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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).

Brian Leiter

THE RADICALISM OF LEGAL POSITIVISM

"Legal positivism," a theory about the nature of law developed over the last two hundred years by, among others, Jeremy Bentham, Hans Kelsen, H.L.A. Hart, and Joseph Raz, is often caricatured by its jurisprudential opponents, as well as by lawyers and legal scholars not immediately interested in jurisprudential inquiry. "Positivist" too often functions now as an "epithet" in legal discourse, equated (wrongly) with "formalism," the view that judges must apply the law "as written," regardless of the consequences. Lon Fuller (late of Harvard Law School), whose spectacular confusions may have poisoned the minds of a whole generation of law students, even went so far as to suggest that "positivism" had something to do with why judges in Nazi Germany did morally abhorrent things![1] Ronald Dworkin, often viewed as a 'liberal' legal philosopher,[2] has made a career out of scandalous mischaracterizations of the positivist theory of law.[3] Writers associated with "Critical Legal Studies"—to whom I'll return below—contributed to the sense that "positivism" was a politically sterile position.

I should like to revisit in this short essay the *actual* theory of law developed by positivist philosophers like Bentham, Hart, and Raz, and to make clear why it is, and was, understood by its proponents, to be a *radical* theory of law, one unfriendly to the *status quo* and anyone, judge or citizen, who thinks obedience to the law is paramount. To be clear, the leading theorists of legal positivism thought the theory gave the *correct* account of the nature of law as a social institution; they did not endorse it because of the political conclusions it entailed, and which they supported. Yet these theorists realized that the correct account of the nature of law had radical implications for conventional wisdom about law. We would do well to recapture their wisdom today.

Positivist theories of law, if we may put their core idea quite simply, treat law as a human *posit*: some normative command—"Don't rob banks" or "Don't go faster than 55 miles per hour"—is a law (or *legally valid*, as I will sometimes say) because of actions taken by human beings. Laws are not God's commands, they are not handed down from 'on high': they come into being through certain kinds of human actions. Human beings, of course, do

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and say lots of things; not all of them create "laws." But, by the same token, there is no reason to think that because human beings have said or done things that create laws that what they have done is good, or sensible, or fair, or just, or ought to command our obedience, or even our allegiance. What the law is in our society is one thing; what it morally ought to be, whether we ought to obey it or endorse it, is wholly another. We would do well not to confuse the two, says the positivist; we would do well, for example, not to think that because the U.S. Supreme Court says the law is X, that we have any moral obligation to comply with X or to celebrate it or defer to it. Or, as Bentham was concerned to argue, we should never confuse the fact that certain rules were duly enacted by Parliament and so constituted "law" with the question whether these laws were any good, whether they made most people better off, whether they should be respected or, instead, ridiculed and repealed.

That is the simple way of putting the core thought underlying Legal Positivism. But let us now state it a bit more formally. Law is, in Hart's famous formulation, "the union of primary and secondary rules." Primary rules are the rules that tell citizens what they can and cannot do, but a legal system requires more: for it also requires rules by which we can change the rules, adjudicate disputes about the rules, and, most importantly, figure out what the rules of *our* legal system actually are. The rule discharging this latter function Hart dubs "the Rule of Recognition": it is the rule that specifies the criteria of legal validity, the criteria all other rules must satisfy to count as rules of the legal system. Of course, if the "rule of recognition" is just another rule, like all the others, then the question can naturally arise: how do we know *this rule of recognition* is the rule of our legal system? An infinite regress looms.

But the Rule of Recognition, according to Hart, is a special kind of rule, what he calls a "social rule." A "social rule" is Hart's label for a social practice that has two distinguishing characteristics. A "social rule" exists when: first, there is a convergent practice of behavior among a group of people; and second, those engaged in the behavior *believe* themselves to be *obligated* to engage in that behavior (in Hart's terminology, those engaged in the behavior take an "internal point of view" towards what they are doing). The first criterion—convergent practice of behavior—is characteristic of lots of mindless group behavior: all the children choose chocolate at the ice cream parlor; all the worker ants serve the queen ant. No one thinks the children have an *obligation* to choose chocolate, it just happens that they are in the habit of doing so. And the worker ants certainly do not think they *must* protect the queen ant; they just do what they do!

The Rule of Recognition is different. To be sure, it involves a convergent practice of behavior: judges in the U.S., for example, treat the fact that Congress enacted a piece of legislation (and the President signed it) as *obligating* them to decide issues that come before them in accord with the rules in that legislation. So judges *converge* on "norms enacted by Congress" as a criterion of legal validity. But judges are not like the kids who habitually choose chocolate or the worker ants serving their queen. Judges do not just "mindlessly" happen to treat Congressional enactments as legally binding; rather they believe that they have an *obligation* to treat such enactments as binding. That is the second crucial component for the existence of a social rule in Hart's sense. The Rule of Recognition is a social rule, which means that for a Rule of Recognition to exist there must be *both* a convergent practice among officials (especially judges) of applying certain criteria of legal validity in deciding which norms are law, but also that the officials adopt an "internal point of view" towards this practice, that is, they believe they have an *obligation* to do this.

So now we have a much richer account of the sense in which law is a product of human actions: a norm is legally valid in some society when it satisfies the criteria of legal validity in that society's Rule of Recognition, and a Rule of Recognition exists in virtue of a complex sociological and psychological fact, namely, that certain officials of the system apply those criteria and *believe* they *ought* to apply them. Notice that the positivist theory of law does *not* claim that they are *correct* to believe that they ought to apply those criteria; the theory claims only that *when law exists* in some society, we find a social rule that is the Rule of Recognition.[4] This leaves open the possibility—*importantly so*—that the officials of the system are *mistaken* in thinking they *ought* to apply the criteria of legal validity they actually apply. That, of course, is what any positivist would have said about judges in Nazi Germany or in the "Jim Crow" American South or in Pinochet's Chile: to the extent they took themselves to have an obligation to apply rules enforcing the second-class status (or worse) of Jews or African-Americans or socialists, they had made a moral mistake. The valid laws of their system were morally reprehensible, and warranted disobedience, not enforcement. But whether Alabama had a legal system in 1950 is a separate question from whether it was a *good* legal system: no significant legal positivist I can think of would have answered the second question in the affirmative.

Jeremy Bentham was a radical who thought British moral thinking of the early nineteenth century was a travesty of trivialities and self-serving nonsense, almost willfully ignoring the plain fact that the majority of people were not well-off or happy. He proposed replacing "morality" (which was

preoccupied with many topics we would now denominate matters of etiquette) with utilitarianism, which would ask whether or not some rule or action actually maximized happiness. His was a radically egalitarian doctrine: each person counted once in the utilitarian calculus, and not more than once. The happiness of lords and bankers counted for no more than the happiness of paupers and cobblers. Bentham thought it important to separate the question, "Is this rule part of the law?" from "Does this rule maximize utility?" precisely because he thought the laws of England were largely indefensible and required radical overhaul in accordance with utilitarian principles. Bentham's radicalism extended, famously, beyond the grave: in order to disabuse his superstitious fellow citizens of their fears about dead bodies, he declared in his will that his body should be preserved and put on display, the "Autoicon" that exists (in somewhat modified form) to this day.

