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QUEERING THE LANDSCAPE: DECRIMINALIZING CONSENT AND REMAPPING THE PERMISSIBLE GEOGRAPHIES OF INTIMACY

EMILY YOST*

Transgender bodies are subject to heightened scrutiny, surveillance, and policing, particularly those of trans or gender non-conforming (“TGNC”)¹ people of color. Trans people of color face increasingly high rates of discrimination in seeking housing and employment leading many trans individuals to turn to sex work² or engage in survival sex.³

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¹ Transgender” refers to individuals who identify with a gender other than that which they were assigned at birth, whereas “cisgender” refers to those whose gender identity aligns with their assigned sex at birth. While some trans individuals identify within the gender binary, others do not. See *The Language of Gender*, GENDER SPECTRUM, <https://www.genderspectrum.org/the-language-of-gender/> (last visited May 5, 2019). For the purpose of this argument, I will not address “transgender” and “gender non-conforming” individuals as distinct entities. Though it is important to note that these are often simultaneously-held identities by gender-expansive folks who implicitly reject binary conceptions of gender, regardless of how individuals actually identify, many transgender people are societally perceived to be inherently “gender non-conforming,” and thus are subject to heightened scrutiny and surveillance on the basis of their gender presentation and expression. For some transgender individuals, “passing” as cisgender is a desirable identity goal, in part because of the protection the presumption of cis-ness carries. This is particularly true for some trans women who engage in sex work, who are more likely to be targets for transphobic violence on the basis of their visibility, gender identities and gender presentation. Discussed, *infra* Part IV-B.

² Carol Leigh, a sex worker and advocate for sex workers’ rights, is first credited with coining the term “sex work” - in response to her feminist contemporaries’ use of the term “sex use industry” in the late 1970s. While anti-trafficking rhetoricians continue to use the term “prostitution,” the use of the term sex work contextualizes discussions by centering the commercial, capitalist nature of the labor being performed. Carol Leigh, *Inventing Sex Work*, in WHORES AND OTHER FEMINISTS (ed. Jill Nagle, 1997); see ERIN FITZGERALD ET AL., MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE, NAT’L CTR. TRANSGENDER EQUALITY 5 (2015), http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf. A study of sex workers found that 24.4% of transgender people of color turned to sex work as a means of financially supporting themselves, when only 6.3% of white transgender participants reported engaging in sex work. *Id.* at 14.

³ Survival sex is “exchanging one’s body for basic subsistence needs, including clothing, food, and shelter.” Mike Marini, *Exchanging Sex for Survival*, THE ATLANTIC (June 26, 2014), <https://www.theatlantic.com/health/archive/2014/06/exchanging-sex-for-survival/371822/>. Many survival sex workers are trans women of color who have experienced discrimination when seeking housing and employment. Tamika Spellman, *Why Decriminalizing Sex Work*

With the passing of the Fight Online Sex Trafficking Act of 2017 (“FOSTA”)⁴ which effectively banned digital expressions of sexuality coupled by the rapid gentrification of urban spaces, TGNC sex workers are being simultaneously physically and virtually displaced, exposing this already vulnerable population to additional physical harm.⁵ In the one year since the passage of FOSTA, Maryland has mourned the senseless murders of two Black⁶ trans women.⁷ For these reasons, while this comment will analyze the adverse effects that provisions of the Maryland Criminal Code and current Baltimore City practices and policies carry for the lesbian, gay, bisexual, transgender, queer (“LGBTQIA+”) and sex worker communities, the discussion will focus primarily on the disparate harms exacted upon the trans, gender non-conforming, and nonbinary population, particularly the TGNC sex worker community.

INTRODUCTION

Maryland Code criminalizes consensual sodomy in blatant contradiction to the Supreme Court’s 2003 ruling in *Lawrence v. Texas*,⁸ which invalidated statutes criminalizing private, consensual sex nationwide.⁹ The crime of “unnatural or perverted sexual practices,” encompassing all oral and anal acts, further affiliates carceral punishment with consensual intimacy.¹⁰ In Baltimore City, the police

Is Central for Gender Equity, Public Health, and Racial Justice, MEDIUM (Nov. 14, 2018) <https://medium.com/seventhirty-dc/why-decriminalizing-sex-work-is-central-for-gender-equity-public-health-and-racial-justice-63549237e36b>. See also MELISSA GIRA GRANT, PLAYING THE WHORE 116 (2010) (noting how most women experiencing incarceration for charges related to prostitution are in jail for “survival work,” or “the crime of refusing poverty, for hustling or trading sex”).

⁴ Colloquially referred to as “SESTA/FOSTA,” for its twin bill, the Stop Enabling Sex Trafficking Act of 2017. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2018) (enacted).

⁵ See *infra* Part IV-B.

⁶ “Black” will be intentionally capitalized throughout this article, in contrast to other racial identities, to highlight the intersecting identities encompassed by Blackness. As Baltimore is a majority Black city, the influx of white gentrifiers into Baltimore has racialized ramifications for their Black TGNC neighbors.

⁷ Ashanti Carmon (2019) and Tydie Dansbury (2018). While their deaths are still being investigated by police, those in community with Ms. Carmon suggest she was the victim of transphobic and anti-sex work animus due to the fact that she was murdered in an area frequented by trans sex workers. Stephen A. Crockett Jr., #SayHerName: Ashanti Carmon, Transgender Woman, Shot and Killed in Maryland, (April 1, 2019 5:30 pm) THE ROOT, <https://www.the-root.com/sayhername-ashanti-carmon-transgender-woman-shot-an-1833723319>.

⁸ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding the “Due Process clause gives individuals the full right to engage in private sexual practices without intervention of the government”).

⁹ See *infra* Parts II-C, III-B.

¹⁰ MD. CODE ANN., CRIM. LAW § 3-322; see *infra* Part III-B.

have been censured by federal government for their pattern and practice of abusing sexually and gender diverse civilians.¹¹ In an increasingly transphobic¹² post-FOSTA political landscape, where expressions of sexuality and gender identity are being virtually policed,¹³ the retention of these unconstitutional statutes and policies serve no legitimate, legal function. Beyond instilling a sense of “otherness,” states’ sodomy statutes might be used to justify unwarranted surveillance of those already subject to heightened policing, particularly the LGBTQIA+ and sex worker communities.¹⁴ Absent a complete repeal of the sodomy and “unnatural or perverse sexual practices” statutes, Maryland’s Criminal Code will disparately impact the queer community, specifically TGNC individuals whose mere existence is often perceived to be “unnatural.”¹⁵ In addition to repealing these provisions and re-enacting with amendments all other portions of the criminal code referring to sodomy as an initial measure of solidarity with the LGBTQIA+ community, this comment argues that the Maryland legislature, in conjunction with grassroots organizations, should coordinate the employment of extra-legislative remedial measures to prevent future abuse.¹⁶

Part II of this paper will lay out the evolution of privacy rights and gradual decriminalization of sexuality in America as reflected by judicial decisions.¹⁷ Part III of this paper will focus on Maryland’s current legislative landscape and the impact of statutory constructions on our conception of gender, sexuality, and victimhood.¹⁸ Part IV will examine the City of Baltimore’s problematic relationship with local TGNC and sex worker communities and the current crisis arising from the simultaneous physical gentrification of Northern Baltimore and virtual gentrification of digital platforms.¹⁹ Part V will look towards other

¹¹ See *infra* Part IV-A.

¹² *Transphobia* is the “fear, hatred, disbelief, or mistrust of people who are transgender, thought to be transgender, or whose gender expression doesn’t conform to traditional gender roles.” *What’s Transphobia*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities/whats-transphobia> (last visited May 6, 2019).

¹³ See *infra* Part IV.

¹⁴ See *id.*

¹⁵ “For a long time hermaphrodites were criminals, or crime’s offspring, since the anatomical disposition, their very being confounded the law that distinguished the sexes and prescribed their union.” MICHAEL FOUCAULT, *Repressive Hypothesis*, in *THE HISTORY OF SEXUALITY VOL. 1: AN INTRODUCTION* 38 (Robert Hurley trans., Vintage Books 2d ed. 1990) (1976). See *infra* Part III.

¹⁶ See *infra* Part V.

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part IV.

jurisdictions' models of decriminalizing consent and offer recommendations for legislative reform and policy measures to remedy the intersecting violence exacted by the community's transphobia, racism, and anti-sex work animus.²⁰

II. PRIVATE PARTS: FROM *WILLIAMS* TO *LAWRENCE*: STATE AND FEDERAL REGULATION OF SEXUALITY

The American legal system has long recognized the individual right to reproductive sexual autonomy as a privilege attaching to straight marriage²¹ and heteronormativity²² tied up within the physical boundaries of property.²³ Over the past half-century, these seminal cases have provided a roadmap for redefining the right to be intimate absent governmental or regulatory interference, regardless of sexual orientation or marital status; however, legal protections for sexual privacy are still largely site-specific.²⁴ While the extent to which public performances of intimacy and displays of sexuality beyond the bedroom may be constitutionally protected remains unclear, the evolving judicial recognition of sexual autonomy seemingly parallels what can and cannot be practically policed.²⁵ Given the interplay between gender identity and sexuality,²⁶ absent a definitive Supreme Court ruling opening up the umbrella of sexual privacy rights, individuals whose gender non-conformity is

²⁰ See *infra* Part V.

²¹ *Perez v. Sharp*, 32 Cal. 2d 711, 713–15 (Cal. 1948) (affirming heterosexual couples' right to choose their marital partners).

²² *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986) (permitting the criminalization of sodomy for same-sex couples only, while acknowledging the right of heterosexual couples to engage in oral or anal sex).

²³ *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (identifying the “sacred precincts” of the marital bedroom and “penumbras” of privacy within one’s own home as spaces protected from government interference).

²⁴ The term “site-specific,” though typically used to describe location-based sculpture and installation art, here refers to the geography of permissible intimacy. See generally *Griswold*, 381 U.S. 479; *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁵ Logically, absent surveillance, private, consensual conduct between adults cannot be conveniently regulated. See *Lawrence*, 539 U.S. at 578; *infra* Part IV-A.

²⁶ Gender identity, or an individual’s “deeply held internal sense of self,” or gender alignment is not to be confused with sexual orientation – the gender(s) one is attracted to sexually, or romantically. See *The Language of Gender*, *supra* note 1. While gender identity and sexual orientation are certainly distinct, these aspects of individuals’ identities often inform one another. *Id.* Genderfluidity and the act of transitioning from one gender expression or gender identity to another may accompany a shift in an individual’s self-identified sexual orientation, or in the sexual orientation of their partners, for instance. *Id.*

visible, then, are likely to be subject to heightened surveillance, scrutiny, and violence on the basis of their “public” identities.²⁷

Prior to the *Lawrence* decision, thirty-six states had already repealed their sodomy statutes judicially or legislatively, though following the ruling many states clung to their sodomy laws,²⁸ citing “traditional values” as a basis for criminalizing consent.²⁹ In 1998, the ACLU took a creative approach to repealing Maryland’s sodomy statute, handcrafting an ideal class of impact litigants: a group of lawyers who successfully brought an action against the State, challenging the constitutionality of the sodomy statute.³⁰ Following *Lawrence*, Maryland did not immediately address the possibility of reforming its criminal code, but instead waited seven years before attempting to amend the sodomy statute.³¹ After the House of Delegates’ failure to repeal the offending statutes in 2010, no additional remedial action was taken for another eight years,³² making Maryland one of the last states to retain inefficient and unconstitutional sodomy laws.³³ Recent attempts at the state-level to reform the residual criminalization of queerness have been met with minimal success.³⁴

²⁷ See *infra* Part IV-A for a discussion of the Baltimore Police Department’s targeting of TGNC individuals and the Consent Decree’s requirement that the Baltimore Police cease their practice of exposing gender non-conforming individuals’ genitals to arbitrarily “assign” a gender to them.

