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## Sodomy and Prostitution: Laws Protecting the “Fabric of Society”

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## Sodomy and Prostitution: Laws Protecting the “Fabric of Society”

NICOLE A. HOUGH\*

### I. INTRODUCTION

Throughout history many people have viewed sodomy and prostitution as moral evils, because sex has often been linked to sin and, therefore, to immorality and guilt.<sup>1</sup> For example, in ancient Hebrew, a sodomite was known as a qadhes, a male temple prostitute who was associated with heathen deities and impure forms of worship.<sup>2</sup> The female version of qadhes, qedheshah, is translated directly as prostitute.<sup>3</sup> This archaic view of labeling prostitution and sodomy as impure has been challenged over time, and both topics are still a source of great controversy.

Even today, sodomy and prostitution are often intertwined. For example, an outspoken opponent of Nevada prostitution, John Reese, attacked legalized prostitution in a number of ways throughout the past two decades.<sup>4</sup> He ran petition drives, lobbied legislators, and paid for billboards to be posted near brothels reading, “Warning: Brothels are not AIDS Safe.”<sup>5</sup> After years of failed attempts to challenge prostitution in the state and after being appointed president of Nevadans Against Prostitution, Reese decided to step down from his post and seek a license to open a gay brothel.<sup>6</sup> While he claimed to have changed his beliefs, he was in fact playing to the homophobia in the state along with the moral evils associated with sodomy.<sup>7</sup> Of all of Reese’s past tactics to shut down the brothel industry, this was the most threatening to the industry because the state could not ban a gay brothel without being discriminatory; it could, however, cause the leg-

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1. Dennis Altman, *Liberation: Toward the Polymorphous*, from *Homosexual: Oppression and Liberation*, 1971, in *Sexual Revolution* 616, 617 (Jeffrey Escoffier ed., Thunder’s Mouth Press 2003).

2. James Orr ed., *The International Standard Bible Encyclopedia*, <http://www.studylight.org/enc/isb/view.cgi?word=sodomite&action=Lookup> (2001).

3. *Id.*

4. Alexa Albert, *Brothel: Mustang Ranch and Its Women*, 163-65 (Ballantine Publ. Group 2001).

5. *Id.* at 163-64.

6. *Id.* at 165.

7. *Id.*

islature to ban all brothels rather than allowing a gay brothel to open.<sup>8</sup> Eventually, Reese withdrew his application, after the commission turned it down for being incomplete, and ultimately admitted that he was only trying to garner attention for his anti-prostitution agenda.<sup>9</sup>

John Reese successfully tied prostitution and sodomy together as issues of sexual morality. Reese's actions show how controversial certain sexual activities continue to be in American society, something that will not change easily. The Supreme Court, however, made a very important and controversial ruling in *Lawrence v. Texas*, holding that a Texas statute criminalizing sodomy between consenting homosexual partners is unconstitutional.<sup>10</sup> The reasoning in *Lawrence* has set the stage for people to challenge not only sodomy but also other forms of prohibited consensual sexual activity such as prostitution.

This note is a comparative analysis of sodomy and prostitution. This note will examine the history of both topics in the United States and, to a limited extent, in other countries. The primary focus will be on the laws and regulations governing people who engage in either practice, as well as the moral arguments used in opposition to either practice. The note will also look at the change in sodomy laws after *Lawrence*, current arguments for changing prostitution laws, as well as examine the effect the reasoning of *Lawrence* may have on future challenges to anti-prostitution laws.

This note is intended to show similarities between the moral justifications for banning sodomy and prostitution, as well as the heterosexist influence on society concerning both issues. This note does not advocate for a change in prostitution laws.

This note concentrates on a limited aspect of both sodomy and prostitution. In dealing with sodomy, the note discusses only consensual sodomy. Sodomy perpetrated upon a person in the context of rape or coercion is not discussed in this note. Additionally, consensual and voluntary prostitution between adults is the only form of prostitution covered by this note. This note will not address the prostitution of underage people, forced prostitution, or human trafficking.

Part II focuses on a general overview of American regulations that are based on moral arguments. Part III provides an overview of sodomy and prostitution, specifically addressing how regulations are used to address moral issues.

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8. *Id.*

9. *Id.*

10. *Lawrence v. Tex.*, 539 U.S. 558 (2003).

## II. REGULATION BASED ON MORALITY

## A. Harm to the “Fabric of Society”

The potential consequences of a particular activity often determine whether society identifies the activity as public or private.<sup>11</sup> If an action does not harm the actor or others, the action is generally considered private.<sup>12</sup> Courts, however, have recognized that the government may control an individual’s actions that do not cause direct harm to anyone if the action causes an indirect harm to the “fabric of our society.”<sup>13</sup> This recognition of harm to the fabric of society has allowed morality to become part of judicial review.<sup>14</sup>

The conservative moral approach uses the concept of injury to the fabric of society as a basis for public policies and legal perspectives.<sup>15</sup> This approach to the legal system is grounded in Christian teachings and considers laws, such as those barring sodomy and prostitution, as necessary to protect society’s moral interests, regardless of the interests and choices of individuals.<sup>16</sup> Traditional Christian teaching opposes sexual activity outside of marriage, and, even in marriage, sexual activity is necessary solely for procreation, not for pleasure.<sup>17</sup> Because sodomy and prostitution do not fit into this traditional Christian view of sexual relations, they are regarded as an assertion of hedonism that cannot be justified in traditional moral teachings.<sup>18</sup>

Conservative moralists have created the idea of a shared public morality grounded in traditional concerns such as family, public health, and safety.<sup>19</sup> Supporters of this doctrine believe that regulating the public on the basis of morality will protect society from certain ills, such as disease, crime, and, of course, immorality.<sup>20</sup> Moral arguments, in this view, are the proper basis for legal restrictions – barring certain activities on the grounds that allowing them at all is bad for society as a whole.<sup>21</sup>

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11. Eric A. Johnson, *Harm to the “Fabric of Society” as a Basis for Regulating Otherwise Harmless Conduct: Notes on a Theme From *Ravin v. State**, 27 Seattle U. L. Rev. 41, 44-45 (2003).

12. *Id.*

13. *Id.* at 43.

14. *Id.*

15. Susan E. Thompson, *Prostitution – A Choice Ignored*, 21 Women’s Rights. L. Rep. 217, 229 (2000).

16. *Id.*

17. *Id.*; Altman, *supra* n. 1, at 618.

18. Altman, *supra* n. 1, at 623.

19. Thompson, *supra* n. 15, at 229.

20. *Id.* at 229-31.

21. Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. Leg. Stud. 693, 695 (1998).

### B. *Failure of Prohibitions*

Prohibitory regulations fail if one of the following three situations occurs: the societal majority no longer disapproves of the activity; enforcement of the prohibition becomes impossible because the activity becomes so widespread; or the societal disapproval is outweighed by the benefits the activity provides.<sup>22</sup> Over time, many prohibitory activities banned on the basis of morality have become socially acceptable.<sup>23</sup> For example, gambling, alcohol consumption, abortion, and now sodomy have all become more widely accepted and are no longer banned outright.