Neither Hart nor Raz is quite the notorious enemy of the status quo that Bentham was, but both share with Bentham the progressive impulse and the desire to demystify "law" so that no one thinks the judgment, "This is the law" settles the question, "Is this what ought to be done?" No public intellectual did more to bring about the decriminalization of homosexuality in Britain than Hart,[5] for example, and Raz, a native of Israel, has been a staunch critic of the mistreatment of the Palestinians and other human rights abuses by Israel. But the real radicalism of Raz's view becomes clear only in the technical details of his legal and political philosophy.[6]

All law claims the right to tell citizens what it is they must do. Even the worst legal systems, and the stupidest laws, present themselves as *authoritative* and *binding*. If you are stopped by the police for speeding, and protest, "But the speed limit is unreasonably low here," the response by the officer of the law will no doubt be abrupt: "Save your breath, you broke the law." Law, as Raz put it, claims "authority," it claims the right to tell its subjects what they *must* do: it does not invite them into a dialogue about whether the reasons underlying the law are good or sound or sensible, it purports to say, *this is what must be done, end of the discussion*.

That may be a characteristic feature of laws and legal systems, but that does not, of course, mean any particular legal system is justified in making that claim to authority. According to Raz's influential account, a claim of authority by the law is *only* justified when what the law commands its subjects to do is close enough to what they *really, morally speaking, ought to do* and, left to their own devices, the subjects would have done worse. Raz calls it the "Service Conception" of authority, and its core idea is simple: a claim of authority is morally justified when the authority actually performs a service

for its subjects, helping them *really* act better than they would without the benefit of the authority's intervention.

Think, for a moment, of a parent who tells her child, "You must wear your raincoat today." The child replies, "Why? It's not raining," even as the first drops fall and the clouds darken. The parent has a *justified* claim of authority over the child precisely because the child will come closer to what Raz calls "right reason"—doing what the child really ought to do (namely, wear a raincoat)—than he would without the parent's intervention. We can all, I think, agree that parents, in situations like this, have justified claims of authority over their children. But Raz's suggestion is that a legal system only has a justified claim of authority over its subjects when it satisfies the same stringent standard.

Legal systems can sometimes meet this standard, for example, when they solve coordination problems that afflict any complex society. Should we drive on the left or the right? Surely it is a matter of moral indifference! The Brits may drive on the left, but they are not for that reason *immoral* drivers! What matters is that we all do the same thing, that is, that we coordinate our behavior. The law is uniquely situated to affect that outcome: by telling its subjects to all drive on the right (or the left, as the case may be), it can exercise a justified claim of authority over its subjects on the Razian view. Sometimes it can also do so when the law brings to bear technical expertise not available to the ordinary citizen.

But the key point is that, on the Razian view, it almost certainly turns out that most laws, and most legal systems, do *not* have justified claims of authority over their citizens. Take the legal system in the plutocratic United States: its laws—from its tax system, to its laws regulating business—consistently enrich a tiny minority (1-2% of the population) at the expense of the well-being of the vast majority.[7] To be sure, the U.S. legal system claims authority over its subjects, but is it justified in doing so? The Razian answer is almost certainly in the negative, unless we suppose that the vast majority would be complicit in their subjugation.[8] If that is right, then even though the U.S. legal system claims *authority* over its subjects, that claim is probably not morally defensible.

The Marxist legal theorist Evgeny Pashukanis (later murdered by Stalin), in his classic 1929 work on *The General Theory of Law and Marxism*,[9] cautioned that it is a mistake to think a Marxist theory of law "should simply throw overboard the basic abstractions which give expression to the fundamental essence of the legal form";[10] rather it "must start with an analysis of the legal form in its most abstract and pure shape and then work towards the

historically concrete".[11] When we understand law and its claimed authority in the manner of Hart and Raz, we immediately open up the possibility that the concrete instantiations of laws and legal systems are unjust and have no claim on our allegiance or obedience. The possibility of radical critique of law, as Pashukanis understood, turns on our ability to identify its essential characteristics precisely so we can then subject its concrete instantiations to skeptical assessment.

There has, alas, never been a serious school of Marxist criticism of legal institutions in American law schools. The closest we have come in the reactionary political culture of the United States over the last thirty years was the "Critical Legal Studies" movement (hereafter CLS) associated with such minor and philosophically insubstantial theorists as Duncan Kennedy and Roberto Unger of the Harvard Law School. From the standpoint of a Pashukanis, or any Marxian theory of law and society, the rise of CLS in the 1970s and 1980s—coinciding, as it did, with the rise of the free-market ideology of the "law and economics" movement—is fraught with ironies. For with some exceptions,[12] CLS simply revived a strategy of left-wing critique that dates back to the Left Young Hegelians of the 1830's in Germany. Seizing upon the Hegelian notion that ideas are the engine of historical change, the Left Hegelians sought to effect change by demonstrating that the prevailing conservative ideas were inherently contradictory and thus unstable. To resolve these contradictions, it would be necessary to change our ideas, and thus change the world.

This strand of Hegelianism was a dead issue by the 1850s—in part because of Schopenhauer's devastating anti-Hegelian polemics, in part because of Marx's criticisms (about which more below), and in part because of the more general "materialistic" and "positivistic" turn in German intellectual life associated with Feuerbach and the so-called "German Materialists."[13] It was not revived until 1922 when Georg Lukács re-introduced Left Hegelian themes into the Marxist tradition of social critique in *History and Class Consciousness*, especially in the central chapter on "The Antinomies of Bourgeois Thought." CLS, however, acquires the style of argument not directly from Lukács--though he was a favorite figure in the footnotes of CLS articles--but from CLS "founding father" Roberto Unger, whose 1975 book *Knowledge and Politics* quite obviously recapitulates the central arguments and themes of *History and Class Consciousness*.

The irony, of which most CLS writers seem little aware, is that CLS should have revived precisely the tradition in left-wing thought that Marx had so viciously lampooned 150 years earlier![14] Indeed, with certain obvious

emendations, we find Marx and Engels articulating the kind of critique that accounts for why CLS is now moribund:

> Since [the Crits] consider conceptions, thoughts, ideas, in fact all the products of consciousness...as the real chains of men...it is evident that [the Crits] have to fight only against these illusions of the consciousness. Since, according to their fantasy, the relationships of men, all their doings, their chains and their limitations are products of their consciousness, [the Crits] logically put to men the moral postulate of exchanging their present consciousness for human, critical or egoistic consciousness, and thus of removing their limitations. This demand to change consciousness amounts to a demand to interpret reality in another way, i.e., to recognize it by means of another interpretation....They forget, however, that to these phrases [constituting the old interpretation] they are only opposing other phrases, and that they are in no way combating the real existing world when they are merely combating the phrases of this world.