²⁸ See ALA. CODE § 13A-6-63 (1975); FLA. STAT. § 800.02 (1993); GA CODE ANN. § 16-6-2 (2011); IDAHO CODE ANN. § 18-6605 (2019); KAN. STAT. ANN. § 21-5504 (2011); KY. REV. STAT. § 510.100 (1975); LA. STAT. ANN. § 14:89 (1942); MD. CODE ANN., CRIM. LAW § 3-322 (2002); MASS. GEN. LAWS ch. 272, §§ 34, 35 (2018); MICH. COMP. LAWS §§ 750.158, 750.338 (1952); MINN. STAT. § 609.293 (1984); MISS. CODE ANN. § 97-29-59 (2013); N.C. GEN. STAT. § 14-177 (1994); OKLA. STAT. 21, § 886 (2007); S.C. CODE ANN. § 16-15-120 (2017); TEX. PENAL CODE ANN. § 21.06 (1973); UTAH CODE ANN. § 76-5-403 (1953).

²⁹ John Riley, *Louisiana Lawmakers Could Kill Anti-Bestiality Bill in Order to Preserve Anti-Gay Sodomy Laws*, METRO WEEKLY (Apr. 27, 2018), <https://www.metroweekly.com/2018/04/louisiana-lawmakers-could-kill-anti-bestiality-bill-in-order-to-preserve-anti-gay-sodomy-laws/> (“This bill was written because the far left wants [sic] to undermine our other laws that protect family and traditional values that the people of Louisiana hold dear,” Sen. Ryan Gatti (R-Bossier City) said to justify his opposition to the bill.”).

³⁰ *Williams v. State*, No. 98036031/CC-1059, 1998 Md. Cir. Ct. LEXIS 2, at *1 (Balt. City Cir. Ct. Oct. 15, 1998); see Janet M. LaRue & Rory K. Nugent, *Williams v. State, The Constitutionality and Necessity of Sodomy Laws*, 29 U. BALT. L.F. 6, 6–7 (1999).

³¹ H.B. 1491, 2010 Leg., 427th Sess. (Md. 2010).

³² H.B. 1134, 2018 Leg., 438th Sess. (Md. 2018); S.B. 800, 2018 Leg., 438th Sess. (Md. 2018); see *infra* Part III-A.

³³ See *infra* Part III-A.

³⁴ See *id.*

A. A Brief History of Sodomy

The criminalization of sodomy originates in biblical moralism, drawing linguistic roots prior to the thirteenth century.³⁵ Though considered to be “too disgusting to be defined,”³⁶ and a “detestable, abominable sin . . . not to be named,”³⁷ Black’s Law Dictionary dares to identify sodomy as “oral or anal copulation between humans, esp[ecially] those of the same sex,”³⁸ or, in the alternate, “oral or anal copulation between a human and an animal; bestiality.”³⁹ Early American judiciaries adopted the English common law definition, filling the regulatory gaps of then-current criminal codes, manufacturing grounds to prosecute nonconsensual conduct on behalf of individuals not able to bring suit themselves.⁴⁰ While the common law construction of sodomy targeted otherwise predatory, nonconsensual sexual acts—namely rape, assault, child abuse and molestation⁴¹—around the turn of the century, American sodomy statutes were broadened to include all forms of oral sex, consensual or otherwise.⁴²

The gradual decriminalization of consensual, non-procreative sex began at a state level in the 1950s in response to the American Law Institute’s 1955 exclusion of sodomy from the Model Penal Code.⁴³ The decriminalization trend carried into the 1970s, influenced by the Supreme Court’s expansive embrace of privacy rights relating to sexual

³⁵ “Sodomy” is traced to middle English, from Anglo-French *sodomie*, from the medieval Latin *sodomia*, or *peccatum Sodomiticum*, referring to the reported homosexuality reported in Genesis 19:5 as occurring in Sodom, an ancient Palestinian town. *Sodomy*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/us/sodomy> (last visited May 5, 2019).

³⁶ *Davis v. State*, 3 H. & J. 154, 157 (Md. 1810) (“[T]he crime of sodomy is too well known to be misunderstood, and too disgusting to be defined, farther than by merely naming it.”).

³⁷ *Id.* (recognizing sodomy as an act of defiance, committed “against the peace, government, and dignity of the state . . . [and] to the great displeasure of Almighty God, and disgrace of all human kind . . .”).

³⁸ *Sodomy*, BLACK’S LAW DICTIONARY (10th ed. 2014) (citing HENRY FINCH, LAW, OR A DISCOURSE THEREOF 219 (1759)) (“Sodomitry is a carnal copulation against nature; to wit, of man or woman in the same sex, or of either of them with beasts.”).

³⁹ *Id.* (noting it is synonymous with “crimes against nature” or “unnatural offenses”).

⁴⁰ Brief for Cato Institute as Amicus Curiae Supporting Petitioners at 11, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

⁴¹ *Id.* at 9–10 (citing JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 49 (1847); ROBERT DESTY, A COMPENDIUM OF AMERICAN CRIMINAL LAW 143 (1882); JOHN WILDER MAY, THE LAW OF CRIMES 193–95 (3d ed. 1905)) (defining sodomy as “penetration by a male penis inside the rectum of an animal, a woman or girl, or another man or boy”).

⁴² *Id.* at 12 (citing William Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1016–32 (1997)).

⁴³ *Id.* at 15 n.24.

intimacy, but trickled down to a halt in the 1980s.⁴⁴ Then in 1986, amid the peak of America's ongoing HIV/AIDS crisis,⁴⁵ the *Bowers* Court upheld the constitutionality of a Georgia statute conferring the right to engage in oral or anal sex exclusively to heterosexual couples, while criminalizing same-sex conduct.⁴⁶ Taking to the courts, gay rights activists challenged their states' remaining sodomy laws, leading to the eventual repeal of laws seeking to regulate sexuality in Kentucky, Tennessee, Montana, Georgia, and Minnesota.⁴⁷ It was not until 2003 that the Supreme Court struck down a Texas statute criminalizing oral sex for unconstitutionally infringing upon the privacy rights of consenting adults, thereby invalidating sodomy statutes nationwide.⁴⁸ Following this ruling, Montana⁴⁹ and Virginia⁵⁰ complied, redacting their then-rendered unconstitutional laws while other states, including Maryland, have yet to repeal these problematic criminal provisions.⁵¹

B. *The Pre-Lawrence Era: Williams v. State*

Shortly following *Bowers*, Maryland's Court of Appeals decriminalized non-procreative, private consensual sexual encounters for heterosexual adults.⁵² In *Schochet*,⁵³ the Court concluded that Maryland's unnatural sexual practices statute could not be reasonably read to criminalize consensual, noncommercial heterosexual intimacy occurring within the home.⁵⁴ A decade following the decision, a plaintiff

⁴⁴ *Id.* at 16–17.

⁴⁵ See generally Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN'S L.J. 363 (2013) (studying the “panicked,” regressive legislation punishing both the intentional and unintentional transmission of the human immunodeficiency virus).

⁴⁶ *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986).

⁴⁷ *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. 1996); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Powell v. State*, 510 S.E. 2d 18 (Ga. 1998); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001).

⁴⁸ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁴⁹ An Act Revising Laws Relating to Deviate Sexual Conduct; Revising the Definition of “Deviate Sexual Relations”, S.B. 107, 63rd Leg. Sess. (Mont. 2013).

⁵⁰ *Martin v. Zihlerl*, 269 Va. 35 (2005) (striking down Virginia's ban on extra-marital sex post-*Lawrence*); *MacDonald v. Moose*, 710 F.3d 154 (2013) (invalidating Virginia's sodomy statute as facially unconstitutional).

⁵¹ Associated Press, *12 States Still Ban Sodomy a Decade After Court Ruling*, USA TODAY (Apr. 21, 2014, 6:42 PM), <https://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/>; see *infra* Part III.

⁵² *Schochet v. State*, 320 Md. 714 (1990).

⁵³ *Id.*

⁵⁴ *Id.* at 731–32 (distinguishing the “unnatural sexual practices” statute from the sodomy statute).

class of attorneys barred in Maryland challenged the constitutionality of Maryland's lingering sodomy statute.⁵⁵ The plaintiffs cited their particularized exposure to potential future harm and discrimination as adults of varying gender identities and sexual orientations engaging in consensual, non-procreative sex acts.⁵⁶ In an unpublished decision, presiding District Court Judge Richard Rombro invalidated the sodomy statute, ruling it facially unconstitutional.⁵⁷ Despite this finding, no conclusive remedial action has been taken judicially or legislatively in the state since 1999,⁵⁸ when *Williams* set the stage for the national shift towards recognizing consensual, sexual intimacy proffered by *Lawrence*.⁵⁹

C. Fifty Shades of Privacy: Lawrence v. Texas, and Constitutional Limitations on Regulating Intimacy

Four years after Maryland's sodomy statute was declared unconstitutional, the Supreme Court revisited the subject of state sodomy laws, reversing *Bowers*⁶⁰ and narrowly determining that consensual, noncommercial sexual conduct occurring within the protections of the home is beyond the scope of state police powers and not subject to government regulation.⁶¹ Drawing from well-established privacy protections against State surveillance and policing which attaches to domestic intimacy,⁶² the *Lawrence* Court concluded that enforcing the Texas sodomy statute would inevitably and impermissibly violate individuals' Due Process rights.⁶³ Building upon a legal foundation centering long-recognized fundamental values of marital privacy, homeownership, and individual autonomy, *Lawrence* contours

⁵⁵ *Williams v. State*, No. 98036031/CC-1059, 1998 Md. Cir. Ct. LEXIS 2, at *1 (Balt. City Cir. Ct. Oct. 15, 1998). In *Williams*, a plaintiff class of gay and heterosexual Maryland attorneys who openly stated that they enjoyed engaging in oral sex challenged the state's sodomy and unnatural sexual practices statute, presenting various claims to ensure they as a group, would have standing, namely: that their livelihoods as attorneys of various sexual orientations were threatened by the potential of criminal charges being filed against them for otherwise consensual adult encounters. *Id.* at *2–3.

⁵⁶ *Id.*

⁵⁷ *Id.* at *22–23.

⁵⁸ See H.B. 1491, 2010 Leg., 427th Sess. (Md. 2010); see also *infra* Part III-A.

⁵⁹ See generally LaRue & Nugent, *supra* note 30 (examining Maryland's sodomy laws pre-*Lawrence*).

⁶⁰ 478 U.S. 186, 195–96 (1986).

⁶¹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁶² See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (recognizing the “notion of privacy surrounding the marriage relationship”).

⁶³ *Lawrence*, 539 U.S. at 578 (finding “no legitimate state interest which can justify its intrusion into the personal and private life of the individual”).

the landscape in which intimacy can occur absent policing by starkly contrasting benign domestic sex with “public conduct or prostitution.”⁶⁴ The Court’s holding did not extend itself to consider the scope of consensual intimacy occurring beyond already recognized penumbras of privacy or ponder the possibility of protecting non-public or indoor commercial intercourse.⁶⁵ However, the holding implicitly rendered state statutes criminalizing “unnatural” or “perverse sexual practices” unconstitutional as-applied in virtually every situation not already subject to criminal penalty by other means.⁶⁶

With this decision, the Supreme Court put states on notice that they could no longer legally target individuals on the basis of the intimate sexual acts they engage in with other adults.⁶⁷ At the time of the ruling, only fourteen states still retained sodomy statutes.⁶⁸ Though not explicit, the Supreme Court effectively rendered moralistic determinations of what sexual acts are “unnatural,” legally indistinct.⁶⁹ The Due Process grounds upon which the nation’s sodomy statutes were invalidated have been generously applied to other similar statutory provisions criminalizing consensual, sexual activities.⁷⁰ Despite drawing distinctions between public/commercial and private/non-commercial intercourse, the Court’s embrace of adult sexual autonomy and broad construction of privacy provides a legal foundation for advocates for widespread decriminalization of sexuality and consensual, non-public sexual commerce.⁷¹

⁶⁴ *Id.*; see *Griswold*, 381 U.S. at 485–86 (specifying the “marital bedroom[]” as a physical space beyond governmental surveillance and regulation); P. Landon Perkinson, *Sexual Privacy After Lawrence v. Texas*, 8 GEO. J. GENDER & L. 203, 208 (2007).