Only recently have sodomy prohibitions been deemed unconstitutional in the United States.<sup>24</sup> Arguments can be made that sodomy prohibitions have failed in all three of the above regulatory situations. The social majority has become more accepting of homosexuality. Additionally, sodomy prohibitions have been rarely enforced, not necessarily due to widespread homosexuality, but rather to an increased awareness and a lack of government interest in intruding into private homes. And finally, social disapproval is outweighed by the benefits provided to individuals who are allowed to engage in sexual acts in the context of homosexual relationships without being subject to criminal law (not being deemed criminal or lower class, protecting personal relationships, etc.).

Like sodomy, prostitution prohibitions may be challenged on all three of the above grounds, particularly on the grounds that the prohibitions are impossible to enforce and that societal disapproval is outweighed by the benefits to individuals if the prohibitions are removed. Currently prostitution prohibitions have centered on preventing violence, stopping the spread of sexually transmitted diseases, and ending the subjugation of women.<sup>25</sup>

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22. Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 Suffolk U. L. Rev. 235, 236 (2000).

23. *Id.*

24. See *Lawrence*, 539 U.S. at 578, *overruling*, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (*Bowers* held that a statute criminalizing same-sex sodomy between consenting adults was constitutional; *Lawrence* overruled *Bowers* and found that statutes criminalizing same-sex sodomy between consenting adults were unconstitutional).

25. Whitebread, *supra* n. 22, at 244 (though there are debates about whether these prohibitions actually prevent these issues or if prohibitions may actually perpetuate them).

## III. SODOMY AND PROSTITUTION

## A. Sodomy

References to sodomy can be traced back to biblical times.<sup>26</sup> Historically, the definition of sodomy has often been confusing, but the courts have almost always defined sodomy as an act done by men.<sup>27</sup> In fact, in the late twentieth century, courts and theorists found sodomy between women to be a legal impossibility.<sup>28</sup> Today sodomy is defined as “oral or anal copulation between humans, especially those of the same sex.”<sup>29</sup>

Sodomy is an example of a private act that does not harm the actors or others, but has been prohibited on the basis of moral arguments.<sup>30</sup> Sodomy laws were not originally created to regulate homosexual sex; in fact, they were originally applied to almost all sexual activity outside of marital procreative sex.<sup>31</sup> These laws did not classify people as homosexual and were not applied to gay and lesbian people as a class.<sup>32</sup> It was only when society began to recognize homosexuals as an identifiable group of people and began to identify homosexual people with sodomitical acts that sodomy laws were targeted toward a specific group in society.<sup>33</sup>

In colonial times, laws against sodomy were often not directed at homosexual conduct, but were focused on sexual acts between men and children, men raping women, or men engaging in bestiality.<sup>34</sup> These laws were created on the grounds that sodomy was immoral and unchristian.<sup>35</sup>

It has only been in recent history that sodomy has been attached to a certain type of person, rather than just to a particular sexual activity.<sup>36</sup> In today’s society, sodomy laws have defined the place of gay people in American society.<sup>37</sup> Even in cases where sodomy is referred to in a gen-

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26. Aimee D. Dayhoff, *Sodomy Laws: The Government’s Vehicle to Impose the Majority’s Social Values*, 27 Wm. Mitchell L. Rev. 1863, 1865 (2001); see also *The Holy Bible*, King James Version at Genesis 19:5, Leviticus 18:22, 20:13, Romans 1:26-27, I Corinthians 6:9, I Timothy 1:9-10 (commonly cited biblical sections supposedly referring to and condemning homosexual acts, though some scholars dispute whether these sections were actually intended to refer to homosexual sex or were instead referring to immoral behavior unrelated to homosexual sex).

27. Michael E. Brewer, *Sodomy Laws and Privacy: The Cost of Keeping Gays in the Closet*, 79 Denv. U. L. Rev. 546, 547 (2002).

28. *Id.*

29. *Black’s Law Dictionary* 1396 (Bryan A. Garner ed., 7th ed., West 1999).

30. Johnson, *supra* n. 11, at 45.

31. Brewer, *supra* n. 27, at 547.

32. *Id.*

33. *Id.*

34. *Lawrence*, 539 U.S. at 568; Brewer, *supra* n. 27, at 546-47.

35. Dayhoff, *supra* n. 26, at 1866.

36. Brewer, *supra* n. 27, at 546-48.

37. *Id.*

der-neutral way, the assumption is that it refers to homosexual acts only, not to sodomy in other contexts.<sup>38</sup> The existence of sodomy laws has limited homosexuals to a second-class position in society, whether or not the laws have actually been enforced.<sup>39</sup> This second-class status is reflected in derogatory synonyms for sodomy such as: unnatural offense, abominable and detestable crime against nature, and buggery.<sup>40</sup> Until the Supreme Court's landmark decision in *Lawrence v. Texas*, states were allowed to prohibit sodomy and prosecute homosexual couples who engaged in consensual sexual acts.<sup>41</sup>

In addition, accusations of homosexuality have become a public way of demeaning certain public and political figures.<sup>42</sup> During the first Gulf War, an ad for a T-shirt appeared in *Rolling Stone* magazine.<sup>43</sup> The shirt had an American flag in the background and a camel in the foreground; superimposed on the camel's buttocks was the face of Saddam Hussein whose slightly open mouth was placed directly where the camel's anus would have been.<sup>44</sup> The caption read, "America Will Not be Saddamized."<sup>45</sup> Sodomy, in this case, was attached to bestiality, immoral sexual behavior, as well as to the image of a man characterized by America as evil.<sup>46</sup>

### B. Prostitution

Prostitution is one of society's oldest professions.<sup>47</sup> While the origins of prostitution are unclear, what is clear is that prostitution dates back to the earliest part of human history.<sup>48</sup>

In ancient Greece, prostitution was a very important part of society and was so widely accepted that many Greek states taxed people who worked or participated in prostitution.<sup>49</sup> The prostitutes of Greece were arranged in a social hierarchy.<sup>50</sup> At the bottom of the hierarchy were the dictertiades,

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38. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. Civ. Rights-Civ. Libs. L. Rev. 103, 111-12 (2000).

39. *Lawrence*, 539 U.S. at 575 (noting that stigma may remain even if laws were not enforced); see generally Br. of Amici Curiae, Bruce A. Ackerman et al., *Lawrence v. Texas*, 539 U.S. 558 (2003).

40. *Black's Law Dictionary*, *supra* n. 29, at 1396.

41. 539 U.S. 558.

42. Jonathon Goldberg, *Sodometries: Renaissance Texts, Modern Sexualities*, 1 (Stanford U. Press 1992).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Thompson, *supra* n. 15, at 218.

48. *Id.*

49. *Id.* at 219.