Showing the right-wing professors that their ideas are incoherent and demanding that they change their ideas is politically irrelevant for Marx: it is, of course, "contradictions" in the material circumstances of life that are the real engine of historical change. What CLS did was to revive precisely this discredited strand of critical theory—the critique of ideas or "consciousness"—in the legal domain. That the right-wing ideology of "law and economics" triumphed in American law schools at the very same time as CLS mounted its critique is surely rather good evidence that this strategy of critique is no more relevant now than it was in 1840.

Unfortunately, the flirtation with CLS's revival of Left Hegelianism disabled an entire generation of legal theorists who might have benefitted from the clarity of thinking about law characteristic of legal positivism. To be sure, we should not imagine that a generation of clear-eyed legal positivists would have defeated the many reactionary developments in American law over the last thirty years. The material circumstances in which we live continue to dictate the major legal and political developments. But as Marx also understood, there come historical moments when intellectual clarity about social reality is indispensable for political action.[15] One part of that social reality is law, and positivism remains the theory that supplies the requisite clarity. Much more is needed, of course, than a realistic picture of the nature of law, but that hardly alters the fact that positivism lays the conceptual foundation for any radical critique of law in late capitalist societies.

NOTES

1. *See* H. L. A. Hart, *Positivism and the Separation of Law and Morals* 4 HARV. L. REV., 71, 593-629 (Feb., 1958); and Lon Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L.REV. 630–672.

2. By American standards, he is certainly a liberal, but by more cosmopolitan standards, he is plainly an apologist for welfare-state capitalism.
3. For detailed discussion, see my "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence," reprinted in BRIAN LEITER, NATURALIZING JURISPRUDENCE (Oxford: Oxford University Press, 2007). For a shorter and more polemical account, with citations to many of those who have tried to correct Dworkin's misrepresentations, *see* Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165 (2006).
4. Confusion on this point accounts for most of the "natural law" criticisms of positivism, from Dworkin through John Finnis.
5. H.L.A. HART, LAW, LIBERTY AND MORALITY 9, 13-14, 25, 45 (1963). *Available at*: http://books.google.com.
6. *See generally,* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).
7. *See*, *Income Inequality: Top 400 U.S. Earners See Income Rise 476% In Last 15 Years*, HUFFINGTON POST, *at* http://www.huffingtonpost.com/2010/03/05/income-inequality-top-400_n_487878.html. In the same time, median family income increased only 13.2 percent.
8. One must admit the possibility, of course, that the U.S. population has had its cognitive and empathetic capacities so damaged by thirty years of reactionary propaganda that, left to its own reasoning, it might well do worse. That, of course, was the nightmare scenario imagined by the Frankfurt School a half-century ago, but we may still hope that most people would, e.g., recognize the moral importance of taxing the estates of the wealthy.
9. Trans. by Barbara Einhorn (Worcester: Pluto Publishing, 1989).
10. *Id*. at 49.
11. *Id*. at 95.
12. Closer to the spirit of Marx are the critiques of the American legal system in CLS-associated writers like Richard Abel and Karl Klare, who emphasize the extent to which the explicit ideals of the law (e.g., in torts and labor law) fall far short of the reality of the practice. See their contribution to David Kairys (ed.), *The Politics of Law: A Progressive Critique,* pp. 445 et seq, pp 539 et seq. respectively (1st. Edn. 1982) *available at* http://books.google.com.
13. See FREDERICK GREGORY, SCIENTIFIC MATERIALISM IN 19TH-CENTURY GERMANY (Dordrecht: D. Reidel, 1977).
14. See esp. the attack on Left Hegelians like Bruno Bauer in Marx and Engels's *The German Ideology: Part I*, reprinted in R.C. Tucker (ed.), THE MARX-ENGELS READER, 2nd ed. (New York: Norton, 1978).
15. *See* the discussion of Marx in my "The Hermeneutics of Suspicion: Recovering Marx, Nietzsche, and Freud," in THE FUTURE FOR PHILOSOPHY, (Brian Leiter, ed., Clarendon Press, 2004).

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David Gespass

CARLOS ALBERTO TORRES—FREE, AFTER A FASHION, AT LAST

History is generally written by the victors. Thus, the American Revolution is recorded as a just struggle for liberation by colonies formerly subject to the whim of the despotic King George III. The "Tories" who supported the king and opposed independence, even though they made up as large a percentage of the population as the revolutionaries who called for independence, are reviled in our text books for choosing the wrong side.

Puerto Rico is today and has been since the Spanish-American War in 1898 a colony of the United States. It took half a century, until 1948, before its people were allowed to elect their governor. In 1952, the US Congress declared it no longer a protectorate, but a "commonwealth." But while the euphemisms changed, Puerto Rico's colonial status did not. One might think that a country like the United States, incubated and born in the armed struggle against colonial authority, would show some empathy to those who chose the path of revolution against an occupier. One would be wrong.

I met Carlos Alberto Torres in 1985 after a National Lawyers Guild colleague from Chicago stayed at our home in Birmingham when she visited him in federal prison in Alabama. By then, he had served five years of his 78-year sentence for "seditious conspiracy," the official charge for engaging, as a member of the Puerto Rican independence group, Fuerzas Armadas de Liberación Nacional (FALN), the Armed Forces for National Liberation, in revolutionary struggle for the liberation of the colony from the United States. Not entirely parenthetically, Judge Learned Hand referred to the charge of conspiracy as "that darling of the modern federal prosecutor's nursery," since it requires so little in the way of proof. Indeed, whatever Carlos was convicted and sentenced for, it was not for causing physical harm to a single person.

After that visit and over the next several years until he was moved to a more remote federal prison, I was fortunate to see him periodically though, in retrospect, not often enough. Carlos never imposed on me and always assured me that knowing I was available if he needed help was enough for him. But he was far from friends and family and I was his one personal contact

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with the free world. His father was able to visit him once that I recall while he was in Alabama.

During the years he was in Alabama, his interest was rarely over his own fate. More often, he would want to talk to me about the needs of fellow inmates or matters of concern to the population as a whole. Still, I had the opportunity to discuss with him how he should reconcile his desire to get out of prison with his political principles. He had, at his trial, refused to recognize the jurisdiction of a colonial court to try him, insisting he be treated as a national of a free and independent country seized as a prisoner of war.

The man I remember was soft-spoken, reflective, serious and caring. He was certainly committed to the cause of his homeland's independence and the betterment of the Puerto Rican people. One can debate his tactical choices and whether independence is the best course for Puerto Rico, though it seems odd that being a colony would ever be a preferable option to the colonized.

