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To Prosecute or Not to Prosecute: A Prosecutor's Role in Decriminalizing Prostitution

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**To Prosecute or Not to Prosecute:
A Prosecutor’s Role in Decriminalizing Prostitution**

Elisia M. Tadros

Abstract

The criminalization of prostitution has a firm place in American history. But as morality surrounding this behavior changes, the narrative shifts to one of liberty and safety for sex workers. This Piece considers the role of a 21st century prosecutor as it relates to the decriminalization of prostitution. Decriminalization means criminal penalties will not be imposed for a behavior that is criminalized. As members of the criminal justice system, prosecutors arguably have the greatest power. Thus, as morality on prostitution changes, prosecutors are in a position to decriminalize this behavior.

The Piece will begin by identifying the moral and social considerations surrounding prostitution and provides the spectrum of options available to a prosecutor faced with a prostitution case. Then, it discusses the power dynamics within the criminal justice system as well as the theories of prosecution while using marijuana decriminalization as an example of these ideas at work. Lastly, this Piece will analyze the theories behind a 21st century prosecutor as applied to the moral and social considerations.

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INTRODUCTION

Aarica S., now twenty-five years old, will forever have a conviction for soliciting prostitution looming over her. In 2013, a then seventeen-year-old Aarica was arrested and charged with prostitution after she agreed to have sex with an undercover officer for sixty dollars.¹ Aarica petitioned to dismiss the case because she was a victim of human trafficking.² Since the age of fourteen, Aarica has been under the control of a pimp who forced her to perform various sexual acts for profit.³ In the years to follow, Aarica had approximately ten pimps, all of whom took the money made by Aarica and proceeded to abuse her.⁴ When Aarica was arrested in 2013, she did not have a pimp but she sought the undercover officer because she did not have any money.⁵ The court denied Aarica’s motion to dismiss and her conviction was upheld because she was no longer a victim of human trafficking during the time of her solicitation.

¹ *In re Aarica S.*, 223 Cal. App. 4th 1480, 1483, 168 Cal. Rptr. 3d 136, 138 (2014)

² *Id.*

³ *Id.* at 1483-85; 138-39. At the age of fifteen, Aarica underwent an abortion procedure because her pimp and uncle forced her to have sex with them resulting in a pregnancy.

⁴ *Id.* at 1484; 139.

⁵ *Id.* at 1485; 139.

Often labeled the oldest profession, prostitution⁶ has been a crime on the books since the 20th century.⁷ Internationally, countries are legalizing or decriminalizing the sale of sexual acts.⁸ Domestically, however, all but one of the fifty states maintain the criminalization of prostitution.⁹ That being said, there is a current shift towards decriminalizing prostitution in the American criminal justice system. Decriminalization is the removal of criminal penalties associated with an action.¹⁰ Among the criminal justice actors, prosecutors play a part in decriminalizing prostitution.

Any discussion of decriminalization by prosecutors brings into question prosecutorial discretion and the renewed interest in the role of the prosecutor in achieving criminal justice objectives. Prosecutors have become the focus of criminal justice reform because their discretion provides them with “enormous power.”¹¹ There is greater public scrutiny of prosecutors because their discretion coupled with prosecutorial misconduct¹² and racial disparities caused by a prosecutor’s implicit bias¹³ are rarely made public. Additionally, the Black Live Matter Movement

⁶ For purposes of this Piece, prostitution is defined as the engaging in or offering to engage in sexual conduct with another person in return for some form of compensation. See e.g., N.Y. PENAL LAW § 230.00 (McKinney) (it is a misdemeanor for a person to engage or agree or offer to “engage in sexual conduct with another person in return for a fee”); IND. CODE ANN. § 35-45-4-2(a) (West 2018) (it is a misdemeanor for a person at least eighteen years of age to knowingly or intentionally perform, or offer or agree to perform, sexual intercourse or other sexual conduct or fondle, or offer or agree to fondle, the genitals of another person for money or other property); TENN. CODE ANN. § 39-13-512(6) (West 2016) (“prostitution means engaging in, or offering to engage in, sexual activity as a business or being an inmate in a house of prostitution or loitering in a public place for the purpose of being hired to engage in sexual activity”).

⁷ 18 U.S.C. § 2421(a) (makes it felony to knowingly transport “any individual in interstate or foreign commerce... with intent that such individual engages in prostitution”).

⁸ For examples of European countries that have either legalized prostitution entirely or decriminalized the sale of sexual services but maintained the criminalization of such services otherwise known as the Nordic Model, see Lena Reinschmidt, *Prostitution in Europe between regulation and prohibition: Comparing legal situations and effects*, INSTITUTE FOR SOCIAL WORK AND SOCIAL EDUCATION, 1, 5 (May 2016) (stating that as of 2016, twenty countries legalized prostitution and four countries follow the Nordic Model).

⁹ Nevada is the only state in the United States in which prostitution is legal however prostitution is legal only when taking place in a licensed house of prostitution otherwise it is unlawful to engage in prostitution. NEV. REV. STAT. ANN. § 201.354 (West 2021).

¹⁰ THOMAS BABORET AL., *DRUG POLICY AND THE PUBLIC GOOD* 195 (2nd ed. 2018).

¹¹ Jan Ransom & Ashley Southall, *Prosecutors Sometimes Behave Badly. Now They May Be Held to Account*, THE NEW YORK TIMES (April 5, 2019), <https://www.nytimes.com/2019/04/05/nyregion/ny-prosecutors-cuomo.html>.

¹² *Id.*

¹³ Angela J. Davis, *The Power and Discretion of the American Prosecutor*, 49 DROIT ET CULTURES 55 (2005) [hereinafter Power and Discretion].

and rise in incarceration have sparked a flame in voters.¹⁴ These issues of what a 21st century prosecutor should look like when exercising discretion and how a prosecutor should conceive their job when substantive criminal law potentially overlaps with other liberty interests¹⁵ are being discussed via elections, scholarly work, and conflicts between courts and prosecutors.¹⁶

But this discussion of the role of a prosecutor in the decriminalization of prostitution is no different than the role of a prosecutor in the decriminalization of other actions. Thus, a discussion of the role of a prosecutor as it relates to this particular behavior, which is substantively criminalized as prostitution, is necessary. There are different theories of the role of the 21st century prosecutor which may have dramatic ramifications on the prosecution of prostitution offenses.

This Piece will address the theoretical and practical discussions by acknowledging the different ways to think about prosecutorial discretion in the role of the prosecutor which by proxy discusses the different ways to think about how prosecutors might approach the decriminalization of prostitution. Part I of this Piece explains the moral and social issues a prosecutor faces when deciding whether to prosecute a sex worker¹⁷ under the applicable prostitution laws as well as the types of actions a prosecutor may take. Part II takes a look at the current events surrounding prosecutors, theories of prosecution, and the power dynamics at play in the criminal justice system. This Part will also take an illustrative dive into the issues surrounding marijuana decriminalization.

¹⁴ Paige St. John & Abbie Vansickle, *Prosecutor Elections Now a Front Line in the Justice Wars*, THE MARSHALL PROJECT (May 23, 2018, 6:00AM), <https://www.themarshallproject.org/2018/05/23/prosecutor-elections-now-a-front-line-in-the-justice-wars>.

¹⁵ See discussion *infra* Part I.A.ii on liberty interests such as sexual autonomy.

¹⁶ See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021); Ronald F. Wright, Jeffrey L. Yates & Carissa Byrne Hessick, *Election Contestation and Progressive Prosecutors*, OHIO ST. J. CRIM. L. (May 2021 forthcoming).

¹⁷ For purposes of this Piece, a sex worker is an individual who is compensated in exchange for sexual services. See Open Society Foundations, *10 Reasons to Decriminalize Sex Work: A Reference Brief*, OPEN SOCIETY FOUNDATIONS, 1 (March 2015) (defining sex worker as an adult “who receive[s] money or other forms of compensation in exchange for consensual sexual services”).

Finally, Part III applies the theories discussed in Part II to the decriminalization of prostitution in light of the issues discussed in Part I.

I. THE MORAL AND SOCIAL STAGE ON WHICH A PROSECUTOR IS ACTING

This Part discusses some of the moral and social issues in play with the crime of prostitution. It begins with a brief explanation of why prostitution is considered a moral wrong. It moves to discuss an emerging view of a sex worker's dignity and liberty interest in choosing to profit off their private sexual conduct. Then, it touches on the health and safety risks associated with prostitution. This Part ends with an examination of the different options available to a prosecutor by using current events surrounding prosecutorial action when it comes to prosecuting, or not prosecuting, prostitution.

A. The changing terrain of prostitution laws

Prosecutors have much to think about when deciding whether to prosecute a suspect with a crime. Basic considerations include the suspect's age and criminal history, the community's safety, whether the prosecutor can prove the suspect committed the crime beyond a reasonable doubt, and mass incarceration. However, there are considerations that are particularly relevant to prosecuting the crime of prostitution such as community moral attitudes surrounding this behavior, a sex worker's liberty interests, and broader health and social ramifications.

i. The historical moral underpinning of criminalizing prostitution

All but one American state, Nevada, maintains the criminalization of prostitution. Even in Nevada, prostitution is not legalized throughout the entire state.¹⁸ The law permits prostitution only in certain counties.¹⁹ Additionally, Nevada does not impose taxes on brothels because

¹⁸ NEV. REV. STAT. ANN. § 201.354 (West 2021).

¹⁹ NEV. REV. STAT. ANN. § 244.345 (West 2021) (requiring a house of prostitution to be in a county with a population of at least 700,000 people).

taxing prostitution would be legitimizing its legality in the state.²⁰ This shows the role morality plays in shaping prostitution laws. It also illustrates that even when the behavior is legalized, communities are slow to depart from the morals underlying the original criminalization of such a behavior. This begs the question of whether prostitution is criminalized because it poses a risk to society's well-being and/or a sex worker's well-being or whether it is criminalized because it is immoral.

When the legislative criminalization of prostitution passed, it expressed what the community, at the time, believed was morally wrong. Law reflects community morals.²¹ Also, law reflects morality in such a way that it cannot contradict natural moral law.²² Historically, religion, specifically Christianity, regarded sexual acts beyond the scope of marriage as sinful and immoral.²³ The desire to preserve familial integrity and the legitimacy of offspring resulted in the criminalization of deviant sexual behavior which did not conform to such purposes.²⁴ In the Middle Ages, such sexual behavior which included prostitution, was tolerated as a necessary evil to protect women against rape.²⁵ This continued to the late 1600s of Colonial America where prostitution was not criminalized rather it was viewed as a form of vagrancy.²⁶ Thus, the stigma surrounding the behavior did not result in its criminalization rather it resulted in regulation.