50. *Id.*; Nussbaum, *supra* n. 21, at 700.

who were required to wear certain clothing that made it easier for other members of the community to identify them and who were greatly restricted in their activities, often losing their citizenship.<sup>51</sup> At the pinnacle of the Greek prostitution hierarchy were the hetarie, considered to be the most educated of Greek women.<sup>52</sup> The hetarie were well respected and were as well known for their intellectual conversations as for their sexual abilities.<sup>53</sup>

Ancient Rome, like ancient Greece, also had prostitutes. In Rome, however, prostitution was simply considered a trade that was in great demand, and which had the benefit of keeping the sexual activities of young men under control.<sup>54</sup> Ancient Rome was the first civilization in the Western world to engage in regulated prostitution.<sup>55</sup> Prostitutes were required to be licensed and, once licensed, their names could never be removed from the official list of prostitutes.<sup>56</sup>

The aedile, or official inspectors, were in charge of making sure that prostitutes followed the regulations, which included wearing the proper clothing and behaving in an acceptable manner. The aedile also ensured that the customers paid the prostitutes, and additionally that the prostitutes were not at risk of physical danger.<sup>57</sup>

In the early frontier era of the United States, prostitutes were used to satisfy the sexual needs of men.<sup>58</sup> With the industrial revolution and the increasing urbanization of the American landscape prostitution blossomed, especially due to the migration of women in search of work.<sup>59</sup> During the California Gold Rush such a great demand for prostitutes arose that prostitution houses emerged in great numbers across the United States.<sup>60</sup> Immigration also increased the number of prostitutes in the country as the number of foreign-born prostitutes increased to the point of outnumbering the American-born prostitutes in many large cities.<sup>61</sup>

Like the ancient Greeks, American prostitutes of present day fit into a hierarchy. In America, prostitutes can be divided into four rough categories: street prostitutes, brothel prostitutes, escorts, and call girls.<sup>62</sup> Street prostitutes are considered the lowest form of prostitution – it is, however,

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51. Thompson, *supra* n. 15, at 219.

52. *Id.*; Nussbaum, *supra* n. 21, at 700.

53. Thompson, *supra* n. 15, at 219-20.

54. *Id.* at 220.

55. *Id.* (prostitution started being regulated in 180 B.C.).

56. *Id.*

57. *Id.*

58. *Id.* at 222 (also noting that if women were unavailable, sex was often exchanged between men).

59. *Id.*

60. *Id.* at 223.

61. *Id.*

62. *Id.* at 225-28.



the form of prostitution most familiar and recognizable to the public.<sup>63</sup> Street prostitution has grown with the increase in car ownership, as cars offer a temporary shelter in which services are provided.<sup>64</sup> Brothel prostitution has a long history in American cities.<sup>65</sup> Brothels are generally run by a madam and are often in districts set apart from the rest of the city.<sup>66</sup> Women involved in brothel prostitution are often restricted in their ability to move about the city and are required to submit to mandatory health checks.<sup>67</sup> Escort agencies may provide a front for prostitution.<sup>68</sup> Such agencies provide “companionship” for a certain price.<sup>69</sup> Finally, call girls are believed to make up the majority of prostitutes.<sup>70</sup> Like an escort service, call girls work within an organized structure where dates are arranged for clients.<sup>71</sup> This is considered to be the highest rung of the prostitution industry, affording call girls economic and personal independence.<sup>72</sup>

Prostitution is often associated with the spread of sexually transmitted diseases and violence. Sexually transmitted diseases are a concern for all sexually active people, but prostitutes are at particular risk since their livelihood depends on being sexually active with a variety of partners; furthermore, they could become infected by one customer and infect a future customer.<sup>73</sup> Prostitutes may also increase their risk of transmitting a sexually transmitted disease by not seeking medical attention or failing to fully explain their sexual history to a physician who may be treating them, because they are concerned with losing social service benefits.<sup>74</sup>

Even though there is a public assumption that prostitutes are a likely source of disseminating sexually transmitted diseases, there is no support for this assumption.<sup>75</sup> There are no studies in the United States finding any increased risk of infection among men who have sexual contact with female prostitutes.<sup>76</sup> This low risk of infection is probably due to the fact that prostitutes are more likely to use condoms than other sexually active women; furthermore, research has shown the transmission of sexually

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63. *Id.* at 225.

64. *Id.* at 226.

65. *Id.* at 227.

66. *Id.*

67. *Id.* (Nevada is the only state with legalized prostitution and requires prostitutes to follow certain regulations and submit to mandatory health checks.).

68. *Id.*

69. *Id.*

70. *Id.* at 228.

71. *Id.*

72. *Id.*

73. James G. Snell, *Mandatory HIV Testing and Prostitution: The World's Oldest Profession and the World's Newest Deadly Disease*, 45 *Hastings L.J.* 1565, 1568 (1994).

74. Whitebread, *supra* n. 22, at 245.

75. Thompson, *supra* n. 15, at 229.

76. *Id.* at 230.

transmitted diseases from men to women is much more likely than the transmission from women to men.<sup>77</sup>

Mandatory testing of prostitutes, or people soliciting prostitution, for the presence of antibodies of the Human Immunodeficiency Virus (“HIV”) is an idea that has increased in popularity in recent years.<sup>78</sup> This increase in popularity has occurred as the Acquired Immunodeficiency Syndrome (“AIDS”) pandemic has become more publicized and awareness has been raised regarding infection and methods of protection.<sup>79</sup> Courts have become entrenched in this debate as states have begun to pass statutes requiring anyone convicted of prostitution to submit to an HIV test.<sup>80</sup>

In 1990, petitioners convicted of soliciting acts of prostitution in California challenged the constitutionality of a statute requiring HIV testing and AIDS counseling as part of their conviction.<sup>81</sup> The petitioners claimed that they had the right to be free from unreasonable searches, as well as claiming that their rights to due process and equal protection were violated.<sup>82</sup> The court focused on the Fourth Amendment claim that HIV testing constituted an unreasonable search and seizure.<sup>83</sup> The court upheld the testing requirements under the Fourth Amendment because it determined that protecting citizens from the spread of AIDS outweighed the rights of the convicted prostitutes to be free from intrusion.<sup>84</sup>

In 1992, the Illinois Supreme Court reversed a lower court’s decision that found mandatory HIV testing for prostitution convictions unconstitutional.<sup>85</sup> Like the *Love v. Superior Court* case in California, the Illinois Supreme Court found that the state’s interest in preventing the spread of HIV outweighed the interest of convicted prostitutes.<sup>86</sup> The Court reasoned that the convicted prostitutes already had reduced expectations of privacy, due to their convictions, in being free from invasive searches.<sup>87</sup>

In addition to the spread of sexually transmitted diseases, prostitution is often linked with other criminal acts, many of which are violent in nature.<sup>88</sup> Prohibition of prostitution is often advocated in the belief that

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77. *Id.*

78. Snell, *supra* n. 73, at 1565-66.

79. *Id.* at 1565-68.

80. *See e.g.* Cal. Pen. Code § 1202.6 (2004) (AIDS testing and education for persons convicted of soliciting or engaging in prostitution).

81. *Love v. Super. Court*, 226 Cal. App. 3d 736, 739-40 (Cal. App. 1st Dist. 1990).

82. *Id.* at 740.

83. *Id.* at 740-46.

84. *Id.* at 746 (The court also focused on the importance of the counseling requirement of the statute.).

85. *People v. Adams*, 149 Ill. 2d 331, 333 (1992).

86. *Id.* at 343-48.

