SEX FOR SALE: THE IMPLICATIONS OF LAWRENCE AND WINDSOR ON PROSTITUTION IN THE UNITED STATES

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I. INTRODUCTION

On a warm, summer day, law enforcement officers erupted through the doors of a brothel in Chiang Mai, Thailand.1 The prostitutes were not jailed, but rather detained, and during this time, they were denied access to their money and possessions.2 These women made a conscious choice to work at the brothel, because the sex work provided them with an opportunity to earn a living and support their families.3 The prostitutes described their work experience as providing flexible work schedules and means of economic freedom.4 This opportunity of economic freedom faded away, however, after a United States evangelical conglomerate

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2 Id. at 1411-12.
3 Id. at 1412.
4 Id. at 1413.
initiated the raid of the brothel.\textsuperscript{5} Like Thailand, prostitution in the United States is illegal, and its criminalization impacts women in the United States similarly as those in Thailand.\textsuperscript{6}

Prostitution has been practiced throughout history and the world.\textsuperscript{7} Yet prostitution in the United States is currently illegal in all states, with the exception of some counties in Nevada.\textsuperscript{8} The criminalization of prostitution, however, is arguably unconstitutional based on protections awarded in recent decisions by the Supreme Court in \textit{Lawrence v. Texas} and \textit{United States v. Windsor}.\textsuperscript{9} In \textit{Lawrence}, for example, the Court established a fundamental right of sexual freedom, and the U.S. Constitution provides the right to choose with whom a person may have a private sexual relationship.\textsuperscript{10}

Part II of this paper will explain the history of regulating prostitution and examine state and foreign statutes that ban or regulate the practice.\textsuperscript{11} Comparison of these various statutes helps shed light on the ways in which prostitution is regulated. Part III will explain, in detail, the decision of \textit{Lawrence v. Texas}.\textsuperscript{12} This illustrates that the driving force behind the criminalization of prostitution is the guise of a certain view of “morality.”\textsuperscript{13} Part IV will explore prominent feminist theories that create a dialogue concerning the promotion of prostitution.\textsuperscript{14} Part V will address counterarguments to the decriminalization of prostitution.\textsuperscript{15} For example, states criminalize prostitution through police power to govern “public health, safety, welfare, and morals.”\textsuperscript{16} States that criminalize prostitution also use police power to mitigate the spread of disease as well as other moral considerations. Part VI will introduce studies that show the benefits of mandatory condom usage and disease testing.\textsuperscript{17} These studies indicate that there is little chance of spreading venereal diseases with these mandatory procedures in place.\textsuperscript{18} Lastly, Part VII will introduce a

\textsuperscript{5} Id. at 1410 n.2, 1413.
\textsuperscript{7} Id.; see also infra notes 21-23 and accompanying text.
\textsuperscript{8} Snadowsky, supra note 6, at 217.
\textsuperscript{9} See discussion infra Part III.
\textsuperscript{11} See discussion infra Part II.
\textsuperscript{12} See discussion infra Part III.
\textsuperscript{13} See discussion infra Part III.
\textsuperscript{14} See discussion infra Part IV.
\textsuperscript{15} See discussion infra Part V.
\textsuperscript{16} Snadowsky, supra note 6, at 217-18.
\textsuperscript{17} See discussion infra Part VI.
\textsuperscript{18} See discussion infra Part VI.
proposal to counteract unconstitutional bans on prostitution. This note proposes that all states should lift bans on prostitution and create brothel systems, similar to the brothel system used in Nevada. Brothel systems decrease violence and disease, and provide those who wish to engage in prostitution with a safer and easier way to do so.

II. THE HISTORY OF REGULATION OF PROSTITUTION

Prostitution has been coined with the moniker the “world’s oldest profession.” There is evidence of prostitution that dates back to the fifth century B.C.E. Prostitution was prevalent in ancient Greece and Rome and has continued to thrive to this date. In 1959, “the United Nations itself declared that prostitution should not be considered a criminal offense.” Despite this declaration, many countries, including the United States, have criminalized prostitution. Although prostitution is practiced throughout the globe, its regulation varies between countries.