The pervasive reality of prostitution continued with a shift from a moral narrative to one of preventing the spread of disease.²⁷ In 1902, the New York Committee of 15 released a report

²⁰ *Id.* See also, *Prostitution Tax Proposed in Nevada*, NPR (Mar. 24, 2009, 7:16PM) <https://www.npr.org/templates/story/story.php?storyId=102314296>.

²¹ Arthur Scheller Jr., *Law and Morality*, 36 MARQ. L. REV. 319, 322 (1953).

²² *Id.*

²³ Ruth Mazo Karras, *Prostitution in Medieval Europe*, HANDBOOK OF MEDIEVAL SEXUALITY 243, 246 (1996).

²⁴ NEW YORK COMMITTEE OF 15, THE SOCIAL EVIL 12 (1902) (discussing ancient Greek and Roman legislation passed in conformity with the religious understanding of family).

²⁵ JEFFREY RICHARDS, SEX, DISSIDENCE AND DAMNATION: MINORITY GROUPS IN THE MIDDLE AGES 152 (1994).

²⁶ New York Committee of 15, *supra* note 24, at 20.

²⁷ New York Committee of 15, *supra* note 24, at 21.

which investigated and recommended sanitary solutions such as improvements to housing and health care, instead of the regulation of prostitution.²⁸ However, the conversation returned to one with moral underpinnings in 1910 when Congress enacted the Mann Act, which in its original form made it a federal crime to knowingly transport a woman or girl in interstate or foreign commerce for purposes of prostitution or “any other immoral purpose.”²⁹ The Mann Act was passed during the height of the “white slavery” phenomena in which young, white “women moved to the city and entered the workforce [so] they were no longer protected by the traditional family-centered system of courtship” and were subjected to temptations.³⁰ This became the narrative behind prostitution as a way of ensuring women did not deviate in their sexual behavior.

ii. Dignity and liberty interests are at stake

Morality surrounding prostitution is slowly evolving. For example, in November 2008, San Francisco residents voted on a de facto decriminalization of prostitution.³¹ The result was 42% in favor of decriminalization.³² Also, as of 2021, the New York Senate is currently reviewing two bills proposing the decriminalization of prostitution.³³ Additionally, New York repealed its anti-loitering statute which was initially passed to discourage prostitution.³⁴ These small moves towards decriminalization illustrate that society’s understanding of this behavior is changing and

²⁸ New York Committee of 15, *supra* note 24, at 67.

²⁹ 36 Stat. 825 (1910), as amended 18 U.S.C. § 2421(a).

³⁰ *The Mann Act*, PBS, <https://www.pbs.org/kenburns/unforgivable-blackness/mann-act/>.

³¹ Ronald Weitzer, *The Movement to Criminalize Sex Work in the United States*, 37 J. L. & SOC’Y 61 (2010).

³² *Id.*

³³ N.Y. LEGIS. SEN. S-3075. Reg. Sess. 2021-2022 (2021) <https://legislation.nysenate.gov/pdf/bills/2021/S3075> (the Stop Violence in the Sex Trade Act aims to fully decriminalize prostitution); N.Y. LEGIS. SEN. S-6040. Reg. Sess. 2021-2022 (2021) <https://legislation.nysenate.gov/pdf/bills/2021/S6040> (the Sex Trade Survivors Justice and Equality Act follows the Nordic Model of decriminalization with a focus on providing support for human trafficking victims).

³⁴ Jesse McKinley & Luis Ferre-Sadurni, *N.Y. Repeals Law That Critics Say Criminalized “Walking While Trans,”* THE N.Y. TIMES (Feb. 3, 2021) <https://www.nytimes.com/2021/02/03/nyregion/walking-while-trans-ban.html>

no longer is morality the primary way to understand consenting adult relationships. Prosecutors need to be aware of the changing norms with respect to this behavior and how existing dignity and liberty interests are moving to the forefront of this discussion.

Although dignity is not expressly provided for in the United States Constitution (“the Constitution”), it was read in by the Supreme Court of the United States (“the Court” or “the Supreme Court”). Dignity “focuses on the inherent worth of each individual.”³⁵ Closely tied to dignity interests are liberty interests. Liberty interests are protected under the Constitution, specifically the Fourteenth Amendment’s Due Process Clause which states that no state “shall deprive any person of life, liberty, or property, without due process of law.”³⁶ There are two forms of due process protected under the Constitution- procedural due process and substantive due process. Procedural due process is concerned with the procedures the government must follow before it deprives an individual of their liberty; this Piece is not concerned with procedural due process. Whereas substantive due process is concerned with whether the government has an adequate reason for taking away a person’s liberty; this will be the focus of this Piece. Substantive due process is used to safeguard (1) economic liberties and (2) the right to privacy and personal autonomy.

First economic liberty is a constitutional right concerning the ability to pursue a profession. Often laws regulating employment practices will be upheld so long as the law is rationally related to serve a legitimate government purpose such as public health or safety.³⁷ In *Lochner v. N.Y.*, the Supreme Court dealt with an individual who violated a state law which set a maximum number of hours an individual could work as to protect the health and safety of employees.³⁸ The

³⁵ Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 187 (2011).

³⁶ U.S. Const. amend. XIV, §1, cl. 3.

³⁷ *Lochner v. N.Y.*, 198 U.S. 45 (1905).

³⁸ *Id.*

Court held that the state law was unconstitutional because it violated the Fourteenth Amendment's Due Process Clause since it was not a valid police power thus interfering with the freedom to contract.³⁹ However, the Supreme Court has retreated from *Lochner*'s broad interpretation of substantive due process and have given greater deference to state legislature when it comes to issues of health and safety.⁴⁰

Second, the Court has expressly held that states may not prohibit private consensual activity between consenting adults because people have a right to privacy and sexual expression.⁴¹ For example, in *Lawrence v. Texas*, the Supreme Court invalidated a state law prohibiting sodomy because the law was a restriction on the right to privacy.⁴² The Court went on to explain that human sexual activity is a fundamental aspect of personhood therefore it is entitled to constitutional protection.⁴³ However, the Court made a point to note that this case did not involve public conduct or prostitution.⁴⁴ This seems to suggest that the law, as of 2003, did not have an "emerging tradition" or "awareness" of protecting sex workers and their consent, in a similar manner it did individuals in the LGBTQ⁴⁵ community.

Proponents of prostitution decriminalization argue that sex workers should be treated with dignity because prostitution is a form of work.⁴⁶ It is important to avoid generalizing why sex workers turn to prostitution. Although there are a group of sex workers who are abused and

³⁹ *Id.* at 64.

⁴⁰ *See, Nebbia v. N.Y.*, 291 U.S. 502, 516 (1934) (upholding a state law fixing milk prices because the law promoted public welfare); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, (1937) (upholding a state law that required a minimum wage for female employees because the Constitution does not speak of a freedom to contract, therefore individuals cannot contract for lower wages); *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938) (stating that economic regulations are presumed to be constitutional as long as the legislature could have rationally concluded the means to fit the ends).

⁴¹ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

⁴² *Id.* at 578.

⁴³ *Id.* at 567.

⁴⁴ *Id.* at 578.

⁴⁵ "LGBTQ" is an acronym for Lesbian, Gay, Bisexual, Transgender, and Queer.

⁴⁶ Open Society Foundations, *supra* note 17, at 2

forced into prostitution,⁴⁷ there are also sex workers who choose this line of work on their own volition. This protects sex workers from government interference in exercising their freedom such as their freedom of privacy and sexual relationships.⁴⁸ Sex workers will choose this work as their main source of income or as a form of supplemental income.⁴⁹ A prosecutor is faced with decision of whether they should punish a sex worker for the method they make a livelihood which could infringe on their dignity and economic liberty interests.

Since some sex workers voluntarily engage in commercial sex, prosecuting them may take away their sexual expression and infringe on their right to privacy.⁵⁰ Following the Court's analysis in *Lawrence*, dignity gives sex workers the right to decide their own personhood and whom they choose to have consensual sex with.⁵¹ To look at tradition more broadly, tradition has protected the action of having consensual sex from government interference. To criminalize adults having voluntary and consensual sex, including commercial sex, "is incompatible with the human rights to personal autonomy and privacy."⁵²

The concepts of dignity and liberty are often a concern for prosecutors under the procedural due process umbrella. When it comes to prosecuting sex workers for prostitution, prosecutors may be concerned with dignity and liberty under the substantive due process umbrella as well.

iii. Safety and health for sex workers

Prosecutors are faced with the safety and health issues plaguing sex workers. Proponents of the decriminalization of prostitution often cite safety and health of sex workers as reasons for

⁴⁷ See discussion *infra* Part I.A.iii.

⁴⁸ Open Society Foundations, *supra* note 17, at 2

⁴⁹ Open Society Foundations, *supra* note 17, at 2 (citing Devine et al., *Pathways to sex-work in Nagaland, India: Implications for HIV prevention and Community Mobilisation*, 22 AIDS CARE 228, 230 (2010)).

⁵⁰ Open Society Foundations, *supra* note 17, at 7.

⁵¹ Annamarie Forestiere, *To Protect Women, Legalize Prostitution*, HARV. C.R.-C.L. L. REV. (Oct. 1, 2019) <https://harvardcrcl.org/to-protect-women-legalize-prostitution/>.

⁵² Human Rights Watch, *Why Sex Work Should be Decriminalized*, HUMAN RIGHTS WATCH (Aug. 7, 2019) <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized>.

decriminalization.⁵³ Sex workers are subject to violence from clients and law enforcement, and they may be victims of human trafficking. The criminalization of prostitution may allow for clients, law enforcement, and traffickers to continue their violence against sex workers because sex workers risk arrest if they report violence.⁵⁴

Where prostitution is a crime, sex workers may feel unsafe reporting crimes, such as abuse, because they “fear prosecution [and] police surveillance.”⁵⁵ Sex workers report crimes at low rates because of this fear as well as the fear law enforcement will victim-blame the sex workers.⁵⁶ For example, a 2017 study surveying sex workers in Baltimore, Maryland revealed that of the 250 female sex workers surveyed, 22% reported physical or sexual violence by a client in the past three months.⁵⁷ Additionally, law enforcement abuse sex workers. Officers may coerce sex workers into performing sexual acts with the threat of arrest for noncompliance.⁵⁸ For example, the above-mentioned study revealed that 78% of sex workers surveyed “experience at least one abusive encounter with the police” in their lifetime.⁵⁹ “Frequent exposures to abusive police practices appear to contribute to an environment where client-perpetrated violence is regularly experienced.”⁶⁰ A prosecutor may consider this abuse when deciding whether to prosecute a sex worker.