What no one who has sat down and talked to Carlos can doubt is his fundamental decency and his sincerity. That is something President Clinton had not done before he offered clemency in 1999 to 12 other Puerto Rican political prisoners, but refused to include Carlos.

Despite his more than 30 years in custody, Carlos contributed much. He invested in his fellow prisoners, teaching them literacy in both English and Spanish, earned a college degree and mastered the skills of painting and pottery making, exhibiting his work throughout the US, Puerto Rico and Mexico. But he could have contributed so much more had he been freed sooner.

Finally, he is about to be released on parole. Celebrations took place July 26 in Chicago and are planned for July 27 in Puerto Rico, to honor him on his release. It is indeed cause for celebration, but thoughts of what might and should have been in a world and a country that looked at the real individual and not the image portrayed by prosecutors and the media, lend a sobriety and somberness to the joy of the occasion.

Not quite a year ago, I became the president of the National Lawyers Guild. As such, I have the good fortune to boast of the remarkable work done by our members, which is to say to brag about what other people do. So, I take pride in the report that our International Committee presented to the UN Decolonization Hearings on June 21 of this year, even though I did not contribute a comma to it. The report exposed the ways in which the United States maintains colonial control over Puerto Rico and discussed the resistance to that control and the human rights violations that accompany it.

It then went on to discuss the (to coin a phrase) cruel and unusual sentences imposed on Puerto Rican independentistas. It mentioned two in particular who had spent decades in custody, Carlos and Oscar López Rivera, as well as Avelino González Claudio. The Guild, along with many other organizations, had previously passed resolutions calling for their release and, following the presentation, so, too, did the Decolonization Committee.

Thus, our happiness over Carlos' release is further tempered by the continuing incarceration of the other two prisoners. The campaign for their release continues. We will do our part, but we recognize that it will be—as it always has been—a larger movement than just the National Lawyers Guild that wins justice for the oppressed

For further information you can visit the National Boricua Human Rights Network website at http://www.boricuahumanrights.org.

Nathan Goetting

BOOK REVIEW: *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT*

By Anthony Lewis, BasicBooks, 2007. 240 pages. Paperback edition, Basic Books, 2009.

Anthony Lewis's *Freedom for the Thought That We Hate: a Biography of the First Amendment* is one of the tamest books ever written about a bold idea. Hardly a trite liberal piety goes unexpressed; nary a predictable inspiring excerpt from Holmes or Brandeis goes unexcerpted. The First Amendment is unique among bold ideas in that it was inserted into our Constitution at least in part for the bracing purpose of protecting and inspiring other bold ideas. If ideas had feelings the First Amendment would take umbrage at being the subject of such an unoriginal, under-researched, unadventurous and incomplete history of its existence. For all its many statements of tribute to the "courage" of journalists and the "bold judicial decisions" [1] that expanded First Amendment protections, this book never shows bravery enough to take even a single position that wouldn't elicit a round of perfunctory nods among the New York Times editorial board.

Anthony Lewis is one of the most established, and establishment, journalists and public intellectuals in the United States. He wrote for the *New York Times* for approximately fifty years and has twice been given the Pulitzer Prize, including once (in 1963) for his writing on the Supreme Court. He lectured at Harvard from 1974–1989 and has been the James Madison Visiting Professor of First Amendment Issues at Columbia University's Journalism school since 1983. Only an author with such a perfect resume could turn the history of an idea so profound and inspiring into such a repository of safe opinions about very familiar cases. A true "biography" of the First Amendment is either a work of serious and comprehensive scholarship or it is nothing. While the title suggests a much fuller treatment, this effort, a short selection of arbitrarily cherry-picked and underdeveloped highlights from the amendment's first 220 years, carries few facts and ideas unavailable elsewhere.

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Noam Chomsky has referred to Lewis as the quintessential American liberal author and as representative of the leftmost boundary of permissible mainstream political and intellectual opinion.[2] This assertion perhaps gains some currency with *Freedom for the Thought That We Hate*. Few First Amendment commentators writing for a popular audience hold views on free expression as expansive and rights-granting as Lewis. However, the problem advocates for increased free speech will have with this book is that, in those instances where he ventures to express any, his views on free speech are not really very expansive at all. In fact, in certain key areas he would scale First Amendment protections back considerably.

For example, he faults the Supreme Court for its ruling in *Republican Party of Minnesota v. White*,[3] which struck down a clause in the Minnesota Code of Judicial Conduct barring those running for a judgeship in that state from informing the voters of their legal and political views. The clause in question was premised on the same notion that has caused the senate confirmation process of Supreme Court nominees to become a sequence of fatuous and fatiguing plays in a long-running theater of the absurd—the notion that judges who publicly announce their beliefs might not be able to judge fairly when cases touching those beliefs arise before them. Lewis writes that for a prospective judge to disclose his or her thoughts on the legal or political issues most relevant to that judgeship would be tantamount to making campaign promises. When they do so "they appear to be just another species of politician,"[4] as if judges, and especially candidates running to become judges, are in this age capable of being anything else. Instead Lewis would have kept the Minnesota gag order, called "the Announce rule," in place and the voters ignorant of information most essential to making an informed decision.

In one of the most vital areas of First Amendment law and the area which began in earnest the Supreme Court's history of explaining the amendment, subversive advocacy, Lewis's position is far more restrictive and censorious than the Supreme Court's current interpretation. More so than the liberal icons he so often cites, Holmes and Brandeis, even. Arguably the most important opinion in the history of First Amendment jurisprudence is Holmes' dissent in *Abrams v. U.S.*[5] whose core idea has in many ways come to serve as a universal principle underlying all First Amendment law. In this opinion Holmes explains what has come to be known as the "Marketplace of Ideas" theory, according to which the First Amendment requires that, barring certain extreme circumstances in which censorship is the only way to prevent the imminent danger of a lawless act, all forms of advocacy will be free to compete for popular acceptance in an uninhibited and open intellectual marketplace.

Society's default remedy against erroneous or harmful ideas should be truthful and good ones uttered in opposition, not state-imposed silence. We should err on the side of too much speech rather than too little. "That at any rate is the theory of our Constitution," Holmes tells us.[6]

Holmes insisted in this opinion that to be exempt from First Amendment protection there must be an "immediate" cause-and-effect relationship between the subversive or criminal advocacy and the danger that the illegal act being advocated will actually be committed.[7] That is, the temporal connection between hortatory speech and the danger of its enactment must be extremely close, "imminent," and if not the state may not punish the speaker.[8] Brandeis, who joined Holmes' dissent in *Abrams*, would define the limits of this temporal connection in his concurrence (wrongly called a dissent by Lewis[9]) in *Whitney v. California*.[10] The speaker may be punished, Brandeis writes, only when the illegal act so quickly follows the exhortation that there is not time enough for good speech to countermand the order of the bad. "If there be time to expose through discussion the falsehood and fallacies…the remedy to be applied is more speech, not enforced silence."[11] In other words, the utterance of any form of advocacy, however offensive or criminal, cannot be punished unless the danger it creates precedes in time the mere possibility of considering a counterargument. The Supreme Court embraced the imminence test put forth by Holmes and Brandeis in 1969 with *Brandenburg v. Ohio*,[12] which is still controlling case law in this area.