Prostitution in the United States has existed since the colonial era. Most women involved in prostitution during this time were single and “primarily of European descent, Native Americans, and slaves or former slaves.” The governing authorities of the colonies, however, suffered increasing concern regarding prostitution. As a result, prostitutes in the early seventeenth century were prosecuted for their actions. Some prostitutes were tied to carts, with no clothing below the waist, and whipped while being dragged through town. Similar laws were enacted as a deterrence to keep people from

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19 See discussion infra Part VII.
20 See Snadowsky, supra note 6, at 218 (discussing the Nevada brothel system).
21 Id. at 217.
22 Id.
24 Snadowsky, supra note 6, at 217.
26 See id.
28 Id. at 71.
29 Id.
30 Id.
31 Id.
engaging in prostitution.\textsuperscript{32} Despite these laws, lack of enforcement allowed prostitution to remain.\textsuperscript{33} It was prevalent in the southern colonies as well as on the western frontier.\textsuperscript{34} From the colonial era to present day, prostitution still strikes discord between many feminist and legal scholars.\textsuperscript{35}

Prostitution is banned in all states, with the exception of Nevada, and each state has different standards for regulating prostitution.\textsuperscript{36} Each of the states listed below deal with criminalization of prostitution differently.\textsuperscript{37} Some include extra penalties if prostitution is committed near particular areas, such as schools and churches.\textsuperscript{38} Some include human trafficking, and others do not.\textsuperscript{39} Nevertheless, it is important to look at these statutes to understand the reasons behind criminalization of prostitution.

The Texas Penal Code’s prostitution statute is located in Title 9, which is entitled “offenses against public order and decency,” indicating a moral driving force behind the regulation.\textsuperscript{40} Similarly, enacted in 1942, South Carolina’s prostitution regulations reside in a chapter named “Offenses Against Morality and Decency.”\textsuperscript{41} Tennessee heightens the punishment if prostitution is “committed within one hundred feet . . . of a church or within one and one-half miles . . . of a school.”\textsuperscript{42} The Kentucky Revised Statutes, on the other hand, have an entire chapter for prostitution offenses.\textsuperscript{43} Kentucky’s prostitution statute was enacted in 1974,\textsuperscript{44} and subsequently included human trafficking in 2007, which is often associated with prostitution.\textsuperscript{45} Lastly, Ohio’s prostitution statute includes the unique requirement that anyone convicted of prostitution be tested for venereal diseases.\textsuperscript{46}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Bingham, supra note 27, at 71.
\item Id. at 71-72.
\item Id. at 69.
\item Snadowsky, supra note 6, at 217.
\item See infra notes 38-46 and accompanying text.
\item See, e.g., TENN. CODE ANN. § 39-13-513(b)(2) (2015) (“Prostitution committed within one hundred feet (100’) of a church or within one and one-half (1 ½) miles of a school . . . is a Class A misdemeanor.”).
\item See, e.g., KY. REV. STAT. ANN. § 529.100 (2007) (including a section for human trafficking under the Prostitution Offenses chapter of the code).
\item TEX. PENAL CODE § 43.02 (2015).
\item See S.C. CODE ANN. tit. 16, ch. 15 (2015); id. § 16-15-90.
\item TENN. CODE ANN. § 39-13-513(b)(2).
\item See KY. REV. STAT. ANN. ch. 529 (2013).
\item KY. REV. STAT. ANN. § 529.020.
\item KY. REV. STAT. ANN. § 529.100 (2007).
\item OHIO REV. CODE ANN. § 2907.27(A)(1) (2014).
\end{enumerate}
\end{footnotesize}
Foreign jurisdictions have a different approach to prostitution. Germany, for example, legalized prostitution in 2002. Not only is prostitution legal, but prostitutes can earn social security and insurance benefits. Stephanie Klee, a German prostitute who has been in the industry for twenty five years, told a German newspaper entitled *Der Tagesspiegel* ("The Daily Mirror") that "[s]ex work is slowly becoming more similar to other professions." Germany’s Federation of Erotic and Sexual Services ("BesD"), Germany’s first professional association for sex workers in the country, advocates for the dissolution of stigma and discrimination that surrounds sex work.

To emphasize this point, the director of BesD has said, "[w]e keep on saying, No, we don’t want to be saved!"

Prostitution is also legal in Ecuador, "[as] long as the businesses are registered with the government and follow health regulations," and the participants are over age eighteen. In 2003, prostitution was decriminalized in New Zealand, and the new law provided structure for the profession by licensing brothels and “operating under public health and employment laws.” The champion of the New Zealand bill was parliament member Tim Barnett, and, in his final appeal to Parliament before the vote, he asked that they put aside “outdated, biased and largely unenforced laws which left real problems untouched.” He went on to say that “[c]urrent law around prostitution wasn’t designed to ensure the wellbeing of sex workers.”

Countries like Germany and New Zealand were able to provide these rights because they chose to rise above social stigmas. The United States has yet to overcome such stigmas, and the government still deems prostitution an act against decency and morality.