⁵³ See Open Society Foundations, *supra* note 17 at 3; American Civil Liberties Union (“ACLU”), *Is Sex Work Decriminalization the Answer?*, ACLU RESEARCH BRIEF (2020) [hereinafter *Is Decriminalization the Answer?*].

⁵⁴ ACLU, *It’s Time to Decriminalize Sex Work*, ACLU (June 8, 2021) <https://www.aclu.org/news/topic/its-time-to-decriminalize-sex-work/> [hereinafter *Time to Decriminalize*].

⁵⁵ Open Society Foundations, *supra* note 17, at 3 (citing Decker et. al., *Human rights violations against sex workers: burden and effect on HIV*, 385 LANCET 186, 187 (2015) [http://dx.doi.org/10.1016/S0140-6736\(14\)60800-X](http://dx.doi.org/10.1016/S0140-6736(14)60800-X)).

⁵⁶ ACLU, *Is Decriminalization the Answer?*, *supra* note 53, at 7.

⁵⁷ Katherine Footer et. al., *Police-Related Correlates of Client-Perpetrated Violence Among Female Sex Workers in Baltimore, Maryland*, 109 AM. J. PUB. HEALTH 289 (2019).

⁵⁸ Department of Justice, *Investigation of the Baltimore City Police Department*, CIVIL RIGHTS DIVISION 1, 149 (Aug. 10, 2016).

⁵⁹ Katherine Footer et. al., *supra* note 57.

⁶⁰ Katherine Footer et. al., *supra* note 57.

In addition to the potential abuse from clients and law enforcement, some sex workers may be victims of human trafficking. Human trafficking is the “coercion of individuals for sexual exploitation or forced labor.”⁶¹ It is important to note that human trafficking is a separate and distinct crime from prostitution. Prostitution, unlike human trafficking, is based on consent rather than coercion.⁶² The two crimes may overlap; however, the crimes are different. Status as a sex trafficking victim may be a defense to the crime of prostitution.⁶³ A prosecutor would need to consider these circumstances and may even enlist the help of sex workers to combat trafficking.⁶⁴

Health concerns such as the prevention and transmission of human immunodeficiency virus (“HIV”) and sexually transmitted infections (“STIs”), may be a consideration for a prosecutor. Sex workers may not have access to health services, or the local community does not provide sex worker health programs.⁶⁵ Decriminalization is associated with financial support for health programs for sex workers as well as access to, and use of, condoms.⁶⁶ Law enforcement conduct may increase the likelihood of transmission. For example, a 2015 study revealed many sex workers did not carry condoms in Sacramento, California, because doing so is seen as “evidence

⁶¹ Open Society Foundations, *supra* note 17, at 6.

⁶² Compare N.Y. PENAL LAW § 230.00 (McKinney) (prostitution is a misdemeanor in which a person to engage or agree or offer to “engage in sexual conduct with another person in return for a fee”) with N.Y. PENAL LAW § 230.34 (McKinney) (it is a felony for a person to intentionally force or engage in a scheme or plan to compel or induce a person being patronized to engage in or continue to engage in prostitution activity by instilling a fear in the person being patronized).

⁶³ See IND. CODE ANN. § 35-45-4-2(b) (West 2018) (stating that being a victim of trafficking is a defense to prosecution of prostitution); N.Y. PENAL LAW § 230.01 (McKinney) (being a victim of sex trafficking is an affirmative defense to the crime of prostitution); TENN. CODE ANN. § 39-13-513(e) (West 2016) (providing that being a trafficking victim is a defense to prosecution of a prostitution charge).

⁶⁴ See Open Society Foundations, *supra* note 17, at 6 (noting there is no evidence thus far to show that removing the prohibition on the purchase of sexual services successfully combats human trafficking); Human Rights Watch, *supra* note 52.

⁶⁵ Open Society Foundations, *supra* note 17, at 4.

⁶⁶ Open Society Foundations, *supra* note 17, at 4.

of intent to commit prostitution.”⁶⁷ Also, sex workers in New York City, New York reported law enforcement confiscating or destroying their condoms.⁶⁸ The actions of other government actors may be a concern for prosecutors as well as the effect of such actions.

B. Options available to a prosecutor

Prosecutorial discretion is a prosecutor’s ability to choose from a vast array of options.⁶⁹ Often this discretion is seen as providing prosecutors with a great deal of power, which will be discussed further in Part II.A., however these options may be shaped by many factors. Recognizing the issues discussed in Part I.A., a prosecutor has a spectrum of options, on one end the prosecutor may prosecute a sex worker to the fullest extent of the applicable prostitution statute and on the other end the prosecutor may decline to prosecute altogether.

Looking back to the example of Aarica, there the prosecutor decided to charge her with the crime of prostitution. The prosecutor chose to follow the black letter law even though Aarica was a minor and a human trafficking victim who experienced abuse from her pimps and clients.⁷⁰

However, the prosecutor in Aarica’s case could have explored other options beyond prosecuting Aarica for prostitution such as pursuing a lower offense or diversion. These options are in the middle of the spectrum of available options. For example, if the act of loitering was a crime in California, then Aarica could have been prosecuted for the lesser offense of general loitering rather than a misdemeanor.⁷¹ Or, if a diversion program was available, then the

⁶⁷ Kristen DiAngelo, *Sex Work and Human Trafficking in the Sacramento Valley; a Needs Assessment*, SEX WORKER OUTREACH PROGRAM 1, 14 (May 2015).

⁶⁸ PROS Network and Leigh Tomppert, *Public Health Crisis: The Impact of Using Condoms as Evidence of Prostitution in New York City*, SEX WORKERS PROJECT 6, 19 (2012).

⁶⁹ Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 178 (2019) [hereinafter *Power of Prosecutors*].

⁷⁰ *In re Aarica S.*, 223 Cal. App. 4th at 1482, 168 Cal. Rptr. 3d at 137 (2014).

⁷¹ Loitering, itself, is not a crime in California rather it becomes an offense when coupled with another action. *But see* N.Y. PENAL LAW § 240.35 (McKinney, 2020) (the act of loitering is a violation); VA. CODE ANN. § 15.2-926 (West 2009) (loitering is considered a nuisance).

prosecutor could have required Aarica to participate in a diversion program.⁷² Diversion is when a prosecutor diverts a “defendant out of the criminal justice system entirely” and instead requires the defendant “to enter a program in order to obtain treatment, compensate victims, [and/or] demonstrate rehabilitation.”⁷³ If the defendant successfully completes the program then they will not incur a criminal conviction.⁷⁴ There are prostitution diversion programs throughout the United States which range from court affiliated diversion programs to specialty treatment courts.⁷⁵ For example, Project Fresh Start in Detroit, Michigan was created to address issues sex workers face throughout the rehabilitation process and is geared towards helping repeat offenders.⁷⁶ The program provides behavioral and lifestyle rehabilitation, health care services and life skills development.⁷⁷ Whereas, New York has four prostitution diversion courts, all with slightly different models but with the intention of rehabilitating sex workers who may or may not be repeat offenders.⁷⁸ Of the New York diversion courts, the Midtown Community Court developed the Services to Access Resources and Safety (“STARS”) program which addresses the various types of violence that sex workers experience.⁷⁹ STARS covers topics with sex workers such as sexual orientation and stereotypes, safety, trauma and affect regulation, arts education, feeling identification, financial literacy, cognitive restructuring, setting boundaries and how to develop healthy relationships as well as the legal consequences of their actions.⁸⁰

⁷² See American Bar Association (“ABA”), *Standards for the Prosecution*, Standard 3-1.2(e) (stating that prosecutors should be knowledgeable about and consider “developing an alternative to prosecution or conviction that may be applicable in individual cases or classes of cases”).

⁷³ Beth McCann et. al., *Prosecution Office Culture and Diversion Programs*, 11 CRIM. L. PRACT. 33 (2020).

⁷⁴ *Id.*

⁷⁵ Daria Mueller, *Treatment Courts and Court-Affiliated Diversion Projects for Prostitution in the United States*, PROSTITUTION ALTERNATIVES ROUND TABLE OF THE CHICAGO COALITION FOR THE HOMELESS 1, 9 <https://www.issuelab.org/resources/14135/14135.pdf>.

⁷⁶ *Id.* at 48.

⁷⁷ *Id.*

⁷⁸ *Id.* at 19-24. See also, Sarah Schweg, *Prostitution Diversion Programs*, CENTER FOR COURT INNOVATION (July 2012).

⁷⁹ Sarah Schweg, *supra* note 78, at 4.

⁸⁰ Sarah Schweg, *supra* note 78, at 5.

On the end of the spectrum, a prosecutor may decline to pursue any charges.⁸¹ There is an emergence of prosecutor’s offices throughout the United States issuing categorical guidance to their line-prosecutors authorizing declinations for prostitution charges.⁸² For example, in April 2021, Manhattan District Attorney (“D.A.”) Cy Vance announced a categorical policy to “decline-to-prosecute prostitution.”⁸³ This led to the dismissal of more than 900 prostitution and unlicensed massage cases.⁸⁴ The goal of this policy is to “[prevent] unnecessary contact with the criminal justice system, eliminat[e] the collateral consequences associated with having a prostitution case or conviction, and [empower] New Yorkers to interact with law enforcement without fear of arrest or deportation.”⁸⁵ Similar to D.A. Vance, the Los Angeles County D.A., George Gascón, issued a categorical declination policy stating that specific misdemeanor charges shall be declined or dismissed.⁸⁶ “Loitering to commit prostitution,” the crime for which Aarica was charged, is on the list of charges to be declined without exception.⁸⁷ If Aarica’s case was brought to the prosecutor on December 8th, 2020 instead of 2013, she would not have been prosecuted for the crime of loitering to commit prostitution.

⁸¹ Jeffrey Bellin, *Power of Prosecutor*, *supra* note 69, at 191. *See also*, ABA, *Standards for the Prosecution*, Standard 3-1.2(b) (stating that prosecutors may exercise their discretion by not pursuing criminal charges).

