

Volume 9 | Issue 1

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Winter 2005

# Reimagining the Right to Commercial Sex: The Impact of *Lawrence v. Texas* on Prostitution Statutes

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## Recommended Citation

Belkys Garcia, *Reimagining the Right to Commercial Sex: The Impact of Lawrence v. Texas on Prostitution Statutes*, 9 N.Y. City L. Rev. 161 (2005).

Available at: [10.31641/clr090105](https://academicworks.cuny.edu/clr090105)

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## **Acknowledgements**

The author thanks Ruthann Robson for her continued advice and mentorship. The author also gratefully acknowledges her family and Jade Townsend for their love and support.

# REIMAGINING THE RIGHT TO COMMERCIAL SEX: THE IMPACT OF *LAWRENCE V. TEXAS* ON PROSTITUTION STATUTES

*Belkys Garcia\**

## I. INTRODUCTION

Does the right to engage in private, adult, consensual sexual conduct without intervention of the government declared in *Lawrence v. Texas*<sup>1</sup> include the right to buy and sell sex?

The short-term answer is probably no, thanks in part to the caveat paragraph of dicta that precedes the holding in which Justice Kennedy specifically remarks that *Lawrence* does not “involve public conduct or prostitution.”<sup>2</sup> However, Kennedy also wrote, “as the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>3</sup> Both a constant ambiguity and an explicitness run throughout the *Lawrence* decision, opening discussions about rights to sexual autonomy and providing an opportunity to reinvigorate and unify movements of sexual liberation. The ambiguity of *Lawrence* begs the question: What are the boundaries of sexual freedom in the United States after the Supreme Court’s decision in *Lawrence v. Texas*, and does it create an argument for decriminalizing voluntary prostitution?<sup>4</sup>

This Article will address this question by discussing two predominant feminist theoretical perspectives on prostitution, generally described as “prostitution-as-work” and “prostitution-as-violence.” Next, the Article will review the majority and dissenting

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<sup>1</sup> 539 U.S. 558, 579 (2003).

<sup>2</sup> *Id.* at 578.

<sup>3</sup> *Id.* at 579.

<sup>4</sup> This Article specifically deals with adult, female, heterosexual, voluntary prostitution. This is not to invisibilize the experience of others working in prostitution, such as queer and transgender prostitutes or the sex trafficking of women or girls. This article aims to approach a stalled conversation about this specific type of prostitution, which historically has been centralized in the debate, through the lens of the current state of the law. For reference on the topic of sex trafficking, see generally Mohamed Y. Matter, *Trafficking in Persons: An Annotated Legal Bibliography*, 96 LAW LIBR. J. 669 (2004). Little to no academic scholarship exists on the topics of gay, lesbian, or transgender prostitution.

opinions in *Lawrence v. Texas* and will describe *People v. Williams*,<sup>5</sup> a recent case from the Third District of Illinois Appellate Court, in which a defendant unsuccessfully challenged her prostitution conviction as a violation of her Fourteenth Amendment due process right to engage in adult consensual sex as established in *Lawrence*. Using *Williams* as a prototype, the Article will discuss why the defendant in that case was not successful—and whether she ultimately could be. Lastly, the Article concludes that *Lawrence* represents a step towards a legal recognition of the need to decriminalize prostitution and calls upon long-divided feminists to unite and construe its inherent ambiguity towards liberating women in prostitution.

## II. BACKGROUND

Women working in prostitution are often an invisible or hated class. The criminalized business of prostitution lies on the fringes of most of the communities where it exists and often in the poorest and most forgotten neighborhoods. It therefore exists away from the public eye.<sup>6</sup> Prostitution is nonetheless subject to public scrutiny when it finds itself in the spotlight, and then it is usually viewed as stigmatized immoral behavior.<sup>7</sup> Despite the long history of prostitution in the United States,<sup>8</sup> the transaction of a woman accepting money for sex falls far outside the scope of perceived legitimate female sexual behavior.<sup>9</sup> The concept of decriminalizing prostitution therefore threatens to subvert the binary structures on which dichotomies—such as active versus passive, public versus private, and virgin versus whore—rely. Within this structure, wo-

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<sup>5</sup> 811 N.E.2d 1197 (Ill. App. Ct. 2004).

<sup>6</sup> See Michelle S. Jacobs, *Prostitutes, Drug Users, and Thieves: The Invisible Women in the Campaign to End Violence Against Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 459, 469-470 (1999); Carlin Meyer, *Decriminalizing Prostitution: Liberation or Dehumanization?*, 1 CARDOZO WOMEN'S L.J. 105, 109-110 (1993). For a discussion on how the feminist dichotomy of public and private women relates to prostituted women, see Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L. J. 47, 123-26 (1997).

<sup>7</sup> For example in November 2005, a ballot measure in Berkeley that sought to make prostitution the lowest priority for police evoked wide criticism as encouraging prostitution-related crime in the area. See Ronald Weitzer, *Why Prostitution Initiative Misses, Measure Q in Berkley Fails on 3 Counts*, S.F. CHRON., Sept. 26, 2004, at E-3 (discussing that the measure ultimately failed by a 66% margin in what is typically a liberal jurisdiction); Betty Yu, *Prostitution Still a Crime in Berkeley*, THE DAILY ONLINE CALIFORNIAN, Nov. 3, 2004, <http://www.dailycal.org/particle.php?id=16782>.

<sup>8</sup> JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 50-52 (2d ed., 1997).

<sup>9</sup> See Susan E. Thompson, *Prostitution—A Choice Ignored*, 21 WOMEN'S RTS. L. REP. 217, 222-225 (2000); see generally KATHY PEISS & CHRISTINA SIMMONS, *PASSION AND POWER: SEXUALITY IN HISTORY* (1989).

men who sell sex occupy the disempowered social status of prostitutes, while men who seek sex with prostitutes remain temporal actors separate from their fixed social status in society. Prostitutes disrupt deeply archaic notions of virginal femininity and sex as purely monogamous, romantic, and procreative.