87. *Id.* at 348.

88. Thompson, *supra* n. 15, at 230-31.

eliminating prostitutes will reduce other illegal criminal activities, such as drug activity, illegal gambling, and street violence.<sup>89</sup>

While society often connects prostitution, crime, and violence, it often neglects to focus on the violence directed towards women, including prostitutes. Prostitutes are often victims of violence, but rarely have a venue for protection under the law.<sup>90</sup> It can be argued that assumptions about prostitution provide the basis for societal attitudes toward violence against women.<sup>91</sup> Women who are victimized, but are not prostitutes, have their behavior analyzed and compared to that of a stereotypical prostitute in order to determine if they “asked for it.”<sup>92</sup> Victimized women are often asked what they were wearing, what they said, and if they behaved in any sexually provocative manner; if the victims did any of these things, they are viewed as behaving like a prostitute, and the legal system often fails to afford them as much protection as others receive.<sup>93</sup>

### C. Regulations

In *Bowers v. Hardwick*, the Supreme Court determined that homosexuals had no privacy right protecting consensual sexual activities because there was no connection between sodomy and family, marriage, or procreation.<sup>94</sup> In Justice Powell’s concurring opinion, he supported the majority because *Hardwick* was not prosecuted.<sup>95</sup> Justice Powell’s opinion supports the widespread view that because a certain type of law is unenforced, it is harmless.<sup>96</sup> This view is incorrect since classifying a group as a criminal class, even though the laws are not enforced, effectively places that group below other citizens and leaves them open to harassment, violence, and discrimination.<sup>97</sup>

In June 2003, the Supreme Court overturned its decision in *Bowers* when it revisited the question of whether or not laws banning sodomy were unconstitutional in *Lawrence v. Texas*.<sup>98</sup> In *Lawrence*, police officers entered the petitioner’s apartment after receiving a report of a weapons disturbance.<sup>99</sup> Upon entering the apartment, the police saw two men engaging

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89. *Id.*

90. Beverly Balos & Mary L. Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. Rev. 1220, 1230-31 (1999).

91. *Id.* at 1231.

92. *Id.*

93. *Id.* at 1230, 1232.

94. *Bowers*, 478 U.S. at 190-91, *overruled*, *Lawrence*, 539 U.S. at 578.

95. *Id.* at 197-98 (Powell, J., concurring).

96. Leslie, *supra* n. 38, at 108.

97. *Id.* at 110.

98. 539 U.S. 558.

99. *Id.* at 562-63.

in anal intercourse; the men were subsequently arrested, charged, and eventually convicted of engaging in deviant sexual intercourse under a Texas sodomy statute.<sup>100</sup> The men challenged their convictions on the grounds that the statute was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment, as well as a similar provision in the Texas Constitution.<sup>101</sup> The state courts, relying on *Bowers*, upheld the convictions of the men.<sup>102</sup>

The Supreme Court granted certiorari in order to consider the following questions:

1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law – which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples – violate the Fourteenth Amendment guarantee of equal protection of the laws?
2. 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?
3. Whether *Bowers v. Hardwick* should be overruled?<sup>103</sup>

The Court decided to resolve these issues by focusing on the second question: whether the Petitioners' criminal convictions violated their liberty and privacy interests under the Due Process Clause.<sup>104</sup> In answering this question, the Court examined a number of issues, including the far-reaching consequences of proscribing a certain kind of sexual behavior in a private place, the history of American sodomy laws, the role of morality in the legal system, and the views of other countries on the subject.<sup>105</sup>

The Court admitted that the decision in *Bowers* was based on a societal condemnation of homosexual conduct as immoral, which was shaped by religious beliefs and the importance of traditional family values at the time when *Bowers* was decided in 1986.<sup>106</sup> Using language from a prior case, the Court noted that, "[o]ur obligation is to define the liberty of all, not to mandate our own moral code."<sup>107</sup> The Court continued this reasoning to show a shift in thought to today's way of thinking, which values more pro-

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100. *Id.* at 563.

101. *Id.*

102. *Id.*

103. *Id.* at 564.

104. *Id.*

105. *Id.* at 566-74.

106. *Id.* at 571.

107. *Id.* (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

tection for adults in determining how to conduct their private sexual lives.<sup>108</sup>

For guidance, the Court looked at the Model Penal Code promulgated by the American Law Institute in 1955.<sup>109</sup> The American Law Institute recommended that criminal penalties not be assessed for consensual sexual relations which were conducted in private based on three grounds: 1) respect for the law was undermined by criminalizing conduct that many people engaged in; 2) these sexual acts are private conduct and do not harm others; and 3) prohibitions are often arbitrarily enforced.<sup>110</sup>

Looking to Europe, the Supreme Court noted that the British Parliament had repealed laws punishing homosexual conduct in 1967.<sup>111</sup> More importantly, the European Court on Human Rights, which is an authority in forty-five countries, determined in 1981 that laws proscribing consensual homosexual conduct were invalid and overruled Irish law to the contrary.<sup>112</sup>

The Supreme Court also examined the consequences of a criminal conviction for sodomy.<sup>113</sup> People convicted under the Texas sodomy laws would be required to register as sex offenders in at least four states if they were to move their residence into those states.<sup>114</sup> While a conviction itself carries a heavy stigma, the act of declaring homosexual conduct as criminal stigmatizes homosexuals, permits discrimination, and "demeans the lives of homosexual persons."<sup>115</sup> The Court held that states cannot stigmatize homosexuals by criminalizing consensual adult conduct and that there is no legitimate state interest to intrude into the personal and private life of an individual.<sup>116</sup> Based on this reasoning, the *Lawrence* Court overruled *Bowers*.<sup>117</sup>

In comparison to sodomy, prostitution has a long history of regulation in the United States. One of the earliest attempts to regulate prostitution in the United States occurred in St. Louis with the passage of the Social Evil Ordinance in 1870.<sup>118</sup> The Social Evil Ordinance required six physicians to provide health care to women who registered as prostitutes and opened special hospitals to treat women who had been infected with sexually

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108. *Id.* at 571-72.

109. *Id.* at 572.

110. *Id.*

111. *Id.* at 572-73.

112. *Id.* at 573.

113. *Id.* at 575-76.

114. *Id.* at 575.

115. *Id.*

116. *Id.* at 578.