⁸² *See* Juliana Battaglia, *Baltimore will no longer prosecute drug possession, prostitution and other low-level offense*, CNN (March 27, 2021, 3:42PM), <https://www.cnn.com/2021/03/27/us/baltimore-prosecute-prostitution-drug-possession/index.html>; Press Release, Manhattan DA, D.A. Vance Ends Prosecution of Prostitution and Unlicensed Massage, A First in New York State (April 21, 2021) (on file with author) [hereinafter *Ends Prosecution of Prostitution*]; Jennifer Gonnerman, *Larry Krasner’s Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018) <https://www.newyorker.com/magazine/2018/10/29/larry-krasnens-campaign-to-end-mass-incarceration>; Memorandum from District Attorney George Gascón on Misdemeanor Case Management to all Deputy District Attorneys (Dec. 7, 2020) (on file with author).

⁸³ Press Release, Manhattan DA, *Ends Prosecution of Prostitution*, *supra* note 82.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Memorandum from District Attorney George Gascón on Misdemeanor Case Management to all Deputy District Attorneys (Dec. 7, 2020) (on file with author).

⁸⁷ *Id.*

The discretion afforded to prosecutors is vast, and it is best used when it is not “idiosyncratic” rather when it “tracks widely shared moral intuitions.”⁸⁸ Therefore, if the community’s morals are changing on issue, it is best that the prosecutor’s actions adhere to those changes. It is also important to note that a prosecutor’s use of their discretion when faced with the issues discussed in Part I.A. may be shaped by internal programs or policies.

II. WHAT IS A PROSECUTOR’S ROLE DURING A PERIOD OF TRANSITION?

The goal of this Part is to discuss the role of a prosecutor on social issues when morality surrounding a certain issue is changing and the criminal law, which previously went unquestioned, is now being scrutinized. This Part begins with an introduction of the power dynamics at play in the criminal justice system while using marijuana decriminalization to illustrate such dynamics. Then, it will examine the various theories behind the role of the prosecutor and moves to apply those theories to marijuana decriminalization.

A. What is a prosecutor supposed to do and do they have the power to do it?

The rise of “progressive prosecutors” stepping into their elected positions has triggered a conversation of what a prosecutor’s role is.⁸⁹ The progressive prosecutor “hope[s] to harness the prosecutorial power... in order to dismantle [the mass incarceration system].”⁹⁰ In addition to dismantling the mass incarceration system, progressive prosecutors hope to address root causes

⁸⁸ Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. R. REV. 369, 372 (2010).

⁸⁹ What makes a prosecutor “progressive” is up for debate. See Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1540 (2020) (discussing there is no single definition for “progressive prosecutor”); Avanindar Singh & Sajid A. Khan, *A Public Defender Definition of Progressive Prosecution*, 16 STAN. J. CIV. RTS. & CIV. L. 475, 476 (2021) (defining progressive prosecution as “the model of prosecution committed to truth-telling about systemic racism, shrinking mass criminalization, addressing root causes of crime, and bringing the criminal legal system in line with basic notions of justice and humanity”); Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 8, 12 (2018) [hereinafter *Progressive Prosecutor*] (“progressive prosecutors” are “willing to use their power and discretion to effect change [which] is essential to bringing fairness and racial equality to our criminal justice system”).

⁹⁰ Carissa Byrne Hessick & Michael Morse, *supra* note 89, at 1542.

of crime and ensure racial equality is present within the criminal justice system.⁹¹ When discussing a prosecutor's role, it is important to discuss whether a prosecutor holds the power necessary to exact the change they seek.

This Piece will be directing most of its attention on the role of head prosecutors rather than line-prosecutors.⁹² "Most head prosecutors are elected"⁹³ whereas line-prosecutors are hired to implement the policies and procedures put in place by the head prosecutor.⁹⁴ Whether a prosecutor is elected or appointed may influence the office's policies because the need to "track popular moral intuitions" to remain in office are different.⁹⁵ For example, in a jurisdiction where the prosecutor is elected, there may be a greater expectation for responsiveness from the prosecutor towards the community's "vision for its justice system."⁹⁶ Elections are a "tool of public accountability," therefore to remain in the position of prosecutor, the office must act in accordance to community's desires.⁹⁷ Whereas when a prosecutor is appointed, the voters' desires are more remote in relation to the prosecutor's actions.

However, any discussion on the role of prosecutors requires an examination of the power dynamics at play in the criminal justice system. Often prosecutors are described as having a great deal of power in the criminal justice system.⁹⁸ Overly broad legislation and the availability of

⁹¹ See Avanindar Singh & Sajid A. Khan, *supra* note 89; Angela J. Davis, *Progressive Prosecutor*, *supra* note 89.

⁹² Therefore, when this Piece uses the term "prosecutor" it will be referring to head prosecutors unless otherwise stated.

⁹³ See Stephanos Bibas, *supra* note 88, at 373; Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, THE ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/>.

⁹⁴ The Vera Institute ("Vera"), *Unlocking the Black Box of Prosecution*, THE VERA INSTITUTE (Oct. 2018) <https://www.vera.org/unlocking-the-black-box-of-prosecution/for-community-members>.

⁹⁵ Stephanos Bibas, *supra* note 88, at 373.

⁹⁶ Vera, *supra* note 94.

⁹⁷ Vera, *supra* note 94.

⁹⁸ Angela J. Davis, *Progressive Prosecutor*, *supra* note 89, at 9; Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1424 (2018). *But c.f.*, Jeffrey Bellin, *Power of Prosecutors*, *supra* note 69, at 212 (arguing that although prosecutors wield power in the criminal justice system, this power is restrained by other actors in the criminal justice system).

severe punishments effectively gave prosecutors the power of the legislature, executive and judiciary.⁹⁹ Yet prosecutors, in the vast majority of states, are part of the political system therefore their power is tethered to the same checks and balances as other political actors, such as judges and the legislature. The judiciary, unlike the prosecution, is the ultimate decision-maker.¹⁰⁰ Although prosecutors may provide the court with the case, a plea agreement, and/or jury instructions, it is the judge who decides whether to take the recommendations of the prosecutor.¹⁰¹ The role of the judge as a check on prosecutorial power may be heightened if the judge is also an elected official. Additionally, a prosecutor's power is dimmed by the legislature, an elected body in every state, because prosecutors would not be able to enforce a crime unless the legislature makes an action into a crime. While prosecutors could exercise their power through declinations, the legislature could "punish the prosecutors for recalcitrance... by cutting prosecutor office budgets."¹⁰² Therefore, the legislature is yet another check on the prosecutor's power.

Even where checks and balances may not be applicable, a prosecutor's power is dependent on other actors in the criminal justice system. For example, law enforcement officers, not prosecutors, detect crime.¹⁰³ Therefore a prosecutor's ability to exercise their discretion in prosecuting a suspect is dependent on law enforcement: (1) detecting crime and (2) choosing not to let the suspect go as a way of exercising their own law enforcement discretion.¹⁰⁴ As members of the executive branch, law enforcement and prosecutors are both tasked with enforcing the law,

⁹⁹ RACHEL ELISE BARKOW, PRISONER OF POLITICS 129-30 (2019).

¹⁰⁰ Jeffrey Bellin, *Power of Prosecutors*, *supra* note 69, at 194.

¹⁰¹ Jeffrey Bellin, *Power of Prosecutors*, *supra* note 69, at 194.

¹⁰² Jeffrey Bellin, *Power of Prosecutors*, *supra* note 69, at 199.

¹⁰³ Jeffrey Bellin, *Power of Prosecutors*, *supra* note 69, at 191.

¹⁰⁴ Jeffrey Bellin, *Power of Prosecutors*, *supra* note 69, at 191.

however a prosecutor’s ability to enforce the law is largely dependent on law enforcement enforcing the law first.

The conversation surrounding “what a prosecutor is supposed to do” is a difficult one because it relies on the community’s understanding of criminal law and criminal justice issues. But these conversations may not get us very far if prosecutors are not able to exact the objectives tasked by the community. Where morality surrounding an issue begins to change, we see such discussions surrounding a prosecutor’s role and power struggles come to light.

B. The fight over marijuana decriminalization

Marijuana decriminalization provides a real-world example of the previously discussed issues and power dynamics. There is a move towards prosecutors declining to prosecute low-level marijuana related offenses because prosecuting such offenses are costly and take away resources from investigating and prosecuting serious crimes.¹⁰⁵ Also, prosecutors are becoming increasingly aware of the disproportionate impact prosecuting these types of offenses have on people of color.¹⁰⁶

For example, prior to New York’s legalization of recreational marijuana in 2021, a couple of D.A. offices in the state declined to prosecute low-level marijuana offenses.¹⁰⁷ In 2018, Manhattan D.A. Vance instituted a new marijuana policy requiring line-prosecutors to “decline to prosecute [a low-level marijuana] arrest.”¹⁰⁸ This illustrates the discussion above, where law

¹⁰⁵ Fair and Just Prosecution, *Marijuana Policy Reform*, 1, 2 <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Marijuana.9.25.pdf>.

¹⁰⁶ *Id.* at 3.

¹⁰⁷ Press Release, Manhattan DA, D.A. Vance Ends Prosecution of Marijuana Possession and Smoking Cases (July 31, 2018) <https://www.manhattanda.org/tomorrow-d-a-vance-ends-prosecution-of-marijuana-possession-and-smoking-cases/> [hereinafter *Ends Prosecution of Marijuana Possession*]; Mary Frost, *Brooklyn DA: Prosecution of low-level marijuana cases down 98 percent*, BROOKLYN DAILY EAGLE (Feb. 20, 2019) <https://brooklyneagle.com/articles/2019/02/20/brooklyn-da-prosecution-of-low-level-marijuana-cases-down-98-percent/>.

¹⁰⁸ Press Release, Manhattan DA, *Ends Prosecution of Marijuana Possession*, *supra* note 107.

enforcement may be enforcing the current legislation through arrests, but the buck can stop with the prosecutor.

Of notable mention is Philadelphia D.A. Larry Krasner, whose win in 2017, created friction within the Philadelphia D.A. Office.¹⁰⁹ Line-prosecutors and high-ranking prosecutors within the office published an open letter stating their unwillingness to work for Krasner; in response, those who did not resign, were fired.¹¹⁰ This illustrates the power struggle within a prosecutor's office, in which line-prosecutors and high ranking prosecutors' own ideologies do not align with the head prosecutor. Beyond the internal fight within the organization, in 2018, Krasner made the decision to no longer prosecute low-level marijuana offenses.¹¹¹

A prime example of political forces clashing on the issue of marijuana decriminalization took place in Arlington County, Virginia. An elected prosecutor, Parisa Dehgani-Tafti, ran as a progressive prosecutor in which she promised not to prosecute low-level drug offenses during her campaign.¹¹² Dehgani-Tafti used her prosecutorial discretion to dismiss charges or enter into plea bargains for such offenses.¹¹³ However, elected-judges, who were not as reform minded, required the prosecutors to file a brief explaining why they decided to either drop the charges or enter into plea bargains.¹¹⁴ Dehgani-Tafti filed a brief to the Virginia Supreme Court arguing that such an order: (1) infringes on the exercise of prosecutorial discretion which is "well-established and essential" to pursue justice, (2) permits "intrusive judicial inquiry that is harmful to the

¹⁰⁹ Jennifer Gonnerman, *supra* note 82.