The criminal and social status of the prostitute has not comfortably found a niche in identity politics. The changing politics of the 1960's gave rise to sexual liberation movements and second-wave feminism. Women began to examine the breadth of gender oppression, gender inequality, and sex discrimination. Sexual outlaws mobilized for civil rights and sought to counter social stigma and oppression.<sup>10</sup> By the 1970s, many women's rights advocates argued against decriminalizing prostitution as a system that victimized women<sup>11</sup>—a position that alienated many sex workers, often low-income women of color, from what was a predominately white middle-class movement.<sup>12</sup> In 1973, Margo St. James organized a group in California called WHO (Whores, Housewives, and Others), which evolved into an international organization fighting for prostitutes' rights, now called COYOTE (Call Off Your Old Tired Ethics).<sup>13</sup> People on both sides of the debate understand that working in prostitution leaves women vulnerable to violence from police, pimps, and customers and without any health services, legal protection, or recourse. Prostitution-as-criminal conduct therefore maintains subjugation of women who are already marginalized by their usual status as poor, immigrant, or minority women.<sup>14</sup> It is this vulnerable position as a potential or constant victim that still pulls the prostitute between two polarized feminist

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<sup>10</sup> See generally D'EMILIO & FREEDMAN, *supra* note 8, at 300-43.

<sup>11</sup> SUSAN BROWNMILLER, *AGAINST OUR WILL* 440 (1975) (arguing that "legalized prostitution . . . institutionalizes the concept that it is man's monetary right, if not his divine right to gain access to the female body, and that sex is a female service that should not be denied the civilized male").

<sup>12</sup> See Holly B. Fechner, *Three Stories of Prostitution in the West: Prostitutes' Groups, Law and Feminist "Truth"*, 4 COLUM. J. GENDER & L. 26, 34-37 (1994).

<sup>13</sup> Margo St. James, *Economic Justice for Sex Workers*, 10 HASTINGS WOMEN'S L.J. 5, 6 (1999).

<sup>14</sup> There are three major approaches to how a government could handle prostitution: criminalization, decriminalization and legalization. Criminalization represents the system that most of the states have now, in which selling and buying sex is illegal and prosecution of either carries criminal penalties. Some feminists have argued that maintaining criminalization of prostitution may be the best way to protect women in prostitution. See, e.g., Margaret A. Baldwin, *A Date with Justice: Prostitution and the Decriminalization Debate*, 1 CARDOZO WOMEN'S L.J. 125, 130 (1993) (arguing that decriminalization will provide no protection for prostitutes, and "jailing victims of sexual exploitation . . . [may] widen[] prostitutes' margins of survival" because jail offers a safe haven where women can detox, eat food, and even get HIV medication

perspectives. These two perspectives can be described as prostitute as a victim of violent male supremacy, prostitute as worker, and sometimes as empowered sexual agent. However, current and former sex workers and other feminists from both perspectives believe, as a practical matter, that decriminalization is necessary to liberate and protect women currently working as prostitutes.

#### A. *Prostitution-as-Violence*

Advocates who view prostitution as a violent exploitation of women believe that prostitution is a literal expression of the violence of male dominance and misogyny that all other women experience metaphorically. Male supremacy subjugates all women, and prostitution is an explicit illustration of living under male supremacy. Under this theory, prostitution exists because of a series of variables in women's lives, such as incest, drug addiction, poverty, racism, and homelessness.<sup>15</sup> The only constant in the prostitution equation is a society of gender inequality in which a woman's only true possession is her body, which she allows in desperation to be exploited for the satisfaction of men.<sup>16</sup> This position presumes that prostitution may be entered into voluntarily,

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that is not readily available to them out of jail); *see also* BROWNMILLER, *supra* note 11 and accompanying text.

Decriminalization is the removal of laws and regulation, equating prostitution to other legal occupations. Decriminalization of prostitution takes many forms. Sweden, for example, decriminalizes the sale of prostitution but maintains criminal penalties for the purchase of sex. Maria Grahn-Farley, *The Law Room: Hyperrealist Jurisprudence and Postmodern Politics*, 36 NEW ENGL. L. REV. 29, 39-40 (2001). This is a model that many feminists advocate. *See, e.g.*, KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 298 (1995). However, others advocate for full decriminalization for both sellers and buyers of sex. *E.g.*, Thompson, *supra* note 9, at 217 (arguing that "prostitution can be a tool of empowerment that will allow those women who choose it as a career to exercise personal power, economic freedom and sexual autonomy," and, to attain that goal, "prostitution must be totally decriminalized . . . [to erase] the social stigma associated with prostitution").

Lastly, legalization requires direct regulation by the state, which may include zoning requirements and mandatory tests for sexually transmitted diseases. A model of legalized and heavily regulated prostitution exists in certain Nevada counties. This approach has been widely criticized as imposing the state as another form of pimp on the prostitute. Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 70, 84-90 (1998) (analyzing the legalized prostitution system in Nevada and arguing that it is "not a good model for changing the current situation of prostitution").

<sup>15</sup> *See* April L. Chery, *Welfare Reform and the Use of State Power in the Prostitution of Poor Women*, 48 CLEV. ST. L. REV. 67, 72-75 (2000); Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism and Feminist Discourse*, 10 HASTINGS WOMEN'S L.J. 37, 40-45 (1999); Margaret A. Baldwin, *Strategies of Connection: Prostitution and Feminist Politics*, 1 MICH. J. GENDER & L. 65, 67-68 (1993).

<sup>16</sup> *E.g.*, Andrea Dworkin, *Prostitution and Male Supremacy*, 1 MICH. J. GENDER & L. 1

but is never a free choice. That is to say, all women want to leave prostitution but are unable to because of the system of male dominance that preserves the factors that lead women to prostitution in the first place: rape, abuse, female poverty, and incest. Prostitution is therefore often characterized as sexual slavery, in which prostitutes are not agents. At best, they are virtually nonexistent in a phallo-centric society that uses prostitutes to express hatred of the female body,<sup>17</sup> or at worst they are gender “Uncle Toms” who perpetuate patriarchal values.<sup>18</sup>

Proponents of this position argue that the inherent violence suffered by women in prostitution at the hand of male dominance is a truth silenced by the system itself and obscured by feminists arguing for complete decriminalization of prostitution. Andrea Dworkin, feminist author and scholar, argues that the prostitute’s experience “has been hidden [because] . . . to know it is to come closer to knowing how to undo the system of male dominance that is sitting on top of all of us.”<sup>19</sup> Others also argue that, although the realities of women in prostitution have been hidden, prostitution is not a private act that the law should protect, but rather is an act of sexual abuse that the state should not sanction.<sup>20</sup>

Most of the authors cited herein are united with organizations such as Coalition Against Trafficking in Women (CATW), Women Hurt in Systems of Prostitution Engaged in Revolt (WHISPER), and others that argue that women should never be punished for being exploited. These authors support the decriminalization of the sale of sex, with an ultimate goal of abolishing prostitution by empowering and enabling those women in it to leave. They also generally advocate maintaining statutes criminalizing the acts of buyers, pimps, and brothels and other sex establishments, while creating systems to allow women to completely escape prostitution.<sup>21</sup>

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(1993); Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13 (1993).

