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—Preamble, NLG Constitution

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FREEING JANE: THE RIGHT TO PRIVACY AND THE WORLD'S OLDEST PROFESSION

Introduction

The right to privacy has been expanding for decades, reflecting society's evolving views on topics such as abortion, gay rights, and women's rights. Should our society's changing standards of decency and the right to privacy make unconstitutional the criminal punishment of the payment of money in return for sex, when both the transaction and sexual act occur in private between consenting adults? Have our social mores changed to the extent that the "oldest profession" in the world should be recognized as constitutionally protected? This article will argue that criminal punishment for such activity is an unconstitutional violation of the right to conduct one's sexual affairs privately.

This article will begin with an analysis of various states' approaches to criminalizing prostitution. Next, this article will analyze how the Supreme Court (Court) is likely to deal with this issue under its five step substantive due process analysis.[1] In step one the Court will determine how it is going to characterize the liberty interest at issue. In step two the Court will determine whether the interest is a fundamental right or liberty interest protected by the Due Process Clause. In step three the Court will determine the appropriate level of scrutiny to apply to a statute infringing the interest. In step four the Court will analyze the state's purpose allegedly justifying such a statute. In step five the Court will determine whether the fit between the state's purpose and the statute is tight enough to justify an infringement of the liberty interest at stake. Lastly, this article will consider policy arguments supporting the decriminalization of prostitution, including how (a) criminalization marginalizes prostitutes, (b) criminalization infringes autonomy, (c) enforcement is not cost effective, (d) enforcement techniques encourage abuse, and (e) decriminalization promotes the public health, safety, and welfare.

This article will conclude that criminal punishment for the payment of money in return for sex, between consenting adults, when both the transac-

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tion and sexual conduct occur in private, is an unconstitutional violation of the right to conduct one's sexual affairs privately.

Discussion

I. Statutes criminalizing prostitution

A. Simple statutes criminalizing prostitution

Criminal prohibitions on prostitution vary widely from state to state.[2] Some states have simple and direct statutes. Connecticut's criminal prohibition of prostitution, for example, states:

> (a) A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.
>
> (b) In any prosecution for an offense under this section, it shall be an affirmative defense that the actor was coerced into committing such offense by another person in violation of section 53a-192a.
>
> (c) Prostitution is a class A misdemeanor.[3]

B. Complicated statutes criminalizing prostitution

Other jurisdictions have complicated criminal statutory prohibitions on prostitution. The District of Columbia, for example, devotes an entire chapter of its criminal code to the prohibition of prostitution.[4] This chapter includes twenty-three specific statutes.[5] These statutes prohibit a wide range of activities from generally "engaging and soliciting . . . prostitution"[6] to specifically "compelling an individual to live [a] life of prostitution against his or her will."[7]

C. The middle ground

Most states' statutory regimes fall in between the comprehensiveness and complexity of the District of Columbia's criminal code chapter and Connecticut's single criminal statute. While statutes vary from state to state, a number of states, such as New York and Pennsylvania, have statutory regimes that follow a similar general structure.[8]

New York's criminal prohibition begins with a definition of prostitution, stating that "[a] person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee."[9] New York's Penal Code has separate statutes for patronizing a prostitute,[10] and promoting prostitution.[11] Patronizing a prostitute is statutorily divided into three degrees.[12] Promoting prostitution is statutorily divided into four degrees.[13] The Code denotes what is and is not a defense to patronizing a prostitute.[14] The Code includes statutes regarding compel-

ling prostitution,[15] permitting prostitution,[16] and sex trafficking.[17] The Code additionally provides specific statutes to deal with accomplice liability for sex trafficking,[18] and accomplice liability for promoting or compelling prostitution.[19]

D. The legal challenge

This article is intended to have broad application and will therefore deal with prostitution at a high level of abstraction. This article's legal argument will not address the specific statutory language of any one state, but instead shall apply to the criminalization of prostitution generally.

II. Introduction to substantive due process analysis

The United States Constitution affords each citizen a right of due process.[20] The Fifth Amendment to the Constitution states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[21] This right was extended against state infringement of liberty by the Fourteenth Amendment, which states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[22] The United States Supreme Court has interpreted these Due Process Clauses to have both procedural and substantive components.[23] According to the Court, "The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."[24] As Justice Harlan so poetically articulated in *Poe v. Ullman*, "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation[,] which by operating in the future could, given even the fairest possible procedure . . . nevertheless destroy the enjoyment of all three."[25]

The Court utilizes a five-step process to determine whether a statute violates due process.[26] First, the Court must determine how it is going to characterize the liberty interest at issue.[27] This is considered to be the most important step in the process, because a determination of constitutionality often hinges on the breadth or narrowness of the right's framing.[28] Second, the Court must determine whether the interest is a fundamental right or liberty interest protected by the Due Process Clause.[29] To make this determination the Court must look to the text of the Constitution, its own precedent, and the legal traditions of our nation.[30] Third, the Court must determine the appropriate level of scrutiny to apply to the statute.[31] The Court's different levels of scrutiny generally fall into four categories: strict scrutiny,[32] intermediate

scrutiny,[33] rational basis scrutiny,[34] and rational basis with bite.[35] Fourth, the Court must analyze the state's purpose for the statute.[36] Depending on the level of scrutiny, the Court may look past the state's alleged purpose to find what it believes to be the true purpose.[37] Fifth, the Court determines whether the fit between the state's purpose and the statute is tight enough to justify an infringement of the liberty interest at stake.[38] The required tightness of the fit will be contingent on the level of scrutiny the Court chooses to apply.[39] Because the level of scrutiny is dependent on whether the interest is a fundamental right or liberty interest protected by the Due Process Clause, it is apparent that the constitutionality of the statute will hinge on the characterization of the liberty interest.

III. Due process analysis of statutes criminalizing prostitution

A. Step 1: How is the liberty interest characterized?

The most important step in the Court's substantive due process analysis is determining how to characterize the liberty interest at stake.[40] If the court construes the liberty interest broadly, the interest is more likely to be protected by due process.[41] Conversely, if the court construes the liberty narrowly, the interest is less likely to be protected by due process.[42]

There are multiple ways to frame the liberty interest at issue when analyzing a statute criminalizing prostitution. The "right to privacy" is a broad construction of the liberty interest at stake. If the liberty interest were framed this broadly, the Court would likely find the interest to be a fundamental right.[43] The "right to engage in prostitution" is a much more narrow way to frame the liberty interest infringed by a statute criminalizing prostitution. If the liberty interest were framed this narrowly, the Court likely would not find the interest to be a fundamental right.[44] The most appropriate way to frame the liberty interest at stake is something between these two extremes. This [45]article suggests that the most appropriate framing of the liberty interest is the "right to conduct one's sexual affairs privately." Precedent of the Court supports this construction.[45]