¹¹⁰ Jennifer Gonnerman, *supra* note 82.

¹¹¹ Alicia Victoria Lozano, *Philadelphia District Attorney's Office No Longer Pursuing Charges Against People Arrested with Small Amounts of Marijuana*, NBC PHILADELPHIA (Aug. 6, 2018) <https://www.nbcphiladelphia.com/news/local/philadelphia-district-attorneys-office-larry-krasner-memo-no-longer-charging-for-small-amounts-of-marijuana/57446/>.

¹¹² Matthew Barakat, *Prosecutor pushes to maintain discretion on dropping charges*, AP NEWS (Aug. 14, 2020) <https://apnews.com/article/virginia-courts-u-s-news-7811bd8c2c45f248b476fc8c86415801>.

¹¹³ *Id.*

¹¹⁴ *Id.*

operation of justice,” (3) is a misuse of resources, and (4) “second-[guesses] the elected local prosecutor” and undermines local control by the voters.¹¹⁵ Judge Daniel Fiore, an Arlington County Circuit Court judge, was not impressed by the argument that prosecuting low-level marijuana offenses was not a proper use of resources because such a declination would amount to the executive branch “effectively nollify[ing] a statute passed by members of the Virginia Assembly, who were duly elected by the citizens[.]”¹¹⁶ Ultimately, the Virginia Supreme Court declined to pursue this matter.¹¹⁷ But in response to this fight over power, the Virginia legislature passed a statute requiring a court to grant a motion to dismiss a charge so long as the prosecutor and defendant agree to the dismissal and the motion to dismiss was not a result of bribery or bias.¹¹⁸ This situation illustrates the effect “being elected” has on the way criminal justice power players interact with one another because both the judge and the prosecutor are conforming to voters’ desires so as to remain in office, but the actors’ understanding of the voters’ desires conflict.

C. Theories behind prosecution

The issues discussed in Parts II.A and B have led to a much-needed conversation on the theories behind prosecution. A necessary Supreme Court opinion, *Berger v. United States*, is often cited when trying to answer the question of “what is a prosecutor’s role?” In response to a federal prosecutor “conducting himself in a thoroughly indecorous and improper manner,”¹¹⁹ the Court stated that prosecutors have an obligation to ensure justice is done.¹²⁰ This responsibility

¹¹⁵ Brief for Petitioner as Amicus Curiae Supporting Petitioner, In re Parisa Dehghanti-Tafti (Aug. 14, 2020). <https://fairandjustprosecution.org/wp-content/uploads/2020/08/Dehghani-Tafti-Amicus-Brief-FINAL.pdf>

¹¹⁶ Matthew Barakat, *supra* note 112.

¹¹⁷ Julia Travers, *Can Prosecutors Drop Cannabis Cases? Virginia Supreme Court Won’t Weigh In, This Time*, THE OUTLAWREPORT (Jan. 12, 2021) <https://www.outlawreport.com/blog/virginia-prosecutorial-discretion-cannabis>.

¹¹⁸ VA. CODE ANN. § 19.2-265.6 (West).

¹¹⁹ *Berger v. U.S.*, 295 U.S. 78, 84 (1935).

¹²⁰ *Id.* at 88.

comes from the prosecutor’s position as a representative of the “sovereignty whose obligation [is] to govern impartially[.]”¹²¹

The concern with the “doing justice” model of prosecution is that it hinges on the meaning of “justice.” Justice is a concept that “covers everything and therefore demands nothing.”¹²² The term is extremely malleable as one jurisdiction’s prosecutor may view “justice” as being tough-on-crime, whereas another jurisdiction’s prosecutor may view the term to mean prosecuting only serious offenses. These two prosecutors are ensuring “justice is done,” yet their definitions of justice are contrary.

This overarching concept of “doing justice” allows prosecutors greater use of their discretion because whatever action they take would be in the interest of “doing justice.” However, the lack of uniformity could mean an overnight and overwhelming policy shift with each new prosecutor. This Part will discuss a handful of, and potentially overlapping, theories falling under “doing justice” which will be applied throughout the remaining portions of this Piece. These theories include prosecutors: (1) being tough-on-crime, (2) advocating for victims, (3) ensuring public safety, (4) fulfilling populist justice, and (5) acting as caretakers of the criminal justice system.¹²³

i. *Being tough-on-crime*

The public’s fear of crime, which is likely a result of media focusing on the most heinous of crimes, has created a public safety issue in which a tough-on-crime agenda is the solution.¹²⁴

¹²¹ *Id.*

¹²² Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203, 1216 (2020) [hereinafter *Theories of Prosecution*].

¹²³ See Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 713-14 (2020) [hereinafter *Reach of Progressive Prosecutors*] in which these theories are derived as well as other theories which this Piece will not discuss such as prosecutors: representing the police, abolishing the criminal justice system, and maximizing severity.

¹²⁴ Barkow, *supra* note 99, at 105-06.

Although there is an emergence of progressive prosecutors, the existence of “tough-on-crime” prosecutors have remained.

These prosecutors see their role simply as enforcers who choose to exercise their discretion by executing the letter of the law to the greatest extent. This results in increased convictions which feeds into America’s mass incarceration problem.¹²⁵ It begs the question of whether justice should be sought through convictions. The American Bar Association (“ABA”) answers this question in the negative.¹²⁶ The ABA’s standard for prosecutors states that the “primary duty of the prosecutor is to seek justice” rather than get convictions.¹²⁷ Yet even with the shift away from tough-on-crime prosecution, such prosecutors are re-elected due to a lack of voter knowledge.¹²⁸

ii. *Victim representation*

Victims play a critical role in the criminal justice process and depending on the crime, prosecutors may feel obligated to advocate for the victim’s rights.¹²⁹ Under the current ABA standards for prosecutors, a prosecutor should consider the “interests of victims” when handling a case.¹³⁰ This obligation to advocate for the victim’s rights could result in prosecutor’s being tough-on-crime. But there is some conflict on this model of prosecution because as *Berger* stated the prosecutor represents the sovereignty.¹³¹ So although a victim is a member of the sovereignty, the victim is not the prosecutor’s client.¹³²

¹²⁵ JOHN F. PFAFF, LOCKED IN: THE TRUE CASES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 6 (2017) (stating that the “primary driver of incarceration is increased prosecutorial toughness”).

¹²⁶ ABA, *Standards for the Prosecution*, Standard 3-1.2(b).

¹²⁷ *Id.*

¹²⁸ Taylor Pendergrass, *Tough-on-Crime Prosecutors Are Out of Step With Public Views*, ACLU (Dec. 12, 2017) <https://www.aclu.org/blog/smart-justice/prosecutorial-reform/tough-crime-prosecutors-are-out-step-public-views>.

¹²⁹ Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty to Neutrality*, 9 LEWIS & CLARK L. REV. 559, 561 (2005).

¹³⁰ ABA, *Standards for the Prosecution*, Standard 3-1.2(b).

¹³¹ *Berger*, 296 U.S. at 88.

¹³² Bennett L. Gershman, *supra* note 129.

iii. Public safety

Often tethered to the idea of ensuring “justice is done,” is the concept of public safety. Here, the prosecutor’s role is to protect and advocate for the public because it is the sovereign’s safety that is at risk every time a crime occurs. “Public safety is increasingly invoked” as a reason for prosecutorial action or inaction.¹³³

However, the concept of safety is malleable and what measures truly promote safety are “difficult to determine.”¹³⁴ For example, if a prosecutor believes public safety is best carried out with harsher criminal penalties due to the deterrent effect on other members of the community, then the prosecutor is using public safety as a justification for a tough-on-crime approach.¹³⁵ Whereas, another prosecutor may believe public safety is best severed through diversion programs because recidivism is believed to be one of the risks to safety.¹³⁶

iv. Populist justice

Populist justice refers to a prosecutor who uses their discretion to fulfill their constituent’s preference.¹³⁷ So if a prosecutor decriminalizes an action, then it is because that is what the voters want, right? Or is it because that is what the prosecutor believes is in the public’s best interest? These two roles of a prosecutor under the theory of populist justice may not have the same result.

The former assumes that voters are making informed decisions and researching the candidates they are voting for. Thus, the prosecutor should bend at the will of their constituents. More declinations may result from voters no longer approving of a law because those voters no

¹³³ Jeffrey Bellin, *Reach of Progressive Prosecutors*, *supra* note 123, at 713.

¹³⁴ Jeffrey Bellin, *Reach of Progressive Prosecutors*, *supra* note 123, at 713.

¹³⁵ See Jeffrey Bellin, *Reach of Progressive Prosecutors*, *supra* note 123, at 713 for his discussion on the duality of public safety approach and problems impeded with this duality.

¹³⁶ Jeffrey Bellin, *Reach of Progressive Prosecutors*, *supra* note 123, at 713.

¹³⁷ Jeffrey Bellin, *Theories of Prosecution*, *supra* note 122, at 1218.

longer want that law to be enforced.¹³⁸ It could be argued voters should not control the prosecution because they have democratic access to the legislature. Therefore, they could vote for legislatures who will repeal the law they no longer value. But criminal statutes are rarely repealed.¹³⁹ Which leaves unsatisfied voters turning to prosecutors for substantive change.

The latter has little faith in voters therefore it views the prosecutor as a trustee for the public.¹⁴⁰ This view holds that prosecutors should work in the best interest of their constituents rather than implementing their will.¹⁴¹ Similar to “justice” being malleable, so is “best interest.” Therefore, a prosecutor can be either tough-on all crime or tough-on only the most serious of crimes so long as it is in the voter’s best interest.

This theory shows the obvious political undertones in the criminal justice process. Where a prosecutor could listen to their voters or risk losing next term. But even if they win, the lack of census on whether the prosecutor is to pursue the will of voters or is to be their trustee makes this theory even more difficult to apply.

v. *Caretaker of the criminal justice system*

Turning to the last theory, prosecutors as caretakers of the criminal justice system. This theory, similar to the theories previously discussed, is derived from *Berger*, in which the Court stated that a prosecutor “is in a peculiar and very definite sense the servant of the law.”¹⁴² The servant-of-the-law or caretaker of the law will not manipulate the system in order to get a

¹³⁸ Jeffrey Bellin, *Theories of Prosecution*, *supra* note 122, at 1218.