<sup>17</sup> See generally KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979); MacKinnon, *supra* note 16.

<sup>18</sup> Laurie Shrage, *Should Feminists Oppose Prostitution?*, 99 ETHICS 347, 357 (1989).

<sup>19</sup> Dworkin, *supra* note 16, at 5.

<sup>20</sup> BROWNMILLER, *supra* note 11; Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, in PROSTITUTION, TRAFFICKING AND TRAUMATIC STRESS 315 (Melissa Farley ed., 2003) available at <http://action.web.ca/home/catw/readingroom.shtml?x=32972>.

<sup>21</sup> E.g., BARRY, *supra* note 14 and accompanying text; Raymond, *supra* note 20. “In countries where women are criminalized for prostitution activities, it is crucial to advocate for the decriminalization of the women in prostitution. No woman should be punished for her own exploitation. But States should never decriminalize pimps, buy-

B. *Prostitution-as-Work*

Supporters of the prostitution-as-work perspective agree that the criminal justice system as it currently applies to prostitutes is governed by misogyny and sex discrimination. However, they fundamentally disagree with the prostitution-as-exploitation theory in several ways. First, they believe that women can and do choose to perform sex work.<sup>22</sup> Central to this perspective is the description of prostitution as work, not as a violent exploitation of women.<sup>23</sup> They demand that a woman's choice to enter sex work be respected and afforded the same legal protection as any other service industry job.<sup>24</sup> Further, the removal of the social stigma around sex work is necessary to achieve workers' rights protections and economic equality.<sup>25</sup>

Prostitution-as-work theorists focus on the choice to enter sex work, and believe that most prostitutes do, in fact, choose that work.<sup>26</sup> They argue that because street prostitution is the most visible—as opposed to women working in businesses such as massage parlors, brothels, and escort services—it is therefore the most dominant stereotypical image of prostitution in the American social consciousness. However, according to recent figures, only 10% to 20% of prostitutes work on the street.<sup>27</sup> Further, at 40%, women of color represent a disproportionate percentage of street prostitutes.<sup>28</sup> Some prostitution-as-work theorists have reasoned that because “women of color are more likely to be socio-economically disadvantaged than their white counterparts . . . [they] therefore turn to street prostitution for immediate economic relief.”<sup>29</sup> They

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ers, procurers, brothels or other sex establishments.” *Id.* “Treating prostitution as a civil rights violation transforms the buying of sex from a transgressive act that reinforces the dichotomy [of degeneracy and respectability] to a discriminatory act that undermines it.” Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1296-97 (1999).

<sup>22</sup> *E.g.*, Thompson, *supra* note 9; St. James, *supra* note 13.

<sup>23</sup> See Amalia Lucia Cabezas, *Legal Challenges To and By Sex Workers/Prostitutes*, 48 CLEV. ST. L. REV. 79, 79-83 (2000) (discussing the development of the term “sex worker”).

<sup>24</sup> See Fechner, *supra* note 12, at 38.

<sup>25</sup> See Thompson, *supra* note 9, at 217-18.

<sup>26</sup> VALERIE JENNESS, MAKING IT WORK: THE PROSTITUTES' RIGHTS MOVEMENT IN PERSPECTIVE 67-71 (1993).

<sup>27</sup> Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184, 189 (Frédérique Delacoste & Priscilla Alexander eds., 1987).

<sup>28</sup> DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 261 (1989).

<sup>29</sup> Thompson, *supra* note 9, at 226.

also recognize that some women do not choose sex work and do want to leave it, but they argue that decriminalizing prostitution would help lift this small percentage of women out from under the oppression of the criminal justice system.<sup>30</sup>

Because the emphasis is on workers' rights, these theorists demand the same protections and benefits available to other legitimate professions, such as the right to organize around issues of health benefits and work conditions.<sup>31</sup> Decriminalization would allow prostitutes to form stronger support networks, unionize,<sup>32</sup> access private health insurance,<sup>33</sup> and access public benefits such as social security, disability insurance, and worker's compensation.<sup>34</sup>

They also disagree with those who promote the continued prohibition and increased prosecution of buyers of sex because this would dry up the income source needed for prostitutes' economic advancement and deny prostitutes the full rights to their work. Further, it undercuts the contention that sex work should not be shameful and women performing it should not experience further marginalization.<sup>35</sup> Margo St. James has argued that as long as prostitution abolitionists "work to . . . promote prohibition, they abdicate the right to later complain that any sexual liberties, including abortion and a women's right to control her own body, are also being restricted."<sup>36</sup> Others argue that prostitution is a sexually liberating and empowering choice because it allows women to reclaim their sexuality<sup>37</sup> and subverts historical fear and repression of female sexuality.<sup>38</sup>

While fundamental perspectives and ultimate goals differ under these two umbrella concepts, generally there exists a passionate common goal of liberating women in prostitution. They overwhelmingly agree that decriminalization is the necessary tool towards that goal. A goal of decriminalization can therefore be seen as a first step, requiring otherwise divided activists and schol-

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<sup>30</sup> See, e.g., Belinda Cooper, *Prostitution: A Feminist Analysis*, 11 WOMEN'S RTS. L. REP. 99, 100 (1989).

<sup>31</sup> See Alexander, *supra* note 27, at 210.

<sup>32</sup> Fechner, *supra* note 12, at 38.

<sup>33</sup> Tracy M. Clements, *Prostitution and the American Health Care System: Denying Access To a Group of Women in Need*, 11 BERKELEY WOMEN'S L.J. 49, 54 (1996).

<sup>34</sup> See *id.* at 87-89.

<sup>35</sup> See generally Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47; see also Fechner, *supra* note 12, at 72.

<sup>36</sup> St. James, *supra* note 13, at 6-7.

<sup>37</sup> See Veronica Monét, *Sedition*, in WHORES AND OTHER FEMINISTS, 221 (Jill Nagle ed., 1997).

<sup>38</sup> See Jill Nagle, *First Ladies of Feminist Porn: A Conversation with Candida Royalle and Debi Sundahm*, in WHORES AND OTHER FEMINISTS, *supra* note 37, at 161.

ars to unite in taking that first step. *Lawrence v. Texas* may represent the vehicle through which unity can initially occur. The next section discusses the *Lawrence* majority and dissenting opinions and *People v. Williams*, a case that attempted to apply *Lawrence* in challenging Illinois's prostitution statute.

