PROSTITUTION AND THE RIGHT TO PRIVACY: A COMPARATIVE ANALYSIS OF CURRENT LAW IN THE UNITED STATES AND CANADA

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The constitutional right to privacy is a cornerstone element of both the U.S. Constitution and the Canadian Charter of Rights and Freedoms, but a divergence in interpretation of the right to privacy in the United States and Canada has caused differing approaches toward dealing with prostitution laws in each country. The United States currently imposes a traditional moral standard, criminalizing those who engage in prostitution and rejecting right to privacy arguments. Contrastingly, Canada follows a regulation approach toward dealing with prostitution laws, and a trend toward less state regulation has emerged due to judicial and legislative action accepting constitutional right to privacy arguments. This Note presents a comparative analysis of federal constitutional regulations on prostitution in the United States and Canada, including how the right to privacy has been used to challenge current prostitution laws and the differing responses of various courts to such challenges in Canada and the United States. Ultimately, this Note argues that the United States should take a similar approach to Canada, recommending that the United States follow international constitutional precedent toward the decriminalization of prostitution and draw a public-versus-private distinction within prostitution laws to effectively extend the constitutional right to privacy to private acts of prostitution.

I. INTRODUCTION

In December 2007 in Vancouver, a man named Robert Pickton was sentenced to life in prison.[1] Pickton was convicted for the murder of six women, although it is estimated that he murdered as many as forty-nine.[2]

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1. Vancouver Sun, *Pickton Now a Convicted Serial Killer*, CANADA.COM (Dec. 9, 2007), http://www.canada.com/topics/news/story.html?id=9fefd5df-acf7-4cbf-b254-ead666c00f58; *see Pickton Investigation to be Reviewed by B.C.*, CBCNEWS (Aug. 20, 2010, 11:10 AM), http://www.cbc.ca/news/canada/british-columbia/story/2010/08/20/bc-pickton-report-released.html.

2. Vancouver Sun, *supra* note 1; *see Pickton Investigation to be Reviewed by B.C.*, *supra* note 1.

The common thread tying Pickton's victims together was that they were all sex workers in the Vancouver area.[3] The sentiment in the courtroom that day was emotional; participants had the sense that society had, in some way, let these women down.[4] Yet this was not an isolated event; the death rate of prostitutes in Canada is nearly forty times higher than that of the general population.[5]

Since these tragic events in Canada, there has been a push toward a reform of the prostitution laws; reformers call for a regime less based on morality, more based in reality.[6] The reality is that with or without regulation, prostitution will occur.[7] Regulation, rather than criminalization, allows the government to step in to prevent violence toward sex workers. Indeed, evidence shows that regulated, indoor prostitution has fewer issues with violence than the unregulated sex trade.[8]

Although conditions for sex workers in the United States are similarly dangerous, the United States still has a prostitution regime that dates back to the turn of the twentieth century.[9] Despite evidence that regulation could potentially prevent the violence toward women prevalent in prostitution, the United States continues to impose a criminalization regime based upon morality.[10] Unlike in Canada, there has been no push for liberalizing reforms. To the contrary, in recent times, there has been a resurgence of traditional morality in the United States, which has led to an outcry against relaxing the criminal laws on prostitution in most states.[11]

There are three different approaches toward dealing with prostitution laws. First, there is complete decriminalization, where prostitution is viewed as an independent business.[12] Second, there is regulation, where prostitution itself is not criminalized, but the state imposes various regulations on the practice.[13] Finally, there is criminalization, where

3. *See Pickton Investigation to be Reviewed by B.C.*, *supra* note 1.

4. *See* Vancouver Sun, *supra* note 1.

5. Melissa Farley & Jacqueline Lynne, *Prostitution in Vancouver: Pimping Women and the Colonization of First Nations*, *in* NOT FOR SALE: FEMINISTS RESISTING PROSTITUTION AND PORNOGRAPHY 106, 113 (Rebecca Whisnant & Christine Start eds., 2004).

6. Vancouver Sun, *PM Not Convinced Prostitution Laws Should be Changed*, CANADA.COM (Jan. 26, 2007), http://www.canada.com/vancouversun/news/story.html?id=1b9d498d-e7ea-4aa7-a234-c9293edd0e39.

7. *See id.*

8. *See, e.g.*, David H. Rodgers, The Viability of Nevada's Legal Brothels as Models for Regulation and Harm Reduction in Prostitution, 10 (Fall Semester, 2010) (unpublished M.S. thesis, The Florida State University College of Criminology and Criminal Justice), *available at* http://etd.lib.fsu.edu/theses/available/etd-11082010-202406/unrestricted/Rodgers_D_Thesis_2010.pdf.

9. Lauren M. Davis, *Prostitution*, 7 GEO. J. GENDER & L. 835, 835–36 (2006).

10. *Id.* at 844.

11. *See generally* Ronald Weitzer, *The Movement to Criminalize Sex Work in the United States*, 37 J.L. & SOC'Y 61 (2010) (arguing that a "powerful moral crusade" in the United States has reshaped existing penalties imposed for prostitution).

12. Barbara G. Brents & Kathryn Hausbeck, *State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels*, 44 SOC. PERSP. 307, 308 (2001).

13. *Id.*

those who engage in prostitution may be prosecuted under criminal law.[14] The United States currently follows a criminalization model.[15] On the other hand, Canada follows a regulation model; as will be discussed further, the trend in Canada has been toward less state regulation.[16]

Coupled with the practical implications, a regulation-based regime in the United States also makes sense from a constitutional standpoint. The United States and Canada both impose regulations on prostitution that have often been subjected to constitutional challenges.[17] Several different provisions of each respective constitution have been used to challenge regulations on prostitution, from freedom of speech to the freedom of contract.[18] While there have been many state and provincial challenges to prostitution regulations, this Note focuses on federal constitutional challenges to regulations on prostitution in the United States and Canada.

The need to challenge regulations in the United States has both a practical as well as a theoretical basis. From a practical standpoint, criminalization or overregulation simply does not work.[19] As the law currently stands in the United States, criminalization has proven ineffective in curbing prostitution,[20] provides little protection for the women who engage in prostitution,[21] and is largely based on antiquated notions of morality that characterized this nation's jurisprudence at the turn of the twentieth century.[22] The regime has not been reformed on a large scale since 1959, when the emphasis in prostitution laws was still on the imposition of morality.[23]

From a theoretical standpoint, the strict criminalization of prostitution makes little sense in light of the jurisprudence on the constitutional right to privacy, under both U.S. and Canadian law. The ever-ambiguous right to privacy has been one of the constitutional provisions most frequently used to challenge prostitution regulation in both the United States and Canada alike.[24] In the United States, courts have found this

14. *Id.* at 309.