¹³⁹ Luna Erik, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005).

¹⁴⁰ See W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 201 (2021) discussing a similar idea coined as “managerialist democracy.”

¹⁴¹ *Id.*

¹⁴² *Berger*, 296 U.S. at 88.

conviction because the prosecutor does not care about the “wins and losses” rather they care that justice is served no matter the outcome.¹⁴³

Under this theory, the prosecutors are guided by the law. This means if “the background law is severe” then the prosecutor’s actions will be severe.¹⁴⁴ This is similar to the tough-on-crime theory, however under the tough-on-crime theory the prosecutor is exercising their discretion to prosecute under a more severe law or punishment. Whereas, under the caretaker theory, the prosecutor is not exercising their discretion in prosecuting the more severe offense rather the severe option is the only option. Conversely if “the background law is lenient” then the prosecutor’s actions will be lenient.¹⁴⁵ Since the prosecutor is guided by the law, there is little discretion afforded to the prosecutor under this theory when compared to other theories. This means that the prosecutor will not decline to pursue a matter simply because the morals surrounding a crime are changing.¹⁴⁶

This theory, unlike the others, is the most neutral and therefore less susceptible to an individual prosecutor’s political and personal motivations. Additionally, if constituents are unhappy with prosecutors- as caretakers of the criminal justice system- following the law as it is set out, then the constituents may exercise their voting power to change legislation.

D. A glance back at marijuana decriminalization

The lack of consensus on issues such as marijuana decriminalization is due, in part, to the various theories behind prosecution. Beyond the political fight over this issue, each prosecutor’s own theory surrounding their role has led to inconsistencies within the American criminal justice

¹⁴³ See Jeffrey Bellin, *Theories of Prosecution*, *supra* note 122, at 1213; Jeffrey Bellin, *Reach of Progressive Prosecutors*, *supra* note 123, at 716.

¹⁴⁴ Jeffrey Bellin, *Theories of Prosecution*, *supra* note 122, at 1213.

¹⁴⁵ Jeffrey Bellin, *Theories of Prosecution*, *supra* note 122, at 1213.

¹⁴⁶ Jeffrey Bellin, *Theories of Prosecution*, *supra* note 122, at 1238 (stating that a prosecuting under the “serving the law” theory of prosecution would not enjoy the freedom that prosecutors “doing justice” have in dismissing charges when societal ambivalence about a crime, such drug possession and prostitution, have changed).

system. The fight for marijuana decriminalization began with a sordid history in which society viewed marijuana as a threat to the country.¹⁴⁷ This perception is largely due to the War on Drugs, an effort by President Richard Nixon to eliminate drug use.¹⁴⁸ Under the Controlled Substances Act (“CSA”) of 1970, marijuana is federally a Schedule I controlled substances that is subject to the strictest form of control due to its potential for abuse and dependence.¹⁴⁹

An added layer of complexity to the decriminalization of marijuana on the state level is the maintained criminalization of marijuana on the federal level.¹⁵⁰ However, medicinal use of marijuana tempered the harshness associated with marijuana criminalization.¹⁵¹ Medicinal marijuana is evaluated through scientific research.¹⁵² Now almost all states legalized the use of medicinal marijuana.¹⁵³ And 18 of those states legalized the recreational use of marijuana.¹⁵⁴ This Section will apply the above-mentioned theories to the issue of marijuana to illustrate the complexity of the role prosecutors play in its decriminalization .

i. Being tough-on-crime

The War on Drugs called for an inherently tough-on-crime policy.¹⁵⁵ With the drug war and the passage of the CSA, prosecutors took a tough-on-crime approach to prosecuting marijuana offenses which resulted in America’s mass incarceration problem.¹⁵⁶

¹⁴⁷ German Lopez, *The war on drugs, explained*, VOX (May 8, 2016, 1:21 PM) <https://www.vox.com/2016/5/8/18089368/war-on-drugs-marijuana-cocaine-heroin-meth>.

¹⁴⁸ *Id.*

¹⁴⁹ 21 U.S.C. § 812 (West).

¹⁵⁰ *See* 21 U.S.C.A. § 841 (West).

¹⁵¹ Congressional Research Service, *the Controlled Substances Act (CSA): A Legal Overview for the 117th Congress*, Congressional Research Service 1 (Feb. 5, 2021) <https://sgp.fas.org/crs/misc/R45948.pdf>.

¹⁵² Lopez, *supra* note 147.

¹⁵³ Congressional Research Service, *supra* note 151, at 25 (stating that 48 states have legalized the use of medicinal marijuana or cannabidiol).

¹⁵⁴ Casey Leins, Horus Alas, & Elliot Davis, *States Where Recreational Marijuana is Legal*, US News (Oct. 14, 2021) <https://www.usnews.com/news/best-states/slideshows/where-is-pot-legal>.

¹⁵⁵ Betsy Pearl, *Ending the War on Drugs: By the Numbers*, AMERICAN PROGRESS (Jun 27, 2018) <https://www.americanprogress.org/article/ending-war-drugs-numbers/>.

¹⁵⁶ Lopez, *supra* note 147.

On a federal level, there is a move away from a tough-on-crime approach to low-level marijuana offense because pursuing such offenses would not be “an effective use of federal law enforcement resources.”¹⁵⁷ And states share a similar sentiment as they begin decriminalizing and legalizing certain marijuana-related behavior. Some prosecutors are met with resistance when they move away from the tough-on-crime approach to prosecution. For example, as discussed in Part II.B., Dehgani-Tafti chose to exercise her prosecutorial discretion by not being tough on *all* crimes because it would be a misuse of resources that would be better placed on serious crimes.¹⁵⁸ Yet, some Virginia judges resisted this movement.¹⁵⁹

Although a tough-on-crime prosecutor may be attractive when prosecuting heinous crimes such as murder and rape, their role in low-level marijuana prosecutions is slowly dwindling.

ii. Victim representation

In the marijuana context, it is difficult to argue the theory of prosecutors advocating for victims because marijuana possession and use is often labeled a “victimless crime.”¹⁶⁰ A victimless crime is usually one in which the government tries to regulate a vice.¹⁶¹ A vice is a practice “that partake[s] both in pleasure and wickedness.”¹⁶² Marijuana use and possession would be characterized as a “victimless crime” because marijuana users are consenting to its consumption and there is no evidence of injury from marijuana use.¹⁶³ Therefore, this theory of prosecution is not viable in this context.

¹⁵⁷ John Hudak, *Merrick Garland, cannabis policy, and restorative justice*, BROOKINGS (Feb. 24, 2021) <https://www.brookings.edu/blog/fixgov/2021/02/24/merrick-garland-cannabis-policy-and-restorative-justice/>.

¹⁵⁸ Brief for Petitioner as Amicus Curiae Supporting Petitioner, *supra* note 115.

¹⁵⁹ Matthew Barakat, *supra* note 112.

¹⁶⁰ Brennan T. Hughes, *Strictly Taboo: Cultural Anthropology's Insights into Mass Incarceration and Victimless Crime*, 41 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 49, 55 (2015).

¹⁶¹ *Id.*

¹⁶² *Id.* (referring to JIM LEITZEL, REGULATING VICE: MISGUIDED PROHIBITIONS AND REALISTIC CONTROLS 4 (2008)).

¹⁶³ Rather it can be argued that marijuana use is beneficial as shown through support of medicinal use of marijuana.

iii. *Public safety*

Whether a prosecutor is acting under the theory of public safety depends on whether the prosecutor views marijuana as a threat to safety. The War on Drugs was created under the guise of public safety, but it may have exacerbated existing safety concerns due to its disproportionate impact.¹⁶⁴

If a prosecutor views marijuana as a “gateway drug,”¹⁶⁵ then they may be tough-on-crime to ensure the public’s safety. However, the idea that marijuana use leads to use of dangerous drugs, such as cocaine and heroin, is debatable.¹⁶⁶ There is no evidence to support the idea that marijuana use leads to use of other drugs,¹⁶⁷ nor that it leads to other crimes beyond possession and distribution of marijuana.¹⁶⁸

However, if a prosecutor views mass incarceration and the disproportionate impact of marijuana enforcement as the threat to public safety, then the prosecutor may either decline to prosecute or recommend the use of diversion programs. For example, Philadelphia D.A. Krasner declined to prosecute certain marijuana charges, such as the purchase and possession of marijuana regardless of its weight in an effort to end mass incarceration.¹⁶⁹ Additionally, it may be viewed as a threat to public safety to focus resources on non-violent low-level marijuana offenses when there are violent crimes which threaten safety.¹⁷⁰ Baltimore City State’s Attorney Marilyn Mosby instituted a marijuana declination policy because “no one who is serious about

¹⁶⁴ Kassandra Frederique, *To truly reimagine safety, we must end the war on drugs*, WASHINGTON POST (Mar. 16, 2021) <https://www.washingtonpost.com/opinions/2021/03/16/nixon-war-on-drugs-public-safety/>.

¹⁶⁵ Centers for Disease and Prevention (“CDC”), *Marijuana: How Can it Affect your Health*, MARIJUANA AND PUBLIC HEALTH <https://www.cdc.gov/marijuana/health-effects/risk-of-other-drugs.html>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* See also, James Austin, *Rethinking the Consequences of Decriminalizing Marijuana*, PRISON POLICY 1, 5 https://www.prisonpolicy.org/scans/jfa/marijuana_report.pdf.

¹⁶⁸ James Austin, *supra* note 167.

¹⁶⁹ Memorandum from District Attorney Larry Krasner, *New Policies* (Feb. 15, 2018) (on file with author).

