

SEXUAL PRIVACY AND THE CONSTITUTION

Is sexual privacy a constitutional right? If it is, why doesn't that right cover private payment for private sex? Those are questions posed by *Erotic Service Provider et al. v. Gascon et al.* filed on March 4, 2015 in federal district court, northern district of California. Plaintiffs seek a declaration that California's anti-prostitution provision, Penal Code section 647(b), violates the substantive due process liberty interest of consenting adults. That provision, along with its interpretive case law, criminalizes any sexual contact whatever if made for money or other consideration regardless how private the contact is. It is the liberty interest in privacy under both the federal and state due process clauses that is at stake. (In addition to, and independent of, this implied liberty interest, the California Constitution explicitly grants a right to privacy, and that state privacy right has been interpreted as an even broader right than the federal one.) Plaintiffs also attack 647(b) as violative of their First Amendment freedom of speech and association rights.

This is not a quixotic action. Its time has come. Impressive voices have questioned the criminalization of prostitution. A sample of those voices includes that of Joycelyn Elders, former US Surgeon General; Martha Nussbaum, widely known legal philosopher and professor of law and ethics; criminologist Ronald Weitzer, known for his expertise and publications on prostitution and sex trafficking; Sylvia Law, professor of law, medicine and psychiatry; and theologian and ethicist Yvonne Zimmerman. Feminist writers overwhelmingly oppose criminalizing women who offer sex for money (although some favor criminalizing the customer and those who share in a prostitute's earnings.) Internationally, although different UN instruments and bodies take different positions on prostitution, two 2012 UN-sponsored reports, along with the UN's International Labour Organization, have come out in opposition to the criminalization of prostitution.

But the single most important reason this case is timely lies with *Lawrence v. Texas* where the U.S. Supreme Court struck down a state statute criminalizing same-sex sodomy. The statute represented an unconstitutional invasion of privacy. Cases and commentary frequently note the *Lawrence* court carefully limited its holding by listing issues the case did *not* involve. One of those excluded issues is prostitution. But this limiting language should not keep plaintiffs from using the legal doctrine of *Lawrence* to support their action. The court also warned that the case before it did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” The opinion was not a ruling on prostitution for the same reason it was not a ruling on same-sex marriage. Neither issue was before the court, and, thus, neither was decided. But the court did not foreclose a future favorable ruling on prostitution any more than it foreclosed a future favorable ruling on same-sex marriage. Indeed, the high court has already gone on to issue a favorable ruling on same-sex marriage. In *United States v. Windsor*, the court ruled that, under certain circumstances, the United States government must give formal recognition to same-sex marriages. With no apologies, the court cited *Lawrence* itself in support of this ruling.

A more complex challenge for plaintiffs will be to define the constitutional right *Lawrence* laid down, to argue the right is broad enough to protect a private act of prostitution between consenting adults, and to work out the appropriate standard of review. But two points are clear from *Lawrence*. First, moral disapproval of a practice is not sufficient to justify prohibiting the practice. Second, the right that *Lawrence* articulated is a constitutional one. It was the sexual partners’ substantive due process right to liberty and privacy. In the court’s words, “[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”

A rejection of the plaintiffs' claim will leave us with an oddly shaped privacy right: one that covers sodomy and the commercial purchase of contraceptives and abortions, while excluding the purchase of sex behind closed doors despite the court's description of sexual behavior as "the most private human conduct."

Turning to California, under the state Constitution a woman has a privacy right to terminate her pregnancy because, in the words of the state high court, that decision implicates the woman's "interest in retaining personal control over the integrity of her own body," and is central to her right to control "her social role and personal destiny." (*American Academy of Pediatrics et al. v. Lungren.*) Following that moving language, will the court dictate to a woman that when she is deciding whether to terminate her pregnancy she is exercising personal control over the integrity of her body and controlling her social role and personal destiny, but that no such intimately personal decision about her body, her role or her destiny is at issue when she decides to take money, rather than a conventional relationship, in exchange for her sexuality?

In addition to this scope-of-privacy question, plaintiffs will be confronted with arguments that the state interest in criminalizing sexual contact for money is very strong, strong enough to override due process and privacy concerns. Plaintiffs will successfully rebut this claim if they can keep the argument bound to evidence and facts rather than anecdotal horror stories, images and societal disapproval. But that task will be a demanding one. Weitzer points out that prostitution policies are becoming increasingly divorced from sound research: not surprising as this subject matter is inundated with political, philosophical, and moral agendas.

For example, it will take a major effort to disassociate the rights of prostitutes from the horrible wrongs of sex trafficking which entails minors, coercion or fraud. We are all outraged by the monster who kidnaps, rapes and coerces. But neither the high-end call girl nor the

impoverished street worker is that monster, and each is entitled to be addressed as an individual and told directly, honestly, and factually why she is being made into a criminal.

Overall, plaintiffs will be supported by a growing body of rigorous studies, academic literature and experts who will jar our preconceptions and dramatically confront the stereotype of prostitutes transmitting disease, especially HIV, and of prostitution as characterized by coercion, exploitation and oppression.