### III. LAWRENCE AND WILLIAMS

#### A. Lawrence Majority: *The Explicitness and Ambiguity of Sexual Freedom*

*Lawrence v. Texas* overruled the Supreme Court's decision in *Bowers v. Hardwick*,<sup>39</sup> decided sixteen years earlier, which upheld a Georgia statute that criminalized sodomy.<sup>40</sup> In doing so, the majority in *Lawrence* dissected the Court's decision in *Bowers*, but it fell short of declaring the right to consensual adult sex a fundamental right—or even clearly establishing it as a constitutionally protected right.<sup>41</sup>

The *Lawrence* Court rejected the description of the liberty right at issue in *Bowers*, which was stated as “a fundamental right [of] homosexuals to engage in sodomy.”<sup>42</sup> The *Lawrence* Court described this articulation of the liberty interest as demeaning, and it reframed the issue more broadly as “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”<sup>43</sup>

The *Lawrence* majority approached this analysis indirectly by rebutting each prong of the *Bowers* Court's fundamental rights analysis. After confronting the “deeply rooted” prong of the analy-

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<sup>39</sup> 478 U.S. 186 (1986).

<sup>40</sup> 539 U.S. at 578

<sup>41</sup> *Id.* When a petitioner asserts a substantive due process challenge, the court applies the following analysis to determine whether the liberty right can be classified as a fundamental right. First, the court analyzes the careful description of the liberty at stake. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Next the court applies a two-prong analysis: First, whether the asserted right deeply rooted in our nation's history and tradition; and, second, whether it is implicit in the concept of ordered liberty such that, if sacrificed, neither liberty nor justice would exist. *Id.* If the court finds that the right satisfies this test, it applies strict scrutiny to the challenged law. *Id.* To find a law constitutional under a strict scrutiny analysis, the state must show that the statute is “narrowly tailored” to a compelling government interest. *Id.* If the court does not find that the right satisfies this test, the court may analyze the statute under the most deferential review, rational basis, which requires that a legitimate state interest be rationally related to the means chosen to achieve the objective of the statute. *Id.*

<sup>42</sup> *Bowers*, 478 U.S. at 190.

<sup>43</sup> *Lawrence*, 539 U.S. at 564.

sis and finding that sodomy laws were historically not aimed at consensual homosexual partners, the majority recognized that the broader point in *Bowers* was a recognition that homosexuality had long been condemned as immoral.<sup>44</sup> However, the *Lawrence* Court stated that the majority's moral code could not dictate the criminal code.<sup>45</sup>

The Court also approached the second prong of the fundamental rights analysis indirectly by addressing an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>46</sup> To support the finding of an emerging awareness and a subsequent erosion of much of the foundation of *Bowers*'s ordered liberty analysis, the Court listed a series of international and domestic instances where sodomy laws had been ignored or repealed at the time that *Bowers* was decided.<sup>47</sup> Then the *Lawrence* Court noted two post-*Bowers* decisions that would have weakened its analysis had they been decided at that time. First, citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, decided six years after *Bowers*, the *Lawrence* majority found that the rights to seek autonomy and self-determination are fundamental and must be shared equally by homosexual and heterosexual people.<sup>48</sup> Second, the court cited *Romer v. Evans*<sup>49</sup> for the proposition that laws may not discriminate against homosexuals as a class and that animosity towards homosexual people cannot be a legitimate state interest.<sup>50</sup>

The underlying assumption in *Lawrence* is that the protections articulated in *Casey* and *Romer*—self-autonomy and freedom from state-sponsored animus, respectively—extend to homosexual people in proper traditional relationships. In his reframing of the is-

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<sup>44</sup> *Id.* at 567-571 (finding "the historical grounds relied upon in *Bowers* . . . more complex than the majority opinion . . . indicate[s]," and acknowledging that "the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral").

<sup>45</sup> *Id.* at 571 (recognizing that "the condemnation [of homosexual conduct as immoral] have been shaped by religious beliefs," but arguing that "the issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law." The Court argues "our obligation is to define the liberty of all, not mandate our own moral code.") (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

<sup>46</sup> *Id.* at 572.

<sup>47</sup> *Id.* at 572 (noting that several states have adopted the American Law Institute's Model Penal code opposing "criminal penalties for consensual sexual relations conducted in private").

<sup>48</sup> *Lawrence*, 539 U.S. at 574.

<sup>49</sup> 517 U.S. 620 (1996).

<sup>50</sup> *Lawrence*, 539 U.S. at 574.

sue in *Lawrence*, Justice Kennedy wrote, “[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.”<sup>51</sup> In applying the liberty at stake in *Casey* to *Lawrence*, Kennedy quoted the following passage from the former:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>52</sup>

This passage forcefully argues for broad freedoms, but it is interpreted narrowly as applied to homosexual sex, reducing the scope from the rights of all individuals to individuals in same-sex relationships. Kennedy writes, “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>53</sup> Here, the language is explicitly limited from the rights of “heterosexual persons” to the rights of “persons in a homosexual relationship.”<sup>54</sup> The argument for bodily integrity then disappears and the privacy issue focuses on the rights of homosexual people in traditionally recognized relationships—and then only in their bedrooms.<sup>55</sup>

Importantly, before the Court explicitly overruled *Bowers* and

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<sup>51</sup> *Id.* at 567.

<sup>52</sup> *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

<sup>53</sup> *Id.*

<sup>54</sup> For an in-depth discussion of how *Lawrence* has domesticated the issue of gay and lesbian rights, see Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400 (2004), which argues that “in *Lawrence* the Court relies on a narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty, as is commonly assumed. In this way, *Lawrence* both echoes and reinforces a pull toward domesticity in current gay and lesbian organizing.” Conversely, David M. Wager argues that the privacy case lines discussed in *Lawrence* “protect a zone of bourgeois, law-abiding normality, not a zone of personal self-definition,” and that “[t]he later cases, beginning with *Griswold v. Connecticut*, protect a right of personal decision-making with regard to one issue, namely, whether to become parents.” David M. Wager, *Hints, not Holdings: Use of Precedent in Lawrence v. Texas*, 18 BYU J. PUB. L. 681, 682 (2004).