¹⁷⁰ John Hudak, *supra* note 157.

public safety can honestly say that spending resources to jail people for marijuana use is a smart way to use our limited time and money.”¹⁷¹ Therefore, a prosecutor may conduct their own cost-benefit analysis of what crimes demand more attention and resources to ensure the community’s safety.

iv. Populist justice

When it comes to marijuana decriminalization, it seems this theory prevails. As of 2020, 68% of Americans support the legalization of marijuana.¹⁷² And 70% of Americans view marijuana use as morally acceptable.¹⁷³ Therefore, it would seem to flow logically where marijuana has not been legalized statutorily that prosecutors may decriminalize it because that is what Americans want. Under the theory of populist justice, a prosecutor can either bend to the voters’ will or act as the voters’ trustee.¹⁷⁴

During the 2021 election, the sitting Virginia Attorney General Mark Herring stated his opponent Jason Miyares, who opposed decriminalizing simple possession of marijuana, was “out of touch with voters.”¹⁷⁵ However, Miyares won the 2021 seat for Attorney General on a “law and order” agenda.¹⁷⁶ This shows that Virginians wanted a tough-on-crime prosecutor despite the

¹⁷¹ Press Release, Baltimore State’s Attorney Marilyn Mosby To Stop Prosecuting Marijuana Cases, Says Prosecutions Provide No Public Safety Value and Undermine Public Trust In Law Enforcement (Feb. 2019) (on file with author). *See also*, Alvin Bragg, *Diversion and Declining Prosecution for Misdemeanors*, ALVIN BRAGG (2021), <https://www.alvinbragg.com/declination> (stating that the Manhattan D.A.’s office will decline misdemeanor marijuana cases because “courts have been clogged with petty offenses for too long”).

¹⁷² Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%*, GALLUP (Nov. 9, 2020) <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx> [hereinafter *Support for Legal Marijuana*].

¹⁷³ Megan Brenan, *Record-Low 54% in U.S. Say Death Penalty Morally Acceptable*, GALLUP (June 23, 2020) <https://news.gallup.com/poll/312929/record-low-say-death-penalty-morally-acceptable.aspx> [hereinafter *Morally Acceptable*].

¹⁷⁴ See discussion *supra* Part II.C.iv.

¹⁷⁵ Whitney Evans, *Herring criticizes Miyares for prosecuting marijuana possession and low-level crimes*, VPM (Oct 8, 2021 2:43AM) <https://vpm.org/news/articles/26127/herring-criticizes-miyares-for-prosecuting-marijuana-possession-and-low-level>

¹⁷⁶ Grace Panetta & Oma Seddiq, *Republican Jason Miyares defeats two-term Democrat Mark Herring for Virginia attorney general*, INSIDER (Nov. 2, 2021, 9:30PM) <https://www.businessinsider.com/virginia-attorney-general-election-mark-herring-jason-miyares-live-results-2021-11>.

previous Attorney General’s decriminalization of marijuana and the growing support for marijuana legalization. Additionally, this example portrays the politics of criminal justice and how quickly policies surrounding any given issue can change with one election.¹⁷⁷

Newly elected Manhattan D.A. Alvin Bragg is an example of a trustee for voters. In 2019, New York amended its marijuana statute so that low-level offenses were punishable by a fine.¹⁷⁸ However, Bragg went a step further in stating there is no situation in which his office would prosecute a marijuana offense and he will institute a declination policy for marijuana charges when an arrestee has another criminal matter pending such as an outstanding warrant.¹⁷⁹ By moving the misdemeanor marijuana offense completely out of criminal courts,¹⁸⁰ Bragg is a trustee advocating greater public safety by not flooding the courts with non-violent misdemeanor offenses.

v. Caretaker of the criminal justice system

Since, under this theory the prosecutor is guided by the law, some of the previously discussed prosecutors are not “doing justice” by declining to prosecute marijuana offenses. If the state has maintained the criminalization of marijuana, then the prosecutor is required to prosecute the offense as required by law,¹⁸¹ despite 70% of Americans viewing marijuana use as morally acceptable.¹⁸²

Therefore, prosecutors such as Krasner and Dehgani-Tafti are not acting as caretakers of the criminal justice system. And when judges, such as Virginia Judge Fiore, state that a prosecutor

¹⁷⁷ Prior to the November 2021 election, Virginia was a predominately blue state with a “progressive” agenda. Now it is a predominately red state with a conservative, tough-on-crime agenda.

¹⁷⁸ N.Y. PENAL LAW §§ 221.05, 221.10 (McKinney).

¹⁷⁹ Alvin Bragg, *supra* note 171.

¹⁸⁰ Alvin Bragg, *supra* note 171.

¹⁸¹ Jeffrey Bellin, *Theories of Prosecution*, *supra* note 122, at 1213.

¹⁸² Megan Brenan, *Morally Acceptable*, *supra* note 173.

should not “nullify” legislation,¹⁸³ it can be said that the judge is holding the prosecutor to their role under this theory of prosecution. Even in states like New York,¹⁸⁴ where certain marijuana-related behavior is legalized, the prosecutor, under this theory, should not go further than the law requires. As such, Bragg should not use his prosecutorial discretion to unilaterally decline all marijuana misdemeanor cases because that is beyond the scope of the statute.

This theory removes some of the politics associated with prosecuting low-level marijuana offenses while limiting the prosecutor’s discretionary power.

III. IS PROSTITUTION THE NEXT TARGET FOR DECRIMINALIZATION?

The decriminalization of prostitution is complex because it puts more power in the hands of prosecutors.¹⁸⁵ A prosecutor’s ability to decriminalize prostitution despite its criminalization via legislation may create tension among criminal justice actors. Similar to the marijuana context, in which the legislature is slow to move towards decriminalization, prosecutors are in a position to decriminalize prostitution through declination and diversion policies. Prosecutors are only able to prosecute behavior which the legislature criminalized, however the presence of such legislation does not automatically result in prosecution.¹⁸⁶ This discretion protects a prosecutor from the checks and balances associated with being a member of the political process. Therefore, if a prosecutor declines to charge a sex worker with prostitution, the judicial branch is unable to hold the prosecutor accountable because the case never makes it that far in the process. Additionally, if a prosecutor institutes a prostitution declination policy, then law enforcement officers are

¹⁸³ Matthew Barakat, *supra* note 112.

¹⁸⁴ N.Y. PENAL LAW §§ 221.05, 221.10 (McKinney).

¹⁸⁵ See discussion *supra* Part I.A.; Brennan T. Hughes, *supra* note 160, at 158.

¹⁸⁶ RACHEL ELISE BARKOW, *supra* note 99, at 129-30 (2019).

unlikely to enforce the law against sex workers because it would not result to a conviction therefore it would waste resources that are better suited elsewhere.

With almost unrestrained power, prosecutors can change the legal landscape of prostitution. But would the theories behind a prosecutor's role allow them to? The remaining portions of this Piece will try to answer this question by applying the theories of prosecution to the moral and social considerations previously discussed in Part I.

A. Being tough-on-crime

A tough-on-crime prosecutor will not result in the decriminalization of prostitution. This prosecutor would use their discretion to prosecute prostitution to its fullest extent despite the dignity and health concerns concerned with criminalization of such behavior.

The foundation of prostitution laws is that it is a morally reprehensible behavior.¹⁸⁷ This moral undertone resulted in the criminalization of prostitution ultimately opening the door for a prosecutor to be tough-on-crime when punishing this behavior. This punishment is justified irrespective of whether the prosecutor believes sex workers have a liberty interest in prostitution because the sex worker is committing a crime.¹⁸⁸ Additionally, for a tough-on-crime prosecutor, decriminalization would not be the answer to preventing the transmission of HIV and STIs because the transmission rate would not decrease but for the punishment of sex workers.¹⁸⁹

When a sex worker's safety is at risk due to a client or law enforcement's actions, a tough-on-crime prosecutor may still prosecute the sex worker because the sex worker was committing a

¹⁸⁷ Ruth Mazo Karras, *supra* note 23.

¹⁸⁸ This takes a retributivist approach to punishment which states that punishment is justified because the wrongdoer, here the sex worker, freely chose to violate the law. Under the retributivist theory of punishment, a wrongdoer should be punished irrespective of whether the punishment reduces crime or not. *See generally*, Hugo Adam Bedau & Erin Kelly, *Punishment*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2021 Edition).

¹⁸⁹ This takes a utilitarian approach to punishment because it is done specifically deter the sex worker from committing prostitution in the future, which would decrease the number of sex workers ultimately leading to a decrease in transmission rates. *See generally*, Hugo Adam Bedau & Erin Kelly, *supra* note 188.

crime. A tough-on-crime prosecutor wants to prosecute all crime.¹⁹⁰ Therefore, in addition to prosecuting sex workers and potential trafficking victims, a prosecutor would also prosecute the abuser or trafficker because they are committing a crime.

Since a tough-on-crime prosecutor is concerned with harshly enforcing the criminal law, they would not support the decriminalization of prostitution.

B. Victim representation

A prosecutor working under the theory of victim representation may not decriminalize prostitution because prostitution is generally a victimless crime.¹⁹¹ Like the marijuana context, when the government criminalizes prostitution, it is trying to regulate the vice of consensual sexual behavior that is beyond the marital relationship.¹⁹² Although prostitution is a “taboo,”¹⁹³ the sex worker is consenting. Therefore, under the *Lawrence* liberty framework, there is no injury to consensual sex.¹⁹⁴

Additionally, decriminalization advocates argue the decriminalization of prostitution creates an environment in which sex workers and trafficking victims are comfortable reporting abuse because the threat of prosecution is removed.¹⁹⁵ Prosecutors under this theory understand some sex workers consent to the sale of sexual activities, while other sex workers are being abused or trafficked. Although statutory limitations are in place protecting human trafficking victims from

¹⁹⁰ Shari Stone-Mediatore, *Tough Questions for Tough-On-Crime Policies*, OHIO WESLEYAN UNI. <https://www.owu.edu/news-media/from-our-perspective/tough-questions-for-tough-on-crime-policies/>.

¹⁹¹ Brennan T. Hughes, *supra* note 160, at 59.

¹⁹² Brennan T. Hughes, *supra* note 160, at 59.

¹⁹³ Brennan T. Hughes, *supra* note 160, at 59; *see also*, Jeffrey Richards, *supra* note 25, at 152.

¹⁹⁴ Brennan T. Hughes, *supra* note 160, at 59.

¹⁹⁵ *See* Open Society Foundations, *supra* note 17, at 6; ACLU, *Is Decriminalization the Answer?*, *supra* note 53, at 13-14; Carlie Porterfield, *Manhattan Won't Prosecute Prostitution - But Will Still Go After Clients*, FORBES (April 21, 2021 03:27PM) <https://www.forbes.com/sites/carlieporterfield/2021/04/21/manhattan-wont-prosecute-prostitution-but-will-still-go-after-clients/?sh=2a4faa51731c>.

prosecution,¹⁹⁶ in practice, establishing a human trafficking defense is difficult because prostitution laws are “designed to maximize arrests and prosecutions, rather than to identify and assist people who have been trafficked.”¹⁹⁷

Decriminalization may be a way for prosecutors to advocate for victims of abuse or trafficking by allowing the prosecution of abusers and traffickers without legal recourse on the victims.