This is too much free speech for Lewis. While his reasoning on this issue is too incomplete to gain a clear understanding of his position, it is clear that he would eliminate the imminence requirement from *Brandenburg*:

> In an age when words have inspired acts of mass murder and terrorism, it is not as easy as it once was to believe that the only remedy for evil counsels, in Brandeis's phrase, should be good ones…I think we should be able to punish speech that urges terrorist violence to an audience some of whose members are ready to act on the urging. That is imminence enough.[13]

One can only imagine how many websites and mass emails urging political violence currently inhabit cyberspace, where any fanatic or crackpot might be their audience. Perhaps some of these websites and emails have been accessible for years without causing any stir, but might lead to actual harm when the wrong person happens upon them. Perhaps some of this inflammatory content has been written by indoctrinated or outraged authors against whom wiser counsels and a cooler head has since prevailed. One can only conclude that such authors would find no refuge behind Lewis's First Amendment.

But, aside from committing the unpardonable sin of referring to the classic 1940 screwball comedy *His Girl Friday* with Cary Grant and Rosalind Russell as "Our Gal Friday,"[14] the primary reason for dissatisfaction with this book is not how it interprets the First Amendment, but its general unwillingness, during an era of numerous ongoing and contentious free speech issues, to explain how the amendment should be interpreted. The list of First Amendment cases and controversies omitted from this "biography" are legion and among the most compelling in Supreme Court history. For instance, Chapter 8, titled "Another's Lyric," addresses the trouble the Court has always had defining the limits of protected sexual expression without so much as mentioning the form of speech perhaps hated by society most of all, child pornography. This is an area of First Amendment jurisprudence that is both politically supercharged and which the Court has meaningfully—and controversially—dealt with more than once in recent years.

While there has always been something like a universal consensus amongst members of the Court that kiddie porn, which the Court defines as "visual depictions of children performing sexual acts or lewdly exhibiting their genitals,"[15] depicts abominable acts of child abuse and should be censored, there have been cases involving speech on the margins of child pornography that have had broad and profound cultural and criminal justice implications and have taken the Court's First Amendment analysis deep into hitherto uncharted terrain. In 1990 the Court ruled in *Osborne v. Ohio*[16] that the First Amendment does not protect knowing possession of child pornography in the home. In 1986, just four years before *Osborne*, federal law enforcement discovered that the bestselling pornographic movie and magazine star in the world, Nora Kuzma (aka "Traci Lords"), had been lying about her age and posing for such magazines as *Penthouse* and starring in hardcore features since the age of 15. In an instant all of these magazines and videos became illegal child pornography of which all those with copies who read or saw news reports of this highly publicized story were in knowing possession. This fiasco culminated *U.S. v. X-Citement Video, Inc*.,[17] in which the Court upheld the conviction of defendants who knowingly distributed Ms. Lords' magazines and movies but did not consider the status of mere possessors in the home who simply forgot to throw the material away or were determined to keep their collection of *Penthouse* magazines intact. In the 2002 case of *Ashcroft v. Free Speech Coalition,*[18] the Court declared the Child Pornography Prevention Act of 1996 overbroad because it banned pornography that, using computer-generated images and young-seeming adults, looked like kiddie porn but really involved no children at all. This

entire area of First Amendment law, continually developing and reshaping the boundaries of permissible expression, escapes Lewis's notice.

Chapter 10, titled "Thoughts We Hate," deals in large part with race-based hate speech, but this chapter neither mentions the two major cases the Supreme Court has heard on this issue, *R.A.V. v. St. Paul*[19] and *Virginia v. Black*,[20] both involving racist cross-burning, nor suggests how the First Amendment should reckon with this issue. Moreover, the longstanding First Amendment struggles of students, prisoners, public school teachers and numerous other groups who have historically been subject to state censorship are nowhere considered.

The First Amendment exists for and is loved most by outcasts, who know what it's like to need it and so want more of it for everyone. This spirit—the spirit of fearlessness and possibility—never finds its way into this book. We should all be grateful that the First Amendment has led a much more fascinating, provocative and wide-ranging life than the one described in this biography.

NOTES

1. ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT, 187-188 (2007) Page numbers cited in this review refer to the hard cover edition.
2. Matthew Bierber, *Citizen Conversation with Noam Chomsky*, THE CITIZEN, *available at* http://harvardcitizen.com/2010/02/11/citizen-conversation-withnoam-chomsky/
3. 536 U.S. 765 (2002).
4. LEWIS, *supra* note 1 at 180.
5. 250 U.S. 616 (1919).
6. *Id*. at 630.
7. *Id*. at 628.
8. *Id*. at 630.
9. LEWIS, *supra* note 1 at 37.
10. 274 U.S. 357 (1927).
11. *Id.* at 377.
12. 395 U.S. 444 (1969).
13. LEWIS *supra* note 1 at 166-167.
14. *Id*. at 145.
15. *New York v. Ferber,* 458 U.S. 747, 762 (1982).

16. 495 U.S. 103 (1990).
17. 513 U.S. 64 (1994).
18. 535 U.S. 234 (2002).
19. 505 U.S. 337 (1992).
20. 538 U.S. 343 (2003).

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Staughton Lynd

LETTER TO THE EDITOR

Henry M. Willis, "Organizing—With or Without the NLRB, " National Lawyers Guild Review, v. 66, no. 2 (Summer 2009) offers a thoughtful and carefully documented assessment of the present weakness of the labor movement in the United States. However, I have a very different analysis. Let me explain.

Waiver of the Right to Strike

As I see it, the primary cause of labor's current impotence is not Supreme Court jurisprudence hostile to the intent of the National Labor Relations Act (the NLRA, or Wagner Act) in the years immediately following the law's enactment; not passage of the Taft-Hartley Act or the expulsion of Communist-led unions from the CIO; not the lackluster leadership of the labor movement since the merger of the CIO and AF of L; and not the influence of business ideology on the courts and National Labor Relations Board in recent decades.

Rather, in my judgment, the fundamental cause of the labor movement's current distress is that from its beginnings the CIO gave away the right to strike. In the very first collective bargaining agreements negotiated by major CIO unions—between the UAW and General Motors, and between the Steel Workers Organizing Committee and U.S. Steel, in 1937—union negotiators voluntarily accepted language abandoning ("waiving") the right to strike during the duration of the contract. Since then, a presumed national policy opposing strikes has been interpreted more and more expansively to prohibit slow-downs, sympathy strikes, strikes in support of or opposition to a political position, strikes in a workplace where there is a grievance-arbitration procedure, and other forms of shopfloor direct action.