<sup>55</sup> *Lawrence* pulls presumably male monogamous homosexual sex closer towards the center of Gayle Rubin’s “charmed circle,” which diagrams sexual hierarchies with good sex, deemed to be “sanctifiable, safe, healthy, mature, legal or politically correct” at the center, and “bad, abnormal, unnatural, [and] damned sexuality” at the outer limits. Gayle Rubin, *Thinking Sex, Note for a Radical Theory of the Politics of Sexuality*, in *SEXUALITY, GENDER, AND THE LAW* 551, 555 (William N. Eskridge, Jr. & Nan D. Hunter eds., 2004).

invalidated the Texas statute as unconstitutional, the majority listed a series of circumstances not at issue in *Lawrence*. These include sex between minors, coerced sex, prostitution, and gay marriage or civil unions.<sup>56</sup> Finally, the Court states, “[t]heir right to liberty under the Due Process Clause gives [the petitioners] the full right to engage in their conduct without intervention of the government.”<sup>57</sup> However, in finding the statute unconstitutional, the Supreme Court surprisingly invokes the language of rational basis review, stating that the statute furthered no legitimate interest that can justify the intrusion into a person’s privacy.<sup>58</sup>

The consistent overt language throughout *Lawrence* of liberty, autonomy, and privacy rights, coupled with the reiteration by the Court that morality cannot dictate law, contradict the Court’s one-sentence failure to expressly declare adult consensual sex a fundamental right. Assuming that this is no linguistic accident, the failure of declaring a fundamental right gives the impression that the Court intended to infer the possibility that a constitutionally protected fundamental right to sexual privacy could exist, but they were not prepared to state that now.<sup>59</sup> The Court could have easily said that the Texas statute does not even pass rational basis review and therefore strict scrutiny need not be applied.<sup>60</sup> The noticeable absence of a declaration of a fundamental right to sexual privacy betrays the mounting expectation of such a formal acknowledgement. This void creates a tension and ambiguity in *Lawrence* that opens the possibility of both progressive goals of sexual liberation and self-determination and of conservative regression, including a possible expansion of the states’ ability to regulate sex.

#### B. *Scalia’s Dissent: Fear of Revolution and Hope for Regression*

This notion of ambiguity fuels conservative and liberal goals alike, and appears to have informed the themes of fear and hope in Justice Scalia’s dissent. Ironically, the dissent begins with the following quote from *Casey*: “Liberty finds no refuge in a jurispru-

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<sup>56</sup> *Lawrence*, 539 U.S. at 578.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

<sup>60</sup> The Massachusetts Supreme Court employed similar language in invalidating a marriage statute that prohibited same-sex marriage. The court held, “because the statute does not survive rational basis review, [the court need] not consider the plaintiffs’ arguments that this case merits strict judicial scrutiny.” *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

dence of doubt.”<sup>61</sup> Scalia states that the quote intends to reveal the Court’s hypocrisy in its refusal to overrule *Roe* in *Casey* on the grounds of stare decisis doctrine, in contrast to the Court’s willingness to overrule *Bowers* in *Lawrence*.<sup>62</sup> However, this quote also conveys another meaning. It implies that the majority cowered from the opportunity to declare adult consensual sex a fundamental right. Scalia discusses the Court’s failure to formally overrule the holding in *Bowers* that homosexual sodomy is not a fundamental right. He criticizes the Court’s failure to apply a strict fundamental rights analysis and overrule *Bowers* on those grounds. The allusion to the majority’s ambivalence sets the stage for this continually implied accusation throughout the opinion<sup>63</sup> and for the future possibilities it presents.

Scalia’s dissent in *Lawrence*, joined by Justice Thomas and former Chief Justice Rehnquist, concludes that the right to homosexual sodomy is not fundamental and therefore the Texas statute is valid under a rational basis review—it does not deny homosexual defendants equal protection.<sup>64</sup> The dissent serves three purposes and speaks to *Lawrence*’s ambivalence on these themes: (1) A roadmap to overturning *Roe v. Wade*<sup>65</sup> following the *Lawrence* decision;<sup>66</sup> (2) a warning against the possible strategies towards allowing same-sex marriage following the *Lawrence* decision;<sup>67</sup> and (3) a general caution against a sexual revolution devoid of morality following *Lawrence*.<sup>68</sup>

Justice Scalia’s caution against a “massive disruption of the current social order” runs throughout the dissenting opinion.<sup>69</sup> This suggests that the underlying rationale of the minority opinion is that the structure of American culture hinges on the need for restraints on sexual freedom and that without such laws there exists the potential for social chaos.<sup>70</sup> Aside from the strong focus on the possibility that the majority’s opinion in *Lawrence* sets up an

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<sup>61</sup> *Casey*, 505 U.S. at 844.

<sup>62</sup> *Lawrence*, 539 U.S. at 586. (Scalia, J., dissenting).

<sup>63</sup> *Id.* at 594.

<sup>64</sup> *Id.* at 605.

<sup>65</sup> 410 U.S. 113 (1973) (finding the right to an abortion a fundamental right protected by the Due Process Clause of the Fourteenth Amendment).

<sup>66</sup> *Lawrence*, 539 U.S. at 587-592.

<sup>67</sup> *Id.* at 603-605.

<sup>68</sup> *Id.* at 591.

<sup>69</sup> *Id.* at 591.

<sup>70</sup> See Daniel Gordon, *Moralism, the Fear of Social Chaos: The Dissent in Lawrence and the Antidotes of Vermont and Brown*, 9 TEX. J. ON C.L. & C.R. 1, 10-17 (2003) (discussing Scalia’s implicit view of homosexuals as threats to American society, and arguing that Scalia’s vision of homosexuality as a societal threat possesses no basis in social fact).

argument for finding same-sex marriage bans unconstitutional, Scalia consistently refers to the possibility of the end of all laws in which the state regulates the body. Three times he argues that prohibitions on prostitution can now be found invalid under *Lawrence* based on the majority's holding that sexual morality cannot be a legitimate state interest.<sup>71</sup>

The dissent summarizes an interpretation of the majority opinion as a three-step justification for overruling precedent: first, whether subsequent decisions have eroded its foundation; second, whether the decision has been subject to criticism; and third, whether individuals or society as a whole have not relied on the decision.<sup>72</sup> In describing the third prong of reliance, the dissent rebuts the majority's finding of no societal reliance on *Bowers* by listing a series of judicial decisions that did rely on *Bowers* as precedent. Further, Scalia notes that the *Lawrence* decision calls into question the constitutionality of prostitution laws because of the impossibility of distinguishing homosexuality laws from other morality laws.<sup>73</sup>