⁶⁵ *Lawrence*, 539 U.S. at 577–79.

⁶⁶ *Id.* at 578 (stating that “the State cannot demean . . . or control . . . by making their private sexual conduct a crime”).

⁶⁷ See *id.*

⁶⁸ Tim Murphy, *The Unconstitutional Anti-Gay Law That Just Won’t Die*, MOTHER JONES (Apr. 13, 2011), <https://www.motherjones.com/politics/2011/04/lawrence-texas-homosexual-conduct-statute/>; Connor Simpson, *Anti-Sodomy Law Erased in Virginia, but Not in 13 Other States*, THE ATLANTIC (Mar. 13, 2013), <https://www.theatlantic.com/national/archive/2013/03/anti-sodomy-law-virginia/317430/>.

⁶⁹ *Lawrence*, 539 U.S. at 577–79.

⁷⁰ See, e.g., *State v. Limon*, 280 Kan. 275, 291, 306–07 (2005) (holding that the “Romeo and Juliet” laws which resulted in more severe sentencing requirements for same-sex minors consenting to sexual acts is unconstitutional on Equal Protection grounds).

⁷¹ See *infra* Part V-B.

III. CRIMINALIZING OTHERNESS: THE SOCIOPOLITICAL IMPLICATIONS OF POLICING CONSENSUAL CONDUCT

Despite the oft-promised separation of church and state, the interests historically represented by the legal system reflect a singular perspective of morality: those of whiteness, heterosexuality, maleness, and Christian values.⁷² The default to cisgendered,⁷³ hetero-masculinity is mirrored in the ubiquitous use of gendered language in statutory constructions, or in the alternative, language which presumes gender-conformity.⁷⁴ Through the use of gender essentialist language and the criminalization of queer sex,⁷⁵ the State targets those “others” deemed undeserving of the guarantees of privacy, liberty, free exercise, equal protection, and due process, subjecting its sexually and gender diverse populations to unconstitutional policing.⁷⁶ By retaining statutory language tainted with gendered assumptions and narrowly construed conceptions of sexuality, Maryland’s laws render its gender diverse citizens less deserving of protection.

A. *Recent Attempts at Legislative Reform in Maryland*

In the wake of the *Lawrence* decision, the Maryland House of Delegates sought to reconstruct the sodomy and unnatural practices statutes as an alternative to striking the laws in their entirety.⁷⁷ Instead of outright repeal, the proposed revisions created a narrow exception “for private consensual noncommercial sexual activity.”⁷⁸ The bill would have decriminalized “noncommercial act[s] of sodomy that take place between consenting adults in private,”⁷⁹ ensuring that the crime of “perverse” sexual practices would “not apply to a noncommercial

⁷² See Letter from Thomas Jefferson, to Danbury Baptist Association (Jan. 1, 1802) (on file with Library of Congress). This letter is credited as the first time the phrase “separation of church and state” appeared. *Id.* See also Mokhtar Ben Barka, *The Christian Nation Debate and the U.S. Supreme Court*, 6 EUROPEAN K. AM. STUD. 1 (2011) (examining the legacy of the “church-state battle” in the United States).

⁷³ “Cisgender” refers to someone whose gender identity aligns with their assigned sex at birth. *The Language of Gender*, *supra* note 1.

⁷⁴ See *infra* Part III-B.

⁷⁵ Hereinafter “consensual activity” or “consensual sexual activity.” For the sake of narrowing the scope of this article, I do not address Maryland’s statutory rape provisions which render minors legally incapable of consenting to sexual acts with adults.

⁷⁶ See *infra* Part III-B.

⁷⁷ H.B. 1491, 2010 Leg., 427th Sess. (Md. 2010).

⁷⁸ *Id.*

⁷⁹ *Id.*

sexual act,” occurring under the blanket of privacy and consent.⁸⁰ These revisions, however, failed to pass scrutiny after the bill’s assignment to the House Judiciary Committee.⁸¹

In the 2018 legislative session, animal rights advocates lobbied for the repeal of § 3-321 and § 3-322 and a re-enactment of all statutes referring to “sodomy” with amendments narrowing the prohibited acts to solely criminalize human intercourse with animals.⁸² Severing consensual sex from bestiality, the proposed amendments also introduced new punishments for bestiality,⁸³ instituting compulsory registry for individuals violating this new statute.⁸⁴ When reviewed by the Senate Judicial Proceedings Committee, it was reported that in fiscal year 2017, there were sixty-three district court and forty-eight Circuit Court violations of the sodomy statute charged, resulting in only one individual being sentenced in Maryland’s Circuit Courts.⁸⁵ Similarly, the Judicial Proceedings Committee’s reading of proposed House Bill 1134 reported one hundred and seventy violations of the unnatural sexual practices statute filed in district courts and one hundred and six violations filed in circuit courts for fiscal year 2017, resulting in only two convictions in a circuit court.⁸⁶ These reports recognized that because “relatively few people are sentenced for sodomy and unnatural or perverted sexual practices,” repealing § 3-321 and § 3-322 in their entirety was both logical

⁸⁰ *Id.*

⁸¹ *House Bill 1491*, GEN. ASSEMBLY MARYLAND, <http://mgaleg.maryland.gov/webmga/frmMain.aspx?tab=subject3&ys=2010rs/billfile/hb1491.htm> (last visited May 6, 2019).

⁸² H.B. 1134, 2018 Leg., 438th Sess. (Md. 2018); S.B. 800, 2018 Leg., 438th Sess. (Md. 2018).

⁸³ See Riley, *supra* note 28 (outlining how Louisiana considered passing S.B. 236, a bill backed by the Humane Society, which sought to create a new criminal punishment solely for animal sexual abuse that was legally distinct from the state’s retained (albeit unconstitutional) sodomy statute, which conflates both acts).

⁸⁴ H.B. 1134, 2018 Leg., 438th Sess. (Md. 2018); S.B. 800, 2018 Leg., 438th Sess. (Md. 2018). When questioned by members of the Maryland Senate Judicial Proceedings Committee about the broad scope of the suggested reform, rescinding every reference to “sodomy” in Maryland’s current criminal code, the animal rights activists speaking at the hearing quickly backtracked and clarified their primary concern was creating new criminal punishments for humans engaging in sexual acts with animals, not decriminalizing other problematic definitions of “sodomy.” *Hearing on S.B. 800*, GEN. ASSEMBLY MARYLAND, <http://mgahouse.maryland.gov/mga/play/92180d84-f3d9-460a-b9e5-19ac904759be/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c&playfrom=1760000> (last visited May 6, 2019).

⁸⁵ AMY A. DEVADAS, DEP’T LEG. SERV., S.B. 800 FISCAL AND POLICY NOTE 4 (Feb. 25, 2018), http://mgaleg.maryland.gov/2018RS/fnotes/bil_0000/sb0800.pdf (reporting that only 11 individuals were sentenced in Circuit Court following 108 violations of criminal provisions prohibiting “aggravated animal cruelty” throughout the state in FY17).

⁸⁶ AMY A. DEVADAS, DEP’T LEG. SERV., H.B. 1134 FISCAL AND POLICY NOTE 2 (Mar. 19, 2018), http://mgaleg.maryland.gov/2018RS/fnotes/bil_0004/hb1134.pdf.

and efficient.⁸⁷ Despite the persuasive data demonstrating the inefficiency of maintaining the sodomy and unnatural sexual practices statutes, the proposed bills failed to pass.⁸⁸

B. Gender Essentialism and the Law: Maryland's Current Criminal Code

There are currently references to “sodomy” in sixteen distinct provisions of Maryland’s annotated code.⁸⁹ Sodomy remains a felony punishable with a sentence of up to ten years⁹⁰ while all “unnatural or perverted sexual practices,” including non-procreative consensual sexual encounters, are punishable as a misdemeanor, subject to a \$1,000 fine and up to ten years incarceration.⁹¹ Both punishments remain distinct, contrary to the Maryland’s Court of Special Appeals conclusion that the unnatural sexual practices statute fully encompasses the sodomy statute, rendering its retention legally superfluous.⁹²

⁸⁷ DEVADAS, DEP’T LEG. SERV., S.B. 800 FISCAL AND POLICY NOTE, *supra* note 82, at 5.

⁸⁸ House Bill 1134 passed its third reading but Senate Bill 800 received an unfavorable report by the Judicial Proceedings Committee. *House Bill 1134*, GEN. ASSEMBLY MARYLAND, <http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=bill-page&stab=03&id=HB1134&tab=subject3&ys=2018rs> (last visited May 6, 2019).

⁸⁹ See MD. CODE ANN., ALCOHOLIC BEVERAGES § 3-604(c)(1)(i), (d)(1) (2019) (prohibiting performances that “simulate . . . sodomy” in establishments with liquor licenses and prohibiting media depicting sodomy); ALCOHOLIC BEVERAGES § 4-605(c)(1)(i), (d)(1) (2019); § 12-2102(5)(i)(1), (6)(i) (2019); MD. CODE ANN., CTS. & JUD. PROC. § 3-801(z)(5) (2019) (including sodomy within the definition of child molestation or exploitation); MD. CODE ANN., CRIM. LAW § 2-201(a)(4)(xi) (2019) (defining first degree murder as inclusive of murder committed “in the perpetration of or an attempt to perpetrate . . . sodomy”); CRIM. LAW §§ 3-321, 3-322; CRIM. LAW 3-602(a) (including “sodomy” within the definition of sexual abuse of a minor); § 3-604(a)(9) (including “sodomy” within the definition of sexual abuse of a vulnerable adult); § 11-203(a)(1)-(3) (2019) (including sodomy within a definition of “illicit sex”); MD. CODE ANN., CRIM. PROC. § 11-701(q)(1)(v) (2019) (including violations of the sodomy statute when committed with force or threat of force within the list of crimes qualifying for mandatory Tier III SORNA registry); MD. CODE ANN., FAM. LAW. § 5-701(z) (2019) (including “sodomy” in the definition of “sexual molestation or exploitation”).

⁹⁰ MD. CODE ANN., CRIM. LAW § 3-321 (2019).

⁹¹ CRIM. LAW. § 3-322. § 3-322(a)(1)-(3) prohibits a person from “tak[ing] the sexual organ of another or of an animal in the persons mouth; plac[ing] the person’s sexual organ in the mouth of another or of an animal; or commit[ting] another unnatural or perverted sexual practice with another or with an animal.” *Id.*

⁹² See *Blake v. State*, 210 Md. 459, 464 (1956) (“[Sodomy] . . . is obviously an unnatural and perverted sexual practice.”); see also *Cherry v. State*, 18 Md. App. 252, 265, 241–42 (1973) (noting that “Blake also includes sodomy, independently proscribed [by statute], and carrying its own penalty as well as felony status, as falling within the definition of ‘unnatural or perverted sexual practice’” and holding that a statute proscribing procuring or soliciting for purposes of prostitution, lewdness or assignation is not unconstitutional for vagueness or overbreadth, in light of express statutory definition of term “prostitution” and “assignation” and in view of

Maryland's criminal code already penalizes non-consensual⁹³ "sexual acts," a term of art defined broadly to include all nonconsensual activities subsumed by the unnatural sexual practices and sodomy statutes, save bestiality.⁹⁴ Curiously, while the broad definition of "sexual acts" implicitly includes vaginal penetration,⁹⁵ vaginal *intercourse* is explicitly disassociated from all other nonconsensual sexual acts, defined under its own sub-heading.⁹⁶ "Intercourse" is never explicitly defined within the title, but since it is made distinct from penetration involving objects or other body parts, one can logically infer "intercourse" refers primarily to phallic penetration.⁹⁷ Though other nearby jurisdictions have abandoned the antiquated, common law distinction,⁹⁸ by creating an arbitrary boundary between nonconsensual vaginal intercourse

statutory definition of term "lewdness" as "any unnatural sexual practice" and the further explicit statutory definition of such phrase).