In *Lawrence v. Texas*, the Court overruled its 1986 decision in *Bowers v. Hardwick*[46] and held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional as applied to adult males engaged in consensual sodomy in the privacy of the home.[47] The *Lawrence* Court criticized the *Bowers* Court for framing the issue too narrowly.[48] Justice Kennedy, writing for the majority, stated that "[t]he Court began its substantive discussion in *Bowers* as follows: 'The issue presented is whether the Federal Constitution confers a fundamental right

upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal. . . .'"[49] Justice Kennedy went on to state "[t]hat statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake."[50]

The *Lawrence* Court framed the liberty interest more broadly than the *Bowers* Court.[51] The *Lawrence* Court framed the issue as "whether the petitioners were free as adults to engage in the private conduct [sodomy] in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."[52] The Court specifically noted that its determination considered the facts that "petitioners were adults at the time of the alleged offense," and that "[t]heir conduct was in private and consensual."[53] *Lawrence* thus supports the notion that, in a substantive due process analysis of the constitutionality of criminal punishment for the payment of money in return for sex, when both the transaction and sexual conduct occur in private, between consenting adults, the most appropriate way to characterize the liberty interest is the "right to conduct one's sexual affairs privately."

One may argue that circumstances in *Lawrence* should be distinguished from a constitutional challenge to a statute criminalizing prostitution, on the grounds that *Lawrence* involved a sexual act coupled with an emotional relationship, and not a business transaction. The Court in *Lawrence* stated that "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[54] The Court noted that:

> The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[55]

The Court held that "[t]his, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[56]

While the *Lawrence* Court did note the importance of the relationship underlying the homosexual sodomy, it ultimately held that the bounds of this relationship are to be determined by the parties engaging in the sexual act.[57] The Court stated that "[w]hen sexuality finds overt expression in intimate

conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[58] The Court, emphasizing the increased right to privacy in one's own home, noted that "[i]t suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[59]

Opponents of the decriminalization of prostitution may argue that, without the recognition of the underlying relationship, the *Lawrence* Court would not have found unconstitutional the statute criminalizing homosexual sodomy. It must be recognized, however, that the Court explicitly left the bounds of this underlying relationship to be determined by those engaging in the sexual act.[60] While a relationship underlying a particular act of homosexual sodomy likely is different from a relationship underlying a particular act of prostitution, this arguably can be said of any two relationships. The Court's decision to leave the bounds of the underlying relationship to the parties engaged in the sexual act, may have been in recognition that no two relationships fit the same mold. The Court may have removed the underlying relationship from its own consideration due to concerns of administrability. If this was the Court's concern, it can be argued that, in the eyes of the law, the distinction between a relationship underlying an act of consensual homosexual sodomy and an act of consensual prostitution is of no import.

B. Step 2: Is the interest a fundamental right or liberty interest protected by the Due Process Clause?

1. Introduction to fundamental rights

The substantive component of the Due Process Clause "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[61] Due process "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'"[62] specifically those "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[63] and "implicit in the concept of ordered liberty,"[64] such that "neither liberty nor justice would exist if they were sacrificed."[65]

The Court's language in *Washington v. Glucksberg* is particularly helpful in directing how to determine if an interest at stake is a fundamental right or liberty interest protected by the Due Process Clause.[66] In *Washington v. Glucksberg* the Court conducted a substantive due process analysis to determine the constitutionality of Washington State's ban on assisted suicide.[67]

The Court determined that assisted suicide was not a fundamental right or a liberty interest protected by the Due Process Clause.[68] The Court therefore applied a low level of judicial scrutiny, and concluded that the statute passed constitutional muster.[69]

In *Washington v. Glucksberg*, the Court stated that "our Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause."[70] In determining whether the "right to conduct one's sexual affairs privately" is a fundamental right or liberty interest protected by the Due Process Clause, the Court must look to (i) the text of the Constitution, (ii) precedent of the Court, and (iii) the legal traditions of our nation.[71]

2. Text of the Constitution

The Constitution does not explicitly confer a specific "right to conduct one's sexual affairs privately," however, it has been interpreted to implicitly confer a broader "right to privacy."[72] The Court has affirmed this "right to privacy" on multiple occasions in numerous cases,[73] and has found the right implicit in multiple sections of the Constitution.[74] In its 1965 decision in *Griswold v. Connecticut*, the Court discussed, in detail, where this "right to privacy" can be found in the Constitution.[75]

In *Griswold* the Court was confronted with a constitutional challenge to a Connecticut statute banning the use and distribution of contraceptives.[76] The Court invalidated the statute as an unconstitutional violation of the "right to privacy."[77] The Court found this "right to privacy" in the "penumbras of the Bill of Rights."[78] Justice Douglas, speaking for the majority, enumerated the constitutional amendments in which the Court found a "right to privacy": the *First*, *Third*, *Fourth*, *Fifth* and *Ninth Amendments* to the Constitution.[79]

The *Griswold* Court referenced *Boyd v. United States*, which described the Fourth and Fifth Amendments as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."[80] The Court also referenced *Mapp v. Ohio*, which referred to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."[81]

Justice Goldberg authored a concurring opinion in *Griswold*, in which he agreed with the majority that the "concept of ordered liberty protects those personal rights that are fundamental, and [is] . . . not confined to the specific terms of the Bill of Rights."[82] Justice Goldberg further agreed that "the right to privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'"[83] Goldberg wrote sepa-

rately to express his view that "the right of privacy in the marital relation is [a] fundamental and basic . . . personal right 'retained by the people' within the meaning of the Ninth Amendment."[84] Justice Goldberg posited that the language and history of the Ninth Amendment "reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[85]

Justice Goldberg discussed the history of the Ninth Amendment in his concurrence.[86] He asserted that the amendment was "proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected."[87] This not only suggests that the Framers believed there to be fundamental rights not specifically enumerated in the Constitution, but also emphasizes that the Framers intentionally wrote the Constitution to adapt and evolve to the changing state of the nation.[88] Thus the Court may determine the "right to conduct one's sexual affairs privately" is a fundamental right, even though it is not explicitly enumerated in the Constitution.