Next, in moving past the Court's stare decisis analysis, Scalia argues that *Bowers* was not wrongly decided. He does so by criticizing the Court's failure to strictly apply the substantive due process and fundamental rights analysis described in *Glucksberg*. He begins

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<sup>71</sup> It is true that following the *Lawrence* decision, a flurry of law review articles were published about the scope of its holding. Although many focus on applying *Lawrence* to a hopeful future of social change, many others argued that in fact *Lawrence* imposed further restraints on progressive causes, such as reproductive freedom and transgender rights towards self-determination. See, e.g., Cynthia Dailard, *What Lawrence v. Texas Says About the History and Future of Reproductive Rights*, 31 *FORDHAM URB. L.J.* 717 (2004) (arguing that the retirement of one of the Justices "who support[ed] a woman's right to choose would provide the anti-choice Bush administration with the opportunity it is seeking to appoint a like-minded Justice, making the scenario that Justice Scalia predicted [in *Lawrence*]<—namely, *Roe's* demise—more likely than ever before"); see also Paisley Currah, *The Other "Sex" in Lawrence v. Texas*, 10 *CARDOZO WOMEN'S L.J.* 321, 321-322 (2004) (arguing that *Lawrence* reaffirmed the "legal regime in which transgender people are denied equality before the law"). More conservative scholars came to similar conclusions. For example, Joseph Bozzuti's article, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, undertakes a project similar to my own, analyzing whether *Lawrence* repeals polygamy bans. Bozzuti ultimately decides that the *Lawrence* decision "may very well have left all morals-based legislation vulnerable to constitutional attack," but that both prostitution and polygamy bans are safe because of their wider use of protecting the safety of women and children. Joseph Bozzuti, 43 *CATH. LAW.* 409, 413, 433-441 (2004).

<sup>72</sup> *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

<sup>73</sup> *Id.* at 590 (noting that "State laws against bigamy, same-sex marriage, adult incest, [and] prostitution . . . are [ ] sustainable only in light of *Bowers'* validation of laws based on moral choices.") (emphasis added).

by stating that the Fourteenth Amendment does not guarantee a right to liberty—it only provides that the states may not deprive citizens of liberty *without* due process of law. In an interesting illustration of this point, Scalia states that prohibitions on prostitution and recreational heroin use both deprive citizens of liberty.<sup>74</sup> Scalia attacks the majority's use of "an *emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*."<sup>75</sup> He argues that the statement does not satisfy a historical or fundamental rights analysis and is inherently false because states continue to prosecute adults for the consensual private adult sexual conduct of prostitution.<sup>76</sup>

In 2004, one woman based her appeal of a four-year sentence on a prostitution charge on the premise that *Lawrence v. Texas* opens the possibility to decriminalizing prostitution.

### C. *People v. Williams: Challenging Prostitution Post-Lawrence*

In November 2001, while walking the street, Donna Williams accepted an invitation into a car by a man who turned out to be an undercover police officer.<sup>77</sup> Williams and the man agreed that she would perform oral sex for \$30.<sup>78</sup> She was then arrested, charged, and convicted of prostitution.<sup>79</sup>

The Illinois criminal code defines prostitution as:

Any person who performs, offers or agrees to perform any act of sexual penetration . . . for any money, property, token, object, or article or anything of value, or any touching or fondling of the sex organs of one person by another person, for any money, property, token, object, or article or anything of value for the purpose of sexual arousal or gratification commits an act of prostitution.<sup>80</sup>

A first-time prostitution charge is classified as a "Class A" misdemeanor<sup>81</sup> and carries a prison sentence of less than one year.<sup>82</sup> Any subsequent charges elevate the conduct to a "Class 4" felony,<sup>83</sup>

<sup>74</sup> *Id.* at 592 (noting that the Texas statute "undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution [and] recreational use of heroin . . .").

<sup>75</sup> *Id.* at 597 (citing majority opinion at 572) (internal citations omitted).

<sup>76</sup> *Id.* at 598.

<sup>77</sup> *Williams*, 811 N.E.2d at 1198.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 720 ILL. COMP. STAT. ANN. 5/11-14(a) (West 2002).

<sup>81</sup> 720 ILL. COMP. STAT. ANN. 5/11-14(b) (West 2002).

<sup>82</sup> 730 ILL. COMP. STAT. ANN. 5/5-8-3(a)(1) (West 2004).

<sup>83</sup> 720 ILL. COMP. STAT. ANN. 5/11-14(b) (West 2002).

which, under Illinois law, carries a sentence of between one and three years.<sup>84</sup> Williams had prior prostitution convictions and therefore was subject to sentencing under the “Class 4” felony regulations; Williams was sentenced to four years’ imprisonment.<sup>85</sup> It is not clear from the court’s opinion why she received a penalty that exceeds the maximum by one year. It appears, however, that she did not challenge this sentence as an abuse of discretion, the standard by which Illinois reviews sentencing challenges.<sup>86</sup>

On appeal, Williams conceded that her conduct violated Illinois state law, but she argued that after *Lawrence v. Texas* prostitution, as private sexual conduct between two consenting adults, is constitutionally protected by the Due Process Clause of the Fourteenth Amendment.<sup>87</sup> Delivering the opinion for the court, Judge Mary K. O’Brien narrowed the description of the constitutionally protected activity in *Lawrence* as the “consensual act of sodomy in the privacy of [the] home.”<sup>88</sup> She rejected Williams’s argument that the statute prohibits constitutionally protected conduct by classifying the conduct not as private consensual sex but commercial sex. The court also turned to the legislative intent of the statute, noting that the drafters clearly distinguished their aim of prohibiting commercial sex from intruding upon private non-commercial acts.<sup>89</sup>

O’Brien analyzed the due process challenge under rational review and ultimately found the law constitutional, thereby affirming the lower court’s holding.<sup>90</sup> The *Johnson* court cited a 1978 case from the Appellate Court of Illinois, *People v. Johnson*, where a woman similarly challenged the Illinois prostitution statute as an infringement on her constitutionally protected right of privacy.<sup>91</sup> The court articulated the state’s interests as “preventing venereal disease, cutting down prostitution-related crimes of violence and theft, and protecting the integrity and stability of family life.”<sup>92</sup> Here, the court adopted the rationale in *Johnson* and found that the statute was rationally related to the state’s legitimate interest of

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<sup>84</sup> 730 ILL. COMP. STAT. ANN. 5/5-8-1(a)(7) (West 2004).

<sup>85</sup> *Williams*, 811 N.E.2d at 1197.

<sup>86</sup> *People v. Stacey*, 737 N.E.2d 626, 629 (Ill. 2000).