⁹³ See e.g., MD. CODE ANN., CRIM. LAW § 3-303(a)(1) (2019) ("A person may not . . . engage in vaginal intercourse with another by force, or the threat of force, without the consent of the other"). It is important to note that "consent in Maryland is not specifically defined." See *Consent Laws Maryland*, RAINN (Dec. 2017), https://apps.rainn.org/policy/policy-crime-definitions.cfm?state=Maryland&group=9&_ga=2.82860127.839098241.1557193194-1014384513.1557193194.

⁹⁴ CRIM. LAW § 3-301(d)(1). "Sexual acts" are defined to include anilingus, cunnilingus, fellatio, anal intercourse "including penetration, however slight, of the anus; or an act in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and that can be reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party." CRIM. LAW § 3-301(d)(1).

⁹⁵ § 3-301(d)(1)(v) (including the penetration of any "genital opening" with an object or body part within the definition of "sexual act").

⁹⁶ § 3-301(d)(2) (noting that "sexual act" does not include vaginal intercourse or "an act in which an object or part of an individual's body penetrates an individual's genital opening or anus for an accepted medical purpose"). Instead, vaginal intercourse is retained as legally distinct "genital copulation." § 3-301(g) ("Vaginal intercourse" means genital copulation, whether or not semen is emitted . . . [and] includes penetration, however slight, of the vagina.").

⁹⁷ Relying on the principle of *eiusdem generis* the distinguishing of intercourse from other forms of penetration within the definition of sexual acts and vaginal intercourse ("vaginal intercourse means genital copulation, whether or not semen is emitted") and subsequent references to ejaculation suggest the legislature's intent to refer solely to organic, phallic penetration. See CRIM. LAW § 3-301(g)(1). This inference is further supported by the arbitrary separation of anal intercourse ("including penetration, however slight of the anus") from "an act in which an object or part of an individual's body penetrates, however slightly, into another's . . . anus." § 3-301(d)(1)(iv)-(v).

⁹⁸ See, e.g., D.C. CODE ANN. § 22-3002(a) (2019) (eradicating the distinction between rape and other forms of sexual assault in favor of a singular "First degree sexual abuse" charge and rendering its criminal code sex-neutral). The District of Columbia also defines "sexual acts" to include oral, anal, or vaginal penetration by a penis, or anal or vaginal penetration "by a hand or finger, or any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." D.C. CODE § 22-3001(8) (2019); see also CRIM. LAW § 3-301(g) (defining vaginal intercourse).

and all other nonconsensual sexual acts while retaining both definitions with legally indistinct, parallel punishments, Maryland's legislature demonstrates its refusal to acknowledge gender divergence.⁹⁹

The segregation of vaginal intercourse, or “genital copulation” from all other forms of sexual encounters, many of which, by statutory definition involve the use of one or more individuals’ genitals, infers a hierarchical view of what “sex” is and is not¹⁰⁰—cementing into law presumptions of cissexism and heterosexuality.¹⁰¹ The othering of non-procreative sex is further supported by the statute’s differing evidentiary burden for rapes which defy the heterosexist presumption of phallic penetration,¹⁰² “in which an object or a part of an individual’s body penetrates, however slightly, into another individual’s genital opening or anus,” requiring additional corroborating proof that the act was carried out for the purposes of “sexual arousal or gratification, or for the abuse of either party.”¹⁰³ While these definitions do recognize the fluidity of potential abuse of power, allowing for either party—the penetrator or the penetrated—to be in violation of the statute, the State forces upon people without vaginas¹⁰⁴ or survivors of sexual assaults

⁹⁹ The possible underlying legislative intent behind excluding vaginal intercourse from the legal definition of a “sexual act” is further confused upon reviewing the definitions for first- and second-degree rape offenses. While the provision for “rape in the first degree” compartmentalizes vaginal intercourse and all other “sexual acts” into separate sub-sections ((a)(1)(i) and (a)(1)(ii)), the provision for “rape in the second degree” lumps together both definitions under one subheading. *Compare* CRIM. LAW § 3-303(a)(1)(i)-(ii), *with* CRIM. LAW § 3-304(a)(1). Further, neither provision offers distinct criminal punishments for either activity when committed in violation of the title. *Id.*

¹⁰⁰ As a former sex educator, I am of the mindset that every individual ought to be able to define what sex is and is not for themselves; however, as a law student, I understand the necessity of clear-cut definitions and guidelines with which to regulate. Narrowly defining “sex” or “intercourse” to be inclusive of only traditionally, procreative sexual acts or a predetermined range of acts or possible combinations of assigned or acquired body parts, however, is equally problematic.

¹⁰¹ “Cissexism” (a compound of “cisgender” and “sexism”) is prejudice or discrimination against transgender people. *Cissexism*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/cissexism> (last visited May 6, 2019). Maryland’s statute’s narrow definition of penile penetration as “intercourse” presumes both that people assigned male at birth (AMAB), or born with penises engage in penetrative anal or vaginal sex, and that this form of sexual intimacy is worthy of being legally distinct from all other, lesser, “sexual acts.” CRIM. LAW § 3-301(d)(1).

¹⁰² Regardless of the phallic narrative of penetrative sex as a “primary” sex act, the legal definition of sexual act presumes as a default that one or both parties in violation of the statute will have penises. CRIM. LAW § 3-301(d)(1) (“Sexual act means any of the following acts, regardless of whether semen is emitted.”) (emphasis added).

¹⁰³ CRIM. LAW § 3-301(d)(1)(v).

¹⁰⁴ Particularly alienating pre-operative or non-operative transgender women or transfeminine individuals.

that do not fit the legal definition of “intercourse”¹⁰⁵ the heavier burden of proving their victimhood.¹⁰⁶ By requiring distinct evidentiary burdens for rapes that do not meet the legal definition of “vaginal intercourse,” or mirror a narrow, cissexist conception of sex, Maryland’s current Criminal Code fails to protect transgender and cisgender survivors equally. Instead, the current law criminalizes queer sex as “unnatural,” conflating consensual sexual acts with nonconsensual violence.¹⁰⁷

IV. GENTRIFICATION, SURVEILLANCE, AND BALTIMORE’S FRAUGHT RELATIONSHIP WITH TRANS AND GENDER NON-CONFORMING SEX WORKERS

The retention of Maryland’s sodomy and unnatural sexual practices statutes reflects the national push towards criminalizing, or regulating out of existence, the transgender body.¹⁰⁸ Trans Marylanders are not immune to the rampant discrimination and violence that advocates call a “crisis of hate.”¹⁰⁹ Locally, the ongoing gentrification

¹⁰⁵ See CRIM. LAW § 3-301(e) (defining “sexual contact” as “intentional touching of the victim’s or actor’s genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party”).

¹⁰⁶ § 3-301(e).

¹⁰⁷ CRIM. LAW § 3-301(d).

¹⁰⁸ “One in three transgender people have experienced homelessness — including one in eight in the last year alone, putting them at risk of physical and sexual violence and being forced into sex work, according to the National Center for Transgender Equality. Seventy percent of transgender people who tried going to a shelter in the last year were kicked out for being transgender, were physically or sexually assaulted, or faced another form of mistreatment because of their gender identity, the center said.” Tracy Jan, *Proposed HUD Rule Would Strip Transgender Protections at Homeless Shelters*, WASH. POST (May 22, 2019) https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/?utm_term=.e590637dc147; Erica L. Green et al., *‘Transgender’ Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

¹⁰⁹ See EMILY WATERS ET AL., NAT’L COALITION ANTI-VIOLENCE PROGRAMS, A CRISIS OF HATE: A REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER HATE VIOLENCE HOMICIDES IN 2017 (2018), <https://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release.pdf>. In 2015, 58% of transgender Marylanders reported experiencing abusive mistreatment during interactions with police, 24% reported experiencing housing discrimination on the basis of their gender identities, 22% were living in poverty, and 11% had experienced homelessness in the past year. 28% of respondents reported experiencing homelessness in their lifetimes. N’TL CTR. FOR TRANSGENDER EQUALITY, 2015 TRANSGENDER SURVEY: MARYLAND STATE REPORT 1–2 (2017) (<https://transequality.org/sites/default/files/USTS%20MD%20State%20Report.pdf>)[hereinafter “MARYLAND STATE REPORT”].

of Baltimore City's Station North¹¹⁰ and the adverse effects of displacing the sex worker community historically connected to the neighborhood is nodded to by Jonathan Borofsky's Male/Female statue,¹¹¹ installed immediately outside of Baltimore's Penn Station in 2004, as part of a "revitalization" project to whitewash the area.¹¹² The architectural dissonance between Penn Station's traditional, historic structure, and the spliced, contemporary, gender-fluid body¹¹³ observing the space mirrors the conflict occurring within the surrounding city blocks.¹¹⁴ Voted "best eyesore in Baltimore," the infamous monolith is the first thing visitors entering the city by train see upon exiting the station.¹¹⁵ Watching over this major port of entry for interstate intercourse, the gender non-conforming icon offers a subtle tongue-in-cheek commentary on the shifting sociocultural landscape of the area, characterized by an influx of affluent younger suburban folks and increased police surveillance.¹¹⁶ The intersecting aluminum panels create an obscene, illuminated hermaphroditic body, highlighting the burden of visibility TGNC folks bear—often barring their safe access legal recourse and protection.¹¹⁷ Its looming presence on State property

¹¹⁰ See Larry Perl, *Station North and North Baltimore 'Moving Closer Together'*, BALT. SUN (Oct. 23, 2015, 9:36 AM), <https://www.baltimoresun.com/news/maryland/baltimore-city/north-baltimore/ph-ms-station-north-expansion-1021-20151023-story.html> (describing growing connections between north Baltimore and the city's Station North neighborhood).

¹¹¹ Jonathan Borofsky, *Male/Female*, BOROFSKY, <http://www.borofsky.com/index.php?album=malefemale> (last visited May 6, 2019) (describing the statute as being 52 feet tall, wrought from aluminum and LED lighting, and a permanent installation at Baltimore Penn Station).

¹¹² See generally ANTERO PIETILA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY (2010) (examining the long, racialized history of segregation and redlining in Baltimore).

¹¹³ Michael Farley, *The Much-Hated 'Male/Female' Statue at Penn Station is in Fact Baltimore's Kinkiest Artwork*, CITYPAPER (Feb. 5, 2015, 4:35 PM), <https://www.citypaper.com/blogs/noise/bcp-the-muchhated-malefemale-statue-at-penn-station-is-in-fact-baltimores-kinkiest-artwork-20150205-story.html>.

¹¹⁴ See Michael K. Lavers, *Baltimore Neighborhood's Gentrification Sparks Tension*, WASH. BLADE (Aug. 16, 2017, 2:23 PM), <https://www.washingtonblade.com/2017/08/16/baltimore-lgbt-neighborhoods-gentrification-sparks-tension/> (chronicling the conflict between a local LGBT community and an incoming gas station).

¹¹⁵ Edward Gunts, *Locals Have Come to Admire Male/Female Statue*, BALT. MAG. (Feb. 12, 2015), <https://www.baltimoremagazine.com/2015/2/12/locals-have-come-to-admire-male-female-statue>; Man Woman Statute (@manwomanstatue), TWITTER, <https://twitter.com/manwomanstatue> (last visited May 6, 2019) (describing itself in the bio as the "[T]he most hated public art in Charm City.>").

¹¹⁶ See Gunts, *supra* note 115 (describing people's changing attitude toward the Man/Woman statue); Lavers, *supra* note 114 (examining tensions related to changes in the Baltimore neighborhood).