3. Precedent of the Court

Opponents of the decriminalization of prostitution may claim that the "right to privacy" discussed in *Griswold* is limited to marital relations, and is therefore not applicable to an act of prostitution. While this argument may have had weight four decades ago, subsequent Supreme Court cases have clarified that this "right to privacy" extends beyond the marital relationship.[89] In the 1972 decision of *Eisenstadt v. Baird*, the Court explicitly stated that *Griswold* applies to married and unmarried alike.[90] Justice Brennan, writing for the majority, stated:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.[91]

Justice Brennan went on to state that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[92]

If there remained any question after *Eisenstadt* as to whether the Court extended the "right to privacy" beyond the marital relation, it was answered by the Court in *Lawrence v. Texas*.[93] In *Lawrence* the Court summarily stated that "[a]fter *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."[94] Here, the Court did more than just suggest that the "right to privacy" extends to "certain decisions regarding sexual conduct"; it clearly stated that it does.[95]

4. Legal traditions of the nation

In *Griswold,* Justice Douglas clarified that when determining which rights are fundamental, "judges are not left at large to decide cases in light of their personal and private notions."[96] He emphasized that judges are tethered by the legal tradition and "must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked fundamental.'"[97] While tradition certainly plays an important role in determining whether a liberty interest is a fundamental right, this consideration is not dispositive.[98]

If the liberty interest is framed as a "right to conduct one's sexual affairs privately," instead of a "right to engage in prostitution," there is a clear legal tradition to support the right.[99] The Court has substantially expanded the "right to privacy" in recent decades.[100] Our society's evolving social mores have caused many formerly criminalized acts to become constitutionally protected;[102] *Lawrence* is merely one example of this phenomenon.[102] Anti-miscegenation statutes, once found in thirty-five states, have since been repealed.[103] Many acts once considered taboo are now constitutionally protected under the Due Process Clause.[104]

5. A fundamental right is found

After analyzing (i) the text of the Constitution, (ii) the precedent of the Court, and (iii) the legal traditions of the nation, the Court must conclude that "the right to conduct one's sexual affairs privately" is a fundamental right or liberty interest protected by the Due Process Clause of the Constitution.

There has been a trend in recent years for the Court to move away from the recognition of fundamental rights and towards the recognition of liberty interests.[105] While the Court has not explicitly explained its shift, it arguably may be asserted that the Court is attempting to broaden its recognition of the interests afforded due process protection. In recognition of this shift, the Court may phrase the interest as a liberty interest protected by the Due Process Clause, instead of a fundamental right. The above analysis emphasizes

that if the liberty interest is construed more narrowly, such as a "right to engage in prostitution," it is much less likely to be found constitutionally protected.

C. Step 3: What is the appropriate level of scrutiny?

Once the Court determines whether the interest at stake is a fundamental right or liberty interest protected by the Due Process Clause, the Court can determine the appropriate level of scrutiny to apply. Though the Court's language has a tendency to change over the years, making classification difficult, the Court's different levels of scrutiny can generally be split into four categories. If the Court applies strict scrutiny, for a statute to pass constitutional muster there must be a compelling governmental interest and the statute must be narrowly tailored to that interest.[106] The statute may not be over-inclusive or under-inclusive. If the Court applies intermediate scrutiny, to pass constitutional muster there must be an important or excessively persuasive governmental purpose and the statute must be substantially related to that purpose.[107] If the Court applies rational basis scrutiny, to pass constitutional muster there must be a legitimate governmental interest and the statute must be rationally related to that interest.[108] If the Court applies what has become known within the legal community as rational basis with bite, the Court will use the same test as in a rational basis analysis, but pay particular attention to the asserted governmental interest, in an effort to find the actual, true purpose motivating the statute.[109]

Legal scholar Jota Borgmann has written extensively on the topic of sexual privacy.[110] Borgmann believes that "any statute defended by a state that criminalizes conduct but cannot prove such concrete harm should be subjected to strict scrutiny."[111] Borgmann believes that "to infringe upon the realm of sexual privacy, the onus should be on the government to establish a compelling interest in preventing a proven, concrete, and significant harm and its regulation of the right should be narrowly tailored to prevent such harm."[112] In Borgmann's opinion "*Lawrence* stands for a right to one's own thoughts, relationship choices, and sexual expression. Criminal statutes infringing on autonomous sexual expression . . . violate this right."[113]

When a fundamental right is infringed, the Court applies its highest level of judicial scrutiny, requiring the statute to have a compelling state interest, and be narrowly drawn to express only the legitimate state interest at stake.[114] If the liberty interest is framed broadly as "the right to conduct one's sexual affairs privately," and the Court finds this interest to be fundamental, then the Court must apply strict scrutiny in determining whether criminal punishment for the payment of money in return for sex, when both the transaction and

sexual conduct occur in private, between consenting adults, is constitutional. If the Court frames the right more narrowly and therefore does not find a fundamental right or liberty interest protected by the Due Process Clause implicated, the Court will apply a lower level of judicial scrutiny; such as rational basis, rational basis with bite, or intermediate scrutiny.

D. Step 4: What is the state's purpose?

Determining the state's purpose for the statute can be one of the most challenging steps in a due process analysis, because there is rarely a record of a clear, concise, and unified purpose for a statute. If the Court subjects a statute criminalizing prostitution to strict scrutiny, the statute must be found unconstitutional unless the government's interest is compelling.

While there may be other purposes asserted for the criminalization of prostitution, most likely the true state purpose is founded in morality.[115] The *Lawrence* decision raised an issue of whether a statute can ever withstand a due process challenge if the state's purpose for the legislation is solely founded on morality.[116] The Court specifically noted that its job in performing the due process analysis was to "define the liberty of all, not to mandate its own moral code."[117] The *Lawrence* Court quoted Justice Stevens' dissent from *Bowers*, stating:

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.[118]

In *Lawrence* the Court adopted Stevens' dissent from *Bowers*, stating that "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here."[119]

Justice Scalia in his dissenting opinion to *Lawrence* stated that "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices."[120] Justice Scalia asserted that "[e]very single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding."[121] The Fifth Circuit Federal Court of Appeals noted in its 2008 decision in *Reliable Consultants v. Earle* that

"[t]oday, state criminal laws prohibit sex-based offenses such as prostitution, polygamy, incest, and bestiality, to name a few. The *Lawrence* Court did not explain why prohibiting these sexual acts advances a legitimate state interest whereas prohibiting homosexual sodomy does not."[122]

While a state may suggest that its criminal prostitution statutes are founded on promoting public health and safety, the research is diametrically opposed to this conclusion.[123] While it is not the role of the Court to determine whether statutes actually promote public health and safety, it is the role of the Court, as part of its strict scrutiny analysis, to determine whether this purpose is the state's true purpose, or merely a cover for law founded on morality.[124] As long as *Lawrence* remains controlling on the issue, it appears that a state will have to proffer a compelling, non-morality based purpose for its statutes criminalizing prostitution to pass constitutional muster.[125]

Constitutional scholars have noted that "[a]lthough there are undoubtedly many people in society who find prostitution morally repugnant and vehemently oppose the notion of legalizing the practice, courts cannot decide the constitutionality of a particular law based on its popularity with the social majority."[126] Even if the state proffers an alleged non-morality based purpose, it is likely that the Court will look deeper to find the state's true purpose founded in morality,[127] and consequently hold the statutes unconstitutional as a violation of the "right to conduct one's sexual affairs privately."