Nothing in the text of the NLRA required surrender of the right to strike. Indeed, according to the principal draftsperson of the Act, Section 13 with its explicit guarantee of the right to strike was included in the statute

> because [Senator] Wagner was always strong for the right to strike on the ground that without the right to strike, which was labor's ultimate weapon, they really had no other weapon. That guarantee was a part of his thinking. It was particularly necessary because a lot of people made the argument that because the government was giving labor the right to bargain collectively, that was a substitute for the right to strike, which was utterly wrong.

Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 11 U. MIAMI L. REV. 353.

In the view of those who drafted the NLRA the strike was labor's "basic weapon," commensurate with "the right of the employer to close his plant." *Id*., p. 353. Tragically, what actually happened was that the typical CIO-contract ever since the years just after World War II has contained both a no-strike clause and a "management prerogatives clause" giving the employer the right to make basic investment decisions unilaterally. Thereby the CIO gave management the explicit right to take away its members' livelihood while also taking away from its members the ability to do something about it by direct action.

No wonder that, with a handful of exceptions, since the 1970s American trade unions have watched helplessly while multinational corporations closed unionized plants in the United States and shifted investment, first to locations in the American South, and then overseas.

The proposed Employee Free Choice Act does nothing to restore the fundamental right to take strike action whenever workers so desire, and thus does not provide any weapon that workers might use in contesting capital flight. On the contrary, the proposed statute seeks to extrapolate the practice of grievance arbitration, customary since the 1930s, by "providing for interest arbitration if the parties (cannot) reach agreement." Willis, "Organizing," p. 117. This proposal departs from the historical opposition of trade unions in the United States to compulsory arbitration of contract terms. In the early 1970s the national leadership of the United Steelworkers of America agreed to interest arbitration in the event of a bargaining impasse. The so-called Experimental Negotiating Agreement aroused widespread and intense rank-and-file opposition, and was abandoned after a few years. The alarming resurrection of this misguided idea is a measure of labor's present weakness.

Preoccupation with Becoming Exclusive Bargaining Representative

A second aspect of American labor's current helplessness, closely linked to waiver of the right to strike, is continued adherence to the concept of exclusive representation.

In his magisterial book, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (Ithaca and London: Cornell University Press, 2005), Professor Charles J. Morris demonstrated that the original intent of New Deal labor legislation and the early practice of federal regulatory agencies was to require an employer to bargain in good faith with any

group of workers who demanded negotiations, whether or not these workers represented a majority of employees in a given workplace.

One can understand that faced with the reality of employer dominated company unions, NLRB decision-making drifted away from the Act's original intent toward the concept of exclusive representation. But exclusive representation has significant drawbacks. Union finances are made to depend on the practice of "dues checkoff" whereby the employer deducts the union's budget from the worker's paycheck: early CIO organizers whom my wife and I interviewed for our book *Rank and File* pointed to this practice as the leading reason that "your (union) dog don't bark no more." *Rank and File: Personal Histories by Working-Class Organizers*, ed. Alice and Staughton Lynd (third edition¡ New York: Monthly Review Press, 1988), pp. xi-xii, 81-102 *et passim*. Exclusive representation also insulates union incumbents from challenge to an extent that "unfair representation suits" pursuant to Section 301 of the Labor Management Relations Act (LMRA) cannot hope to rectify. Perhaps most significantly, there is a convergence between waiver of the right to collective direct action on the shopfloor and lack of legal protection for rank-and-file initiatives supported by less than a majority of the workforce. Thus, for example, African American workers who, believing the employer was discriminating against them, picketed on their own time and on public property asking consumers to boycott their store, were held first by the NLRB, and then by the United States Supreme Court, to have been lawfully discharged because they should have filed individual grievances. Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975).

This symbiosis of, on the one hand, abandonment of the right to strike, and, on the other hand, certification of particular unions as exclusive representatives that smother rank-and- file initiatives from below, can be seen most clearly by examining the experience of a minority union that retained the right to strike.

In 1969 I interviewed the late John Sargent, first president of the 18,000 member Local 1010, United Steelworkers of America, at Inland Steel in East Chicago, Indiana. "Guerrilla History in Gary," in *From Here to There: The Staughton Lynd Reader* (Oakland CA: PM Press, 2010), pp. 152-158. wherein Sargent is referred to as "John Smith. Settlement of the "failed" Little Steel strike of 1937 gave SWOC the right to bargain with management on behalf of SWOC members. The right to strike, during as well as after work, remained in full force. At a community forum on "Labor History from the

Viewpoint of the Rank and File," John Sargent spelled out what happened at Inland Steel in the late 1930s.

According to John,

> The enthusiasm of the people in the mills made this settlement of the strike into a victory of great proportions.
>
> Without a contract, without any agreement with the company, without any regulations concerning hours of work, conditions of work, or wages a tremendous surge took place.'
>
> (T)here were no organizers at Inland Steel. The union organizers were essentially workers in the mill . . .
>
> Without a contract we secured for ourselves agreements on working conditions and wages that we do not have today (1970), and that were better by far than what we do have today in the mill. For example as a result of the enthusiasm of the people in the mill you had a series of strikes, wildcats, shut-downs, slow-downs, anything working people could think of to secure for themselves what they decided they had to have. If their wages were low there was no contract to prohibit them from striking, and they struck for better wages. If their conditions were bad, if they didn't like what was going on, if they were being abused the people in the mills themselves- -without a contract or any agreement with the company involved- -would shut down a department or even a group of departments to secure for themselves the things they found necessary.

Rank and File, pp. 99-100. Nowadays, Sargent commented, "you have a pretty good company union." "Guerrilla History," p. 157.

Alternative Strategies

Some readers may respond, "Well, Staughton, perhaps you are right that it would have been better to begin in a different way but that beginning happened long, long ago. What do you suggest we do right now?" I wish I had a complete solution in my hip pocket. I see three possible strategies to explore.

The Republic Windows and Doors occupation in Chicago was unusual in that the workers were seeking to enforce the employer's contractual obligations to pay them certain shutdown benefits. We sought something similar in Youngstown when U. S. Steel announced .the closure of all its facilities in the area. We argued that in addition to the management prerogatives clause in the national (basic) steel contract, there was a second, local contract, formed by "promissory estoppel," obligating the employer to keep its Youngstown mills running so long as they were making a profit. We lost for other reasons, but no one questioned the validity of this legal argument.

Equally fruitful as a starting point for exploration may be the work-to-rule campaign at A. E. Staley described in Steven Ashby and C. J, Hawking, *Staley: The Fight for a New American Labor Movement* (Urbana and Chicago, University of Illinois Press, 2009), especially Chapter 4. After the collective bargaining agreement expired, members of the local union were essentially in the same situation as members of Local 1010, USWA, after the Little Steel strike. During the nine months Staley workers worked without a contract 97 percent voluntarily paid union dues. On their own, workers began to meet at lunch, breaks, and shift changes to plan their next moves.