117. *Id.*

118. Thompson, *supra* n. 15, at 224.

transmitted diseases.<sup>119</sup> This ordinance remained in effect until 1874, when the state, after being challenged by 100,000 clergymen and middle-class women to uphold morality, banned prostitution outright.<sup>120</sup>

Another attempt to regulate prostitution in response to the rise in “opium dens,” which were being used to entice young girls into prostitution, was the passage of the White Slave Traffic Act, also known as the Mann Act of 1910.<sup>121</sup> This Act prohibited the interstate transportation of prostitutes and required the deportation of prostitutes who were illegal immigrants.<sup>122</sup>

After the Mann Act, when earlier attempts at regulating prostitution failed, prostitutes were segregated in red-light districts.<sup>123</sup> The term red-light came from the practice of trainmen leaving their signal lanterns in front of a house while making a visit for sexual services.<sup>124</sup> Prostitutes working in these districts were required to register with the police, who were supposed to oversee the prostitutes, madams, and the prostitution houses.<sup>125</sup>

Prostitution was criminalized entirely under the Standard Vice Repression Law of 1919.<sup>126</sup> This prohibition of prostitution led to a disparate treatment between prostitutes and customers as prostitutes are often criminally charged, while customers are largely ignored by law enforcement.<sup>127</sup> Additionally, enforcement is almost entirely focused on street prostitutes who make-up only a small minority of prostitutes as a whole.<sup>128</sup>

When attempting to control prostitution, there are three legal models commonly used: criminalization, legalization, and decriminalization.<sup>129</sup> Criminalization makes the activity itself illegal; this can be seen in most American states, except for Nevada.<sup>130</sup> Legalization allows the government to enact regulatory schemes to be put in place in order to permit certain forms of prostitution; this can be seen in Nevada.<sup>131</sup> Decriminalization removes most governmental regulations and allows prostitutes to control

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119. *Id.*

120. *Id.*

121. Jessica N. Drexler, *Governments' Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 *Dick. J. Intl L.* 201, 204 (1996); Whitebread, *supra* n. 22, at 242-43.

122. Whitebread, *supra* n. 22, at 243.

123. Thompson, *supra* n. 15, at 224.

124. *Id.*

125. *Id.* at 225.

126. Whitebread, *supra* n. 22, at 243.

127. *Id.* at 244.

128. *Id.*

129. *See generally* Thompson, *supra* n. 15, at 239-47.

130. *Id.* at 239-41.

131. *Id.* at 241-42.

their business free from government interference; this can be seen in some European countries, such as the Netherlands.<sup>132</sup>

Nevada is the only state in the United States where prostitution is legal.<sup>133</sup> In Nevada, individual counties are able to decide whether to allow legalized prostitution within their borders.<sup>134</sup> Each county has differing regulations regarding licensing requirements and governing rules.<sup>135</sup> As a result, six counties ban prostitution outright, seven counties permit prostitution within their borders, and four counties allow prostitution in certain areas.<sup>136</sup> The four largest cities in Nevada, including Las Vegas and Reno, do not permit prostitution within the city limits; however, brothels located near the city lines are the most profitable and busiest establishments in the state.<sup>137</sup>

In order to prevent many of the social ills commonly associated with prostitution, most counties in Nevada have laws aimed at preventing others from taking advantage of and exploiting prostitutes.<sup>138</sup> In the hope of eliminating the role of pimps in prostitution, it is illegal for anyone to live off the earnings of a prostitute or to procure a person for the purpose of prostitution.<sup>139</sup> Counties often require that owners and managers of a brothel be female, and that the brothels ban male employees from the premises.<sup>140</sup> Additionally, women who do not work in the brothels are often barred from the premises in order to prevent domestic disputes between wives or girlfriends who come to the brothels looking for their partners.<sup>141</sup> Men seeking a prostitute's service may also be declined admittance if they are drunk, rowdy, or underage.<sup>142</sup> These regulations are credited with keeping licensed prostitutes safe and, as a result, they have rarely suffered physical violence.<sup>143</sup>

In order to assure the safety of people soliciting prostitutes and to protect them from the spread of sexually transmitted diseases, prostitutes in

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132. *Id.* at 244.

133. *Id.* at 242.

134. *Id.*

135. Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 *Yale J.L. & Feminism* 69, 88-89 (1998); *see generally* Albert, *supra* n. 4.

136. Bingham, *supra* n. 135, at 88.

137. Thompson, *supra* n. 15, at 242.

138. James R. Stout & Thomas S. Tanana, *Could California Reduce AIDS by Modeling Nevada Prostitution Law?*, 2 *San Diego Just. J.* 491, 494, 498 (1994).

139. *Id.* at 494; *see* Albert, *supra* n. 4, at 72 (Prostitutes used to be required to have a pimp in order to work in a brothel; owners would call the pimp if the woman got out of line and the pimp would be responsible for disciplining her.).

140. Stout, *supra* n. 138, at 498.

141. Albert, *supra* n. 4, at 11.

142. *Id.* at 17.

143. Stout, *supra* n. 138, at 498.

Nevada are required to undergo mandatory health checks regularly.<sup>144</sup> In addition, all prostitutes are required to use condoms.<sup>145</sup> HIV testing is required statewide for prostitutes once a month and prostitutes must undergo weekly tests for sexually transmitted diseases.<sup>146</sup> There are very harsh penalties for a prostitute, and the brothel in which she works, if she tests positive for HIV.<sup>147</sup> Anyone who tests HIV positive and is working in a licensed brothel, or is convicted of practicing illegal prostitution, is guilty of a felony.<sup>148</sup> Licensed prostitutes who test positive for treatable sexually transmitted diseases are required to stop working until they test negative.<sup>149</sup> Additionally, brothel owners are held liable for the spread of sexually transmitted diseases caused by the women working in their establishment to the clientele.<sup>150</sup> Since mandatory HIV testing began in 1986, no brothel workers have tested positive for the disease.<sup>151</sup>

Unlike the majority of the United States, other countries have permitted legalized prostitution for a long time and have few of the social ills that Americans associate with the practice.<sup>152</sup> In fact, there is a lower rate of prostitution related crimes in European countries that have legalized prostitution compared with countries that criminalize prostitution such as the United States.<sup>153</sup>

An unmistakable example of the different treatment prostitution receives in the United States compared with other countries can be seen in the case of Heidi Fleiss. Fleiss, well known in the United States as the "Hollywood Madam," ran a large prostitution ring in Hollywood until she was convicted and sentenced to serve three years in a federal penitentiary on a number of charges.<sup>154</sup> In the United States she is considered a criminal; however, in Australia, Fleiss was asked to be the international ambassador for the first bordello to sell shares on the Australian stock exchange.<sup>155</sup> Prostitution has always been legal in Australia, though it is limited to non-residential areas.<sup>156</sup> Like Nevada, Australian prostitutes are regulated; they must be regularly tested for sexually transmitted diseases,

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144. *Id.* at 500; Thompson, *supra* n. 15, at 242.

145. Thompson, *supra* n. 15, at 242; Stout, *supra* n. 138, at 500.

146. Albert, *supra* n. 4, at 164 (tests also required to get a prostitution license); Bingham, *supra* n. 135, at 89-90; Stout, *supra* n. 138, at 500.

147. Nev. Rev. Stat. § 41.1397 (2003); Thompson, *supra* n. 15, at 242; Stout, *supra* n. 138, at 494.

148. Nev. Rev. Stat. § 201.358 (2003); Thompson, *supra* n. 15, at 242; Stout, *supra* n. 138, at 494.

149. Stout, *supra* n. 138, at 500.

150. Nev. Rev. Stat. § 41.1397.

151. Albert, *supra* n. 4, at 4, 164.

152. Thompson, *supra* n. 15, at 231.

153. *Id.*

154. Heidi Fleiss & Nadya Labi, *In Defense of Prostitution*, 2003 OCT- Legal. Aff. 35, 35 (2003).

155. *Id.* at 36.