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47 See infra notes 48-56.
48 See 100 Countries, supra note 25.
49 Id.
55 Id.
56 Id.
57 See supra notes 48-56 and accompanying text.
58 See supra notes 40-41.
United States government should rise above this and apply the underlying principles set forth in Lawrence v. Texas and United States v. Windsor to prostitution.\textsuperscript{59} Applying the principles of Lawrence and Windsor, the United States should decriminalize prostitution.

III. \textit{Lawrence v. Texas} and the Right to Sexual Freedom

\textit{Lawrence v. Texas} held that, through the Due Process Clause of the Fourteenth Amendment, the right to sexual freedom was a fundamental right, and that the government was not to interfere with private sexual conduct.\textsuperscript{60} In Lawrence, Houston police officers were called to the home of John Lawrence due to a “reported weapons disturbance.”\textsuperscript{61} As officers entered the home, they saw John Lawrence and Tyron Garner, both male, “engag[ed] in a sexual act.”\textsuperscript{62} Both men were arrested and charged with “deviate sexual intercourse.”\textsuperscript{63} The statute at issue defines “deviate sexual intercourse” as “any contact between any part of the genitals of one person and the mouth or anus of another person.”\textsuperscript{64} The petitioners “challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment.”\textsuperscript{65} The petitioners argued that the Texas statute “which criminalizes sexual intimacy by same-sex couples, not identical behavior by different-sex couples—violate[s] the Fourteenth Amendment guarantee of equal protection of laws.”\textsuperscript{66} The petitioners argued that being held criminally liable for “adult consensual sexual intimacy in the home” violates their “interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.”\textsuperscript{67}

The Court decided that the case “should be resolved by determining 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.”\textsuperscript{68} The Court then went through a case-by-case reflection of the evolution of liberty through

\textsuperscript{60} Lawrence, 539 U.S. at 578.
\textsuperscript{61} Id. at 562.
\textsuperscript{62} Id. at 563.
\textsuperscript{63} Id. (citation omitted).
\textsuperscript{64} Id. (quoting TEX. PENAL CODE ANN. § 21.06(a) (2003)).
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 564.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
various Supreme Court decisions. The Court first discussed *Griswold v. Connecticut* and *Eisenstadt v. Baird*.

*Griswold v. Connecticut* held that a statute that prohibited the sale of contraceptives was unconstitutional on the basis that there is a “protected interest as a right to privacy.” The *Griswold* Court further identified that there is a “protected space of the marital bedroom.” In *Eisenstadt*, the Court expanded upon *Griswold*, and found that a similar prohibition against providing unmarried persons with contraceptives was also unconstitutional.

The *Lawrence* Court also sought to overrule *Bowers v. Hardwick*, a factually similar case which upheld a Georgia law criminalizing sodomy. The Court in *Bowers*, however, described the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many states that still make such conduct illegal and have done so for a very long time.” The *Lawrence* Court stated that this reasoning was fundamentally flawed because it failed “to appreciate the extent of liberty at stake.”

The *Lawrence* Court used *Planned Parenthood v. Casey* and *Romer v. Evans* to further illustrate that *Bowers v. Hardwick* should be overruled. *Casey* explained that the Constitution affords “protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” The Court in *Casey* stated:

> 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

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70 *Lawrence*, 539 U.S. at 564-65.
71 Id. at 564 (citing *Griswold*, 381 U.S. at 479).
72 Id. at 564-65 (citing *Griswold*, 381 U.S. at 485).
73 Id. at 565 (citing *Eisenstadt*, 405 U.S. at 438).
74 Id. at 575-78.
75 Id. at 566-67 (citing *Bowers*, 478 U.S. at 190).
76 *Lawrence*, 539 U.S. at 567.
78 Id. (citing *Casey*, 505 U.S. at 851).
define the attributes of personhood were they formed under compulsion of the State.\textsuperscript{79}

The issue in \textit{Romer} involved the Colorado Constitution, which deprived homosexuals, lesbians, and bisexuals the right of protection under the state antidiscrimination laws.\textsuperscript{80} The Court found that the lack of protection in the Colorado Constitution for homosexuals, lesbians, and bisexuals was unconstitutional due to the lack of “a legitimate governmental purpose.”\textsuperscript{81} After describing the history of past Supreme Court decisions, the Lawrence Court ultimately overruled \textit{Bowers v. Hardwick}.\textsuperscript{82}