¹¹⁷ "Black women and trans people of color are fighting for visibility in the legal system, particularly as victims of intimate partner and other forms of gendered violence." Samone Ijoma, *False Promises of Protection: Black Women, Trans People & the Struggle for Visibility as*

is suggestive of both a tacit acceptance and recognition of those workers who have been displaced by the area's state-sponsored gentrification.¹¹⁸

A. *Not in My Neighborhood: The IRL¹¹⁹ Gentrification of 'Station North' and Surrounding Neighborhoods Has Heightened Policing of TGNC Community Members*

Despite the pervasive undercurrent of transphilia¹²⁰ throughout Baltimore's arts scene, newcomers to the evolving neighborhoods surrounding Station North—an historic nexus for the LGBTQIA+ community and TGNC sex work—have been calling the police on their TGNC and sexing-working neighbors.¹²¹ As an influx of residents has increased demand for local small businesses, street work has continued in the now more heavily trafficked, illuminated neighborhoods surrounding Station North.¹²² Tensions have been high in these neighborhoods over the past several years, where settlers have failed to connect with the pre-existing communities into which they relocated.¹²³ Key players in this wave of gentrification, Maryland Institute College of Art and Johns Hopkins University, have openly encouraged increased

Victims of Intimate Partner and Gendered Violence, 18 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 225, 279 (2018); see Farley, *supra* note 113 (describing the symbolism of the Male/Female statute).

¹¹⁸ *Id.*; see Perl, *supra* note 110.

¹¹⁹ “IRL” or “in real life” is a colloquialism referring to this physical, tangible dimension, paralleling “URL” or digital space which can only be occupied virtually. Marko Ticak, *What Does Irl Mean?*, GRAMMARLY, <https://www.grammarly.com/blog/irl-meaning/> (last visited May 6, 2019).

¹²⁰ Transphilia is the opposite of transphobia. S.G. ASH, *FABULOUS FACTS: AN ENGAGING Q & A CELEBRATING THE EXTRAORDINARY, QUIRKY AND CLOSETED QUEER COMMUNITY* (2012).

¹²¹ Wesley Case, *Baltimore's LGBT Hub Expands Beyond Mount Vernon Amid Discussions of Inclusion, Competition*, BALT. SUN (Apr. 17, 2017, 6:32 AM), <https://www.baltimoresun.com/features/bs-ae-lgbt-neighborhoods-20170417-story.html>; Raye Weigel, *We Are Kinda Unbreakable*, CITY PAPER (Sept. 26, 2017, 5:06 PM), <https://www.citypaper.com/bcpnews-we-are-kinda-unbreakable-20170926-htmllstory.html> (discussing the outreach of the Transgender Action Group (TAG) which supports transgender sex workers in Baltimore with safe sex/hygiene kits and the reality of transgender sex workers in Baltimore). See also Lavers, *supra* note 114 (noting the “late night operations” which occur in the Charles North neighborhood where “sex workers frequently operate,” several of whom are trans women of color).

¹²² Lavers, *supra* note 114 (“[T]here’s enough automobile traffic and enough residences around that the people who are on the streets feel if they were to cry out, if they’re in real danger that somebody would call the police.”).

¹²³ Weigel, *supra* note 121 (discussing the impact of gentrification and the need to “educate folks who are moving into a community who don’t understand the street economy, who don’t understand anything about these people’s lives, who don’t even see them as human”).

police presence to protect their investments in rehabilitated properties in the area.¹²⁴

In a 2014 survey of Baltimore residents, researchers noted a clear racial divide in how community members reacted to the presence of sex workers in their neighborhoods.¹²⁵ Over the past decade, the predominantly white gentrifiers¹²⁶ have helped create a heightened police presence in these historically Black neighborhoods by reporting the mere presence of Black and brown TGNC neighbors suspected of engaging in sex work.¹²⁷ The combination of institutionalized gentrification and individuals' associations of Blackness and transness with criminalization has contributed to the violent displacement of the TGNC and sex worker communities historically connected to Baltimore's arts and entertainment district.¹²⁸

In response to increased community complaints about the presence of sex workers in their neighborhoods, the Baltimore City State Attorney's Office, in conjunction with a panel of community stakeholders, established the Specialized Pretrial Diversion Program ("SPDP") in August of 2009, an early resolution docket to which all prostitution charges are to be routed.¹²⁹

¹²⁴ *Id.* ("And with more gentrification also comes more police."). See Pamela Wood, *Maryland General Assembly Gives Final OK to Armed Johns Hopkins University Police Force*, BALT. SUN (Apr. 2, 2019, 6:40 PM), <https://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-hopkins-police-final-20190401-story.html>.

¹²⁵ "Findings show that one neighborhood is notably different from the others in that respondents consider prostitution less of a problem, are less likely to believe police should respond to prostitution, and are less likely to indicate that prostitution causes a nuisance or could lead to additional criminal behavior." Corey S. Shdaimah et al., *Neighborhood Assessment of Prostitution as a Pressing Social Problem and Appropriate Responses: Results of a Community Survey*, 25 CRIM. JUST. POL'Y REV. 275 (2014) (reporting the results of a community survey in a predominantly Black neighborhood, as compared to two predominantly white neighborhoods).

¹²⁶ Sarah Meehan, *Baltimore Among Nation's Most Gentrified Cities, Study Shows*, BALT. SUN (Mar. 20, 2019, 9:40 AM), <https://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-gentrification-study-20190319-story.html>; Weigel, *supra* note 121 (discussing the "divide between the white gay community and people of color in the trans community" and how neighborhood newcomers are entering "like ambassadors of white settler colonialism to displace the neighborhood").

¹²⁷ Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, THE ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/>; Lavers, *supra* note 114.

¹²⁸ Lavers, *supra* note 114; see also Farley, *supra* note 113 (explaining that in 2004, the area surrounding the sculpture was an entertainment district that contained a large population of queer sex workers).

¹²⁹ Née the "Specialized Prostitution Diversion Program," the program is theoretically available to all individuals charged with prostitution related crimes in Baltimore who has not been previously charged with a felony offense. Corey Shdaimah, *Taking a Stand in a Not-So-Perfect*

Here, individuals charged with crimes relating to street work would be given the opportunity to complete a 90-day therapeutic diversion program, after which their charges would be dropped.¹³⁰ This tone-shift¹³¹ is joined by the introduction of a sex trafficking statute in Maryland, which displaces the onus of criminality onto parties coercing, threatening, forcing or fraudulently compelling another to prostitute.¹³² The “problem-solving” court, hidden away out of sight and mind in the basement of the Eastern District Courthouse on North Avenue, has not been subject to organized observation and data tracking since 2011, when researchers compiled an initial report on the failures and successes of the program.¹³³ Though dated, the report reflects that of the 616 street working arrestees in 2010, the early resolution program was “successful” for only fifty-eight percent of participants, resulting in dismissed charges.¹³⁴ As a pre-requisite for dismissal, participants are required to successfully complete a 90 re-education program, after which their charges will be *null processed*, however, “formal written criteria for what constitutes successful completion do not exist.”¹³⁵ Though participation in the diversion program is not compulsory, eighty-five percent

World: What's a Critical Supporter of Problem-Solving Courts to Do, 10 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 89, 94–95 (2010).

¹³⁰ *Id.*

¹³¹ The 2014 Neighborhood survey, for instance, confirmed that Baltimore residents “indicate an association between prostitution and both addiction and poverty,” which “suggests the usefulness of hybrid programs that address underlying concerns rather than solely relying upon punitive responses.” Shdaimah, et al., *supra* note 125 at 293. While sex work is still illegal in Maryland, courts are increasingly recognizing that “a person charged with prostitution is arguably as much a victim as an offender.” Shdaimah, *supra* note 129 at 100; CRIM. L. § 11-306 (criminalizing prostitution as a misdemeanor punishable with up to one year of jail time, a \$500 fine, or both); CRIM. L. § 11-301 (c) (defining prostitution as “the performance of a sexual act, sexual contact, or vaginal intercourse for hire.”).

¹³² Previously, prosecutions were made under the human trafficking statute, which embedded a provision criminalizing sex trafficking, however this legislative session Maryland created a distinct provision specific to sex trafficking. CRIM. L § 11-303; H.B. 871, 2019 Leg., 439th Sess. (2019) (enacted April 18, 2019).

¹³³ Shdaimah, *supra* note 129; see generally Corey Shdaimah & Marie Bailey-Koch, “Can You Help With That Instead of Putting Me in Jail?”: Participant Insight on Baltimore City’s Specialized Prostitution Diversion Program, 35 JUST. SYS. J. 257 (2014).

¹³⁴ Shdaimah & Bailey-Koch, *supra* note 133 at 261 (reporting that “90 percent were female, 9 percent were transgender, and 1 percent were male,” failing to identify whether the 9% transgender population tracked identified as female, non-binary, or neither.).

¹³⁵ *Id.* at 260 (noting that “From our observations and interviews with program staff, it appears that clients who remained engaged or became reengaged with program staff, even if they periodically breach program requirements, were deemed successful. While there is sometimes disagreement on what constitutes a breach or (dis)engagement worthy of termination, these are resolved through staff discussion and consensus, sometimes with the input of the participant. At their ninety-day court hearing, the charges of successful participants are *null processed*, and they are then entitled to have the charges expunged from their record at a cost of \$30.”).

of sex working women surveyed reported they had consented to participate simply because they did not want to go to jail.¹³⁶

In 2011, funded by the Abell Foundation, TurnAround, Inc., a Maryland non-profit became the primary source for referrals from SPDP.¹³⁷ TurnAround's Anti-Trafficking program touts its dedication to "empowering survivors of sex trafficking and commercial sexual exploitation," by promoting a model of "diversion" that does not acknowledge the capacity of individuals to affirmatively choose to engage in sex work, requiring that participants to embrace their victimhood to graduate.¹³⁸ Over the 90 days, the program offers individual and group therapy and provides referrals to transitional housing, however, by neglecting to provide long-term treatment that addresses all of the intersecting stigmas leading individuals to engage in street work, the program fails to incorporate a holistic approach to healing and harm reduction.¹³⁹ Critics of the program have also pointed to the potentially inconvenient location,¹⁴⁰ the program's lack of trans fluency,¹⁴¹ and its potential adverse impact on Black street workers and "poor women, who already bear the brunt of societal ills, such as poverty, low-wage work, unemployment, and increased surveillance."¹⁴² Since the program's initiation, concerns have been raised about the

¹³⁶ *Id.* at 262 (reporting that of the 21 participants willing to speak about their experience, 18 expressed the desire to avoid jail time as their primary motivation for entering the program).

¹³⁷ Abell Foundation, *Abell Salutes TurnAround, for providing victims of sex trafficking with a new life*, <https://www.abell.org/publications/abell-salutes-turnaround-providing-victims-sex-trafficking-new-life> (last visited May 24, 2019).

¹³⁸ TurnAround, Inc., Human Trafficking, <https://turnaroundinc.org/educate/human-trafficking/> (last visited May 24, 2019); see also Shdaimah, *supra* note 129 at 104 (noting the tendency of diversion programs to focus on "moral redemption" over holistic, long-term supporting, suggesting that "[T]here would likely be little need for problem-solving courts if this country's mental health, drug treatment, and economy functioned better to meet the needs of its citizens.").

¹³⁹ "Our study shows a dire and ongoing need for material assistance, such as housing, health care, addiction treatment, mental health services, educational and vocational services, and documentation to qualify for services." Shdaimah & Bailey-Koch, *supra* note 133 at 267.

¹⁴⁰ While individuals charged with prostitution anywhere in Baltimore, are eligible "regardless of where they live," the anti-trafficking program takes place only out of TurnAround Inc.'s Baltimore City office, making access inconvenient for many individuals living outside the city limits. Shdaimah et al., *supra* note 125 at 275.

¹⁴¹ See Maire Bailey-Koch et al., *Finding the Right Fit: Disparities Between Cisgender and Transgender Women Arrested for Prostitution in Baltimore*, J. OF FORENSIC SOC. WORK, 5, 82–97 (2015) (identifying that, because transgender individuals often turn to sex work after experiencing discrimination, for diversionary programs to be useful, they must provide additional support to transgender participants, who will likely face additional stigmas and barriers to care following their program completion).