<sup>87</sup> *Williams*, 811 N.E.2d at 1199.

<sup>88</sup> *Id.* at 1199.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See* *People v. Johnson*, 376 N.E.2d 381 (Ill. App. Ct. 1978). In this case, the defendant Althea Johnson was convicted of prostitution after she offered oral sex to an undercover police officer for \$50.

<sup>92</sup> *Williams*, 811 N.E.2d at 1198 (quoting *Johnson*, 376 N.E.2d at 386).

protecting public welfare. Therefore, the statute did not violate Williams's constitutional rights.<sup>93</sup> The court further rejected Williams's reliance on *Lawrence* by citing that the caveat paragraph of *Lawrence* "specifically excluded from its opinion . . . acts of prostitution."<sup>94</sup>

Below this Article discusses whether *Lawrence* could be interpreted as overturning prostitution laws. This first requires a brief discussion on how the lower courts have interpreted and applied *Lawrence*.

#### IV. LAWRENCE AND PROSTITUTION

##### A. Post-Lawrence

In overruling *Bowers v. Hardwick*, the *Lawrence* Court explicitly stated that the fundamental right at stake was incorrectly defined as the right of homosexuals to engage in sodomy.<sup>95</sup> Justice Kennedy reframed the issue before the court as "whether the petitioners' criminal conviction for *adult consensual intimacy in the home* violates their vital interest in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment," and held that it did.<sup>96</sup> Despite this explicit language, several state courts have sought to narrow *Lawrence* by citing the following four sentences of dicta as the Court's holding:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.<sup>97</sup>

Courts have used this passage to refute parties' attempts to apply *Lawrence* as precedent to their own cases. It has been used to support decisions denying homosexuals the right to adopt children;<sup>98</sup> denying an extension of *Lawrence*'s protection against criminal conviction for private sexual acts, including sodomy, to minors;<sup>99</sup> deny-

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<sup>93</sup> *Id.* at 1198-1199.

<sup>94</sup> *Id.* at 1199 (emphasis added).

<sup>95</sup> *Lawrence*, 539 U.S. at 568.

<sup>96</sup> *Id.* at 564 (emphasis added).

<sup>97</sup> *Id.* at 578.

<sup>98</sup> See *Lofton v. Sec'y of the Dep't of Children & Family Serv.*, 358 F.3d 804 (11th Cir. 2004) (distinguishing *Lawrence* by stating that the majority limited its holding to its facts, and finding that *Lawrence* does not apply because adoption involves minors and does not exist within the criminal context).

<sup>99</sup> See *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004).

ing an extension of the same right in the military context;<sup>100</sup> denying a recognition by the United States of same-sex marriages formed in Canada;<sup>101</sup> and denying a recognition of same-sex marriage in the United States.<sup>102</sup> All of these cases expressed a reticence to extend the holding in *Lawrence* beyond its factual scenario and to declare a constitutionally protected right to sexual privacy.

In addition to disregarding much of the language and the spirit of *Lawrence* and interpreting a sentence of dicta as the holding, these cases have used the inherent ambivalence in *Lawrence* toward restrictive ends. A case from the Eleventh Circuit, *Williams v. Attorney General of Alabama*, serves as another example.<sup>103</sup> In this case, the American Civil Liberties Union, on behalf of sellers and buyers of sex toys, challenged an Alabama statute prohibiting commercial distribution of any device primarily used for sexual stimulation. The court held that there is no fundamental, substantive due process right of consenting adults to engage in private, intimate sexual conduct.<sup>104</sup> Like the cases mentioned above, the court reasoned that because the Supreme Court failed to apply strict scrutiny in *Lawrence*, it also failed to establish a substantive due process right to sexual privacy.<sup>105</sup> It remains to be seen if other lower courts will interpret this ambivalence more expansively as establishing a constitutionally protected right of consenting adults to engage in private sexual intimacy, which—despite its holding applying a heightened rational basis review—is the spirit of the decision.

### B. Prostitution as Constitutionally Protected Sex

Lower courts' interpretations of *Lawrence* have thus far been disheartening. Though Scalia criticizes the majority for turning *Casey's* "sweet-mystery-of-life" passage into "the passage that ate the rule of law,"<sup>106</sup> *Lawrence's* caveat paragraph has swallowed its hold-

<sup>100</sup> Marcum, 60 M.J. at 208 (distinguishing *Lawrence* by finding that sex with a subordinate service member within one's chain of command is a context in which "consent might not easily be refused" (citing *Lawrence*, 539 U.S. at 578)).

<sup>101</sup> See *In re Kandu*, 315 B.R. 123, 139 (Bankr. W.D. Wash. 2004) (stating that *Lawrence* did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter") (citing *Lawrence*, 539 U.S. at 578).

<sup>102</sup> See *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 487-88 n.32 (Cal. 2004).

<sup>103</sup> 378 F.3d 1232 (11th Cir. 2004).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) ("[I]f the passage calls into ques-

ing and spirit. The paragraph is classic dictum but is yet to be seen as such. The Supreme Court in *Lawrence* set forth a heightened level of review when it characterized the right to sexual privacy as very important and evoked a combination of rational basis and fundamental rights analyses. The Court explained, “the State cannot demean [people’s] existence or control their destiny by making their private sexual conduct a crime.”<sup>107</sup> This suggests that in applying *Lawrence* as precedent for the protection of sexual privacy, the outcome might turn on the state’s interests. However, subsequent decisions thus far imply that the escape hatch is too tempting for judges to even apply the heightened level of scrutiny conveyed in *Lawrence* when a party asserts his or her right to sexual privacy. Instead, any state interest will suffice.

The *Williams* court, for example, failed to analyze the defendant’s constitutional challenge under the heightened level of review. When she evoked her constitutionally protected right to sexual freedom, the court should have more closely scrutinized whether the statute was rationally related to the state’s interests. The state’s interests included “preventing venereal disease, cutting down prostitution-related crimes of violence and theft, and protecting the integrity and stability of family life.”<sup>108</sup> Without a more searching review, these interests were quickly found rationally related to the statute.

