover, promoting prostitution laws that target non-exploitative third parties often implicate family members.<sup>305</sup> Under the plain language of the MPC's presumption of living off the proceeds of prostitution, adult children and romantic partners of sex workers are presumed to be promoting prostitution if they derive support from a parent or partner involved in prostitution, regardless of any evidence of actual involvement.<sup>306</sup> The same would be true of a childcare worker who knowingly is paid to care for the children of sex workers as they would be living off the proceeds of prostitution.

In one study of street and off-street sex workers in Vancouver, Canada, which was conducted after the country's adoption of the Nordic model, 7.5% of sex workers reported "[f]ear of police" as a major barrier to accessing health and social support services while pregnant or parenting, with another 13% reporting "[f]ear of accessing services due to child protection services involvement" as another barrier.<sup>307</sup> Researchers who

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<sup>301</sup> See, e.g., GCHL, *supra* note 228, at 36–37; DEP'T OF JUST., *supra* note 207, at ¶ 15; Ito et al., *supra* note 271, at 1628, 1639.

<sup>302</sup> See, e.g., Carrie Weisman, *The Right to Mother and Do Sex Work*, IN THESE TIMES (Feb. 12, 2018), <https://inthesetimes.com/article/presumed-guilty-of-bad-mothering>; *Victims of Domestic Violence Are Not Criminals*, N.J. RED UMBRELLA ALL. (Nov. 11, 2015), <https://njrua.org/press-releases>; see also CANADIAN HIV/AIDS LEGAL NETWORK, *SEX WORK LAW REFORM IN CANADA: CONSIDERING PROBLEMS WITH THE NORDIC MODEL* 5 (2013). Comparatively, in the decriminalized setting of New Zealand, courts have noted one's status as a sex worker is irrelevant to child custody determinations. See *Discrimination and Harassment in the Sex Industry*, COMTY. L., <https://communitylaw.org.nz/community-law-manual/chapter-20-starting-and-leaving-a-job/sex-workers-your-rights/discrimination-and-harassment-in-the-sex-industry/> (last visited Dec. 27, 2022).

<sup>303</sup> See *supra* note 202 and accompanying text.

<sup>304</sup> Duff et al., *supra* note 298, at 1046–47.

<sup>305</sup> AMNESTY INT'L, *supra* note 224, at 10; Alison Phipps, *Sex Wars Revisited: A Rhetorical Economy of Sex Industry Opposition*, 18 J. INT'L WOMEN'S STUD. 306, 309 (2017).

<sup>306</sup> See MODEL PENAL CODE § 251.2(4) cmt. at 467 (AM. L. INST., Proposed Official Draft 1962).

<sup>307</sup> Duff et al., *supra* note 298, at 1047, 1049 (“37% of sex workers in our study reported ever having a child apprehended, and 38% had been apprehended themselves as children.”).

interviewed street-based “sex workers in a large Midwestern city of the United States” similarly cited criminalization as a primary barrier to parenting.<sup>308</sup> To address these barriers, the Canadian researchers ultimately concluded:

[A] shift away from the current criminalized nature of sex work to one that recognizes sex work as a legitimate occupation would likely reduce stigmatization and increase access to necessary services and supports. Additionally, decriminalization would foster the collectivization and empowerment of sex workers and decrease exposure to workplace and partner violence and improving peer social support networks and access to care. The collectivization of sex workers could potentially offer the possibility of sharing of child care responsibilities among sex workers or the availability of more formal child care for the children of sex workers.<sup>309</sup>

At the time of writing, no research emerged on the effect that the decriminalization of sex work has had on the stability of families.<sup>310</sup> In India, however, where sex work has a quasi-legalized status, researchers found the collectivization of sex workers (known as the Durbar Mahila Samanwaya Committee) “made various resources available both in the material and symbolic realms that mothers used to improve the quality of their life with their children.”<sup>311</sup> Such a collectivization outcome is not possible when sex workers and non-exploitative third parties are criminalized.