The Lawrence Court then turned back to the issues that the petitioners brought forth for review.\textsuperscript{83} The majority asserted that the case involved two consenting adults, who chose to engage in a sexual relationship with one another.\textsuperscript{84} The majority explained that “the State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”\textsuperscript{85} The majority further found that “the Due Process clause gives [citizens] the full right to engage in their conduct without intervention of the government.”\textsuperscript{86} The Court, however, did not find the Texas statute invalid under the Equal Protection clause because doing so might lead some to “question whether a prohibition would be valid if drawn differently.”\textsuperscript{87}

\textit{Lawrence} arguably attempted to limit the holding in regards to prostitution.\textsuperscript{88} Indeed, the Court explicitly stated that this case “does not involve public conduct or prostitution,” and therefore, this decision does not apply to the right to engage in sex for hire.\textsuperscript{89} I would argue, however, that because commercialized sex is legal in the form of pornography, this idea of sexual freedom should be applied to those who wish to engage in prostitution.\textsuperscript{90} The Court in \textit{Miller v. California}
stated that “at a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.”

Pornography and prostitution have no substantial differences; they both involve the performance of sexual intercourse or other sexual acts in exchange for money. The Court, however, allows protection for pornography pursuant to the First Amendment. Yet prostitution is not afforded similar constitutional protection, even though the conduct is synonymous with pornography.

A. Lawrence and Prostitution

The criminalization of prostitution stems from a certain view of morality. I argue that this narrow view of morality casts an unfair stigma on those who engage in prostitution. The morality based approach of the condemnation of prostitution stems from Christian views regarding the relationship of family and sex. This view is referred to as the “conservative moral approach,” and it has been adopted by the United States to justify the criminalization of prostitution.

In ancient times, before the birth of Christianity, prostitution was widely accepted and practiced. The Christian Church discouraged the causal nature of sex, and it publically “endorsed chastity as a virtue.” Romantic love was a response to the contractual nature of marriage during the Middle Ages due to the influences of the Christian Church. The culmination of sex and romantic love created the idea of a modern view of family. After the Protestant Reformation, the Church decided that prostitution was a threat to the family and that sex should be performed within the confines of the marriage. This resulted in a dichotomous view of

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91 Miller, 413 U.S. at 26.
92 Id.; see also U.S. CONST. amend I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).
93 See supra Part II.
95 Cooper, supra note 94, at 99-101.
96 Id. at 101.
97 Id. at 102.
98 Id.
99 Id.
100 Id.
female sexuality. Belinda Cooper, a Senior Fellow at the World Policy Institute and an expert in human rights and international and transitional justice, states that there is a “disparate legal attitude towards marriage and prostitution.” Cooper argues that “the law continues to promote the traditional dichotomous view of female sexuality.” Indeed, the United States legal system adopts a strong stance that marriage has a special status, especially in relation to prostitution. Cooper, however, further suggests that this idea of a special status of marriage is starting to erode in the law. She notes that “contraception, adultery, and fornication are no longer illegal in most states, while marital rape has been made illegal in some states, indicating that the connections between sex and procreation, and sex and the family, are no longer consistent assumptions even in law.” Despite the apparent deterioration of certain aspects of marriage, the United States still holds a conservative moral approach as it concerns prostitution. Those who are proponents of the conservative moral approach find a “prostitutes lifestyle ‘degrading’” and have attempted to reform or change prostitute’s ways.

However, this type of morals legislation should not be forced on those who choose to engage in prostitution. holds that there is a fundamental right to sexual freedom and that it is within one’s own dignity as a human being to choose with whom they have a consensual sexual relationship. Justice , in his dissenting opinion in , warned that “this [decision] effectively decrees the end of all morals legislation.” And in recent years, the Court has shown a trend towards striking down laws immersed in morals legislation; for example, as previously stated, in , the Supreme Court found a state ban on contraceptives unconstitutional. In 1973, the Court also found that the right to an

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101 Cooper, supra note 94, at 102.
102 Id.
103 Id. at 103.
104 Id. at 104.
105 Id. at 103.
106 Id. at 104.
107 Cooper, supra note 94, at 104.
108 Id. at 104-05.
109 Id. at 105.
111 Id. at 599.
abortion was a personal liberty guaranteed by the Due Process Clause.¹¹³

More recently, in *United States v. Windsor*, the Court examined morals legislation in regards to same-sex marriage.¹¹⁴ The Defense of Marriage Act (“DOMA”) was enacted in 1996 in response to some states that were beginning to conceptualize same-sex marriage.¹¹⁵ DOMA’s overall purpose was to solidify that any Congressional decision that contained the word “‘marriage’ mean[ts] a legal union between one man and one woman as husband and wife.”¹¹⁶ The majority found that DOMA went astray from the “history and tradition of reliance on state law to define marriage.”¹¹⁷ New York had made the decision to recognize same-sex marriage, and DOMA invalidated the state’s decision.¹¹⁸ In conclusion, the Court found that DOMA was unconstitutional, and it “impose[d] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”¹¹⁹