15. *See infra* Part II.A.1.

16. *See infra* Part II.A.2; *see generally* Sarah Beer, The Sex Worker Rights Movement in Canada: Challenging the "Prostitution Laws" (2010) (unpublished Ph.D. dissertation, University of Windsor (Canada)), *available at* http://myweb.dal.ca/mgoodyea/Documents/Canada/The%20sex%20worker%20rights%20movement%20in%20Canada.%20Challenging%20the%20'prostitution%20laws'%20Beer%202011.pdf (giving an overview of trends in the Canadian courts regarding prostitution laws).

17. *See, e.g.*, 18 U.S.C. §§ 2421–24 (2006); Criminal Code, R.S.C. 1985, c. C-46, ss. 210–13 (Can.).

18. *See, e.g.*, United States v. Thompson, 458 F. Supp. 2d 730 (N.D. Ind. 2006) (challenging an Indiana prostitution regulation under the First Amendment); Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123 (Can. Man.) (challenging laws preventing the solicitation of prostitution under Freedom of Association).

19. *See* Brents & Hausbeck, *supra* note 12, at 309.

20. *See, e.g.*, *id.* at 307–11 (describing the major shortfalls of the current prostitution regime).

21. *Id.* at 327–28.

22. *See supra* notes 9–11 and accompanying text.

23. Esther Saraga, *Abnormal, Unnatural and Immoral? The Social Construction of Sexualities*, *in* EMBODYING THE SOCIAL: CONSTRUCTIONS OF DIFFERENCE 139, 169 (Esther Saraga ed., 1998).

24. *See, e.g.*, Bedford v. Canada, 2010 ONSC 4264 (Can. Ont. Sup. Ct. J.); Belkys Garcia, Note,

provision within the Due Process Clause of the Fourteenth Amendment.[25] In Canada, the right to privacy is found within the right to security of person contained in the Canadian Charter of Rights and Freedoms.[26] The fact that neither of these provisions explicitly mentions a right to privacy has led to some inconsistent application.[27] While such challenges have had some success in Canada, courts in the United States have consistently rejected the argument that the right to privacy is violated by regulations on prostitution.[28]

Part II of this Note focuses on the current state of prostitution regulation in the United States and Canada and then delves into the ways the substantive right of bodily privacy has been found within each country's constitution. Both nations have experienced an evolution characterized by the expansion of the bodily right to privacy.

Part III of this Note explores how the right of privacy has been used to challenge current prostitution laws and the response of various courts to such challenges. Part III also explains how using the right to privacy to challenge prostitution regulation in Canada has gained popularity, while it has largely fallen flat in the United States, despite recent expansions in the right to privacy made by the Supreme Court in other areas of the law.

Finally, Part IV of this Note illustrates why the United States should take a similar approach to Canada, both because of constitutional standards as well as positive practical impacts. In Canada, the regulations that withstand judicial scrutiny find roots in the prevention of public nuisance rather than the legislation of morals.[29] In light of the privacy interests encompassed by the Due Process Clause of the U.S. Constitution, it is logical that prostitution cannot be regulated to the extent it is a private act, but rather to the extent it causes some public harm. Part IV will also show why it is desirable for the United States to follow international constitutional precedent in this realm. Part V concludes.

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

25. U.S. CONST. amend. XIV; Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

26. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 7 (U.K.); Jennifer Coates, *A Comparison of United States and Canadian Approaches to the Rights of Privacy and Abortion*, 15 BROOK J. INT'L. L. 759, 766–68 (1989); *see infra* Part II.B.2.

27. *See infra* Part II.B (describing how there has been ambiguous application of the right to privacy in the both the United States and Canada).

28. *See* Garcia, *supra* note 24, at 161–62; *see also* Marten Youssef, *Former Sex Trade Worker Seeks Day in Court*, THE GLOBE AND MAIL (Oct. 11, 2010, 9:47 PM), http://www.theglobeandmail.com/news/national/british-columbia/former-sex-trade-worker-seeks-day-in-court/article1752685/.

29. Saraga, *supra* note 23, at 170.

II. BACKGROUND

In both the United States and Canada, regulations on prostitution first appeared at the turn of the twentieth century.[30] Prostitution laws were justified in both nations under a theory of morality or social nuisance.[31] Although based on similar theoretical grounds, the prostitution regimes in the United States and Canada differ. The United States imposes complete criminalization of prostitution, while Canada has a regulation-based regime, which is becoming more flexible with time.[32]

In both nations, the constitutional right to privacy has had a long relationship with prostitution laws.[33] In the United States, the right to privacy is found in the Due Process Clause of the Fourteenth Amendment.[34] In Canada, the right to privacy is found in the Section 7 right to security of person.[35] Challenges to regulations are often made through arguing that a right of bodily autonomy is conferred through the constitutional right of privacy.[36] In both Canada and the United States, part of the difficulty in application stems from a rather ambiguous definition of the right to privacy, since the explicit right is nontextual in both the U.S. Constitution and the Canadian Charter of Rights and Freedoms.[37] This increases the debate over whether the constitutional right to privacy can be extended to prostitution at all.

A. Prostitution Regulation in the United States and Canada

1. The United States

While the United States has seen liberal progress in the decriminalization of sex acts such as sodomy, there has been little movement in regulations on prostitution.[38] The theory behind the criminalization of prostitution in the United States rests largely on the categorization of

30. *See* John Lowman, *Deadly Inertia: A History of Constitutional Challenges to Canada's* Criminal Code *Sections on Prostitution*, 2 BEIJING L. REV. 33, 34 (2011); *see also* Davis, *supra* note 9, at 835–36.

31. *See, e.g.*, Lowman, *supra* note 30, at 34; Davis, *supra* note 9, at 835–36.

32. *See* Brents & Hausbeck, *supra* note 12, at 309; Youssef, *supra* note 28.

33. *See supra* notes 24–26.

34. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

35. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 7 (U.K.); *see* R. v. Morgentaler, [1993] 3 S.C.R. 463, 469 (Can.).

36. Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 997 (2006).

37. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 815 (3d ed. 2006); Nancy Holmes, *The Right to Privacy and Parliament*, PARLIAMENTARY INFO. & RESEARCH SERV. (Library of Parliament), Feb. 1996, at 2.

38. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 247 (3d ed. 2011).

prostitution as a "nuisance offense," or an act of public indecency.[39] Those with more conservative approaches justify the criminalization of prostitution under the theory that the state has a right to impose morals legislation on the public.[40]

Criminalization began in the United States in the late nineteenth century as part of a social morality movement, alongside the movement for the prohibition of alcohol.[41] Until that point, prostitution was legal in virtually all states and was especially prevalent in larger cities.[42]

Currently in the United States, a total prohibition on prostitution exists in all fifty states, except for eleven small counties in Nevada.[43] Nevada currently has around thirty legal brothels, all in rural areas.[44] This model allows for state-imposed regulation, and regulation is unique to each county.[45] Implementing control at the county level is meant to allow each community to respond to its own unique needs.[46]

Counties are limited by the state in what they may allow, however. Counties may license indoor prostitution (for example, brothels), but there is still a state-wide ban on street solicitation and escort services.[47] Indoor brothels are still subject to strict zoning laws.[48] Solicitation is allowed both indoors and over the Internet.[49] Advertising, however, is prohibited on public streets or highways in counties where prostitution is not permitted.[50]

Every other state in the United States imposes criminal penalties for prostitution.[51] In most states, prostitution is classified as a misdemeanor.[52] In many states, laws are also imposed against solicitation, pimping, and being a customer.[53] Although it is a topic of much controversy, some states, such as Louisiana, also require registration on a sex offender reg-

39. *Id.*
40. *Id.*
41. Davis, *supra* note 9, at 835.
42. *Id.*
43. Every U.S. state completely criminalizes prostitution, including Nevada. Some jurisdictions in Nevada allow for legal prostitution in limited circumstances. Rhode Island allowed for some limited acts of prostitution for over thirty years, but has since joined the other states in criminalizing prostitution. *100 Countries and Their Prostitution Policies*, PROCON.ORG, http://prostitution.procon.org/view.resource.php?resourceID=00772#unitedstates (last updated Dec. 22, 2011).
44. RONALD WEITZER, LEGALIZING PROSTITUTION: FROM ILLICIT VICE TO LAWFUL BUSINESS 50 (2012).
45. *Id.*; Brents & Hausbeck, *supra* note 12, at 314–16.
46. Brents and Hausbeck, *supra* note 12, at 327.
47. WEITZER, *supra* note 44, at 59.
48. Brents & Hausbeck, *supra* note 12, at 313.
49. WEITZER, *supra* note 44, at 59.
50. Brents & Hausbeck, *supra* note 12, at 313.
51. *See* WEITZER, *supra* note 44, at 48.
52. Prostitution itself is not criminalized in Canada. Both federal and provincial Canadian law, however, impose criminal sanctions for acts associated with prostitution. *100 Countries and Their Prostitution Policies*, *supra* note 43.
53. *See, e.g.*, 720 ILL. COMP. STAT. 5/11-14.1 (2010) (Criminal Code of 1961) (Solicitation of a Sexual Act); *id.* § 5/11-18 (2010) (Criminal Code of 1961) (Patronizing a Prostitute); *id.* § 5/11-19 (2010) (Criminal Code of 1961) (Pimping).

istry.[54]

Prostitution is also proscribed under the Mann Act, stemming from Congress' Commerce Clause powers.[55] While this federal statute was once used to prosecute acts of immoral fornication, amendments in the 1980s have changed the purpose of the statute to solely regulate interstate prostitution.[56] The Mann Act has been used in the prosecution of high-profile prostitution cases, such as boxing champion Jack Johnson and former Governor Eliot Spitzer.[57] Between the federal and state regulations, prostitution is almost completely criminalized within the United States.

2. Canada

Prostitution itself is not illegal in Canada, but the Canadian government has criminalized many acts associated with prostitution. This includes operating a bawdy house,[58] communicating in a public place for the purposes of engaging in prostitution,[59] and living off of the avails of prostitution.[60] The practical effect of such heavy regulation is that it is virtually impossible to engage in prostitution without falling subject to a criminal regulation.[61]

Legal theorists in Canada justify such heavy regulation on the same grounds as legal theorists in the United States. Such regulations are designed to protect families and communities from the externalities associated with prostitution and are also designed with morality in mind.[62] The morality-oriented prostitution laws were created in the late nineteenth century, as part of a widespread "social purity" movement.[63] Prostitution laws were justified under the theory that such moral harms adversely impacted women and children.[64]

Originally, prostitution was prosecuted under vagrancy theories; prostitution was only punishable if it took place in public.[65] Now, Cana-

54. Nathan Koppel, *Louisiana's 'Crime Against Nature' Sex Law Draws Legal Fire*, THE WALL ST. J.L. BLOG (Feb. 16, 2011, 2:56 PM), http://blogs.wsj.com/law/2011/02/16/louisianas-crime-against-nature-sex-law-draws-legal-fire/.

55. *See* 18 U.S.C. §§ 2421–24 (2006).

56. ESKRIDGE, JR. & HUNTER, *supra* note 38, at 248.

57. Eric Weiner, *The Long, Colorful History of the Mann Act*, NPR (March 11, 2008, 2:00 PM), http://www.npr.org/templates/story/story.php?storyId-88104308.

58. Criminal Code, R.S.C. 1985, c. C-46, s. 210 (Can.).

59. *Id.* s. 212.

60. *Id.* ss. 201–13; Bedford v. Canada, 2010 ONSC 4264 (Can. Ont. Sup. Ct. J.) (discussing various criminal statutes in Canada); *100 Countries and Their Prostitution Policies*, *supra* note 43.

61. Vancouver Sun, *supra* note 6.

62. *See generally Bedford*, 2010 ONSC at para. 56 (giving an overview of the history and purposes of prostitution regulations in Canada).

63. *See generally* Lowman, *supra* note 30, at 33 (providing an overview of the successes and failures in challenging Canadian prostitution regulations).

64. *Id.* at 34.