156. *Id.*



anyone convicted of a crime in the past five years may not own or manage a brothel, and employers must provide condoms and are responsible for making sure their prostitutes are free of disease.<sup>157</sup>

Similar to Australia, prostitution is a legitimate profession in the Netherlands.<sup>158</sup> Even though it is legal to be a prostitute, it is illegal to run a prostitution enterprise, and pimping has been criminalized since the Dutch Public Morality Act was passed in 1911.<sup>159</sup> In some parts of the Netherlands, legalized prostitution is limited to certain areas, which are commonly known as green-light districts (similar to red-light districts in America).<sup>160</sup> And like Nevada and Australia, prostitutes are required to be tested bi-weekly for sexually transmitted diseases and all customers must wear condoms.<sup>161</sup> As a result, prostitutes in the Netherlands have the lowest rate of AIDS infection in Western Europe, and the lowest rate of sexually transmitted diseases in the world.<sup>162</sup> In addition to protection from sexually transmitted diseases, prostitutes in the Netherlands are also given a call button wired to police, which provides protection from violent customers, contributing to a low rate of prostitution related crime.<sup>163</sup>

Other countries have not regulated or criminalized sodomy or prostitution to the same extent as the United States.<sup>164</sup> The Supreme Court, in *Lawrence*, found “no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent” in comparison to other countries.<sup>165</sup> In the United States, sodomy and prostitution have been regulated mostly on an individual state-by-state basis. States have been allowed to create and enforce their own regulations regarding both activities, at least until *Lawrence v. Texas* invalidated anti-sodomy laws.<sup>166</sup> Regulations have been created and enforced in order to protect both the actors involved in the activity, as well as the general welfare of society (for example, mandatory HIV/AIDS testing for prostitution convictions).<sup>167</sup>

Prohibitory regulations will fail if one of three situations occurs.<sup>168</sup> The first situation occurs when the societal majority no longer disapproves

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157. *Id.*

158. Drexler, *supra* n. 121, at 202.

159. *Id.* at 218-19.

160. Thompson, *supra* n. 15, at 224; Drexler, *supra* n. 121, at 219, 222.

161. Drexler, *supra* n. 121, at 227.

162. *Id.*

163. Nussbaum, *supra* n. 21, at 702; Drexler, *supra* n. 121, at 230.

164. *Lawrence*, 539 U.S. at 573; Thompson, *supra* n. 15, at 231.

165. 539 U.S. at 576-77 (referring only to sodomy, not to prostitution).

166. Prostitution legalized in Nevada; until *Lawrence v. Texas*, 539 U.S. 558 (2003), sodomy was illegal in a number of states.

167. Albert, *supra* n. 4, at 164; Bingham, *supra* n. 135, at 89-90; Stout, *supra* n. 138, at 500.

168. Whitebread, *supra* n. 22, at 236.

of the activity.<sup>169</sup> This may be the case, to a certain extent, with sodomy. While the social majority may not approve of sodomy, there has been an increased awareness of the homosexual community in America and an increased willingness to be tolerant. As awareness increases, society becomes more knowledgeable and able to discard old stereotypes and assumptions about sodomy. Comparatively, it is also unlikely that the social majority will approve of prostitution in the near future. Like sodomy, however, an increased awareness about prostitution may allow the social majority to become more informed, thereby providing evidence to contradict any widely held stereotypical beliefs.

The second situation occurs when enforcing the activity becomes impossible because the activity becomes so widespread.<sup>170</sup> In the case of sodomy, it is an activity practiced by consenting adults across the globe. In recent years, the government has ignored this kind of behavior unless it took place in certain types of situations (by force or in public, etc.). Prostitution is also a widely practiced activity. All states have some type of prostitution being practiced within their borders by consenting adults.

The third situation occurs when societal disapproval is outweighed by the benefits the activity provides.<sup>171</sup> This situation is fairly clear when discussing sodomy. Regardless of the social majority's disapproval, legalizing sodomy helps prevent homosexual couples from being stigmatized and discriminated against.<sup>172</sup> Same-sex couples can engage in activities that opposite sex couples may freely engage in, such as expressing physical love, without fear of being labeled as criminals or public punishment.<sup>173</sup> The benefits of prostitution are less clear because of the lack of approval in most parts of society, and the lack of knowledge regarding any benefits derived from the activity. Advocates for decriminalizing prostitution point to the low levels of sexually transmitted diseases in places like Nevada and foreign countries as evidence of the success of regulatory regimes; these regimes involve mandatory health checks of prostitutes.<sup>174</sup> Because prostitution is largely illegal in the United States, most prostitutes are unlikely to get tested regularly and they hide their occupation for fear of losing their social service benefits.<sup>175</sup> Additionally, regulating prostitution appears to be successful in limiting some of the disadvantages often associated with it.<sup>176</sup> In places where prostitution is legal, crime against prostitutes is often

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Lawrence*, 539 U.S. at 575-76.

173. *Id.*

174. Albert, *supra* n. 4, at 4, 164; Drexler, *supra* n. 121, at 227.

175. Whitebread, *supra* n. 22, at 245.

176. Thompson, *supra*, n. 15, at 231, 242; Stout, *supra* n. 138, at 494, 498, 500.

greatly reduced and measures are taken to protect the safety of people engaged in the business.<sup>177</sup>

The illegality of sodomy has been successfully challenged in *Lawrence v. Texas*. Prostitution, however, has not yet been successfully challenged. There are two constitutional arguments that have been raised to support claims that prostitution should be decriminalized and made into a regulated industry in the United States. One argument centers on the Equal Protection Clause of the Fourteenth Amendment and the other centers on the Fourth Amendment right to privacy.<sup>178</sup>

The Fourteenth Amendment challenge centers on the fact that laws criminalizing prostitution are often gender biased because the laws either apply, or are applied in practice, only to women. Though recent surveys suggest that male prostitutes are just as numerous as female prostitutes, they are rarely subject to criminal actions. Additionally, male customers are arrested only one-quarter as often as female prostitutes. Those clients who are arrested often testify against the prostitute in return for the charges against them being dropped. Even if customers are subject to criminal penalties, penalties for solicitation are not as harsh as those for the prostitute. Also, the people in charge of prostitution, pimps, madams, hotel managers, etc., profit greatly from prostitution but often avoid prosecution.<sup>179</sup>

Challenges to prostitution based on the Fourth Amendment right to privacy center on the balance between the harm of the conduct and the rights of an individual to be free from intrusion into his or her privacy.<sup>180</sup> Consensual sexual activity between adults, even in the context of prostitution, requires more than mere suspicion before the government may interfere and encroach upon a person's privacy.<sup>181</sup>

#### D. Moral Arguments

The Conservative Moral Approach and heterosexist views have caused homosexuals to be classified as a lower class of people than heterosexuals.<sup>182</sup> Not only is sodomy considered immoral, but the perceived conflict between traditional marriage and homosexuality further alienates homo-

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177. Nussbaum, *supra* n. 21, at 702; Drexler, *supra* n. 121, at 230; Stout, *supra* n. 138, at 494, 498.