The United States Supreme Court is steadily doing away with morals legislation.¹²⁰ This type of jurisprudence should be applied to the practice of prostitution. Those engaged in sex work are entitled by the Constitution to enter into any type of sexual relationship they choose, because *Lawrence* provides that “[t]he right to liberty under the Due Process Clause gives [people] the full right to engage in their conduct without intervention of the government.”¹²¹ The bans on prostitution “impose a disadvantage, a separate status, and so a stigma upon” those who choose to engage in prostitution.¹²² Liberal feminism promotes the ideas of “autonomy, individualism, and minimal state interference in private choice.”¹²³ Since liberal feminists believe in autonomy and personal choice, they

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¹¹⁵ Id.
¹¹⁶ Id. (citing 1 U.S.C. § 7 (1996)).
¹¹⁷ Windsor, 133 S. Ct. at 2692.
¹¹⁸ Id. at 2692-93.
¹¹⁹ Id. at 2693.
¹²² Windsor, 133 S. Ct. at 2693.
“presumptively see[] individual expressions of sexuality as implicitly consensual, liberating, and empowering.”

Margo St. James founded the first American prostitutes’ rights group entitled, Cast Off Your Old Tired Ethics (“COYOTE”). This group advocates for the decriminalization of prostitution because it is “dignified, respectable work.” Prostitutes’ rights groups view their work as “superior” to other jobs because it provides women the opportunity to “set their hours and wages, work where they want to, and serve only customers they choose.” These groups explain that “prostitution empowers women because it enables them to earn a living in an environment they control, or would control but for state interference.”

There are many activist groups that advocate on behalf of sex workers’ rights.

The American Civil Liberties Union states that “women who engage in prostitution [are] punished criminally and stigmatized socially while her male customer, either by the explicit design of the statute or through a pattern of discriminatory enforcement is left unscathed.” The reality of the enforcement of prostitution is unequal and disfavors women. This unequal enforcement is illustrated by Carol Leigh’s experience as a sex worker. Ms. Leigh, after being raped while working as a prostitute, reflected on that moment and said, “I couldn’t call the police because I certainly felt that they wouldn’t take the crime seriously.” According to women in the industry, “the only way to really protect sex workers . . . is to make what they do both legal and legitimate.” Belinda Cooper states that, in reality, it is “[a]lmost always the prostitute, rather than the client[] . . . [who is] made to bear the brunt of repression.”

124 Id. at 88.
125 Id. at 83.
126 Id.
127 Id.
128 Id.
132 Id.
133 Id.
134 Cooper, supra note 94, at 103.
Lawrence and Windsor both provide legal precedent that should be used to lift bans on prostitution. Once these bans are lifted, stigmas and negative feelings associated with prostitution will likely fade away with time.

Notably, a poll conducted in 1971 asked 15,000 people about the legalization of prostitution. 135 Fifty percent of the participants stated that they thought it was a good idea. 136 In 1973, another survey found that only forty-six percent of participants thought that prostitution did “more harm than good.” 137 These polls show that not all people condemn prostitution, or at the very least, “do[] not believe in using the law to enforce its condemnation.” 138 These numbers show that, in this particular setting, decriminalization of prostitution is favored, and most participants saw nothing wrong with the practice. Although the polls indicate overall acceptance, stigmas still persist because of the criminal nature of prostitution.

IV. FEMINIST THEORIES, HEGEMONIC MASCLINITY, AND THE DISCUSSION OF SEX WORK

A. Feminist Theories and Choice

Prostitution has not only been a point of contention in the United States legal system, but also for feminist scholars. Dominance theorists believe that the social inequalities that women face are due to sexual coercion by men. 139 Historically, dominance feminists have analyzed sexual harassment and pornography illustrations, noting the forms of sexual dominance that men use to subordinate women. 140 Kathleen Barry, a noted dominance theorist, believes that sex work is “wholly exploitative,” 141 but she “recognized that not all women are forced and defrauded into entering prostitution against their will.” 142 Although dominance theorists do not agree with legalizing prostitution, some are conceding that there can be an element of choice in prostitution. 143