65. Leslie Ann Jeffrey, *Prostitution As Public Nuisance: Prostitution Policy in Canada*, *in* THE POLITICS OF PROSTITUTION: WOMEN'S MOVEMENTS, DEMOCRATIC STATES AND THE

dian law tends to criminalize public solicitation and the operation of brothels under a theory of public nuisance.[66] Notably, the regulations that have been upheld as within the Canadian government's power deal with the issue of public as opposed to private harms, such as public disturbance and crimes associated with operating a bawdy house.[67]

In recent times, constitutional challenges to the strict regulations on prostitution have gained momentum. As a result, some provinces still criminalize virtually all acts associated with prostitution, while others no longer impose criminal penalties in practice.[68] Practically speaking, in some areas of Canada, prostitution will not result in sanctions, while in others it is virtually proscribed.[69]

B. The Constitutional Right to Privacy

1. The United States Constitution

The idea of privacy as a fundamental right has been such a nebulous concept in U.S. jurisprudence in large part because it is not found within the text of the Constitution.[70] The fact that these fundamental rights are nontextual often raises the important issue of how the courts should even go about applying them.[71] The Supreme Court has used various components of the Constitution to find the right to privacy, from the Ninth Amendment to "penumbras" of the Bill of Rights.[72] Currently, the fundamental right to privacy is largely said to be found within the Due Process Clause of the Fifth and Fourteenth Amendments.[73]

The effect of finding a fundamental right has large ramifications on the U.S. government's ability to impose a regulation. Once a fundamental right is found, a higher level of court review known as "strict scrutiny" will apply.[74] This application of scrutiny is so demanding, that it is often said to be "strict in theory, but fatal in fact."[75]

The extension of the right to privacy for sexual acts began with *Griswold v. Connecticut* in 1965.[76] In *Griswold*, the Supreme Court rec-

GLOBALISATION OF SEX COMMERCE 83, 83 (Joyce Outshoorn ed., 2004).

66. *Id.* at 84.

67. *See infra* notes 205–06 and accompanying text.

68. For example, post-*Bedford*, the majority of criminal sanctions on acts associated with prostitution were found unconstitutional in Ontario, but similar regulations still hold in other provinces.

69. Vancouver Sun, *supra* note 6.

70. CHEMERINSKY, *supra* note 37, at 815.

71. *See id.* at 794–95.

72. Griswold v. Connecticut, 381 U.S. 479, 484 (1965); CHEMERINSKY, *supra* note 37, at 815.

73. CHEMERINSKY, *supra* note 37, at 793.

74. *Id.*

75. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Powell, J., concurring); *see*, *e.g.*, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts* (UCLA School of Law, Research Paper No. 06-14), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=897360.

76. *Griswold*, 381 U.S. at 485.

ognized a general right to privacy that extended to the ability to make decisions regarding sexuality.[77] This limited decision did not extend a privacy right to all acts of sexuality, however; the decision mostly extended privacy to reproductive rights.[78] Second, the right was seemingly only extended to the sexual autonomy of married couples.[79]

The right to privacy was explicitly extended to sexual activity, married or not, in *Lawrence v. Texas*.[80] The Court recognized that "adults may choose to enter upon this [sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[81] *Lawrence* is a powerful decision because it is both an extension as well as an affirmation of the nontextual right to privacy.[82] *Lawrence* remains one of the only cases in U.S. jurisprudence recognizing that a person's sexuality is part of the fundamental right to privacy.[83]

Yet *Lawrence* as a declaration that the right to privacy extends to private, consensual sex acts is deficient in several respects. First, the Court did not address whether it was using heightened scrutiny, so there is some debate over whether the Court was using a fundamental rights analysis at all.[84] Second, the Court seems to focus on sexual autonomy to the extent it is based on an expression of intimacy only.[85]

Especially in regards to its application to prostitution, *Lawrence* is far from a perfect fit. Although *Lawrence*'s recognition of a right to private, consensual sexual activity seems to press upon the prostitution issue, a short section of dicta included in the majority opinion explicitly says that the holding does not extend to prostitution.[86] Since the statement is not a piece of the actual holding, the application of *Lawrence* to prostitution regulation is not doomed.[87] It certainly, however, has made extending *Lawrence* more difficult.

2. The Canadian Charter of Rights and Freedoms

The right to privacy is more easily found within the Canadian Charter of Rights and Freedoms, but even then, its application to sexual autonomy has required some extension. The Canadian Charter of Rights and Freedoms includes a textual right of "security of person," added in the 1980s.[88] This provision was lifted from the United Nations Charter

77. *Id.*
78. *Id.* at 486.
79. CHEMERINSKY, *supra* note 37, at 816.
80. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
81. *Id.* at 567.
82. CHEMERINSKY, *supra* note 37, at 846.
83. *Id.*
84. *Id.*
85. *See Lawrence*, 539 U.S. at 558.
86. *Id.* at 578.
87. *See, e.g.*, Garcia, *supra* note 24, at 161.
88. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 7 (U.K.).

for Human Rights.[89]

Coupled with the addition of the right to security of person, the 1980s also saw sweeping changes to views of constitutional equality in Canada.[90] One of the biggest changes was the need for constitutional recognition of women's equality rights.[91] Reformers placed emphasis on women's issues such as equal pay, domestic violence, and prostitution.[92]

The effect of a finding that the right to security of person has been implicated is similar to the finding of a fundamental right in the U.S. Constitution.[93] If a right to security of person is found, the court will engage in a heightened level of scrutiny.[94] Canadian courts balance the individual's liberty interest against the state's interest in depriving the liberty.[95] Ultimately, there must be a finding that the governmental interest is not arbitrary.[96]

This provision has taken on a multitude of different meanings, but notably it has been used to find a right of bodily privacy and autonomy.[97] This argument first found its footing in the right to have an abortion.[98] Canadian courts largely accepted the argument that since the right to security of person could be read as a right to bodily autonomy, prohibition of abortion illegally controlled a woman's rights.[99] Under this analysis, the security of person provision arguably extends to the right to engage in prostitution and has successfully been advocated in court in recent times.[100]

III. ANALYSIS

In the United States, the right to privacy encompasses the right to bodily autonomy.[101] The right to privacy as applied to sexual conduct, however, has been complicated by the fairly recent Supreme Court decision in *Lawrence v. Texas.* Some argue that *Lawrence* expanded the fundamental of right to privacy to include sexual privacy, and thus the decision extends to prostitution laws.[102] Proponents of extending *Lawrence*

89. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) § 3 (Dec. 10, 1948).