As the culmination of this research shows, criminalizing prostitution does more to undermine stability of the family and home than

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<sup>308</sup> Sloss et al., *supra* note 296, at 103.

<sup>309</sup> Duff et al., *supra* note 298, at 1050–51 (internal quotations omitted). The researchers who interviewed sex workers in the Midwestern U.S. city also concluded that decriminalizing prostitution and focusing on improved working conditions would reduce barriers to these street-based sex worker’s ability to parent. Sloss et al., *supra* note 296, at 112–13.

<sup>310</sup> See Polly H.X. Ma et al., *Conflicting Identities Between Sex Workers and Motherhood: A Systematic Review*, 59 *WOMEN & HEALTH* 534, 554 (2019) (“[T]o expand our knowledge of the effects of the legal environment and culture on [female sex workers] and their children’s lives and child custody arrangements, it would be valuable to explore the experiences of [female sex workers] in countries where prostitution is fully decriminalized or less stigmatized.”).

<sup>311</sup> Samira Ali et al., *Exceeding the Individual: A Qualitative Examination of a Community-Led Structural Intervention and Its Implications for Sex Workers and Their Families*, 1 *GLOB. SOC. WELFARE* 53, 60 (2014).

any real or perceived effects that lawful prostitution would have. Like the others, this rationalization does not stand against the overwhelming evidence that has been found in the decades since Section 251.2 of the MPC was published.

#### CONCLUSION

Despite the ALI's groundbreaking work to decriminalize consensual sexual relations, a clear exception to this goal emerged by drafting and approving Section 251.2 of the MPC. As a partial consequence, sex work remains criminalized in every jurisdiction in the United States while the statutes criminalizing other forms of consensual sexual activity have been all but eliminated.<sup>312</sup> For at least 20 jurisdictions, understanding their respective prostitution-related offense statutes requires analyzing the MPC. Whether litigating under a statute influenced by the MPC or seeking policy reform, this Article provides the first comprehensive review of this influential authority.

ALI's internal debates behind drafting and approving Section 251.2 indicate the opposing, sometimes conflicting, forces driving criminalization. While the reporters primarily framed prostitution as an "affront to public sensibilities,"<sup>313</sup> the rationalizations for criminalization focused exclusively on private conduct. Further, ALI members openly questioned whether patrons of sex workers—who they referred to only as male-identified figures—should be implicated by the criminal law as contrary to their policy on illicit extramarital relations but failed to extend the same concerns to sex workers—who they referred to only as female-identified figures—when considering whether prostitution should include not-for-hire activity.

As evident from these debates and corresponding commentary, assumptions and stereotypes were implicitly ALI's best source of authority in drafting and approving Section 251.2. The four stated reasons for criminalizing sex work—suppressing venereal disease, decreasing organized crime's profit and power, preventing the corruption of government and law enforcement, and maintaining stability of the home and family—were full of

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<sup>312</sup> A notable exception to this is of course HIV exposure laws, which emerged after the development of the MPC and in an ill-informed response to the HIV epidemic. *See* CENTER FOR HIV LAW & POLICY, HIV CRIMINALIZATION IN THE UNITED STATES: A SOURCEBOOK ON STATE AND FEDERAL HIV CRIMINAL LAW AND PRACTICE 4 (2020); *see also* AMIRA HASENBUSH ET AL., HIV CRIMINALIZATION AND SEX WORK IN CALIFORNIA 16 (3rd ed. 2017).

<sup>313</sup> MODEL PENAL CODE § 251.2 cmt. at 447 (AM. L. INST., Proposed Official Draft 1962).

logical fallacies and untested theories, even in 1962. By today's standards, these reasons to criminalize sex work are entirely irrational. Instead, consistent with the goals of the MPC and stated rationalizations, all aspects of sex work must be decriminalized. Only then can the ALI membership's concerns with sex work truly be addressed.