If the Court determines that a statute criminalizing prostitution is based solely on morality, then the Court's analysis is over; there is no compelling purpose and therefore the statute is unconstitutional. If the state is able to proffer an honest, non-morality based purpose, and that purpose is determined by the Court to be compelling, then the Court must analyze the fit between the alleged purpose and the statute.

E. Step 5: How tight is the fit?

If the Court finds the liberty interest to be a fundamental right and applies strict scrutiny, the statute must be narrowly tailored to the compelling state purpose in order to pass constitutional muster.[128] This narrowly tailored standard is the most stringent that the Court can apply. To meet this standard the statute may not be unduly under-inclusive or over-inclusive. A statute is under-inclusive if it does not prohibit disfavored activity that the state seeks to address with the statute. A statute is over-inclusive if it bars activity even of people who are not engaging in the proscribed activity. While the Court is concerned with both under-inclusivity and over-inclusivity, it is most concerned with the latter.[129]

A state may proffer "promotion of the public health and safety" as its justification for criminalization of prostitution. If the Court finds this justification compelling, and not a mere façade of an underlying illegitimate purpose, the Court must analyze whether the statute is narrowly tailored to further this end. It is unlikely that a Court would find a statute narrowly tailored to further this purpose because of the over-inclusive nature of a full and complete ban, and the tenuous connection between criminalization and promotion of the public health and safety. Somewhat ironically, there is a solid argument that promoting the public health and safety would be best accomplished by decriminalizing prostitution: if prostitution were decriminalized, it could be regulated by state and federal governments.[130] Regulation and monitoring the practice of prostitution likely would help promote the public health and safety.[131]

IV. Policy Considerations

The Court is more likely to find a statute criminalizing prostitution unconstitutional if it allows considerations of public policy to influence its analysis.[132] The following are a few of the policies furthered by the decriminalization of prostitution.

A. Criminalization marginalizes prostitutes

Norma Jean Almodovar, the president and founder of the non-profit International Sex Worker Foundation for Art, Culture and Education, is one of the foremost prostitutes' rights activists in the country.[133] Almodovar argues that "laws against prostitution are meant to protect basic human rights and to preserve . . . dignity . . .[but] rather than meeting these goals, prostitution laws actually serve to further the exploitation of women, and therefore should be repealed."[134]

Almodovar claims that "as long as prostitution laws remain [on the books], prostitutes will continue to be marginalized from mainstream society. Their needs will be ignored and brutality against them will be rationalized or even condoned."[135] This is because "the stigmatization that goes along with prostitution laws strip . . . women of their rights."[136] Almodovar argues that people, "[e]ven those who take an oath to protect all citizens[,] see the prostitute as undeserving of rights that are supposedly guaranteed to all people."[137] To support her argument Almodovar provides the example of "Pasadena Superior Court Judge Gilbert C. Alston, a former Los Angeles Police Officer, who stated his belief that the law did not afford prostitutes protection against rape or sodomy if they had agreed to and were paid for a 'lesser' sex act."[138] A man could force a prostitute "to engage in sexual

intercourse and sodomy without being criminally liable, as long as [he] didn't physically abuse her."[139]

Even some women's rights activists marginalize prostitutes.[140] In response to a question about a woman's right to choose to become a prostitute, the president of the Broward County, Florida Chapter of the National Organization for Women responded, "I don't think a hooker has rights."[141] Almodovar believes that even those in "reputable circles" believe the misconceived notion that "prostitutes are without rights or standing before the law."[142] Laws criminalizing prostitution "marginalize and victimize prostitutes, making it more difficult for those who want out to get out of the industry and more difficult for those who remain in prostitution to claim their civil and human rights."[143]

B. Criminalization infringes autonomy

At the heart of the feminist debate surrounding issues of decriminalization of prostitution is whether becoming a prostitute is a legitimate career choice.[144] Many feminists have been unwilling to support decriminalization of prostitution, claiming that it "leads to a lifetime of shame and degradation which robs the prostitute of her bodily integrity, personal privacy, self-respect and reputation."[145] Almodovar believes that "this view fails to understand that some women, even prostitutes, see prostitution differently. It also completely takes the individual out of the equation in determining issues concerning her own life."[146]

Dr. Janice G. Raymond, the co-executive director of Coalition Against Trafficking in Women, criticized those supporting decriminalization, by stating:

> Some treat prostitution as a personal choice, ignoring the sexual exploitation of prostitution while at the same time announcing that the worst thing about prostitution is its stigmatization. But the worst thing about prostitution is its violation of and violence against women and children. While emphasizing the harm that is done to actual women and children in prostitution, we must also note that the sexual exploitation of prostitution is harmful to all women. The sexual violation of any women is the sexual degradation of all women . . . Any form of sexual exploitation, including prostitution, abrogates this human dignity.[147]

Almodovar responds to comments like this by asking, "what about women who disagree with Dr. Raymond, who do not accept the postulation that their work in prostitution is a violation of their human dignity?"[148] Almodovar asks, "What about us women who see the inconsistency in continuing to advocate choice in one arena [abortion], while actively trying to squelch freedom of choice in other situations [prostitution]?"[149]

Almodovar believes that the "prostitute as 'victim' theory, now deeply imbedded into law, and espoused by so-called feminists . . . involves the irrational belief that all women are inherently incapable of self-determination and need 'big sister' protection."[150] Statutes criminalizing prostitution may be an attempt by the state to protect individuals, many of whom do not desire protection. Statutes criminalizing prostitution may thus be an overly paternalistic infringement of prostitute's rights to autonomy and self regulation.[151]

C. Enforcement is not cost effective

The San Francisco Task Force on Prostitution (Task Force) was formed in response to various media outcries and campaigns regarding the city's "prostitution problem."[152] The Task Force submitted a report to the San Francisco Board of Supervisors that began with the premise that the city's responses to prostitution were ineffective, as well as harmful.[153] The Task Force believed that the responses "marginalize[d] and victimize[d] prostitutes, making it more difficult for those who want[ed] out to get out of the industry and more difficult for those who remain[ed] in prostitution to claim their civil and human rights."[154]

The Task Force concluded that the prosecutorial response to prostitution had done a great deal of harm but little good.[155] According to the Task Force, the response "ha[d] not solved the quality of life concerns voiced by neighborhood residents; it ha[d] cost the City millions of dollars; it [had] deprive[d] residents of positive services which would ameliorate the problems. Moreover, City residents overwhelmingly oppose[d] enforcement and prosecution of prostitution crimes."[156] The Task Force recommended that "the City departments stop enforcing and prosecuting prostitution crimes" and that "the departments instead focus on the quality of life infractions about which neighborhoods complain and redirect funds from prosecution, public defense, court time, legal system overhead and incarceration towards services and alternatives for needy constituencies."[157]