¹⁴² Shdaimah et al., *supra* note 125 at 102–103. See GRANT, *supra* note 3.

potential for the diversionary system to unintentionally increase community and police surveillance of those most vulnerable to attack.¹⁴³

In 2016, the Department of Justice initiated an investigation into the Baltimore Police Department (“BPD”) following complaints of corruption and a pattern and practice of constitutional violations.¹⁴⁴ The investigation culminated in the ordering a Consent Decree,¹⁴⁵ which indicated, *inter alia*, the department’s inability to safely interact with the LGBTQIA+ and sex worker communities, causing the Baltimore City Police Commissioner to reinstate the City’s LGBTQ Advisory Council.¹⁴⁶ This council sought to communicate feedback from targeted community members to the BPD Commissioner, acting as liaisons in “enact[ing] systemic and cultural change” within the police department.¹⁴⁷ The Consent Decree identified and delegated to the BPD distinct responsibilities and remedial measures to ensure no further constitutional violations occur, such as affirmative training on working with “vulnerable populations,” including LGBTQIA+ community members and sex workers.¹⁴⁸ Released in 2017, a 2015 state-wide survey confirmed that fifty-eight percent of transgender Marylanders had experienced police harassment, including verbal abuse, misgendering, physical and sexual assault, including being forced to sexually perform to avoid arrest.¹⁴⁹

In response, the 2017 Decree bars police from discriminating against people perceived to be gender non-conforming by misgendering

¹⁴³ GRANT, *supra* note 3 at 100; 102 (“As some of the most marginalized and stigmatized members of our society, persons who engage in prostitution are vulnerable to attacks, physical and otherwise, by clients, community members, and sometimes law enforcement. . . People engaged in “streetwalking,” . . . are the most vulnerable to harm, lowest paid, and most easily targeted for arrest and prosecution. . . I was concerned about whether the creation . . . would result in increased law enforcement and prosecution of prostitution. . . encourage[ing] communities to report and harass those engaged in prostitution more aggressively.”).

¹⁴⁴ U.S. DEP’T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), <https://www.justice.gov/opa/file/883366/download>.

¹⁴⁵ United States v. Police Dep’t. of Balt. City et al., No 1:17-cv-00099-JKB (Apr. 7, 2017) [hereinafter Consent Decree].

¹⁴⁶ *Id.* at 8, 89 (“BPD will ensure that it solicits input from its advisory boards and councils representing particular communities in Baltimore, such as the Youth Advisory Board and the LGBT Advisory Council, on policies, practices, training, engagement programs, and enforcement strategies that affect the communities those advisory groups represent.”).

¹⁴⁷ Steve Charing, *DOJ Report Spurs Police LGBT Advisory Council*, WASH. BLADE (Sept. 8, 2016, 6:00 AM), <https://www.washingtonblade.com/2016/09/08/doj-report-spurs-police-lgbt-advisory-council/>.

¹⁴⁸ Consent Decree, *supra* note 145, at 88–89.

¹⁴⁹ MARYLAND STATE REPORT, *supra* note 109 at 2.

them in their interactions or official police reports,¹⁵⁰ by requiring individuals display legal identification as corroborative proof of their gender identity,¹⁵¹ and conducting “searches of LGBT individuals for the purpose of viewing or assigning gender based on the person’s anatomy or genitalia.”¹⁵² Officers are additionally prohibited from “inquiring about intimate details of an individual’s sexual practices,” including what types of sexual acts in which individuals may be consensually engaging.¹⁵³ Despite the Decree’s explicit inclusion of provisions forbidding officers from asking inherently violative questions about TGNC individuals’ sexual habits or forcibly exposing their genitals, as of 2019 the BPD has not yet formally amended their policies to prohibit officers from continuing to engage in a pattern and practice of targeting gender non-conforming individuals for heightened scrutiny and policing.¹⁵⁴

This past year, in response to the dramatic increase in police targeting of TGNC sex workers in Northern Baltimore, where a high number of “concerned citizens” have been calling the police on their Black and brown neighbors,¹⁵⁵ FreeState Justice, a nonprofit serving the local LGBTQIA+ community, secured a grant to organize “Community Healing and Police Accountability,” a mediation series facilitated by Community Mediation Maryland.¹⁵⁶ The mediation series sought to resolve tensions between the individuals gentrifying traditionally Black, brown, working-class, and queer neighborhoods and to educate the BPD officers serving the affected communities to mitigate the ongoing violence directed towards Northern Baltimore’s TGNC community, particularly local trans women of color.¹⁵⁷ Invited to the table were residents of Northern Baltimore, employees of BPD stationed in those

¹⁵⁰ *Id.* at 31.

¹⁵¹ *Id.*

¹⁵² *Id.* at 20.

¹⁵³ *Id.* at 32.

¹⁵⁴ U.S. DEP’T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 144, at 123 (discussing allegations of “mistreatment” of transgender individuals by BPD officers, reflecting “underlying unlawful gender bias”). *See also*, N’TL CTR. FOR TRANSGENDER EQUALITY, EXECUTIVE SUMMARY OF FAILING TO PROTECT AND SERVE: POLICE DEPARTMENT POLICIES TOWARDS TRANSGENDER PEOPLE (2019) (<https://transequality.org/police>) (citing the failure of the BPD to update their policies and procedures to incorporate provisions of the consent decree and the Department’s continued failure to comply with Prison Rape Elimination Act (“PREA”) lockup standards).

¹⁵⁵ Bill Redmond-Palmer, *Trans Sex Work on the Street*, BALT. OUTLOUD, <http://baltimore-outloud.com/wp/trans-sex-work-on-the-street/> (last visited May 6, 2019).

¹⁵⁶ Steve Charing, *Police Accountability Dialogue Initiated*, WASH. BLADE (July 12, 2017, 1:24 PM), <https://www.washingtonblade.com/2017/07/12/police-accountability-dialogue/>.

¹⁵⁷ Comments of Community Organizers, Trans Response Lunch, Md. Dep’t of Health (Sept. 7, 2018).

neighborhoods, the community members being policed, and staffers from organizations supporting local LGBTQ+ and sex worker populations.¹⁵⁸ Though ultimately unsuccessful, one solution discussed during the mediation series was the possibility of decriminalizing indoor sex work at specific properties and arranging a ceasefire between the BPD and TGNC sex workers, effectively decriminalizing indoor sex work at these designated locations.¹⁵⁹ Organizers workshopped the possibility of buying property as a community for safe use by Baltimore's trans sex workers as a protectionist measure to remove them from community and police scrutiny and discussed various models of organizational land ownership, such as community land trusts.¹⁶⁰

In a recent open letter, the Baltimore chapter of the national grassroots organization, Sex Workers Organizing Project ("SWOP") addressed the mediations' failure to address the primary concern raised by the sex worker community: the safety of sex workers in relation to their interactions with police.¹⁶¹ The letter criticized the series for leveraging funding to "attempt to pressure sex workers into proximity with law enforcement" and for ultimately failing to provide safe spaces in which sex workers can safely engage in constructive dialogue and self-advocate without being treated as a "problem."¹⁶² The SWOP letter demanded accountability from both the involved community-oriented organizations and the BPD.¹⁶³ As a remedy, SWOP sought specific forms of reparatory actions including an end to unconstitutional policing as mandated by the Consent Decree and an end to the ongoing profiling, harassing, and entrapping of individuals suspected by community members and law enforcement to be engaged in consensual adult sex work.¹⁶⁴

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ An Open Letter from Sex Worker Outreach Project-Baltimore, SWOP-Baltimore (Oct. 23, 2018), <http://swopbaltimore.weebly.com/blog/an-open-letter-from-sex-worker-outreach-project-baltimore>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

B. *SESTA/FOSTA's URL*¹⁶⁵ *Gentrification Disparately Harms
LGBTQIA+ and TGNC Sex Workers*

Despite aggressive opposition from sex work advocacy groups,¹⁶⁶ FOSTA, a bill barring sex work and expressions of sexuality from digital platforms, was signed into law on April 11, 2018.¹⁶⁷ While bipartisan support for the bill touted the easily digestible narrative of trafficked women and minors, the legislation fails to account for those adults who affirmatively choose to engage in sex work,¹⁶⁸ diminishing the capacity of sex workers to consent to their labor by conflating all sex work¹⁶⁹ with trafficking.¹⁷⁰ By reducing consensual adult encounters to the realm of non-consensual violence, FOSTA suggests that, because commercial transactions of an intimate or sexual nature can sometimes be defined as ‘crimes,’ there must be an identifiable victim.¹⁷¹ Despite its purportedly protectionist nature, by denying access to safe, virtual workspaces, the law disparately harms those individuals

¹⁶⁵ URL, or “uniform (or universal) resource locator,” the shorthand for the digital address used to locate and access virtual space, such as webpages or other platforms. *URL*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/url> (last visited May 7, 2019). When cited to distinguish “IRL” or “in real life” interactions, “URL” functions as a shorthand for virtual, or “unreal” life. *See supra* note 119.

¹⁶⁶ Danielle Citron & Quinta Jurecic, *FOSTA: The New Anti-Sex-Trafficking Legislation May Not End the Internet, But It's Not Good Law Either*, LAWFARE (Mar. 28, 2018, 2:41 PM), <https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-internet-its-not-good-law-either>.

¹⁶⁷ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (1st Sess. 2017); Pub. L. No. 115-164, 115th Cong. (2d Sess. 2018).

¹⁶⁸ *See* AMNESTY INT’L, AMNESTY INTERNATIONAL POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS 1 (May 26, 2016), <https://www.amnesty.org/download/Documents/POL3040622016ENGLISH.PDF> (using the term ‘sex work’ only to refer to “consensual exchanges between adults”).

¹⁶⁹ “Sex work” or “sex-adjacent-work” refers to an umbrella of acts occurring between consenting adults, including both currently criminalized commercial conduct and many currently legal, socially innocuous business relationships, such as massage therapy, modeling, webcamming, dancing, performing, or hostessing. *See* Melissa Gira Grant, *Let's Call Sex Work What It Is: Work*, THE NATION (Mar. 5, 2014), <https://www.thenation.com/article/lets-call-sex-work-what-it-work/>.

¹⁷⁰ By negating the capacity of adults, largely women and LGBTQIA+ individuals, to affirmatively choose sex work, FOSTA forcibly silences those already subject to violence and criminalization when speaking up or seeking state support and resources. The underlying motivation behind SESTA/FOSTA is made transparent by reviewing its legislative history. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (1st Sess. 2017); Pub. L. No. 115-164, 115th Cong. (2d Sess. 2018).

¹⁷¹ *See Sex Work and Sex Trafficking*, SWOP BEHIND BARS, <https://www.swopbehind-bars.org/amnesty-international-policy-to-decriminalize-sex-work/the-difference-between-sex-work-and-sex-trafficking/> (last visited May 7, 2019). This is not unlike the national attitude towards sodomy prior to *Lawrence*. *See supra* Part II.

affirmatively choosing to engage in sex work, particularly TGNC sex workers of color.¹⁷²

The disparate harm of this “hollow polic[y]”¹⁷³ is not theoretical.¹⁷⁴ The post-FOSTA closure of the popular advertising platform, Backpage, and the subsequent removal of Craigslist’s “personals” platform has virtually displaced many adults engaging consensually in an umbrella of sex work, including both legal and criminalized commercial acts.¹⁷⁵ With the closure of websites where individuals could safely screen clients, post advertisements promoting and disclosing transgender status, and remotely negotiate, many sex workers are being forced to solicit in person, often through street work, where they are subject to heightened violence, both at the hands of the State¹⁷⁶ and individuals within their communities.¹⁷⁷ This erasure has the heaviest impact on those most susceptible to violence.¹⁷⁸ Because

¹⁷² Ty Mitchell, *If Lawmakers Want to Protect Sex Workers, They Must Listen To Us*, HUFFINGTON POST (Mar. 8, 2018, 7:51 PM), https://www.huffpost.com/entry/sex-workers-bill-fosta-sesta_n_5aa1924fe4b04c33cb6cecb2 (arguing that prostitution laws are implemented in the name of “broken window policing, which disproportionately targets trans people and people of color”); see also Citron & Jurecic, *supra* note 166.