Grievances became group grievances. The workers created an underground newspaper. The no-strike clause of the contract no longer existed, and production dropped within a few months by close to 50 percent. This fight, too, was lost, because ultimately the company locked the workers out. But the experience seems to me full of possibilities for the future.

Finally, IWW member Daniel Gross and I have described a strategy developed at Starbucks stores in New York City in *Labor for Law for the Rank and Filer: Building Solidarity While Staying Clear of the Law* (revised ed., Oakland: PM Press, 2008). What has worked at Starbucks is to make ample use of Section 7 of the LMRA while altogether avoiding Section 9, that is, while deliberately not seeking an NLRB election to determine whether the union can be recognized as an exclusive bargaining representative.

Conclusion

I do not mean to be particularly critical of trade unionism in the United States. In countries allover the world, there are centralized, bureaucratic, hierarchical union structures that seek to channel workers' self-activity into legalized and predictable forms of protest. (Recent examples include Mexico, South Africa, and China.) Unfortunately, most labor organizers, labor educators, and labor lawyers serve existing unions rather than improvised alternatives. There are full-time jobs that make it possible for them to do so. But as I once had occasion to say, "Nothing in the Communist Manifesto, or for that matter the New Testament, assures us that at age thirty-five or forty we should expect to achieve economic security for the rest of our lives." "Intellectuals, the University, and the Movement," in *From Here to There*, p. 151. Assistance to alternative fledgling and impoverished structures improvised from below is a challenge for the next generation.

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"This is the first time the Court has ever held that physicians can be prohibited from using a medical procedure deemed necessary by the physician to benefit the patient's health."[7] Most recently, in a case involving a drive-by shooting in Michigan, *Berghuis v. Thompkins*,[8] the Court ruled that a suspect who finally confessed after remaining almost completely silent during three consecutive hours of police interrogation, never uttering a word about the crime at issue, was not protected under *Miranda*. The Court reasoned that the suspect's continued silence was not an assertion of his *Miranda* rights but rather a *de facto* waiver of them. To invoke his *Miranda* rights, according to the Court, a suspect must express them "unambiguously."[9] The Roberts Court is moving full speed ahead.

Two of President Obama's nominees, Sonia Sotomayor and Elena Kagan, are now on the Court. There is reason to be concerned that they will make the Court even more reactionary. President Obama has publicly criticized the more progressive courts of the 1960s and 1970s as having "overreached."[10] Justice Sotomayor, who spent five years as a prosecutor and was first appointed to the federal bench by George H.W. Bush, has replaced Justice David Souter, who in his later years on the bench had become a surprisingly strong vote and independent-minded voice upholding many Warren Court reforms and, to the dismay of many who supported his nomination, the principle that the right to an abortion is inherent in the Due Process Clauses of the Fifth and Fourteenth Amendments. While Justice Sotomayor dissented in *Thompkins*, she has a long record as a "tough on crime" judge[11] known to mete out harsh sentences.[12] In her only abortion-related opinion as a federal judge, then-Judge Sotomayor upheld the George W. Bush administration's "Mexico City Policy," which defunded foreign organizations that performed or recommended abortions.[13] While one can only speculate as to what her legacy on the High Court will be, those civil libertarians encouraged by her dissent in *Thompkins* still have reason to be concerned.

Justice Kagan gives progressives little reason to think her tenure on the Court will resemble that of the justice for whom she clerked, the great defender of the Warren Court legacy, Justice Thurgood Marshall. While Justice Kagan has never evinced anything like the reactionism of the rightmost members of the Roberts Court, she is nonetheless a former paid advisor to Goldman Sachs[14] who has stated that those arrested for financially supporting Al-Qaeda can be held indefinitely without trial[15] and who, in her capacity as solicitor general, has argued that the Court should narrow the scope of the First Amendment by creating a broad new category of censorable speech (depictions of animal cruelty).[16]

Most ominous for civil libertarians, Justice Kagan has a marked fondness for increased executive power, as shown in her 2001 article advocating tight presidential control of administrative agencies[17] and her years working as a lawyer in the executive branch. In her relatively short stint as solicitor general she took several strong and unambiguous stands on behalf of the president against transparency and open government. In her *amicus* brief in *Mohawk Industries, Inc. v. Carpenter*[18] Kagan surprised many by broadly defining the "state-secret privilege," often used by Presidents Bush and Obama to scuttle lawsuits challenging their prosecution of the "war on terror," and asserting that it exists inherently in the doctrine of separation of powers and has "constitutional grounding."[19] In *United States Department of Defense v. ACLU*[20] she argued that the Supreme Court should overturn a ruling by the Second Circuit requiring the Obama administration to release hitherto unpublished photos of U.S. personnel torturing detainees in Iraq and Afghanistan, echoing the president's oft-repeated line that their release would "endanger the lives" of U.S. and allied personnel abroad.[21]

While Justice Kagan's views on criminal procedure are less public than those on executive power, it is perhaps telling that she filed an *amicus* brief in the abovementioned case on custodial interrogations (*Thompkins*) that, according to Charles Weisselberg of the UC Berkeley School of Law, sought to limit *Miranda* in a way that "was even more aggressive than Michigan's."[22] Justice Kagan has replaced Justice John Paul Stevens, hailed as the Court's "liberal leader" by *The New Yorker*'s Jeffrey Toobin[23] and as a "stalwart defender of individual rights" by Matthew Rothschild of *The Progressive*.[24] Justice Stevens' stinging rebuke of the right-wing partisans on the Court in his *Bush v. Gore*[25] dissent is already fast becoming one of the most oft quoted sentences in the history of the Court, "Although we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the nation's confidence in the judge as the impartial guardian of the rule of law."[26] There is nothing at all in the carefully directed and upwardly mobile career of Justice Kagan that portends the expansive view of civil liberties and principled boldness of Justice Stevens. Her many defenders often echo the arguments of those who defended other former executive branch attorneys, like Chief Justice Roberts and Justice Alito, by stating that her positions as solicitor general do not necessarily suggest how she will vote on the Court. After all, a solicitor general must represent the views of her superior, the president. But this defense only carries so much weight and, ultimately, is little more than an evasion. It is the fact that Justice Kagan, a Harvard Law School graduate with a universe

of career options before her, chose to spend so much of her professional life serving executive power in the first place that is so disquieting.[27]

The time is ripe for those wary (and perhaps weary) of the Court's continual rightward shift to provide their own model for the ideal Supreme Court Justice, one who might defend the Warren Court reforms and the right to privacy from the onslaught already underway. The first article in this issue, "Reclaiming the Judiciary: Notes for the Next Supreme Court Nomination," written shortly before the Kagan nomination by the chair of the Guild's *Amicus Curiae* Committee, Professor Zachary Wolfe, Esq. of George Washington University, does precisely that. With the hard won liberties of the past in imminent danger, Prof. Wolfe describes the kind of Justice capable of preserving them. There are no Thurgood Marshalls or William J. Brennan's—or now even a John Paul Stevens—on the Roberts Court. It seems neither Democrats nor Republicans want there to be one. With "Reclaiming the Judiciary" Prof. Wolfe gives us a vision for a model justice whose placement on the Court progressives can mobilize toward and a set of standards by which those already on the Court can be measured by.