The Task Force found that "[a]dequate state and local laws already exist[ed] to respond [to many of the crimes incident to prostitution, such as] noise, trespassing and littering."[158] These types of infractions were punishable by fines and were generally handled by traffic courts.[159] Since violators could not be jailed, people charged with these types of infractions did not have the right to an attorney or jury trial.[160] Prosecution, defense, and sheriff's resources were therefore conserved.[161] The Task Force determined that "[i]nfractions are . . . a more cost-effective enforcement option than misdemeanors and felonies."[162] The Task Force concluded that "decriminal-

ization of prostitution could eventually reduce street prostitution and would enable the City to address the problems of the vulnerable populations who [were] part of the street economy."[163]

Decriminalization would allow for authorized establishments to facilitate prostitution.[164] Creating a legal supply of prostitution services would decrease the demand for illegal prostitution services. Additionally, through decriminalization a state would be able to more directly and effectively further its legitimate interests, through regulation of these legally authorized establishments.[165]

D. Enforcement techniques encourage abuse

The very methods that law enforcement officers use to enforce statutes criminalizing prostitution encourage physical, mental and emotional abuse.[166] As Norma Jean Almodovar aptly critiqued, "A woman who goes out on the street and makes a whore out of herself opens herself up to anybody. . . . She steps outside the protection of the law. . . . Who in the hell is going to believe a whore on the witness stand anyway?"[167] The Task Force concluded that "[h]arassment and abuse of suspected prostitutes [was] a serious problem."[168] They noted that "[a]rrest statistics clearly indicate[d] discrimination in prostitution arrests based on gender, since only a small percentage of those arrested [were] male despite the fact that males comprise[d] the large majority of participants in prostitution. Police also discriminate[d] against street prostitutes although they represent[ed] the smallest sector of prostitutes."[169] The Task Force additionally concluded that "African American, transgender and immigrant women [were] specifically targeted in cases of harassment and other abuse."[170]

E. Decriminalization promotes the public health, safety, and welfare

The Nevada brothel system is a prime example of how decriminalization of prostitution can help improve the public health, safety, and welfare.[171] Nevada is currently the only state that regulates prostitution "as a tactic to further the State's police power objectives of promoting public health, safety, welfare, and morals."[172] Nevada has had a long history of regulating the exchange of sex for a fee.[173] Shortly after achieving statehood in 1864, "the Nevada State Legislature passed municipal incorporation laws that allowed incorporated cities to regulate brothel prostitution."[174] Today the practice of prostitution in Nevada is regulated by approximately three dozen statutes.[175] There are approximately thirty-six existing brothel licenses in Nevada, and approximately thirty brothels open for business at any given time.[176]

The Nevada brothel system has been successful "because it recognizes prostitution as a reality and therefore functions to protect all the affected parties, as opposed to the other forty-nine states, which make a crime out of a commerce that has withstood the test of time."[177] Las Vegas Mayor Oscar Goodman said "there are pragmatic reasons to back legalized prostitution. Those include the acknowledgement that illegal prostitution is occurring and that brothels could provide safer, regulated and revenue-generating sex."[178] All of the brothels in Nevada function in a relatively similar manner:

> The customer parks in the brothel's lot or is dropped off if he is using a car service. Many of the brothels are encircled by a high chain link fence, and there is generally only one gate open at any given time. The customer enters the parlor. The available prostitutes form a lineup, after which the customer chooses his prostitute and she leads him to her bedroom. Once there, the prostitute and customer engage in price negotiations, which are overheard by the madam or another manager via intercom. Then the prostitute and customer return briefly to the front office where the prostitute tells the madam the terms of the deal, and the customer pays. Before the service begins, the prostitute checks the customer's genitals for visible signs of venereal disease. The bedrooms may be equipped with emergency buttons that the prostitute can press in case her customer refuses to wear a condom and she requires intervention from a security guard. [179]

To promote public health and safety the Nevada Administrative Code outlines stringent health codes regulating prostitutes and brothels.[180] For example, anyone applying to be a brothel prostitute must take a blood test for HIV and syphilis, as well as provide a cervical specimen for gonorrhea and chlamydia.[181] Additionally, before a prostitute may be granted a work card, a prerequisite to working at a brothel, the prostitute must secure a state health card certifying that she does not have any STDs.[182] As long as the prostitute is employed in a brothel, she must submit to weekly pap smears to check for gonorrhea and chlamydia, as well as monthly blood tests for HIV and syphilis.[183] Since 1988 condom use has been mandated for all sex acts.[184] If a prostitute's test results indicate that she has contracted a venereal disease, other than HIV, she is barred from employment until the disease is cured and a physician reinstates her health card.[185] If a prostitute tests positive for HIV, her status is reported to the State Health Board.[186] In Nevada it is a felony for anyone infected with HIV to work as a prostitute.[187] Nevada incentivizes brothel owners to actively monitor their employees' health by holding a brothel owner personally civilly liable to clients who contract HIV from a prostitute who has previously tested HIV-positive.[188]

Statistics on the health and safety of Nevada's licensed brothel workers and their customers demonstrate that "both parties are more protected under the current system than if they were to conduct their commerce outside the bounds of the law."[189] Studies have shown that on average legal prostitutes in Nevada contract fewer STDs than not only illegal prostitutes but the nation's female population as a whole.[190] Decriminalizing prostitution in the other forty-nine states would allow the states to regulate the profession to further promote the public health, safety, and welfare.

Conclusion

The Supreme Court is likely to proceed through a five-step process when it is inevitably confronted with a substantive due process challenge to a statute criminalizing the payment of money in return for sex between consenting adults, when both the transaction and sexual conduct occur in private.

First, the Court must determine how it is going to characterize the liberty interest at issue. Precedent of the Court suggests that the most appropriate framing of the liberty interest at stake is the "right to conduct one's sexual affairs privately."

Second, the Court must determine whether this interest is a fundamental right or liberty interest protected by the Due Process Clause. The text of the Constitution, precedent of the Court, and the legal tradition of the nation suggest that the liberty issue at stake is a fundamental right protected by due process.

Third, the Court must determine the appropriate level of scrutiny to apply. As with all fundamental rights, the Court must apply strict scrutiny.[191] Under this standard the statute must be narrowly tailored to serve a compelling state interest to pass constitutional muster.

Fourth, the Court must analyze the state's purpose justifying the law. The chief purpose for criminalizing prostitution is founded on morality. *Lawrence* states that such a purpose is not sufficiently weighty to justify an infringement of any liberty interest. Even if the state is able to proffer alternative purposes to justify its statutes, the Court, in its application of strict scrutiny, may look deeper to determine whether the asserted purposes are the true purposes.