¹⁷³ Kimberly Mehlman-Orozco, *Sex Trafficking Bill Likely To Do More Harm than Good*, BALTIMORE SUN (Mar. 22, 2018, 9:05 AM), <https://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0323-fosta-trafficking-20180322-story.html> (attacking the alleged motivation underscoring FOSTA and suggesting that cooperative information exchange between private companies and law enforcement would be a more valuable measure in ending trafficking).

¹⁷⁴ MARK LEE, HUMAN RIGHTS CAMPAIGN FOUND., A NATIONAL EPIDEMIC: FATAL ANTI-TRANSGENDER VIOLENCE IN AMERICA IN 2018 4 (2018), https://assets2.hrc.org/files/assets/resources/AntiTransViolence-2018Report-Final.pdf?_ga=2.227704287.393372106.1557235750-1015845812.1557235750 (“At least 22 transgender people have been killed in the United States since the beginning of 2018.”); WATERS ET AL., *supra* note 109, at 9–10 (stating that of the fifty-two anti-LGBTQ homicides reported in 2017, seventy-one percent were of people of color and fifty-six percent of victims identified as transgender women, transfeminine, two spirit, femmandrogynne, transgender men, or nonbinary).

¹⁷⁵ April Glaser, *After Backpage*, SLATE (Apr. 27, 2018, 4:10 PM), <https://slate.com/technology/2018/04/after-backpage-and-sesta-sex-workers-worry-theyll-have-to-return-to-the-streets.html> (“Unlike sex trafficking, consensual adult sex work that isn’t prostitution is not necessarily illegal.”).

¹⁷⁶ Discussed, *supra* Part IV-A.

¹⁷⁷ Alison Bass, *Craigslist’s Erotic Services Site Appears to Have Reduced Female Homicide Rates By 17 Percent*, HUFFINGTON POST (Oct. 12, 2017, 11:28 AM), https://www.huffingtonpost.com/entry/craigslists-erotic-services-site-appears-to-have-reduced_us_59df8778e4b0cee7b9549e66 (reporting that street workers experience a homicide rate “over 13 times that of the general population” and noting that it would require “an additional outlay of 200,832 police officers, costing the U.S. an added \$20 billion per year” to reduce the female homicide rate by the “same percentage that craigslist’s free service apparently did”).

¹⁷⁸ “Disabled (and other multiply marginalized) sex workers are likely to feel the effects of increased violence more acutely. . . . Non-criminalized jobs are often inaccessible to disabled people.” Katie Taström, *Sex Work is a Disability Issue. So Why Doesn’t the Disability*

trans people of color are four times as likely to engage in sex work as a means of financially supporting themselves, when compared with the white transgender population¹⁷⁹ and are subject to heightened police scrutiny in virtually every arena,¹⁸⁰ this policy shift disparately targets service providers who are already subject to heightened surveillance, scrutiny, and criminalization,¹⁸¹ furthering the pre-existing divide between sex workers who hold multiple marginalized identities and those less likely to be negatively impacted by FOSTA.¹⁸²

The URL displacement of sex work has already begun to trickle down to impact the LGBTQIA+ community's daily use of digital platforms for simply sharing images and language depicting their sexualities, bodies, and identities, for daring to publicly occupy virtual space.¹⁸³ Facebook and Instagram, among other social media sites and dating apps, have drawn attention for their targeted deletion of queer bodies

Community Recognize That?, ROOTED IN RIGHTS (Jan. 4, 2019) <https://rootedinrights.org/sex-work-is-a-disability-issue-so-why-doesnt-the-disability-community-recognize-that/>.

¹⁷⁹ WATERS ET AL., *supra*, note 109 at 14 (noting the high rates of poverty, homelessness, unemployment, and incarceration experienced by the population when identifying that 24.4% of transgender people of color turned to sex work as a means of financially supporting themselves, while only 6.3% of white transgender participants reported engaging in sex work).

¹⁸⁰ “Black and black multiracial respondents had the highest rates of both arrest due to their transgender status (65.3%) and being sent to jail/prison for any reason (69.6%).” *Id.* at 18. Overall, 79.1% of transgender sex workers surveyed between 2008-2009 reported “high levels” of police interaction,” of which 64.1% reported mistreatment at the “hands of the police.” FITZGERALD ET AL., *supra* note 2, at 7.

¹⁸¹ Angelina Chapin, *Craigslist's Sex Work Ads Saved 2,150 Women's Lives. A Bill Could Make Such Posts Illegal.*, HUFFINGTON POST (Mar. 20, 2018, 6:50 PM), https://www.huffingtonpost.com/entry/online-ads-keep-sex-workers-safer-this-bill-could-make-those-ads-illegal_us_5ab16105e4b0decad044d0c0. According to a study conducted by economist Scott Cunningham and colleagues at Baylor University, after Craigslist created an “erotic services” section, “the rate of female homicides [excluding homicides related to domestic violence] in U.S. cities fell by 17.4%” and there is “modest evidence” that introduction of the erotic services section led to a “reduction in forcible female rapes over time.” Scott Cunningham et al., *Craigslist's Effect on Violence Against Women 5* (Nov. 2017) (unpublished paper).

¹⁸² Laura LeMoon, *Why It's Not Okay to Kill Sex Workers: One Year of FOSTA/SESTA*, MEDIUM (Apr. 11, 2019) <https://medium.com/@lauralemoon/why-its-not-okay-to-kill-sex-workers-one-year-of-fosta-sesta-257ed73011c1> (asserting that “. . . what these laws have done is to bifurcate the sex industry so that there is now only high income, career escorts (usually white) who are little effected by these laws and everyone else, who whether or not they advertise online or on the street, face the worst of the worst of clientele who are taking advantage of this horrible time for us.”).

¹⁸³ Alexander Cheves, *The Dangerous Trend of LGBTQ Censorship on the Internet*, OUT (Dec. 6, 2018, 12:16 PM), <https://www.out.com/out-exclusives/2018/12/06/dangerous-trend-lgbtq-censorship-internet> (citing the shutdown of Instagram accounts and Facebook's algorithm blocking LGBTQ+ advertisements and disparately targeting queer content for removal as fostering the sense of “otherness” experienced by queer users of online, identity-based platforms).

and terminology,¹⁸⁴ conflating the mere expression of sexual and gender diversity with solicitation, harassment, or other “violations” of the platform’ terms of service.¹⁸⁵

This practice, effectively criminalizing public displays of queerness by conflating non-conformity with illicit subversion, is yet another form of impermissible policing of gender identity and sexuality. The legislative and algorithmic exclusion of consensual sexual commerce, expressions of sexuality, and images of gender divergent bodies from virtual spaces mirrors the physical gentrification and white-washing of urban spaces. This pattern of othering and isolation is not unlike the wave of community policing of gender non-conformity currently plaguing Baltimore, displacing and subjecting TGNC and sexually diverse populations to increased virtual and physical violence.

V. ANALYSIS AND RECOMMENDATIONS: REPEALS AND REMEDIES

A. *Maryland’s Sodomy and “Unnatural” Sexual Practices Statutes Unconstitutionally Criminalize Consensual Conduct*

Given the facial unconstitutionality and inefficiency of the sodomy and unnatural sexual practices statutes, the Maryland legislature should mirror other states’ actions and repeal these provisions. As acknowledged by the Maryland Court of Appeals over 40 years ago, there is no reasonable justification for the retention of the sodomy statute, given the exhaustive definition of sexual acts otherwise criminalized within previous and subsequent provisions of Maryland’s Code.¹⁸⁶ Nor does the State need to retain arbitrary legal distinctions between intercourse and penetration.¹⁸⁷ Post-*Lawrence*, the retention of both the sodomy and unnatural sexual practices statutes and their

¹⁸⁴ “Many LGBTQ people’s posts have been blocked recently for using words like “dyke,” “fag,” or “tranny” to describe ourselves and our communities.” Dottie Lux & Lil Miss Hot Mess, *FaceBook’s Hate Speech Policies Censor Marginalized Users*, WIRED (Aug. 4, 2017, 7:00 am) <https://www.wired.com/story/facebooks-hate-speech-policies-censor-marginalized-users/>

¹⁸⁵ Megan Farokmanesh, *YouTube is Still Restricting and Demonetizing LGBT Videos — and Adding Anti-LGBT Ads to Some*, THE VERGE (June 4, 2018 2:46 pm) <https://www.theverge.com/2018/6/4/17424472/youtube-lgbt-demonetization-ads-algorithm> (noting the inclusion of the word “trans” triggers demonetization of Youtube videos); Jesselyn Cook, *Instagram’s Shadow Ban On Vaguely ‘Inappropriate’ Content is Plainly Sexist*, HUFFINGTON POST (Apr. 29, 2019 7:04 pm) https://www.huffpost.com/entry/instagram-shadow-ban-sexist_n_5cc72935e4b0537911491a4f (“Anybody who is taking ownership of their sexuality and being comfortable with their body even in a nonsexual way is being silenced for it.”).

¹⁸⁶ Discussed *supra*, note 92.

¹⁸⁷ See *supra* Part III-B.

enforcement is economically inefficient, resulting in less than a two percent mean conviction rate in Maryland's Circuit Courts in the last fiscal year.¹⁸⁸ As applied, these provisions are arguably unconstitutional in virtually every instance not already punishable on a state or federal level.¹⁸⁹

Further, the retention of the sodomy and unnatural sexual practices statutes belies the State's true feelings towards the LGBTQIA+ community. Despite the facially performative creation of new positions within Baltimore City government for LGBTQIA+ community members,¹⁹⁰ the State's continued use of the "trans panic" defense¹⁹¹ belies the belief that an individual's gender diversity is a sufficient legal justification for unprovoked violence against them.¹⁹² Where any identity or practice commonly affiliated with an affinity group can be legally deemed "unnatural," the State can be construed as encouraging its policing, effectively targeting visibly gender-non-conforming individuals within the community.

B. Other Jurisdictions' Models of Decriminalized Consent

Given the inefficiency of laws seeking to criminalize consensual, sexual conduct, Amnesty International has called for the international decriminalization of "all aspects of adult consensual sex work" since 2015.¹⁹³ Their 2015 report proposes State regulation can decrease harms experienced by those engaging in sex work and also create economic benefits in freeing up policing resources upon decriminalizing

¹⁸⁸ Reflecting a 1.9% conviction rate in circuit courts under the unnatural sexual practices statute. AMY A. DEVADAS, H.B. 1134 FISCAL AND POLICY NOTE, *supra* note 86, at 2. The conviction rate in circuit courts for sodomy charges in 2017 was 2.1%. AMY A. DEVADAS, S.B. 800 FISCAL AND POLICY NOTE, *supra* note 85, at 4.

¹⁸⁹ See *supra* Part III-B.

¹⁹⁰ See *Mayor Pugh Establishes Baltimore LGBTQ Commission*, CBS BALT. (Jan. 25, 2018, 10:40 AM), <https://www.baltimorepolice.org/safespace/lgbtq-liaison-officer>.

¹⁹¹ A "defense" in which the gender identity of the victim – most often transgender women – is used to justify their slaughtering. See Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77, 128 (2014) (discussing how the "trans panic defense" employed as a trial strategy might be better coined a "trans rage defense").

¹⁹² See *supra*, note 6. Steve Charing, *Suspect Acquitted in Murder of Baltimore Transgender Woman*, WASH. BLADE (Jan. 13, 2017, 11:09 AM), <https://www.washingtonblade.com/2017/01/13/suspect-acquitted-murder-baltimore-trans-woman/> (citing to the interview of Ava Pipitone, the Executive Director of The Baltimore Transgender Alliance, stating "[t]he defense's argument was layered over cultural biases against the trans community").