135 Id. at 104 n.30 (citing RICHARD SYMANSKI, IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES 6 (1981)).
136 Id.
137 Id.
138 Id.
139 Cavalieri, supra note 1, at 1418.
140 Id. at 1419; see also ANDREA DWORIN, PORNORAPHY: MEN POSSESSING WOMEN (1981); CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).
141 Cavalieri, supra note 1, at 1420.
142 Id. at 1420-21 (citing KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1979)).
143 Id.
Responding to dominance theory, liberal feminist theory advocates for the rights of sex workers.\textsuperscript{144} Liberal feminism promotes the “principle of the equality of all human beings by virtue of their capacity for reason and choice.”\textsuperscript{145} Martha Nussbaum stated that the goal of liberal feminism is “to put people into a position of agency and choice, not to push them into functioning in ways deemed desirable.”\textsuperscript{146} This fundamental idea is at the core of sex worker advocacy groups.\textsuperscript{147} This idea of choice and autonomy advocated by liberal feminists is similar to the petitioner’s Due Process argument made in \textit{Lawrence}.\textsuperscript{148} There, the petitioners asserted that they had a fundamental right to choose, and the Court ultimately agreed.\textsuperscript{149} This fundamental right to choice should be applied to prostitution. The liberal feminism model should be adopted in the United States legal system because it promotes autonomy and choice.

\textbf{B. Hegemonic Masculinity and Control of Women’s Bodies}

R.W. Connell defined the concept of hegemonic masculinity as the guarantee of “the dominant position of men and the subordination of women.”\textsuperscript{150} Ann McGinley explains that hegemonic masculinity is frequently associated with “an upper middle class white form of masculinity.”\textsuperscript{151} Hegemonic masculinity is performed by men vying to display and prove their masculinity to other men, and “is socially constructed through performances.”\textsuperscript{152} It works as a force to police behavior.\textsuperscript{153} For example, in the workplace, hazing is a tool used by men to control the behavior of those that differ from their idea of masculinity.\textsuperscript{154} Those that are hazed are “members of racial minorities, gender nonconforming men, and women.”\textsuperscript{155}

Hegemonic masculinity controls those who use it to harass, and those who do not fit within the rigid confines of the masculinity.\textsuperscript{156}

\begin{footnotesize}
\begin{itemize}
    \item\textsuperscript{144} Id. at 1429.
    \item\textsuperscript{145} Id. at 1428-29 (citing MARTHA C. NUSSBBAUM, SEX AND SOCIAL JUSTICE at 10 (1999)).
    \item\textsuperscript{146} Id. at 1429 (citing MARTHA C. NUSSBBAUM, SEX AND SOCIAL JUSTICE at 11 (1999)).
    \item\textsuperscript{147} Id.
    \item\textsuperscript{148} Lawrence v. Texas, 539 U.S. 558, 564 (2003).
    \item\textsuperscript{149} Id. at 578.
    \item\textsuperscript{150} Ann C. McGinley, \textit{Work, Caregiving, and Masculinities}, 34 SEATTLE U. L. REV. 703, 706 (2011) (citing R.W. CONNELL, MASCULINITIES 77 (2d ed. 2005)).
    \item\textsuperscript{151} Id.
    \item\textsuperscript{152} Id. at. 706-07.
    \item\textsuperscript{153} Id. at 707.
    \item\textsuperscript{154} Id. at 707-08.
    \item\textsuperscript{155} Id. at 708.
    \item\textsuperscript{156} McGinley, supra note 150, at 708.
\end{itemize}
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The controlling nature of hegemonic masculinity manifests itself in relation to women and their chastity. It promotes dominance, and this domination is institutionalized by adopting a law that controls the chastity of women, making it illegal for them to get paid in exchange for sex.157

V. ADDRESSING COUNTERARGUMENTS TO THE DECRIMINALIZATION OF PROSTITUTION

A. Police Power and the Spread of Venereal Diseases

Police power is the legal mechanism that states use to criminalize prostitution.158 It is important to understand this power to adequately address counterarguments to decriminalization. The legal basis that has fostered criminalization of sex work is state police power derived from the Tenth and Fourteenth Amendments.159 The Tenth Amendment states that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”160 Although police power is not explicitly mentioned in the Tenth Amendment, it has been crafted and discussed in many Supreme Court cases.161 The Fourteenth Amendment allows states to use “discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rest on grounds wholly irrelevant to the achievement of the State’s objective.”162 The Tenth and the Fourteenth Amendment work together to allow states to regulate activities “for the protection of the safety, health, or morals of the community.”163