Fifth, *in arguendo*, if the state is able to proffer a true, non-morality based purpose, and that purpose is determined by the Court to be compelling, then the Court must determine whether the fit between the alleged purpose and the statute is tight enough to justify an infringement of the liberty interest

at stake. Assuming the Court finds the liberty interest to be a fundamental right and consequently applies strict scrutiny, the statute must be narrowly tailored to a compelling state purpose in order to pass constitutional muster. This strict standard is unlikely to be met by any alleged purpose because of the over-inclusive nature of a full and complete ban of prostitution.

Numerous policies are furthered by the decriminalization of prostitution. Criminalization marginalizes prostitutes and infringes autonomy. Enforcement is not cost effective, and enforcement techniques encourage abuse. Additionally, decriminalization promotes the public health, safety, and welfare.

Criminal punishment for the payment of money in return for sex, between consenting adults, when both the transaction and sexual conduct occur in private, is an unconstitutional violation of the right to conduct one's sexual affairs privately. The Constitution, precedent, and public policy support this conclusion. Consequentially, the Supreme Court should support this conclusion when the issue inevitably arrives on its docket.

NOTES

1. *See* Part II.
2. *See, e.g.*, N.Y. PENAL § 230 (2008); MINN, STAT. § 609.321 (2009); D.C. CODE § 22-2731 (2001).
3. C.G.S.A. § 53a-82.
4. D.C. CODE §§ 22-2701-31.
5. Theses statutes include: "Engaging and soliciting for prostitution prohibited." D.C. CODE § 22-2701 (2001). "Definitions." D.C. CODE § 22-2702 (2001). "Suspension of sentence, conditions, enforcement." D.C. CODE § 22-2703 (2001). "Abducting or enticing child from his or her home for purposes of prostitution, harboring such child." D.C. CODE § 22-2704 (2001). "Pandering, inducing or compelling an individual to engage in prostitution." D.C. CODE § 22-2705 (2001). "Compelling an individual to live life of prostitution against his or her will." D.C. CODE § 22-2706 (2001). "Procuring, receiving money or other valuable thing for arranging assignation." D.C. CODE § 22-2707 (2001). "Causing spouse or domestic partner to live in prostitution." D.C. CODE § 22-2708 (2001). "Detaining an individual in disorderly house for debt there contracted." D.C. CODE § 22-2709 (2001). "Procuring for house of prostitution." D.C. CODE § 22-2710 (2001). "Procuring for third persons." D.C. CODE § 22-2711 (2001). "Operating house of prostitution." D.C. CODE § 22-2712 (2001). "Premises occupied for lewdness, assignation, or prostitution declared nuisance." D.C. CODE § 22-2713 (2001). "Abatement of nuisance under § 22-2713 by injunction--Temporary injunction." D.C. CODE § 22-2714 (2001). "Abatement of nuisance under § 22-2713 by injunction—Trial, dismissal of complaint, prosecution, costs." D.C. CODE § 22-2715 (2001). "Violation

of injunction granted under § 22-2714." D.C. CODE § 22-2716 (2001). "Order of abatement, sale of property, entry of closed premises punishable as contempt." D.C. CODE § 22-2717 (2001). "Disposition of proceeds of sale." D.C. CODE § 22-2718 (2001). "Bond for abatement, order for delivery of premises, effect of release." D.C. CODE § 22-2719 (2001). "Tax for maintaining such nuisance." D.C. CODE § 22-2720 (2001). "Keeping bawdy or disorderly houses." D.C. CODE § 22-2722 (2001). "Property subject to seizure and forfeiture." D.C. CODE § 22-2723 (2001). "Impoundment." D.C. CODE § 22-2724 (2001). "Anti-Prostitution Vehicle Impoundment Proceeds Fund." D.C. CODE § 22-2725 (2001). "Prostitution free zones." D.C. CODE § 22-2731 (2001).

6. D.C. CODE § 22-2701 (2001).
7. D.C. CODE § 22-2706 (2001).
8. *See, e.g.*, 18 Pa. Cons. Stat. § 5902 (2007); N.Y. Penal § 230 (2008).
9. N.Y. PENAL § 230.00 (2008).
10. N.Y. PENAL § 230.02-230.10 (2008).
11. N.Y. PENAL § 230.15-230.32 (2008).
12. N.Y. PENAL § 230.04 (2008) (stating "[a] person is guilty of patronizing a prostitute in the third degree when he or she patronizes a prostitute."); N.Y. PENAL § 230.05 (2008)(stating "[a] person is guilty of patronizing a prostitute in the second degree when, being over eighteen years of age, he patronizes a prostitute and the person patronized is less than fourteen years of age."); N.Y. PENAL § 230.06 (2008)(stating "[a] person is guilty of patronizing a prostitute in the first degree when he patronizes a prostitute and the person patronized is less than eleven years of age.").
13. N.Y. Penal § 230.20 (2008)9 stating "[a] person is guilty of promoting prostitution in the fourth degree when he knowingly advances or profits from prostitution."); N.Y. Penal § 230.25 (2008)(stating "[a] person is guilty of promoting prostitution in the third degree when he knowingly: 1. Advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes, or a business that sells travel-related services knowing that such services include or are intended to facilitate travel for the purpose of patronizing a prostitute, including to a foreign jurisdiction and regardless of the legality of prostitution in said foreign jurisdiction; or 2. Advances or profits from prostitution of a person less than nineteen years old."); N.Y. Penal § 230.30 (2008)(stating "[a] person is guilty of promoting prostitution in the second degree when he knowingly: Advances prostitution by compelling a person by force or intimidation to engage in prostitution, or profits from such coercive conduct by another; or 2. Advances or profits from prostitution of a person less than sixteen years old."); N.Y. Penal § 230.32 (2008)(stating "[a] person is guilty of promoting prostitution in the first degree when he knowingly advances or profits from prostitution of a person less than eleven years old.").
14. N.Y. Penal § 230.07 (2008)(stating "[i]n any prosecution for patronizing a prostitute in the first or second degrees, it is a defense that the defendant did not have reasonable grounds to believe that the person was less than the age specified."); N.Y. Penal § 230.10 (2008)(stating [i]n any prosecution for prostitution or patron-

izing a prostitute, the sex of the two parties or prospective parties to the sexual conduct engaged in, contemplated or solicited is immaterial, and it is no defense that: 1. Such persons were of the same sex; or 2. The person who received, agreed to receive or solicited a fee was a male and the person who paid or agreed or offered to pay such fee was a female.")

