

# Sex-Work Prohibition in America

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## An Understanding of Contemporary Jurisprudence

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### Sex-Work: Defined

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Infringing on the rights of consenting adults to engage in private sexual intercourse is unconstitutional! In *Lawrence v. Texas*, the Court held that intimate consensual sexual conduct was protected by substantive due process under the Fourteenth Amendment of the U.S. Constitution. 539 U.S. 558 (2003). Sex is a constitutional right. However, consenting adults generally may not enter into a legal contract for commercial sex-work, except for in a few limited jurisdictions within the state of Nevada.

The Freudian undercurrent of the human psyche is decidedly... agitated, and the commercial sex industry has existed throughout history to satisfy that economic demand. Commercial sex-work has been broadly defined by the World Health Organization (WHO) as, "the exchange of money or goods for sexual services." Sex-workers may be men, women, or transgendered people who receive money or goods in exchange for sexual services. Clients are people (typically men) who pay cash or other resources for sexual services either explicitly or with an agreed package that includes other services such as entertainment or domestic services. Such broad definitions certainly encompass acts that fall within conceivably legal parameters in the United States. Under the WHO definition, any pornographic performance would likely constitute sex-work; and performers working at strip clubs, as well as the customers who frequent that establishment, would certainly fall within the commercial sex paradigm described above. And while there are a few jurisdictions within the United States where

commercial sex is totally legal and government regulated, commercial sex is generally prohibited. Curiously, the continuum of legality applied to sex-work may shift according to time and place, but the underlying act may very well be exactly the same.

It is not exactly clear how to determine what constitutes a contract for commercial sex. The common law right to contract recognizes contracts to marry, for insemination of a surrogate and gestation of a child, and even contracts for pornographic performances. Notwithstanding, states are reserved the right under the Tenth Amendment to criminalize any conduct not protected by the constitution. For example, the Utah Revised Code defines and criminalizes prostitution as the act of “loiter[ing] in or within view of any public place for the purpose of being hired to engage in sexual activity.” Sexual activity is defined in a few other Utah criminal codes and statutes but is left undefined by the legislature as it relates to commercial sex.

Sex-work is regarded as an act of criminal deviance throughout most of the United States. On the other hand, people have a substantive constitutional right to engage in private consensual sexual conduct in any manner they deem most preferable and pleasurable. There is an obvious tension between the moral prohibition against the sex-industry, and the protected privilege that each citizen has to exercise their right to engage in sex. It is important to understand that because the underlying act is constitutionally protected—it is merely the mens rea (the state of mind) of the person that can be punished by the state. If the sex is conducted for commerce, it is criminal. If the sex is for pleasure, then it is a protected right. When it comes to sex-work among consenting adults, it is wise to remember the words of George Orwell in his masterpiece 1984:

*“The only crime is Thought Crime”*

## The Historical Prohibition of Prostitution

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The sex industry in America has been in existence since before the inception of the nation, and by the 1800s more than 200 brothels were in operation across lower Manhattan alone. Although prostitution was technically illegal at that time under various vagrancy laws, the statutes generally went unenforced.

The sex industry was astoundingly prolific, but also staunchly reviled by evangelical Christian voters of the time. In 1873, Anthony Comstock established the New York Society for the Suppression of Vice. The institution was dedicated to improving and edifying the morality of the nation; and in 1873 the Society successfully lobbied for the Comstock Law, which made it illegal to deliver or transport “obscene, lewd, or lascivious” material across state lines (it also prevented the dissemination of information about birth control). And in 1875, Congress passed the Page Act, making it illegal to transport women into the nation for commercial sex-work.

The prominence of the community brothel began losing its eminence in mainstream American society by the beginning of the 20<sup>th</sup> century. In 1908, the Bureau of

Investigation (a precursor to the Federal Bureau of Investigations) was established to investigate allegations of rampant slavery within the sex industry. The Bureau would interview sex-workers and attempt to determine whether they had been trafficked, or otherwise coerced into the sex industry. And in 1910, the Mann Act criminalized the interstate transportation of women for “immoral purposes.”

Prior to World War I, very few state or local laws criminalized prostitution in any capacity. Then, during World War I, the U.S. government instituted the Chamberlain-Kain Act of 1918, a policy that authorized the military to arrest any woman within five miles of a military encampment suspected of prostitution. If that woman was found to be infected with venereal disease, the woman could be quarantined and committed to medical treatment until cured. By the end of the war, more than 15,000 women had been imprisoned under that policy. Federal restrictions of prostitution became increasingly heavy-handed throughout the first half of the 20<sup>th</sup> century; and by the late 1940s, sex-work had largely been repressed to the criminal underground. However, the sexual revolution of the 1960s and the advent of widely available birth control pharmaceuticals led to a resurgence of the American sex industry. By 1970, Nevada began regulating houses of prostitution, and the state eventually legalized prostitution in 10 of its 17 counties. Today, the legal sex industry is thriving in Nevada, and the illegal industry is thriving everywhere else—all totaled, experts estimate that the national sex industry accounts for \$100-150 billion in revenue annually.

It is important to understand the rights and obligations that are associated with soliciting sexual services. In the United States— sex is a constitutional right! And commercial sex is perfectly legal in some jurisdictions. While prostitution remains illegal outside of Nevada, there is nothing constraining a sex-worker from traveling outside the state for reasons not related to prostitution. see *Mortensen v. United States*, 322 U.S. 369 (1944). And the Fourteenth Amendment of the U.S. Constitution always protects the substantive right of consenting adults to engage in sexual intercourse however they please.

Do not let the government violate your rights! If you or someone you know has been charged with prostitution or soliciting a prostitute, call ***Wasatch Defense Lawyers*** ***immediately.***