The theory of substantive due process—that the Due Process Clauses of the Fifth and Fourteenth Amendments can substantively, rather than just procedurally, limit government interference with individual rights—began in the late 19th and early 20th centuries as a way for courts to protect private property and commercial transactions.[28] This form of "economic" substantive due process reached its apogee in 1905 with *Lochner v. New York*,[29] where the Supreme Court found that the New York Bakeshop Act of 1897, designed to protect unconscionably overworked bakers by capping their weekly hours, violated the bakers' substantive right under the Fourteenth Amendment to freely enter into a contract for their labor. The Court's *Lochner* era, where Social Darwinism and contempt for workers' rights reigned under the theory of economic substantive due process, effectively ended in 1937 when the Court upheld a Washington minimum wage statute in *West Coast Hotel Co. v. Parrish*.[30] In the second half of the twentieth century substantive due process has been used to locate a right to privacy that protects individuals from state incursion into areas of medical, familial and sexual decision-making. The next article in this issue, "Freeing Jane: The Right to Privacy and the World's Oldest Profession" by Benjamin David Novak, argues that, especially after the Court's groundbreaking decision on the issue of sexual privacy in *Lawrence v. Texas*,[31] anti-prostitution laws should be overturned as violations of the substantive right to privacy found in the Constitution's due process clauses.

More than that, Mr. Novak gives a thoughtful and detailed argument as to why the abolition of these laws is sound public policy.

While acknowledging the commercial nature of prostitution, Mr. Novak's argument is rooted squarely in the right to sexual privacy and does not advocate a return to *Lochner*-style "liberty of contract" on behalf of sex workers, which, for numerous reasons, the Roberts Court would almost certainly never endorse. However, students of the history of the Court's substantive due process jurisprudence might find it interesting and perhaps ironic that, if the Court recognizes a privacy right for sex workers to ply their trade, as Mr. Novak claims it should, it will have the coincidental effect of creating for them something very similar to the "right" to contract for labor granted bakers as a poisoned gift under the abandoned laissez-faire reasoning in *Lochner*. It goes without saying that the *Lochner* Court of 1905 would have upheld a statute criminalizing prostitution as a permissible exercise of a state's police power to promote the morals of its people. However, as Mr. Novak points out, *Lawrence* seems to have precluded morality as a legal basis for the regulation of private adult consensual sexual conduct in the home. Were a privacy right to engage in prostitution recognized, substantive due process, in both its past and present forms—the right to sell your labor in whatever fashion you choose and the right to privacy in the bedroom—would, through a strange and perhaps unwished-for alchemy of legal reasoning, in some way converge. Mr. Novak's bold and well-reasoned article certainly provides ample food for thought.

The next feature in this issue, a short and provocative piece titled "The Radicalism of Legal Positivism" by Professor Brian Leiter of The University of Chicago Law School, argues that the philosophical school of thought most worthwhile and relevant to radical legal reform is Legal Positivism, not, as many on the left believe, the Critical Legal Studies (CLS) movement, which Prof. Leiter sees as animated by obsolete and "discredited" ideas "lampooned" by Marx 150 years ago. *National Lawyers Guild Review* does not necessarily share the views Prof. Leiter espouses in this piece, particularly those regarding CLS and its exponents, whom he regards as "philosophically insubstantial." We publish Prof. Leiter's article with the hope that it will generate a wider discussion on the foundations of radical legal theory. The philosophers whose work Prof. Leiter criticizes by name have been invited to respond.

Next, National Lawyers Guild President David Gespass reflects on the recent paroling of political prisoner Carlos Alberto Torres, a crusader for Puerto Rican independence who served 30 years of a 78-year sentence in a

federal prison for seditious conspiracy and carrying a firearm. Mr. Torres was a leader of the Forces of National Liberation (FALN), a Puerto Rican nationalist organization devoted to freeing Puerto Rico from U.S. domination and control. Responding to pressure from numerous Nobel Peace Prize winners, human rights organizations, the Archbishop of Puerto Rico and many others, in 1999 President Clinton granted clemency to several FALN members, but not to Mr. Torres, whom President Clinton regarded as an unrepentant "leader of the group."[32] His release is being widely celebrated as long overdue by those supporting an independent and autonomous Puerto Rico.

This issue ends with a book review of Anthony Lewis's *Freedom for the Thought That We Hate: A Biography of the First Amendment* and a letter to the editor from renowned writer and activist Staughton Lynd.

—Nathan Goetting, Editor in chief

NOTES

1. 410 U.S. 113 (1973).
2. 347 U.S. 483 (1954).
3. 384 U.S. 486 (1966).
4. 551 U.S. 701 (2007).
5. Jefferson County Public Schools in Kentucky had a similar school diversity program, also struck down in this case. *Id.*
6. 550 U.S. 124 (2007).
7. George J. Annas, *The Supreme Court and Abortion Rights*, 356 NEW ENG. J. MED. 2201, 2201 (2007) *available at* http://www.nejm.org/doi/full/10.1056/NEJMhle072595.
8. 130 S. Ct. 2250 (2010).
9. *Id.* at 2259-60.
10. Charlie Savage & Sheryl Gay Stolberg, *Obama Says Liberal Courts May Have Overreached*, N.Y. TIMES, April 30, 2010, at A15, *available at* http://www.nytimes.com/2010/04/30/us/politics/30court.html.
11. Jess Bravin & Nathan Koppel, *Nominee's Criminal Rulings Tilt to Right of Souter*, WALL ST. J., June 5, 2009, at A3, *available at* http://online.wsj.com/article/SB124415867263187033.html.
12. *Id.*
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27. *See* Marjorie Cohn, *Kagan Will Move Supreme Court to the Right*, HUFFINGTON POST, May 14, *at* http://www.marjoriecohn.com/2010/05/can-kagan-fill-stevens-mighty-shoes.html; and Marjorie Cohn, *Kagan's Troubling Record, at* http://www.marjoriecohn.com/2010/05/kagans-troubling-record.html, for analyses of the Kagan nomination by the Guild's immediate past president, Marjorie Cohn. Her website is marjoriecohn.com.
28. Some, but by no means all, scholars and commentators in this area, including Justice Scalia, trace the origin of substantive due process to Dred Scott v. Sandford, 60 U.S. 393 (1857). Planned Parenthood v. Casey, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part and dissenting in part).
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