15. N.Y. Penal § 230.33 (2008)(stating [a] person is guilty of compelling prostitution when, being twenty-one years of age or older, he or she knowingly advances prostitution by compelling a person less than sixteen years old, by force or intimidation, to engage in prostitution.").
16. N.Y. Penal § 230.40 (2008)(stating [i]n a prosecution for promoting prostitution or compelling prostitution, a person less than seventeen years of age from whose prostitution activity another person is alleged to have advanced or attempted to advance or profited or attempted to profit shall not be deemed to be an accomplice."
17. N.Y. Penal § 230.34 (2008).
18. N.Y. Penal § 230.36 (2008)(stating [i]n a prosecution for sex trafficking, a person from whose prostitution activity another person is alleged to have advanced or attempted to advance or profited or attempted to profit shall not be deemed to be an accomplice.").
19. N.Y. Penal § 230.35 (2008)(stating [in a prosecution for promoting prostitution or compelling prostitution, a person less than seventeen years of age from whose prostitution activity another person is alleged to have advanced or attempted to advance or profited or attempted to profit shall not be deemed to be an accomplice.").
20. U.S. CONST. amend. V § 1.
21. *Id*.
22. U.S. CONST. amend. XIV § 1.
23. *See, e.g*., Washington v. Glucksberg, 521 U.S. 702, 755 (1997) (Souter, J., concurring).
24. *Id.* at 719.
25. 367 U.S. 497, 541.
26. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).
27. *Id.* at 152.
28. *Compare Lawrence*, 539 U.S. 558, 564 (framing the issue as "whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment."), *with* Bowers v. Hardwick, 478 U.S. 186, 190 (1986)(framing the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.").
29. *See Washington*, 521 U.S. 702.
30. *Roe*, 410 U.S. at 152.
31. *Id.* at 155.
32. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).
33. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

34. *See, e.g.*, United States v. Carolene Products, 304 U.S. 144 (1938).
35. *See, e.g.*, *Lawrence*, 539 U.S. 558.
36. *Id.* at 147-49.
37. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).
38. *Roe*, 410 U.S. at 150.
39. *Compare Carolene Products*, 304 U.S. at 152 (stating "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."), *with Grutter,* 539 U.S. at 333 (citing Shaw v. Hunt, 517 U.S. 899 (1996))(stating "[e]ven in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'").
40. *See* Jota Borgmann, *Hunting Expeditions: Perverting Substantive Due Process and Undermining Sexual Privacy in the Pursuit of Moral Trophy Game*, 15 UCLA WOMEN'S L.J. 171, 190 (2006).
41. *Id.*
42. *Id.*
43. *See* Part III.B.
44. *See Bowers*, 478 U.S. at 190 (framing the issue narrowly as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.").
45. *See Lawrence*, 539 U.S. 558 (framing the issue as "whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.")
46. 478 U.S. 186 (1986).
47. *Lawrence*, 539 U.S. at 578.
48. *Id.* at 566-67.
49. *Id.* (citing *Bowers*, 478 U.S. at 190).
50. *Id.*
51. *Id.* at 564.
52. *Id.*
53. *Id.*
54. *Id.* at 567.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

59. *Id.*
60. *Id.*
61. Reno v. Flores, 507 U.S. 292, 301-02 (2003).
62. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1976)).
63. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
64. Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937).
65. *Id.*
66. 521 U.S. 702.
67. *Id.*
68. *Id.* at 728.
69. *Id.*
70. *Id.* at 721 (citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).
71. *Id.* at 702.
72. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); *see also Roe*, 410 U.S. 113.
73. *Id.*
74. *See id.*
75. *Id.*
76. *Id.* at 480.
77. *Id.* at 479-86.
78. *Griswold*, 381 U.S. at 484. The Court asserted that "specific guarantees in the *Bill of Rights* have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* (citing Poe v. Ullman, 367 U.S. 497, 516-522 (dissenting opinion)).
79. *Id.* (stating that "[v]arious guarantees create zones of privacy. The right of association contained in the penumbra of the *First Amendment* is one, as we have seen. The *Third Amendment* in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The *Fourth Amendment* explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The *Fifth Amendment* in its *Self-Incrimination Clause* enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The *Ninth Amendment* provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.")
80. *Id.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).
81. *Id.* at 484-85 (citing Mapp v. Ohio, 367 U.S. 643, 656 (1961)).
82. *Id.* at 486.
83. *Id.* at 494.
84. *Id.* at 499.
85. *Id.* at 488.
86. *Id.* at 488-92.

87. *Id.* at 488-89.
88. *Id.*
89. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).
90. *Id. at* 453.
91. *Id.*
92. *Id.* at 453-54.
93. *See* Lawrence v. Texas, 539 U.S. 558 (2003).
94. *Id.* at 565.
95. *Id.*
96. Griswold v. Connecticut, 381 U.S. 479, 493 (1965).
97. *Id.* (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
98. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).
99. *See, e.g.*, *Lawrence*, 539 U.S. 558.
100. *See, e.g.*, *id.*
101. *See, e.g.*, *id.* (finding statutes banning homosexual sodomy unconstitutional); Loving v. Virginia, 388 U.S. 1 (1967) (finding anti-miscegenation statutes unconstitutional); Roe v. Wade, 410 U.S. 113 (1973) (finding statutes completely banning abortion unconstitutional).
102. *Id.*
103. *See, e.g.*, *Loving*, 388 U.S. 1.
104. *See, e.g.*, *Griswold*, 381 U.S. 479; *Loving*, 388 U.S. 1; *Roe*, 410 U.S. 113.
105. *See, e.g.*, *Lawrence*, 539 U.S. 558.
106. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).
107. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).
108. *See, e.g.*, United States v. Carolene Products, 304 U.S. 144 (1938).
109. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).
110. *See* Jota Borgmann, *Hunting Expeditions: Perverting Substantive Due Process and Undermining Sexual Privacy In the Pursuit of Moral Trophy Game*, 15 UCLA WOMEN'S L.J. 171 (2006).
111. *Id.* at 209-10.
112. *Id.* at 209.
113. *Id.* at 210.
114. Roe v. Wade, 410 U.S. 113 (1973).
115. Lawrence v. Texas, 539 U.S. 558 (2003) (stating "Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy.")
116. *Id.* at 559.
117. *Id.*
118. *Id.* at 577-78 (citing Bowers v. Hardwick, 478 U.S. 186, 216 (1986)).
119. *Id.* at 578.