90. Kathleen E. Mahoney, *The Constitutional Law of Equality in Canada*, 44 ME. L. REV. 229, 229 (1992).

91. *Id.* at 239.

92. *Id.*

93. *See id.* at 230.

94. *See* ESKRIDGE, JR. & HUNTER, *supra* note 38, at 251.

95. *Id.*

96. *See* Bedford v. Canada, 2010 ONSC 4264, para. 368–69 (Can. Ont. Sup. Ct. J.).

97. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 981 (3d ed. 1992).

98. *See generally* R. v. Morgentaler, [1993] 3 S.C.R. 463, 469 (Can.) (striking down regulations on abortion as an unconstitutional infringement on a woman's right to control her body under "security of person").

99. *See, e.g.*, *id.* at 472.

100. *See infra* Part III.B.2.

101. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

102. *E.g.*, Garcia, *supra* note 24, at 177–80.

further argue that sexual privacy is a "fundamental right," so the government must set forth a compelling interest.[103] The argument is bolstered by the decision in *Romer v. Evans*, which arguably removes morality as a compelling government interest.[104]

Opponents argue that *Lawrence* only narrowly applies to sodomy laws.[105] In practice, courts have not readily extended the constitutional right to privacy to prostitution laws, even in a post-*Lawrence* regime.[106] This stems from two main reasons. First, courts reason that prostitution is not a "private" act, but rather a commercial transaction.[107] Second, courts find that the limiting language of *Lawrence* itself precludes application to prostitution.[108] The substance of both the supporting and opposing arguments is explored in Part III.A.1. How courts have treated these arguments is explored in Part III.B.2.

In Canada, the right to privacy was extended to a right of bodily autonomy through a series of cases involving the right to abortion.[109] Those who advocate extending this fundamental right to prostitution argue that the right to bodily autonomy is implicated.[110] These arguments are further fleshed out in Part III.B.1.

Those who oppose extending the fundamental right argue that even if the right is implicated, the government has a compelling cause for regulation. The compelling causes include prevention of public nuisance and prevention of violence against women.[111] Despite these objections, Canadian courts—unlike those in the United States—have entertained privacy challenges to prostitution regulations.[112] The most prominent of these cases are laid out in Part III.B.2.

A. Application of Right to Privacy As Challenging Prostitution Laws

1. Overview of the Competing Arguments

a. Argument Challenging Regulation

The argument that the constitutional right to privacy renders the criminalization of prostitution unconstitutional is hardly new. The essential argument is that criminalizing prostitution invades an individual's privacy, or rather, his or her "right to control the use and function of his

103. *See infra* Part III.A.
104. Romer v. Evans, 517 U.S. 620, 635 (1996).
105. J. Kelly Strader, Lawrence's *Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 101–03 (2011).
106. *See infra* Part III.A.
107. *See infra* Part III.A.2.
108. *See infra* Part III.A.2.
109. Coates, *supra* note 26, at 765–68.
110. *See infra* Part III.B.2.
111. *See infra* Part III.B.
112. *See infra* Part III.B.2.

or her body without unreasonable interference from the state."[113] Since the *Lawrence* decision extended the right of privacy to at least some aspects of private sexual conduct, "right to control" has become a more tenable argument.[114]

Part of the central holding of *Lawrence* expanded the liberty right of privacy to "adult persons in deciding how to conduct their private lives in matters pertaining to sex."[115] Those arguing for an extension of *Lawrence*'s holding advocate a broad reading, as not just extending to private homosexual sodomy, but rather all private consensual sexual acts.[116]

This argument finds some merit in the history of the case itself. The *Lawrence* decision expressly overruled *Bowers v. Hardwick*, which took a narrow view of sexual liberty interests.[117] *Lawrence* explicitly admonished the *Bowers* court for taking such a narrow view of potentially protected conduct.[118] Rather, the liberty interest at stake was to be defined broadly and not just as a specific sexual act.[119] If the liberty interest is defined broadly, then the government has to justify intervening in private sexual conduct.[120]

If *Lawrence* is given a broad reading and stands for a proposition of general sexual autonomy for consenting adults, then it is logical that the privacy interest is implicated by criminal sanctions on prostitution. Further, the dissent in *Lawrence* recognized that the ruling could be (and likely would be) extended beyond acts of sodomy, to other sexual acts.[121]

If the right to privacy were extended to prostitution regulations, the government would have to advance a compelling state interest in defense of the regulations. Since the Supreme Court decision in *Romer v. Evans* came down, the state of "morals legislation" has been hotly debated.[122] The term "morals legislation" can be appropriately used to describe laws that are aimed at "acts that violate a social norm or taboo."[123] The majority in *Romer* ruled that a Colorado law advanced by the state legislature based on moral disapproval could not stand.[124]

113. Charles Rosenbleet & Barbara J. Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373, 411 (1973).

114. Garcia, *supra* note 24, at 161.

115. Lawrence v. Texas, 539 U.S. 558, 559 (2003); Garcia, *supra* note 24, at 161.

116. *But see* ESKRIDGE, JR. & HUNTER, *supra* note 38, at 237.

117. *See* Bowers v. Hardwick, 478 U.S. 186, 190 (1986) ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ."); *see also Lawrence*, 539 U.S. at 559 ("Having misapprehended the liberty claim presented to it, the *Bowers* Court stated that proscriptions against sodomy have ancient roots.").

118. *Lawrence*, 539 U.S. at 566–67.

119. *Id.*

120. Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1250–51 (11th Cir. 2004) (Barkett, J., dissenting).

121. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting); Davis, *supra* note 9, at 844.

122. *See* Romer v. Evans, 517 U.S. 620 (1996); S.I. Strong, Romer v. Evans *and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. 1259, 1261 (1997).