The articulated interests described in *Williams* support the notion that prostitution statutes exemplify male supremacy and misogyny. Although state goals are veiled in the language of protection of the public welfare, they are in fact rooted in animus against sex workers. A closer look at these state interests demonstrates that private conduct is being regulated for the unconstitutional purpose of animus. Many strong arguments for the lack of rationality of prostitution statutes, as discussed earlier, are ignored. For example, condoms protect from venereal disease more effectively than a jail cell. Therefore, it seems that the stated goal of preventing venereal disease translates to the protection of men from contracting venereal diseases from prostitutes. Otherwise, the state would also take measures to protect the prostitute from the diseased customer who initially infected her.<sup>109</sup> Next, the argu-

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tion the government’s power to regulate *actions based on one’s self-defined ‘concept of existence, etc.,’* it is the passage that ate the rule of law.”).

<sup>107</sup> *Id.* at 578 (majority opinion).

<sup>108</sup> *Williams*, 811 N.E.2d at 1198.

<sup>109</sup> *But see* Thompson, *supra* note 9, at 229 (noting that “studies have indicated that only 5% of sexually transmitted diseases were related to prostitution”).

ment of cutting down on prostitution-related crime is ultimately one of the goals that feminists expect decriminalization to achieve. In decriminalization, prostitutes would have a legal recourse for crimes committed against them such as rape, theft, and violence; thus having a retributive and deterrent effect.

Lastly, the court's affirmation of the state interest in protecting the integrity and stability of family life further demonstrates its misogynist logic. It suggests a concern that removing the criminal consequences of soliciting a prostitute would more easily tempt men into infidelity. The court's reasoning that jailing sex workers will protect families requires these women to bear a burden not equally shared with their married customers. The argument that jailing a prostitute is justified to protect against a man's unfaithfulness to his wife explicitly lays the blame on prostitutes for the problems in America's marriages. Even if it is true—that the existence of prostitution leads to infidelity—this concern is clearly a private matter and not an issue of public welfare, further demonstrating the underlying animus. Had the *Williams* court done a more searching analysis of the state's articulated interests, the animus prohibited by the Supreme Court may not have been as easily resolved.<sup>110</sup>

The *Williams* court's focus on the concerns of buyers of sex and their wives fails to examine the effect of criminal sanctions for the seller of sex. In her concurring opinion in *Lawrence*, Justice O'Connor spoke to the significance of these secondary consequences, including the requirement of registering as a sex offender, the exclusion from various professions, and the stigma of being branded a criminal.<sup>111</sup> *Lawrence* holds that "the State cannot demean [people's] existence or control their destiny by making their private sexual conduct a crime."<sup>112</sup> The same could be true for the private sexual conduct of buyers and sellers of sex. Until attention focuses on the immediate need for decriminalization, the hope that courts will apply *Lawrence* as protecting a right to commercial sex is unrealistic.

## V. CONCLUSION

The promise of *Lawrence* lies in its introduction of an evolving norm. To apply this doctrine—which recognizes an "emerging awareness that liberty gives substantial protection to adult persons

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<sup>110</sup> *Romer*, 517 U.S. at 634.

<sup>111</sup> *Lawrence*, 539 U.S. at 581-82 (O'Connor, J., concurring in the judgment).

<sup>112</sup> *Id.* at 578 (majority opinion).

in deciding how to conduct their private lives in matters pertaining to sex,<sup>113</sup>—towards a goal of liberation from sexual(ity) and gender oppression requires a unified social movement to develop such an awareness. The reasoning in *Williams* derived from the 1978 case *People v. Johnson*, and the social conception of prostitution remains frozen in that time. Therefore, the *Williams* court may not have been wrong in applying *Johnson* as binding authority even after *Lawrence*.

Just as the *Lawrence* majority looked to the repeal of sodomy laws by the European courts, the approach of foreign countries that have legalized or decriminalized prostitution could serve as examples of whether the fears of state legislatures are justified.<sup>114</sup> However, on a local level, there is little happening in Illinois to support the argument that there exists an emerging awareness of the need for decriminalization. Only small traces of the feminist movement's goal of liberating women in prostitution are evident in Illinois. For example, a recent study out of Chicago by the Center of Impact criticizes the disparate impact prostitution laws have on African-American women.<sup>115</sup> In 2004, a bill supported by Republican and Democrat senators passed in Illinois allowing prostitution charges to be sealed from public record. This aimed to encourage people convicted of prostitution to apply for jobs, thereby reducing the recidivism rate.<sup>116</sup>

A recent ballot measure in Berkeley, California, which sought to decrease the police priority of prostitution, may serve as an example of how the feminist divide can stall any real social movement on this issue.<sup>117</sup> The feminist debate was again highlighted with some arguing that decriminalization is a goal championed by white-middle class academics far removed from the realities of street prostitutes and others arguing that prostitution laws are the product of paternalistic notions of female sexuality.<sup>118</sup>

Even with this counter-productive divide, a majority of current

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<sup>113</sup> *Id.* at 572.

<sup>114</sup> See Grahn-Farley, *supra* note 14.

<sup>115</sup> For a discussion on this topic, also see Vednita Nelson, *Prostitution: Where Racism and Sexism Intersect*, 1 MICH. J. GENDER & L. 81 (1993).

<sup>116</sup> Cal Skinner, *Bill Moving to Seal Criminal Records for "Victimless Crimes,"* ILL. LEADER, Apr. 28, 2004, [http://www.mpp.org/IL/news\\_7190.html](http://www.mpp.org/IL/news_7190.html).

<sup>117</sup> Kai Ma, *U.S. Prostitutes Split Over Prostitution Measure*, North Gate News Online, Nov. 1, 2004, <http://journalism.berkeley.edu/ngno/stories/003577.html>.

<sup>118</sup> *Id.* (citing Janice Raymond saying that "[t]here are two groups of women in the prostitution debate. The first group is characterized as being articulate, and engaging in outlaw sexuality or sexuality as a form of resistance. The second group is out on the streets, in brothels, trafficked, poor, and of mainly African, Latin or Asian descent.").

and former prostitutes and other feminists agree that decriminalization is a step towards guaranteeing prostitutes' civil rights and promoting safety and equality for women.<sup>119</sup> This requires that women's rights activists unite and create a social movement that would awaken the social conception of the injustice of prostitution statutes. The prostitutes' rights movement is fairly stagnant compared to the gay rights movement's success in removing the social stigma of homosexuality and the repeal of sodomy laws.<sup>120</sup> This may be attributed in part to the degree of in-fighting amongst the very people who advocate for decriminalization. The lack of unity stalls any social and political movement and awareness that would perhaps compel courts to follow the emerging awareness standard set forth in *Lawrence*, fulfilling the promise for liberation embedded within its language.

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<sup>119</sup> See *supra* Part II.

<sup>120</sup> See generally D'EMILIO & FREEDMAN, *supra* note 9.