178. Drexler, *supra* n. 121, at 214-16.

179. *Id.*

180. *Id.*

181. *Id.* at 215-16.

182. Alexandra B. Stremler, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 U. Fla. J.L. & Pub. Policy 189, 192 (1995); Thompson, *supra* n. 15, at 229 (discussing the Conservative Moral Approach as applied to prostitution).

sexuals.<sup>183</sup> In addition to disparate treatment in the legal system, the United States Department of Justice has reported that homosexuals are “probably the most frequent victims” of hate crimes.<sup>184</sup> Moral arguments against sodomy have fostered an environment where such acts are likely to take place.<sup>185</sup>

In comparison to sodomy laws, the United States’ military’s “Don’t Ask, Don’t Tell” policy demonstrates another example of American conservative moralist values being applied to homosexuals.<sup>186</sup> Being gay is considered a conflict with being a “true” soldier and the military has officially labeled homosexuality as “incompatible with military service.”<sup>187</sup> Gay men are seen as not being real men, in fact they are considered to be “women.”<sup>188</sup> There is a heterosexist view that men need to be interested in heterosexual women in order to be defined as a “military man.”<sup>189</sup>

Additionally, in America today, it is widely believed that taking money for sex is immoral; it demeans women and turns their bodies into commodities.<sup>190</sup> The argument that prostitution is morally bad centers on the exchange of money for sex, not on the idea that sex itself is bad.<sup>191</sup> Female prostitutes, however, are much more likely than paying male customers to be viewed as morally flawed.<sup>192</sup>

This double standard was called into question after tolerance of prostitution spread in the latter part of the nineteenth century and sexual purity ideology became a movement.<sup>193</sup> The sexual purity ideology questioned the double standard applied to men and women who were involved in trading sex for money.<sup>194</sup> Followers of the ideology, however, did not advocate freeing women from the sexual customs of the time, instead they demanded purity from both sexes.<sup>195</sup> Even with the rise of the sexual purity ideology the double standard regarding sexual activity continued to persist

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183. Brewer, *supra* n. 27, at 549.

184. Leslie, *supra* n. 38, at 122.

185. *Id.* at 122-26.

186. Julie Y. Ralston, *Geishas, Gays and Grunts: What the Exploitation of Asian Pacific Women Reveals About Military Culture and the Legal Ban on Lesbian, Gay and Bisexual Service Members*, 16 *Law & Inequality: J. Theory & Prac.* 661, 670 (1998) (noting the struggles of women and minorities to challenge the military’s ideal of white, heterosexual, male officers).

187. *Id.* at 682, 705-06.

188. *Id.* at 706.

189. *Id.* at 709.

190. Nussbaum, *supra* n. 21, at 695.

191. *Id.* at 699 (stating that some conservative moralists would argue that any kind of sexual activity outside of a heterosexual marriage is bad).

192. Whitebread, *supra* n. 22, at 241-42.

193. *Id.* at 241.

194. *Id.*

195. *Id.* at 241-42.

and today prostitutes are still arrested much more often than their customers.<sup>196</sup>

Deep-seated cultural beliefs about sexuality have justified the convictions of female prostitutes.<sup>197</sup> In 1975, there was the much publicized trial of the “Mayflower Madam,” Sidney Biddle Barrows. The attorney for the madam defended her on the grounds that the legal system was treating women differently than men; he argued that the state systematically ignored male clients, but continuously charged female prostitutes. The defense attorney threatened to read the book of client names, rumored to contain the names of several prominent members of the state’s legal community, at jury selection. The state agreed to fines and a conditional discharge for Barrows rather than proceeding to trial and allowing the names to be read. By agreeing to a plea bargain, the state effectively protected the male clientele from public disclosure, though Ms. Barrows was widely publicized as a failed woman.<sup>198</sup>

Women are often judged for their sexual behavior outside of the confines of marriage because a woman’s chastity is tied to respectability and the family.<sup>199</sup> Any extramarital sex is considered immoral.<sup>200</sup> Society mandates that women are not supposed to be lustful, and nothing is more dangerous to society than a woman whose whole career involves lust.<sup>201</sup> These women are considered a possible source of physical and moral contagions.<sup>202</sup> During the Victorian era, sexual deviance was considered to be the source of all female criminality, linking prostitution with every kind of crime and vice.<sup>203</sup> In order to protect women from becoming “fallen,” female sexuality had to be kept in bounds, usually through social boundaries often set by men.<sup>204</sup>

Moral views on sodomy and prostitution have shifted over time. Sodomy, once viewed as an act perpetrated by a man with force upon another, has shifted to being inextricably linked to homosexual men.<sup>205</sup> The Supreme Court, in a landmark reversal of its 1986 ruling in *Bowers*, considered the argument that states had the right to ban sodomy since it was not related to marriage or procreation. Revisiting *Bowers*, the Supreme Court

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196. Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 Berkeley Women’s L.J. 47, 59 (1995); Whitebread, *supra* n. 22, at 241-42; Stout, *supra* n. 138, at 496.

197. Stremler, *supra* n. 182, at 192.

198. *Id.* at 194-95.

199. See generally Whitebread, *supra* n. 22, at 241 (discussing sexual purity ideology).

200. Nussbaum, *supra* n. 21, at 707.

201. *Id.*

202. Balos, *supra* n. 90, at 1279.

203. Lucas, *supra* n. 196, at 51.

204. Nussbaum, *supra* n. 21, at 708; Lucas, *supra* n. 196, at 51.

205. Brewer, *supra* n. 27, at 546-48.

found that banning sodomy unconstitutionally affects and stigmatizes homosexuals.<sup>206</sup> Likewise, prostitution, once widely accepted in American society as the country expanded west and the country became more industrialized, has become the subject of much regulation and prohibition.<sup>207</sup>

Both sodomy and prostitution are often connected with other activities society deems as immoral. They have been connected with forms of deviant sexual behavior, such as bestiality, and have been linked to other forms of vice, such as illegal gambling, street crime, and drug use.<sup>208</sup> Connecting sodomy and prostitution with social ills has tainted the social perception of both activities and cast them in a negative light.

Using the concept of injury to the fabric of society as a basis for public policies and regulations, the Conservative Moral Approach has attacked both sodomy and prostitution.<sup>209</sup> Arguably, both activities are sexual in nature and are not performed for the purpose of procreation.<sup>210</sup> Additionally, both activities are done outside the boundaries of heterosexual marriage, which is the only proper place for sex under this conservative approach.<sup>211</sup>

Sodomy and prostitution represent an immoral and hedonistic lifestyle to many conservative moralists.<sup>212</sup> Laws barring these activities have been viewed as necessary in order to prevent the moral downfall of society.<sup>213</sup> To this end, courts have been willing to uphold laws having foundations that rest firmly in the morality of the social majority. For example, the Supreme Court in *Bowers v. Hardwick* rejected the respondent's argument that Georgia's sodomy law should be found unconstitutional because it was solely based on a moral belief.<sup>214</sup> The Court, however, revisited and subsequently overruled *Bowers* when it asked whether the social majority may enforce their beliefs on society as a whole through criminal law and found the Texas sodomy law at issue in *Lawrence* to be unconstitutional.<sup>215</sup>

The Model Penal Code, cited by the Supreme Court in *Lawrence*, provides a basis for examining both sodomy and prostitution outside of the realm of morality.<sup>216</sup> The Model Penal Code recommended that consensual sexual relations, which are conducted in private, not be subject to

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206. *Lawrence*, 539 U.S. at 567, 571, 575, 578 (overruling Justice White's opinion in favor of Justice Stevens' dissenting analysis weighing freedom).