123. Strong, *supra* note 122, at 1261.

124. *Romer*, 517 U.S. at 632. In *Romer*, the Court was tasked to decide whether a Colorado law repealing all affirmative action for homosexuals was constitutional. The Court concluded that the law

The *Romer* holding brings into question a number of state regulations aimed at combating moral and social harms.[125] Specifically, it prompts the argument that regulations on prostitution cannot be propagated by the state to the extent that such regulations are solely aimed at curing moral ills.[126] As discussed above, prostitution regulations are frequently justified as curbing moral harm to society at large.[127]

Proponents of decriminalization argue that the state does not in fact have an interest in combating the purported secondary effects of prostitution, largely because there is no tenable link between prostitution and crime rates.[128] Decriminalization proponents argue that individual liberty does not allow for the government to prosecute an act solely because it "might be involved either directly or indirectly" with certain secondary crimes.[129] Such logic can be compared to the rejection of state vagrancy laws by the Supreme Court; where the state interest is only based on presumptions about "suspicious" individuals, the regulation should not stand.[130]

By this logic, states should not be allowed to presume that prostitutes will inevitably engage in other crimes, as that presumption is inconsistent with liberty interests. Further, to the extent the government seeks to prevent certain crimes, laws already exist to punish and deter such crimes.[131] In terms of a constitutional right-to-privacy analysis, this means that the government is unable to propound a "compelling interest" to overcome the fundamental right of privacy. An attenuated, potential secondary effect alone is not enough to justify such infringement. Yet as discussed further below, courts tend to indulge secondary effects arguments.[132]

b. Argument that *Lawrence* Is Inapplicable

Conversely, those arguing against the extension of the *Lawrence* right to privacy characterize the holding as narrowly applying to the decriminalization of sodomy.[133] This argument finds a textual hook in the

lacked a rational basis because it was based solely on the imposition of morality, and "animus" toward a social group could never serve as a legitimate state interest. *Id.*

125. Strong, *supra* note 122, at 1261.

126. *See id.* at 1261–62 n.8.

127. *See supra* notes 38–40 and accompanying text.

128. Rosenbleet & Pariente, *supra* note 113, at 418–19; *see infra* Part IV.C (discussing how a regulation regime is more effective at curbing disease and violence toward women than a criminalization regime).

129. Rosenbleet & Pariente, *supra* note 113, at 418 (emphasis omitted).

130. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) ("A presumption that people who might walk or loaf or loiter . . . are to become future criminals is too precarious for a rule of law.").

131. Rosenbleet & Pariente, *supra* note 113, at 419 ("If prostitutes or pimps rob or beat patrons, the victims should charge robbery or bodily harm, not prostitution." (quoting L. TIFFANY ET AL., DETECTION OF CRIME 214–15 (1967))).

132. *See infra* Part III.A.2.

133. ESKRIDGE, JR. & HUNTER, *supra* note 38, at 237.

Lawrence decision itself. Writing for the majority, Justice Kennedy specifically states that the opinion is to be read narrowly, and does not involve "public conduct or prostitution."[134]

This language, however, is not determinative and does not foreclose the possible extension of the *Lawrence* opinion, though it certainly does add some difficulty. First, since the language is not pertinent to the holding of the case, it is mere dicta, and thus not binding on lower courts.[135] Second, Justice Kennedy also acknowledges in his opinion that what is encompassed in the right to privacy can change as each subsequent generation develops and searches for new truths.[136] These competing factors make application of the *Lawrence* opinion somewhat unclear for lower courts.

Additionally, the government often successfully argues that even if a fundamental right is implicated, it is offset by a compelling governmental interest.[137] Even if the right to privacy extends to prostitution, the government is able to point to a compelling state interest in several ways.

First, even post-*Romer*, so called "morals legislation" is still used and upheld in a variety of circumstances. The "preservation of moral values" itself may be allowed as a legitimate governmental purpose, one that state governments have engaged in throughout history.[138] The validity of morals legislation is bolstered by the fact that states continue to impose restrictions on obscenity, incest, polygamy, and prostitution; such regulations have time and again passed judicial scrutiny.[139] So while both *Romer* and *Lawrence* purport to invalidate "morals legislation," laws based entirely on morality continue to be held as valid.

Second, the criminalization supporters argue that unlike the laws at issue in *Romer* and *Lawrence*, prostitution regulations can advance interests besides upholding morality.[140] Because of the economic conditions of prostitution, it is arguably not a consensual sexual act.[141] Further, the economic element raises the risk that prostitution is an exploitative sexual act.[142] The governmental interest, then, would not be imposing morality but rather preventing the exploitation of women associated with prostitution.

Finally, the government can argue that it has an interest in regula-

134. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

135. Garcia, *supra* note 24, at 161.

136. *Lawrence*, 539 U.S. at 579.

137. *Id.* at 593 (Scalia, J., dissenting).

138. Romer v. Evans, 517 U.S. 620, 651 (1996) (Scalia, J., dissenting).

139. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting); *see, e.g.*, John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L. J. 1, 31–33 (2010) (discussing contexts where morals legislation has been upheld post-*Royer*).

140. *See* Strong, *supra* note 122, at 1279 n.89.

141. Shaman, *supra* note 36, at 998; Strong, *supra* note 122, at 1279 n.89 ("Prostitution arguably contains an element of economic exploitation that could vitiate claims that the act is fully consensual.").

142. Strong, *supra* note 122, at 1279 n.89.

tion because prostitution is directly linked to other harms, especially organized crime.[143] For example, criminalization supporters argue that prostitution is connected to robbery, drug possession, and assault.[144] Yet another harm arguably increased by prostitution is the spread of infectious disease.[145] As explained in the next Subsection, courts have found such "secondary effects" arguments compelling. Most courts find that the government has an interest in regulating prostitution in order to prevent such secondary harms.

2. Application in the Lower Courts

People v. Williams made its way up to the Appellate Court of Illinois with a right-to-privacy challenge of prostitution laws.[146] Donna Williams was sentenced to four years imprisonment for violation of section 11-14 of the Illinois Criminal Code of 1961.[147] The provision makes it a crime for anyone to knowingly "perform[], offer[] or agree[] to perform any act of sexual penetration . . . for . . . anything of value."[148]

Williams did not deny that she had engaged in the activity prohibited by the code.[149] Rather, Williams argued that the statute itself was facially unconstitutional because it proscribed "private consensual sexual activity between adults."[150] After *Lawrence*, Williams argued, such activities are to be free from governmental interference.[151]

In light of Williams's argument, the court needed to decide which level of scrutiny to apply to the Illinois law.[152] In the past, the statute had passed rational basis review.[153] If the *Lawrence* right to privacy was applicable to the proscribed activity of the regulation, however, the statute would be subject to a higher level of judicial scrutiny and could potentially be invalidated.[154]