¹⁹³ AMNESTY INTERNATIONAL POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS, *supra* note 168, at 2.

consensual sexual commerce.¹⁹⁴ Their data further confirms that, when criminalized, sex workers are less likely to report crimes or avail themselves of state support, enabling violence against sex workers to remain underreported and unpunished.¹⁹⁵ Despite the documented propensity for police avoidance which accompanies criminalization, a 2015 study of twenty-five Dutch cities from the IZA Institute of Labor Economics reported a thirty to forty percent decrease in reported sexual violence, as well as an overall decrease in drug offenses within the first two years after the institution of *tippelzones*, or decriminalized zones for sex work to safely and legally occur.¹⁹⁶

In 1980, through a series of happy accidents, the Rhode Island General Assembly amended the state's prostitution statute to exclusively prohibit "street solicitation," removing language defining and banning "prostitution."¹⁹⁷ When the Rhode Island Supreme Court recognized that indoor sex work had been effectively decriminalized via a legislative loophole and publicly dismissed prostitution charges brought against indoor workers in 2003, the public was given notice of the then-twenty-three year old exemption.¹⁹⁸ The legislative decriminalization of indoor sex work remained open to loose interpretation until Rhode Island Governor Donald Carcieri redefined the crime in 2009, recriminalizing indoor sex work.¹⁹⁹

During the period of decriminalization from 2003-2009, Rhode Island's public health and safety dramatically increased.²⁰⁰ The National Bureau of Economic Research reported a marked decrease in reports of

¹⁹⁴ *Id.* at 2, 14–15.

¹⁹⁵ *Id.* at 10–11 (acknowledging the intersecting harms sex workers face, including discrimination in housing, employment, and education, denial of access to medical and social services, penalization, state violence, police abuse, arbitrary surveillance, and extortion, among other harms).

¹⁹⁶ PAUL BISSCHOP ET AL., INST. STUDY LAB., STREET PROSTITUTION ZONES AND CRIME 2 (May 2015), <http://ftp.iza.org/dp9038.pdf>.

¹⁹⁷ Scott Cunningham & Manish Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health* 9 (Nat'l Bureau Economic Res. Working Paper No. 20281, 2014).

¹⁹⁸ *State v. DeMagistris*, 714 A.2d 567, 573–74 (R.I. 1988) (finding the state's definition of prostitution only applied to public or outdoor spaces).

¹⁹⁹ Associated Press, *Rhode Island: New Prostitution Law*, N.Y. TIMES (Nov. 3, 2009), https://www.nytimes.com/2009/11/04/us/04brfs-NEWPROSTITUT_BRF.html.

²⁰⁰ Cunningham & Shah, *supra* note 197, at 30.

sexual violence²⁰¹ and STI transmission²⁰² in Rhode Island during this time. The report indicated that in the mid-aughts, eighty-five percent of sex work in the United States was conducted indoors.²⁰³ Logically, then, post-FOSTA, when a higher percentage of sex and sex-adjacent work has been virtually displaced, leading more workers to take to the streets, decriminalizing indoor sex work would likely invite an even higher immediate decrease in rates of nonconsensual sexual violence and STI transmission, along with a marked decrease in homicide rates.²⁰⁴

In the United Kingdom, a unique pilot program called “Housing First,” provides long-term stable housing to sex working women, as a basis for addressing the intersecting stigmas and barriers to support that sex workers face.²⁰⁵ While the UK has not yet fully decriminalized sex work and recently enacted its own version of SESTA/FOSTA,²⁰⁶ this model approach centers harm reduction and access to healthcare, mental healthcare, and drug dependency treatment in supporting women who engage in sex work.²⁰⁷ The program, which is inclusive of both cisgender and transgender women, recognizes that homelessness is often a triggering event leading to survival sex work.²⁰⁸ Housing First claims to empower its tenants to make informed choices – not by encouraging them to give up sex work, but rather to choose to engage in safer sex work practices – such as “home-based” or indoor sex work at their tenancies, as a lower-risk option.²⁰⁹ As another part of their harm reduction

²⁰¹ *Id.* (noting that “decriminalization “reduce[d] sexual violence by 824 fewer reported rapes or 31%”).

²⁰² *Id.* at 24, 30 (noting “improved public health outcomes by decreasing female and male gonorrhea incidence by approximately 2000 cases” and a thirty-nine percent decrease in female gonorrhea).

²⁰³ *Id.* at 2.

²⁰⁴ See Bass, *supra* note 177; Cunningham et al., *supra* note 181 (discussing the 17.4% reduction in the female homicide rate, following the advent of digital sex working spaces).

²⁰⁵ Emma Bimpson, *An Evaluation of Basis Yorkshire’s Housing First Pilot*, LEEDS SOCIAL WORK FOUNDATION (Mar. 2018) (<https://basisyorkshire.org.uk/wp-content/uploads/2018/03/Basis-Housing-First-Final-Report-March-2018.pdf>) (namely, homelessness, drug dependency, and intimate partner violence).

²⁰⁶ As of July 15, 2019, internet users will be required to provide personal information via official State ID to confirm their age prior to viewing pornography, or other forms of “adult” sexual content on digital platforms. John Herman, *How the U.K. Won’t Keep Porn Away From Teens*, N.Y. TIMES (May 3, 2019) <https://www.nytimes.com/2019/05/03/style/britain-age-porn-law.html>.

²⁰⁷ Bimpson, *supra* note 205.

²⁰⁸ *Id.* at 4–5; 9–10.

²⁰⁹ *Id.* at 9; 26 (stating that they “do not expect their beneficiaries to desist from sex work as a legal activity. Instead, they support women to make safer choices about their work and reduce any harm associated with activities linked to street sex working . . . encouraging women to work legally, or ‘off street’ rather than visible street-based work.”).

model, the program provides its tenants free access to services, such as physical and mental healthcare and drug dependency treatment – however, engagement with support services is not required for tenants to maintain status in the program.²¹⁰

In New Zealand, sex work has been fully decriminalized since the passage of the Prostitution Reform Act of 2003.²¹¹ Under the New Zealand model, sexual commerce is regulated as a public health and human rights issue— there is no mandated provider registry, or required STI testing – instead, the country provides free sexual health services to providers and clients at designated clinics, holding all participants, providers and clients alike, equally accountable to engage in safer sex practices.²¹² Because sex work is fully decriminalized, both indoor and outdoor work are legal, low-risk sources of revenue.²¹³

C. Reparatory Actions: Decriminalizing Survival, Redistributing Resources, and Instituting Tipplezones in Baltimore

In light of the national crisis of hate directed towards gender non-conformity and the recent attempts to collapse the legal definition of gender to a biological sexual binary,²¹⁴ Maryland should take immediate steps towards protecting its trans and gender expansive community from unnecessary violence. First, the Maryland legislature must repeal the sodomy and unnatural sexual practices statutes and repeal and re-enact with amendments all other provisions of the criminal code which refer to “sodomy.”²¹⁵ Given the low conviction rates associated with charging individuals for violating sections 3-322 and 3-323, the legislature need not create new sex crimes. Additionally, Maryland should look towards the District of Columbia’s model, removing the trappings of gender essentialism from the rape and sexual abuse statutes, consolidating the definition of such crimes, and

²¹⁰ *Id.* at 24–25 (discussing flaws with the “sometimes punitive system that is embedded within tenancy management.”).

²¹¹ Frazer Crichton, *Perspectives on public health and sex work in New Zealand*, MEDIUM (Jul. 4, 2017) <https://medium.com/@fraser.crichton/faces-behind-the-voices-health-b022a0e4c8ff>; Prostitution Reform Act 2003.

²¹² *Id.*

²¹³ *The New Zealand Model*, NEW ZEALAND PROSTITUTES’ COLLECTIVE, <https://www.nzpc.org.nz/The-New-Zealand-Model> (last visited May 25, 2019).

²¹⁴ Green et al., *supra* note 108; Jan, *supra* note 108; WATERS, ET AL., *supra* note 109. *See also* MARYLAND STATE REPORT, *supra* note 109.

²¹⁵ *See supra* note 89 and accompanying text; *see, e.g.* H.B. 1134, 2018 Leg., 438th Sess. (Md. 2018); S.B. 800, 2018 Leg., 438th Sess. (Md. 2018).

eradicating gendered assumptions about perpetrators and victims.²¹⁶ Given the ongoing failure of the BPD to comply with the Consent Decree and respect the constitutional rights of vulnerable communities, the State should also consider adopting a hybrid model of decriminalization, incorporating elements of different jurisdictions' approaches as a means of mitigating harm to the gender variant population and conserving City resources.

To address the ongoing conflict with those most highly policed, efforts should be dedicated to mitigating hostility and violence directed towards TGNC people of color and other gender divergent individuals working and living in the rapidly gentrifying neighborhoods surrounding the Station North area. Though proponents of SPDP believe that full decriminalization of sex work in Maryland is "unfeasible," they also recognize that the program would be defunct if systems were in place that met citizens' basic survival needs.²¹⁷ While international human rights organizations call for a full decriminalization of sex work, by decriminalizing indoor sex work entirely or enacting *de facto* decriminalized zones for indoor work, Baltimore City would reduce the frequency of potentially invasive police interactions with TGNC individuals and sex workers, taking steps towards compliance with the Consent Decree's requirements.²¹⁸

By creating legal venues removed from police surveillance, decriminalizing indoor sex work would undoubtedly mitigate some of the harms experienced by trans community members and sex workers. However, decriminalizing indoor work alone would not necessarily benefit those most marginalized as the LGBTQ+ community, particularly trans persons of color, experience overwhelmingly high rates of homelessness.²¹⁹ New proposed rules, which could allow federally-funded shelters to deny transgender individuals access to sex-segregated facilities, would only further this divide.²²⁰ Baltimore street workers report "a dire an ongoing need for material assistance," prioritizing access to physical and mental health care, substance use treatment, support

²¹⁶ See *supra* note 98 and accompanying text.

²¹⁷ Shdaimah, *supra* note 129 at 104, 108.

²¹⁸ See *supra* Part IV-A.

²¹⁹ FITZGERALD ET AL., *supra* note 2, at 14; MARYLAND STATE REPORT, *supra* note 109 at 1–2. Discussed, *supra* Part IV.

²²⁰ Jan, *supra* note 108 (discussing the possible implications of the proposed rule, which would partially reverse the 2012 Equal Access Rule, allowing the denial of transgender individuals at sex-segregated shelters).

accessing identity documents, and long-term housing accommodations.²²¹ Absent additional remedial measures, such as securing grant funding to ensure community access to safe spaces in which individuals can conduct sex work—or establishing tenancies for sex workers experiencing homelessness in Baltimore—simply decriminalizing indoor sex work while continuing to police street work would only exacerbate the racial, economic, and gendered divide furthered by FOSTA and ongoing urban gentrification.

While it is unlikely the City of Baltimore would directly appropriate funds delineated for community use by the recently passed Affordable Housing Land Trust Act²²² for the creation of *tippelzones*, Baltimore non-profits supporting the LGBTQIA+ and sex working communities could collaborate with pre-existing land trusts—or form trusts of their own—and apply for grant funding to subsidize housing for qualifying clients, prioritizing TGNC folks who engage in street work and are in need of housing. By utilizing this existing framework, Baltimore non-profits could directly provide individual community members with tenancies not unlike the Housing First pilot program. Grants should be allocated to grassroots organizations led by people with lived experiences, such as SWOP, to acquire physical property and negotiate for official areas of diminished surveillance in Baltimore. While repealing the sodomy and unnatural sexual practices statute is a necessary step forward, to successfully address the needs of Maryland's TGNC community, any push for the legislative reform of criminal codes must be coupled with tangible, practical, extra-judicial reparatory measures, decriminalizing queerness and prioritizing the creation and preservation of spaces where gender variant individuals can safely exist.

²²¹ Shdaimah & Bailey-Koch, *supra* note 133 at 267.

²²² MD. CODE ANN., REAL PROP. § 14-501 (2018) (purporting to provide funding to a set number of established community land trusts to subsidize affordable housing for low-income and moderate-income Marylanders).