207. Thompson, *supra*, n. 15, at 222-23.

208. Goldberg, *supra* n. 42, at 1-3; Balos, *supra* n. 90, at 1279.

209. Altman, *supra* n. 1, at 618, 623; Thompson, *supra* n. 15, at 229.

210. Altman, *supra* n. 1, at 618; Thompson, *supra* n. 15, at 229.

211. Altman, *supra* n. 1, at 618; Thompson, *supra* n. 15, at 229.

212. Altman, *supra* n. 1, at 623.

213. Thompson, *supra* n. 15, at 229-32.

214. 478 U.S. at 196.

215. 539 U.S. at 571.

216. *Id.* at 572.

criminal penalties.<sup>217</sup> The Code gives three reasons for this recommendation.<sup>218</sup> The first reason was that criminalizing conduct that many people engage in undermines respect for the law.<sup>219</sup> Many people engage in both sodomy and prostitution. While participants in either activity may desire to keep their involvement secret in order to escape the negative stigma attached to the activities, the social majority has been forced to recognize these activities as widespread. Sodomy is practiced among a large percentage of the population, both within heterosexual and homosexual relationships. The abundant supply of escort services and underground brothels, and the relative success of Nevada's legalized prostitution industry demonstrates that prostitution is a highly profitable enterprise.

Secondly, under the Model Penal Code reasoning, sexual acts between consenting adults in private do not harm others.<sup>220</sup> Consenting adults participating in sodomitical acts or prostitution are not harming anyone else or forcing anyone else to be an unwilling witness to their activities. While the Conservative Moral Approach, which believes that simply allowing the activities is harmful to all society, refutes this opinion, participating in these activities has not been proven to directly harm any other members of society.<sup>221</sup>

Lastly, according to the Model Penal Code, the arbitrary enforcement of these kinds of prohibitions favors removal of criminal penalties.<sup>222</sup> In the past few years, sodomy has very rarely been prosecuted.<sup>223</sup> When it has, prosecution has been in the context of forcible sodomy or in cases where the activity was done in public.<sup>224</sup> Prostitution, on the other hand, has been prosecuted fairly regularly, but there is a great disparity in who is prosecuted and to what extent.<sup>225</sup> Most often the female prostitute is charged with a crime, but not the male customer.<sup>226</sup> Additionally, treatment of prostitutes in the legal system often depends on her socio-economic status and the kind of prostitution she is associated with (street-walking versus running an escort service).

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217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Thompson, *supra* n. 15, at 229.

222. *Lawrence*, 539 U.S. at 572.

223. *Id.* at 570.

224. *Id.*

225. Whitebread, *supra* n. 22, at 241-42; Stout, *supra* n. 138, at 496; Lucas, *supra* n. 196, at 59.

226. *Supra* n. 225.

## IV. CONCLUSION

From John Reese, who attempted to stop the brothel industry in Nevada by threatening to open a gay brothel, to Saddam Hussein, depicted in *Rolling Stone* magazine in a sexual manner suggesting sodomy, American society has strategically used sodomy to demean certain people, achieve certain objectives, and taint certain activities. Since the Supreme Court's decision in *Lawrence v. Texas*, the issue of homosexuality has been at the center of a whirlwind of media attention, especially since the Massachusetts Supreme Court held that denying homosexual couples the right to marry was unconstitutional.<sup>227</sup> This decision was only the first, as other cities and states have begun to challenge the constitutionality of denying same-sex couples the right to marry.<sup>228</sup> The current debate surrounding gay marriage is a clear example of the current debate about equal rights for homosexuals and clearly shows the conflict in society involving homosexual sex.

In deciding *Lawrence v. Texas*, the Supreme Court weighed a number of factors including the history of the activity in America, the issue of morality governing private sexual conduct, the views of the international community, and the harm inflicted on the actors by not legalizing their activity.<sup>229</sup> These factors have very similar results when sodomy and prostitution are compared.

Both issues involve private sexual conduct that has been deemed immoral by the social majority, but as the Court noted in *Lawrence*, disapproval of an activity's morality does not mean that society may condemn it without further justification.<sup>230</sup> Throughout most of American history, consensual homosexual sodomy was not illegal. Sodomy was illegal in rape contexts, but was not associated with homosexuals.<sup>231</sup> Similarly, for a long period of American history prostitution was not illegal. Today, prostitution has been successfully regulated in Nevada, though it is illegal throughout the rest of the country.<sup>232</sup>

International acceptance of sodomy and prostitution is widespread.<sup>233</sup> As the Court noted in *Lawrence*, there is "no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."<sup>234</sup> Other countries (and the state of Nevada in

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227. *Goodridge v. Dept. of Pub. Health*, 440 Mass. 309, 312 (2003).

228. Most notably the city of San Francisco, California.

229. 539 U.S. at 570-73, 575-77.

230. *Id.* at 571.

231. *Id.* at 569; Brewer, *supra* n. 27, at 546-48.

232. Stout, *supra* n. 138, at 498.

233. 539 U.S. at 573; Thompson, *supra* n. 15, at 231.

234. 539 U.S. at 577.



the case of prostitution) have successfully legalized sodomy and prostitution and decreased the social ills thought to be associated with such activities, most notably the spread of sexually transmitted diseases, particularly HIV and AIDS.<sup>235</sup>

Additionally, proscribing prostitution may be more harmful for people involved in the activity than legalizing it would be. Regulating the prostitution industry may have positive benefits for society by protecting prostitutes from violence and limiting the spread of disease. Further, a regulatory regime may create legal venues for prostitutes who are being taken advantage of, abused, or who are victims of violence but cannot come forward and receive assistance from authorities or social service organizations because they must hide their activities. Legalizing prostitution may limit the stigma and discrimination faced by people in the business and may give adults a greater ability to conduct their private sexual lives without fear of overly-intrusive government interference.

It should not come as a surprise if prostitution is one of the next taboo sexual topics to be challenged under the *Lawrence* reasoning. Like sodomy, prostitution and the accusation of loose sexual morals among women has been consistently used in American society to demean certain people and taint certain activities. Regardless of a person's views on prostitution or on sodomy, there are arguments for and against both activities. The greater question is whether or not these are topics that the American legal system should be able to criminalize absent evidence of direct harm to any actors or other people in society. The Model Penal Code that provided a guideline for the Supreme Court in *Lawrence* may also provide a framework for future challenges to prostitution laws.<sup>236</sup>

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235. Albert, *supra* n. 4, at 4, 164; Thompson, *supra* n. 15, at 231, 242; Drexler, *supra* n. 121, at 227; Stout, *supra* n. 138, at 494, 498, 500.

236. *Lawrence*, 539 U.S. at 572.