The *Williams* court declined to extend *Lawrence* for two main reasons. First, the textual hook in *Lawrence* declining to extend the holding to prostitution laws came into play. The court noted, "[i]ncluded in the conduct the *Lawrence* Court specifically excluded from its opinion were acts of prostitution."[155] In light of this language in *Lawrence*, the court concluded that Williams's reliance on the case extending to acts of prosti-

143. Rosenbleet & Pariente, *supra* note 113, at 417.
144. *Id.*
145. Shaman, *supra* note 36, at 998.
146. People v. Williams, 811 N.E.2d 1197, 1198 (Ill. App. Ct. 2004).
147. 720 ILL. COMP. STAT. 5/11-14 (2010); *see also Williams*, 811 N.E.2d at 1197.
148. 720 ILL. COMP. STAT. 5/11-14.
149. *Williams*, 811 N.E.2d at 1197–98.
150. *Id.* at 1198.
151. *Id.* at 1198–99.
152. *Id.* at 1198.
153. *Id.*
154. *See id.* at 1199.
155. *Id.*

tution was "misplaced."[156]

Second, the court accepted the Illinois government's argument that even if *Lawrence* extends a privacy right for private, consensual sexual conduct between adults, the statute does not aim at this activity. Rather, the proscribed activity was characterized by the court as "the commercial sale of sex."[157] Both the court and the Illinois government emphasized that the motivation of the legislature was not to prohibit "private, non-commercial acts" but rather to target the "business of selling sex."[158]

With the proscribed act characterized in this way, the court declined to extend *Lawrence* and find the presence of a fundamental right to privacy in this context.[159] The court thus applied rational basis review and upheld the statute under the governmental interests of disease prevention, crime prevention, and protecting family life.[160]

The defendant made a similar argument in *State v. Romano*, which made it to the Supreme Court of Hawaii.[161] Pame Romano was prosecuted under Hawaii's prostitution law, which makes it a criminal act to "engage[] . . . , agree[] or offer[] to engage in, sexual conduct with another person for a fee."[162]

Romano argued that, like the statute at issue in *Lawrence*, this statute criminalized an "utterly private sexual activity."[163] Romano wanted to characterize the liberty interest found in *Lawrence* as the protection of individual decisions "concerning the intimacies of their physical relationship."[164] Romano argued that since the *Lawrence* decision, the government could not criminalize the private and consensual sexual activity of adults unless there is a compelling state interest.[165]

The majority opinion rejected Romano's argument. As in *Williams*, part of the court's ruling was based on the dicta in *Lawrence* that the opinion was not meant to be extended to acts of prostitution.[166] The court read this as drawing a "legal boundar[y]" around the decision, precluding it from being extended to acts of prostitution.[167]

The majority also reasoned that even if the *Lawrence* opinion had

156. *Id.* ("Williams characterizes her conduct as private sexual activity between two consenting adults. As the State argues, however, Williams' activity is more aptly described as the commercial sale of sex.").

157. *Id.*

158. *Id.*; *see also* 720 ILL. COMP. STAT. ANN. 5/11-14, Committee Comments-1961, at 448 (West 2010) (describing the legislature's motivations in passing the law).

159. *Williams*, 811 N.E.2d at 1198–99.

160. *Id.* at 1198 (noting that criminal prostitution statutes in Illinois are "upheld . . . as a valid attempt by the State to promote the legitimate purpose of protecting the safety, health, and welfare of the people").

161. State v. Romano, 155 P.3d 1102, 1104 (Haw. 2007).

162. HAW. REV. STAT. § 712-1200(1)(a) (2013); *Romano*, 155 P.3d at 1104.

163. *Romano*, 155 P.3d at 1109–10.

164. *Id.* at 1110 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

165. *Id.* at 1109–10.

166. *Id.* at 1110.

167. *Id.*

not excluded prostitution, the holding could still not reach prostitution.[168] The court arrived at this conclusion by taking a very narrow interpretation of the *Lawrence* holding, interpreting *Lawrence* as only invalidating governmental laws that were aimed at a particular sexual practice, that is, sodomy.[169] The court viewed the decision as prohibiting governmental interference with certain sexual conduct or acts between adults, rather than as a broad proposition of sexual privacy.[170]

The court also embraced a policy argument for not extending the right to privacy to prostitution laws. The court first acknowledged that the right to privacy had been extended in a variety of situations to acts once viewed as criminal.[171] The court then noted that unlike these other acts now covered by the right to privacy, prostitution has a long and deeply rooted history of societal condemnation.[172]

The court concluded that in light of the widespread societal distaste for prostitution, the judiciary was not the appropriate forum for striking down the law.[173] Rather, the legislature would have to take steps to legalize such acts if society later urged legalization.[174]

Although the majority rejected Romano's privacy argument, the dissenting opinion found the argument persuasive. The dissent found application of *Lawrence* appropriate in this case for several major reasons. First, the dissent viewed the holding broadly, interpreting *Lawrence* to find a right of privacy in all sexual activity between adults when done in private.[175] The dissent interpreted the *Lawrence* holding to encompass the choice of adults to engage in certain sexual acts free from governmental interference.[176]

As for the dicta in *Lawrence* specifically excluding prostitution, the dissent took a different interpretation from the majority. The dissent noted that *Lawrence* stated that the holding did not extend to "public conduct or prostitution."[177] The dissent interpreted this language as limiting extension of the right to privacy to prostitution only to the extent the acts involved public conduct.[178] Public prostitution can reasonably

168. *Id.* at 1111.

169. *Id.*

170. *Id.* at 1110–11 ("The [*Lawrence*] Court has . . . drawn legal boundaries around its decisions, despite the fact that arguably logic would lead inexorably beyond such strictures." (internal citation omitted)).

171. *Id.* at 1113 (noting that "[t]he right to privacy has been expanded by the [Supreme] Court in discrete situations. . . . This court has also extended privacy rights under our own constitution").

172. *Id.*

173. *Id.* at 1114–15.

174. *Id.* at 1115.

175. *Id.* at 1117 (Levinson, J., dissenting).

176. *Id.* at 1118.