158 See ERNST FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 226 (1904) (“Prostitution is a subject legitimately falling under the police power . . . .”).
159 See U.S. CONST. amend. X; U.S. CONST. amend. XIV.
160 U.S. CONST. amend. X.
161 See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (explaining that “the police power [is] asserted for the public welfare”); Lawton v. Steele, 152 U.S. 133, 136 (1894) (“[Police power] is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance.”); Thurlow v. Massachusetts, 46 U.S. 504 (1847) (“When they made . . . [the Constitution], and gave to the United States the control over foreign commerce, and reserved to the States the police powers, they knew that life and health and property in the States must be provided for . . . .”).
While the Supreme Court has not decided the issue of criminalizing prostitution, *Paris Adult Theatre I v. Slanton* provides precedent supporting the notion that prostitution can be criminalized. The case involved movie theatres that screened erotic films. The trial court found that showing the movies violated a Georgia statute, and the managers of the theaters appealed, stating that barring such films violated the First Amendment. The Court found that “obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment.” “[T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity . . . [t]hese include the interest of the public in the quality of life and the total community environment . . . and, possibly, the public safety itself.”

Those that oppose legalizing prostitution argue that prostitution “legitimately fall[s] under the police power.” They argue that it falls within the police power because it is a “public nuisance” that threatens the institution of marriage, “tends to demorali[z]e the community,” and promotes “venereal diseases[,] which are spread chiefly by prostitutes.” Accordingly, the main legal arguments facilitating criminalization of prostitution are that states have the right to ban it under the police power given to states by the Tenth and Fourteenth Amendments. And arguably, a legitimate state interest is served by preventing the spread of venereal diseases as well as protecting the institution of marriage.

The spread of venereal disease is one of the main arguments against prostitution. Many studies tracking venereal diseases and prostitution have been conducting; for example, in 1993, Nevada, the only state in which prostitution is legal, conducted such a study. Since 1971, counties with 400,000 people or fewer have been able to vote on legalizing prostitution via brothels. Prostitutes that work in brothels then have to adhere to weekly “state-mandated medical

165 *Id.* at 51-52.
166 *Id.* at 51; *see also* U.S. CONST. amend. I.
167 *Paris Adult Theater I*, 413 U.S. at 54.
168 *Id.* at 58.
170 *Id.*
171 See [*supra* notes 158-70 and accompanying text.
172 See *id*.
175 *Id.* at 1514.
examinations for gonorrhea, herpes, and for syphilis.” In March 1986, Nevada similarly mandated HIV testing for prostitutes, who had to test negative to continue working. In 1987, “the brothel industry voluntarily adopted a compulsory condom policy.” The state then adopted a “mandatory condom law in March 1988.” Tests were conducted on 246 prostitutes that worked in the brothel system between 1982 and 1989, and there were “only 2 cases of syphilis and 19 cases of gonorrhea, all reportedly contracted before implementation of Nevada’s mandatory condom law.” This particular study also examined the slippage and breakage rates of condoms used in brothels. The study involved forty-one licensed prostitutes, and they were asked to used condoms at every occurrence of vaginal intercourse and report any instances of condom slippage or breakage. The study’s findings showed that the condom breakage rate was the “lowest published to date, suggesting that female prostitutes who use condoms consistently may develop techniques to achieve lower breakage rates than other users.”

Other studies have found that “no brothel prostitute in Nevada has tested positive for HIV since 1986,” the same year the state mandated HIV tests. These studies illustrate that when mandatory testing and condom usage are implemented, the spread of venereal diseases is minimal. This renders prostitution no less safe than private sexual intercourse, where condom usage and testing are not mandatory. If mandatory condom usage and disease testing are implemented along with the regulation of prostitution, states cannot argue that police power requires criminalization of prostitution to sustain “public health, safety, welfare, and morals.”

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176 Id.
177 Id.
178 Id.
179 Id.
180 Id.
181 Id.
182 Id. at 1515-16.
183 Id. at 1518.
185 Id. at 217-18, 226.
There is also an argument that prostitution is dangerous and, therefore, no one would choose to enter such a profession willingly.\footnote{Cavalieri, \textit{supra} note 1, at 1440 ("[P]rostitution, as it currently exists, is an unusually dangerous profession for most women who engage in it.")} I would argue that there are many jobs in the United States that are dangerous, and yet people still choose to work in those fields.\footnote{\textit{Id.} ("Certainly, there are more dangerous lines of work, some of which threaten similar kinds of risks as those specific to sex work.").} The way to ensure ultimate safety is to regulate the industry. Regulation will give the profession structure and, as these studies have shown, reduce risks associated with prostitution.