120. *Id.* at 590 (dissenting opinion).
121. *Id.*
122. 517 F.3d 738 (5th Cir. 2008).
123. *See* Part IV.E.
124. *See generally* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (holding the city's purposes for its permit requirement statute were not those alleged by the city, but rather a manifestation of animus grounded on an irrational prejudice).
125. *See Lawrence*, 539 U.S. 558, 582 (O'Connor, J., concurring) (stating "This case raises a[n] . . . issue . . . whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.")
126. Marissa H.I. Luning, *Prostitution: Protected in Paradise?*, 30 HAWAII L. REV. 193, 194 (2007).
127. *See Lawrence*, 539 U.S. 558, 577 (citing *Bowers*, 478 U.S. 216) (stating "Our prior cases make . . . abundantly clear. . . . the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.")
128. *See, e.g.*, Grutter, 539 U.S. 306.
129. *See* Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 651 n.14 (1985).
130. Carol Leigh, *A First Hand Look at the San Francisco Task Force Report on Prostitution*, 10 HASTINGS WOMEN'S L.J. 59, 77-78 (1999).
131. *See* Part IV.E.
132. *See* Part IV.A-E.
133. Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 HASTINGS WOMEN'S L.J. 119, 119 (1999).
134. *Id.* at 120
135. *Id.*
136. *Id.*
137. Almodovar, *supra* note 133, at 120.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* (citing Ronnie Greene, *Fighting for Right to Sell Her Body*, DAILY NEWS, June 11, 1995, at 24).
142. *Id.* at 120.
143. Leigh, *supra* note 130, at 62.
144. Almodovar, *supra* note 133, at 121.

145. *Id.*

146. *Id.*

147. *Id.* at 121-22 (citing Janice G. Raymond Ph.D., Report to the Special Rapporteur on Violence Against Women, United Nations Women's Conference, May 1995, at 8-9, 11).

148. Almodovar, *supra* note 133, at 122.

149. *Id.*

150. *Id.*

151. Leigh, *supra* note 130, at 59.

152. *Id.* at 62.

153. *Id.*

154. *Id.*

155. *Id.* at 67.

156. *Id.*

157 *Id.* at 62-63. The following is a summary of the Task Force's recommendations: "I. Repeal the unconstitutional Municipal Police Codes--sections 215 through 248--in accord with recommendations by the City Attorney. II. Immediately stop enforcing and prosecuting misdemeanor and felony laws. Dismiss all current prosecutions in order to begin immediately reallocating resources. III. Respond directly to complaints of excessive noise, littering and trespassing by enforcing ordinances specific to those complaints. . . . IV. Vigorously enforce laws against coercion, blackmail, kidnapping, restraining individual's freedom of movement, fraud, rape and violence regardless of the victim's status as a sex worker. V. Redirect resources currently allocated to police investigation, incarceration, prosecution and defense of sex workers to augment resources for housing, outreach and other services for these populations. VI. Curtail expenditures for Police investigation of prostitution venues where there are no accompanying complaints, including hotels, cafes and bars. VII. Remove authority for the licensing of massage parlors, masseuses and masseurs and escort services from the Vice Crime Division's jurisdiction and place it with agencies already qualified to grant other standard business licenses. VIII. Provide training and circulate directives to Police Department and Sheriff's Department personnel to eliminate harassment and abuse of prostitutes by law enforcement personnel. IX. Provide training to improve the ability of the District Attorney's office to successfully prosecute cases of rape and other assault in which prostitutes and other sex workers are the victims. X. Authorize City lobbyists to identify legislators who will commit to carrying legislation towards the following goals: [a] Repeal state laws that criminalize engaging in, agreeing to or soliciting prostitution, or laws and policies which can be interpreted to deny freedom of travel, and the right to privacy to prostitutes. [b] Repeal state laws which can be interpreted to deny freedom of association, or which criminalize prostitutes who work together for safety. [c] Repeal mandatory HIV testing and felony enhancements of HIV+ prostitutes. [d] Repeal minimum mandatory sentencing laws for second and subsequent convictions. Currently, and as long as there are people accused and convicted of prostitution-related offenses in our jails, the Task Force recommends the following: XI. Conduct a study of the accessibility and relevance

of services in the City and County jails, and the juvenile detention center, to individuals involved in the sex industry. XII. Develop peer based pre-release planning programs relevant to prostitutes to connect them to social service programs that respond to their specific needs, including sex workers' rights organizations, as well as other programs that help them obtain housing, jobs, clothes, child custody and child care, health care and other post-release needs they have. XIII. Formulate a proactive policy within the Sheriff's Department, that persons brought in on charges related to prostitution should not be excluded from citation release programs."

158. *Id.* at 68.
159. *Id.* at 68-69.
160. *Id.*
161. *Id.* at 69.
162. *Id.*
163. *Id.* at 68 (citing Courtney Kerr, *Geographical Study of Prostitution in San Francisco*, J. URB. STUD., 1994, at 30-35).
164. *See* Part IV.E.
165. *Id.*
166. *Id.* (finding that "police officers pose[d] as prospective clients and tr[ied] to get suspects to say the words that w[ould] get them arrested. [The police that were] most successful [were those who] most convincingly behave[d] like clients. Many women complain[ed] of vice officers fondling them or exposing themselves before arresting them. These women refuse[d] to report abusive officers because they fear[ed] retaliation or that they w[ould] not be believed.")
167. Almodovar, *supra* note 133, at 120 (citing Mark Arax, *Judge Says Law Doesn't Protect Prostitutes, Drops Rape Count*, L.A. TIMES, Apr. 24, 1986, at A1).
168. Leigh, *supra* note 130, at 69.
169. *Id.* at n.22
170. *Id.*
171. *See* Daria Snadowsky, *The Best Little Whorehouse is Not in Texas: How Nevada's Prostitution Laws Serve Public Policy, and How Those Laws May be Improved*, 6 NEV. L.J. 217 (2005).
172. *Id.* at 226.
173. *Id.* at 219.
174. *Id.*
175. *Id.* at 220.
176. *Id.* at 224. Prostitution is legal "in the counties of Storey, Lyon, Lander, Churchill, Mineral, Esmeralda, and Nye, where the county commissions retain the right to regulate prostitution and issue brothel licenses. Four other counties outlaw brothels in unincorporated areas but implicitly allow incorporated areas to permit legalization by municipal option."
177. *Id.* at 218.
178. *Id.* at n.90.
179. *Id.* at 227.

180. *See* NEV. ADMIN. CODE ch. 441A, §§ 010-325, 775-815 (2008).
181. *See* NEV. ADMIN. CODE ch. 441A, § 800(1) (2008).
182. Barbara Brents & Kathryn Hausbeck, *State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels*, 44 SOC. PERSP. 307, 314 (2001).
183. *See* NEV. ADMIN. CODE ch. 441A, § 800(3) (2008).
184. *See* NEV. ADMIN. CODE ch. 441A, § 805 (2008).
185. *See* NEV. ADMIN. CODE ch. 441A, § 800(4) (2008).
186. *Id.*
187. *See* NEV. REV. STAT. § 201.358 (2008).
188. *See* NEV. REV. STAT. § 041.1397 (2008).
189. Snadowsky, *supra* note 171, at 218.
190. Barbara Brents & Kathryn Hausbeck, State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels, 44 SOC. PERSP. 307, 321 (2001).
191. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).

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