C. Public safety

A prosecutor working under the theory of prosecution would likely decriminalize prostitution because they want to prevent threats to safety such as harm to sex workers and human trafficking victims as well as the transmission of HIV and STIs.

Like with marijuana use and possession, there is no evidence that a sex worker engaging in prostitution commits other crimes beyond prostitution or loitering-related charges. Therefore, sex workers are not posing a threat to the community’s safety. Rather, advocates for decriminalization argue the greatest threat to safety is the maintained criminalization of prostitution.¹⁹⁸ The argument that decriminalization will result in more crime has no evidentiary support.¹⁹⁹

¹⁹⁶ For examples of states providing that being a human trafficking victim is a defense to prosecution, *see e.g.*, IND. CODE ANN. § 35-45-4-2(b) (West 2018) (stating that being a victim of trafficking is a defense to prosecution of prostitution); N.Y. PENAL LAW § 230.01 (McKinney) (being a victim of sex trafficking is an affirmative defense to the crime of prostitution); TENN. CODE ANN. § 39-13-513(e) (West 2016) (providing that being a trafficking victim is a defense to prosecution of a prostitution charge).

¹⁹⁷ International Women’s Human Rights Clinic, et. al., *Criminalization of Trafficking Victims: Submission to the United Nations Universal Periodic Review of U.S.A.*, 22nd Sess. of UPR, Human Rights Council ¶2 (April 2015) <https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/hrgj/publications/Criminalization-of-Trafficking-Victims.pdf>.

¹⁹⁸ ACLU, *Is Decriminalization the Answer?*, *supra* note 53, at 15.

¹⁹⁹ ACLU, *Is Decriminalization the Answer?*, *supra* note 53, at 15.

Additionally, if a prosecutor views mass incarceration and the disproportionate impact²⁰⁰ of prosecuting sex workers as threat to public safety, then the prosecutor may either decline to prosecute or recommend the use of diversion programs.²⁰¹ For example, newly elected Manhattan D.A. Bragg declined to prosecute consensual sex trade due to the racial disparities in enforcement of prostitution laws.²⁰² Bragg stated that focusing on prostitution “jeopardize[s] public safety,” therefore he will focus on prosecuting individuals coercing others into this work while also assisting trafficking victims.²⁰³ A similar sentiment is shared with Philadelphia D.A. Krasner,²⁰⁴ and Baltimore Prosecutor Mosby.²⁰⁵ The priority of these prosecutors, similar to their priorities in imposing marijuana declination policies, is combatting serious crimes rather than the low-level crime of prostitution.

With the overwhelming evidence and support by researchers and advocates for decriminalization of prostitution in the interest of public safety,²⁰⁶ a prosecutor under this theory is likely to decriminalize such behavior.

²⁰⁰ Members of the LGBTQ community, specifically transgender women of color, and immigrants are disproportionately impacted by the criminalization of prostitution. *See*, ACLU, *Is Decriminalization the Answer?*, *supra* note 53, at 11-12; Charlie Porterfield, *supra* note 195 (New York repealed a “walking while trans” anti-loitering law, which “resulted in discrimination against women, trans[gender] people and people of color”).

²⁰¹ See discussion *supra* Part I.B. on diversion programs..

²⁰² Alvin Bragg, *supra* note 171 (stating in the last four years, 89% of sex workers charged with prostitution were not white and 93% of clients charged were not white this is in light of evidence that clients are majority white).

²⁰³ Alvin Bragg, *supra* note 171.

²⁰⁴ Memorandum from District Attorney Larry Krasner, *supra* note 169 (stating prosecutors are to decline prostitution cases against sex workers who have no more than prostitution convictions and shall dismiss all pending prostitution cases that would otherwise be declined under this policy).

²⁰⁵ Press Release, State’s Attorney, Mayor’s Office and Community Partners Announce Success of Covid Criminal Justice Policies (March 26, 2021) (on file with author) (in an effort to combat mass incarceration, the office impose a prostitution declination policy); Tom Jackson, *After crime plummeted in 2020, Baltimore will stop drug, sex prosecutions*, WASHINGTON POST (March 26, 2021 8:00AM) <https://www.washingtonpost.com/dc-md-va/2021/03/26/baltimore-reducing-prosecutions/>.

²⁰⁶ Nina Luo, *Decriminalizing Survival: Policy Platform and Polling on the Decriminalization of Sex Work*, DATA FOR PROGRESS 1, 9-12 (2020) <https://www.filesforprogress.org/memos/decriminalizing-sex-work.pdf>; Umberto Bacchi, *Legalizing prostitution lowers violence and disease, report says*, Thomson Reuters Foundation (Dec. 11, 2018 2:07PM) <https://www.reuters.com/article/us-global-women-prostitution/legalizing-prostitution-lowers-violence-and-disease-report-says-idUSKBN1OA28N> (stating that researchers are calling for decriminalization of prostitution to minimize the violence against sex workers and prevent the spread of disease); ACLU, *Is*

D. Populist justice

A prosecutor under the theory of populist justice would likely decriminalize prostitution because a majority of voters support decriminalization. Since a prosecutor under populist justice is cognizant of the voters' desires, they would conform their policies to maintain their position as prosecutor.²⁰⁷ Whether a populist justice prosecutor bends to the will of their constituents or acts as a trustee, decriminalization would result.

First, a prosecutor bending to the will of voters would decriminalize prostitution by declining to prosecute prostitution. A 2019 Data Progress Survey, surveyed more than one thousand American voters and found that 52% of voters either somewhat or strongly supported the decriminalization of sex work.²⁰⁸ The percentages tracked with the voters' political affiliation as 64% of Democrats and 55% of Independents supported decriminalization while 37% of Republicans supported decriminalization.²⁰⁹ The Data Progress Survey also showed that two-thirds of voters between the ages of 18 to 44 supported decriminalization.²¹⁰ The margins between support and opposition were the narrowest among voters aged 65 years or older, in which 42% supported decriminalization while 51% opposed.²¹¹ This increase in support is not shocking because a 2008 San Francisco ballot resulted in 42% in the affirmative for prostitution decriminalization.²¹² Therefore, a prosecutor who is aware of this increased support for decriminalization would decline to prosecute sex workers with prostitution.²¹³ Second, a

Decriminalization the Answer?, *supra* note 53, at 15; Open Society Foundations, *supra* note 17; Human Rights Watch, *supra* note 52.

²⁰⁷ Stephanos Bibas, *supra* note 88, at 373.

²⁰⁸ Nina Luo, *supra* note 206, at 22 (the survey's margin of error was +/-3.8 percent); *see also*, Zack Budryk, *Poll: Majority supports decriminalizing sex work*, THE HILL (Jan. 30, 2020 2:45PM) <https://thehill.com/regulation/other/480725-poll-majority-supports-decriminalizing-sex-work>.

²⁰⁹ Nina Luo, *supra* note 206, at 22.

²¹⁰ Nina Luo, *supra* note 206, at 22 (the age breakdown includes all political affiliations).

²¹¹ Nina Luo, *supra* note 206, at 22.

²¹² Ronald Weitzer, *supra* note **Error! Bookmark not defined.**

²¹³ *See generally*, Jeffrey Bellin, *Theories of Prosecution*, *supra* note 122, at 1218.

prosecutor acting as a trustee for the public would likely decriminalize prostitution because of the health and safety concerns associated with criminalization.²¹⁴ Therefore, working in the best interest of the public and ensuring their safety would result in decriminalization.

Although, it could be argued that the voters may seek decriminalization from the legislature rather than prosecutors, the legislature is slow to decriminalize this conduct. For example, in Washington D.C. and New York, bills were introduced to decriminalize prostitution, however both did not pass.²¹⁵ Since repeals are a slow process,²¹⁶ prosecutors are a better able to provide the substantive change voters seek by decriminalizing prostitution.

E. Caretaker of the criminal justice system

A prosecutor acting as a caretaker would not decriminalize prostitution because a prosecutor under this theory will not manipulate the system to conform to their own idiosyncrasies.²¹⁷ As the law currently stands, prostitution is illegal.²¹⁸ Thus, a prosecutor would prosecute a sex worker for prostitution as required by law despite the health and social concerns with criminalization.

The increase in voter support for decriminalization²¹⁹ will not affect a prosecutor under this theory because a caretaker of the system is detached from their own political motivations.

²¹⁴ See discussion *supra* Part III.C; see also, Neela Ghoshal, *Stop Criminalizing Sex Work in DC*, HUMAN RIGHTS WATCH (July 11, 2019 11:44PM) <https://www.hrw.org/news/2019/07/11/stop-criminalizing-sex-work-dc>; ACLU, *Is Decriminalization the Answer?*, *supra* note 53, at 15.

²¹⁵ Anna North, *The movement to decriminalize sex work, explained*, VOX (Aug. 2, 2019 7:30AM) <https://www.vox.com/2019/8/2/20692327/sex-work-decriminalization-prostitution-new-york-dc>. But see N.Y. LEGIS. SEN. S-3075. Reg. Sess. 2021-2022 (2021) <https://legislation.nysenate.gov/pdf/bills/2021/S3075> in which the New York bill was reintroduced to the Senate in 2021.

²¹⁶ Luna Erik, *supra* note 139.

²¹⁷ See Jeffrey Bellin, *Theories of Prosecution*, *supra* note 122, at 1213; Jeffrey Bellin, *Reach of Progressive Prosecutors*, *supra* note 123, at 716.

²¹⁸ With the exception of several counties in Nevada.

²¹⁹ See discussion *supra* Part III.D.

Therefore, constituents should exercise their voting power by electing legislatures who align with their views on decriminalization.

CONCLUSION

The maintained criminalization of prostitution and its impact on a sex worker's liberty, health and safety is emerging as a concern across the country. Morality is no longer the central focus surrounding this behavior, as the focus shifted towards liberty and safety. Many scholars discussed the harsh effect criminalization has on sex workers and have called for its decriminalization. As the spotlight shines on prosecutors, this Piece attempted to show that as prostitution remains a crime, prosecutors may be in the best position to decriminalize the behavior. The 21st century prosecutor has much to think about when exercising their discretion in a manner that may decriminalize prostitution. With almost unconstrained power, prosecutors have come under greater scrutiny and conversations questioning the role of a 21st century prosecutor arose. This Piece does not take a position on which theory of prosecution is best, however the implementation of these theories may change the legal landscape of prostitution. Thus, this Piece hopes to provide a legal lens for the prosecutorial decriminalization of prostitution.