\section*{B. Protection of the Institution of Marriage}

Proponents of the use of police power often cite protecting the institution of marriage to justify their position.\footnote{\textit{See} FREUND, \textit{supra} note 158, at 226.} Legal prostitution, however, is unrelated to what people choose to do inside the confines of their marriage, and the decriminalization of prostitution is not going to change an individual’s behavior. Belinda Cooper explains the liberal individualist approach to prostitution, and she states that “human beings achieve dignity through autonomy—that is, the right and freedom to choose among options.”\footnote{Cooper, \textit{supra} note 94, at 109.} Everyone should be allowed the opportunity to exercise this choice in all aspects of their lives, and decriminalization of prostitution will not substantially change the nature of one’s marital relationship.

\section*{VI. Proposal to Decriminalize Prostitution and Implement a Brothel System}

The first step to legalizing prostitution is to declare the bans on prostitution unconstitutional. The second step is to implement a brothel system regulated by state government. In Nevada, for example, the brothel system is a thriving and lucrative business.\footnote{Snadowsky, \textit{supra} note 6, at 226.} Indeed, “millions of dollars a year are not earned only by the prostitutes and brothel owners, but the counties that regulate the prostitution earn money from the taxes collected.”\footnote{\textit{Id.}} Like the Nevada system, there should be initial blood and cervical tests to determine the status of every prospective prostitute.\footnote{\textit{Id.} at 227.} Each prospective sex worker must be able to pass these tests before they can obtain a work card.\footnote{\textit{Id.}}
Mandatory condom usage and weekly testing would also be implemented to ensure the safety of both sex workers and clients.\textsuperscript{194} Other regulations would include a minimum age requirement; the current age requirement in Nevada is twenty-one.\textsuperscript{195} Nevada also has a policy that no one can be hired as a sex worker “if they have been convicted of a felony in the past five years or a misdemeanor in the past year.”\textsuperscript{196} Work contracts that depict the nature of the prostitute’s responsibilities, “grievance procedures and mobility . . . and dress requirements” should also be implemented.\textsuperscript{197} This would provide both the employer and employee with security if either breaches the terms of the contract.

In short, bans on prostitution must be found to be unconstitutional. Subsequently, regulations that mandate condom usage, venereal disease testing, and implement an organized brothel system must be put into place. If these steps are taken, prostitution can be a safe, lucrative business model, no different than any other legitimate business.

\section*{VII. CONCLUSION}

In this paper, I have stated that the bans on prostitution should be deemed unconstitutional using the Supreme Court decisions \textit{Lawrence v. Texas} and \textit{United States v. Windsor}. The \textit{Lawrence} Court held that, under the Due Process Clause of the Constitution, there is a fundamental right to choose one’s own sexual partner.\textsuperscript{198} Although the Court in \textit{Lawrence} stated that this reasoning did not apply to prostitution, it does not mean that it can never apply to prostitution.\textsuperscript{199}

Morality is one of the main reasons behind the criminalization of prostitution.\textsuperscript{200} This view of morality makes it hard for sex workers to rise above social stigma. This social stigma is dangerous for those who do engage in sex work because they are seen as criminals and often ignored as victims of assault or rape.

Feminist theories also toil with the idea of whether prostitution should be legal. Dominance theorists believe that commercialized sex is demeaning and harmful to women, while liberal feminists believe that every person has the right to choice.\textsuperscript{201} In this case, the ideas behind liberal feminism are at the helm of sex worker’s advocacy

\begin{thebibliography}{99}
\bibitem{194} Id. at 228.
\bibitem{195} Id. at 231.
\bibitem{196} Id. at 232.
\bibitem{197} Snadowsky, \textit{supra} note 6, at 231.
\bibitem{199} See id. (expressly limiting the holding in \textit{Lawrence} to exclude prostitution).
\bibitem{200} See Cooper, \textit{supra} note 94, at 99-101.
\bibitem{201} See Cavalieri, \textit{supra} note 1, at 1418-20; Freeman, \textit{supra} note 123, at 86-88.
\end{thebibliography}
platforms. Hegemonic masculinity plays a role in the criminalization of prostitution by using its institutionalized nature to control women’s sexuality by criminalizing prostitution.\textsuperscript{202} There is a common misconception that those who engage in prostitution were forced or coerced to do so; however, that is not always the case. Many women choose to be sex workers, and are proud of their jobs.\textsuperscript{203}

Finally, this paper addressed counterarguments to the decriminalization of prostitution by providing evidence that the spread of venereal disease is minimized when prostitution is regulated.\textsuperscript{204} This paper proposes that all states should lift bans on prostitution and create brothel systems that will provide protection for brothel owners and sex workers alike.

\textsuperscript{202} See McGinley, supra note 150, at 706-08.
\textsuperscript{203} See Cavalieri, supra note 1, at 1411-13.
\textsuperscript{204} See Albert et al., supra note 174, at 1514-15.