177. *Id.* (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

178. *Id.* at 1118–19 ("[T]he thrust of the *Lawrence* majority's analysis supports the conclusion that the Court was focused on addressing only private sexual activity among adults capable of consenting and, therefore, *to the extent that prostitution involves public solicitation*, it departed from the realm of the private and, hence, from the scope of the *Lawrence* analysis.").

fall outside of the scope of *Lawrence* because it "departed from the realm of private."[179] The dissent went on to reason that when prostitution takes place between consenting adults in private, the holding of *Lawrence* logically applies.[180]

Second, the dissent noted that *Lawrence* broadly rejected the imposition of a moral code as the rationale behind laws.[181] In order for governmental interference to be justified, the dissent believed the state would have to present an interest beyond morality.[182] Rather, the state would have to demonstrate an interest in preventing "injury to a person or abuse of an institution the law protects."[183]

The dissent further reasoned that the liberty interest at stake should be defined broadly, rather than the majority's characterization of the liberty interest as "sex for hire."[184] The dissent noted that the U.S. Supreme Court in *Lawrence* had rejected a narrow characterization of the liberty interest at stake, and instead opted for a broad one.[185]

In light of this, the *Romano* dissent argued that the liberty interest should be broadly defined as a right to private sexual conduct, rather than a right to sex for hire.[186] The dissent further noted that when broadly defined, the conduct at issue clearly enjoyed a liberty interest.[187]

As discussed above, the vague holding of *Lawrence* creates much confusion as to how and when the decision's rationale should be applied.[188] There are, however, a few general consistencies within the state court decisions. First, the dicta in *Lawrence* prompts most courts to reject an extension to prostitution.[189] Second, many courts will define the liberty interest identified by *Lawrence* and the situations at hand narrowly, despite the holding saying the liberty interest should be defined broadly.[190] Overall in the United States, while the right to privacy has become a tenable argument for the decriminalization of prostitution, there has been little acceptance of such an argument in practice.[191]

179. *Id.* at 1119.
180. *Id.*
181. *Id.*
182. *Id.* ("The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code." (quoting Lawrence v. Texas, 539 U.S. 558, 571 (2003))).
183. *Id.* at 1110 (quoting *Lawrence*, 539 U.S. at 568).
184. *Id.* at 1123.
185. *Id.* ("*Lawrence* created just such a precedent, confirming that individual decisions by married and unmarried persons concerning the intimacies of their physical relationship . . . are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." (internal citation omitted)).
186. *Id.* at 1123–24.
187. *Id.*
188. *See supra* notes 85–87 and accompanying text.
189. *See supra* Part III.A.2.
190. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
191. Davis, *supra* note 9, at 844–45.

B. Application of Right to Security of Person As Challenging Prostitution Regulations

1. Overview of the Competing Arguments

a. Argument Challenging Regulation

The argument that the right to security as guaranteed in the Canadian Charter of Rights and Freedoms should prevent government interference with acts of prostitution is based on a broad interpretation of this nebulous right.[192] As discussed above, while no Canadian law criminalizes prostitution, the heavy regulations imposed have the effect of virtual criminalization.[193] The argument therefore follows that these regulations are unconstitutional because they have the effect of preventing prostitution from being carried out at all, since all associated acts are illegal.[194]

The practical state of illegality caused by these regulations has been challenged under the right to security of person found in the Canadian Charter of Rights and Freedoms.[195] Security of person is interpreted as providing a right to privacy of the body.[196] This interpretation has brought the provision into the realm of sexual autonomy. Such an extension is premised on the assertion that the "human body ought to be protected from interference by others."[197] Similar to the right of privacy found in the U.S. Constitution, this provision is used to support the proposition that an individual has a right to "control one's body and make fundamental decisions about one's life."[198]

This argument first garnered support in the abortion context. Canadian abortion laws were struck down under the view that the laws constituted "state interference" with the body in violation of the right to security of person.[199] Courts reasoned that state interference with a woman's choice in what to do with her body contravened the right to security of person.[200] Such cases can be extended to support the proposition that governmental interference with the body, in the form of prostitution laws, contravenes the right to security of person.

192. *See supra* notes 35–37 and accompanying text.

193. *See supra* notes 58–61 and accompanying text.

194. Gwendolynne Taylor, The Prostitution Debates in Canada: Competing Perspectives Presented to the Subcommittee on Solicitation Laws 2–3 (Apr. 1, 2010) (unpublished research paper, Master of Laws program, University of Victoria), *available at* http://law.uvic.ca/grad/Graduate/documents/LLMMajorResearchPaper.Amended.GwenTaylor.pdf.

195. *See* R. v. Morgentaler, [1988] 1 S.C.R. 30, 32–33 (Can.).

196. *See* Blencoe v. B.C. (Human Rights Comm'n), [2000] 2 S.C.R. 307, 310 (Can.).

197. R. v. Morgentaler, [1988] 1 S.C.R. 30, 53 (Can.).

198. *Id.* at 54.

199. *Id.* at 56.

200. *Id.* at 57.

b. Argument that Section 7 Is Inapplicable

The main argument that Section 7 is inapplicable is that the Canadian Constitution specifically provides for the allowance of some government interference with rights, if such interference is "reasonable."[201] Thus the right to security of person is not absolute; rather, it is explicitly subject to at least some level of governmental regulation. The argument against extending the right to security of person is that this level of interference (i.e., the governmental regulation of prostitution) is a reasonable constraint.

In determining whether a limit on personal freedom is "demonstrably justified in a free and democratic society" the court will employ the *Oakes* two-prong test.[202] The test is whether the legislative objective is "pressing and substantial," and whether the means chosen are reasonable within a free and democratic society.[203]

Under this rationale, even though regulating prostitution does in fact infringe upon security of person, the government is justified because it has a "pressing and substantial interest."[204] The government has an interest in regulation because prostitution creates a public nuisance and also constitutes a "pervasive social evil."[205] Prostitution is seen as a "pervasive social evil" both because it is inherently socially harmful and because it exacerbates other harms such as drug usage, violence toward women, and human trafficking.[206]

Scholars have also propounded an argument that "security of person" as a concept simply can never apply to prostitution. This concept is usually backed by feminist theory. For example, feminist theorists argue that prostitution can never promote the security of person for women, because prostitution inevitably results in a loss of liberty for women.[207]

These scholars further argue that to the extent that there is any privacy concern involved in prostitution, it is not a socially *valuable* right to privacy. Rather, the "privacy" involved is seen as resulting in a sphere where women can be abused and victimized, and society will turn a blind

201. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 1 (U.K.) (known as the "reasonable limits" or "limitations clause").

202. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 7 (U.K.); R. v. Oakes, [1986] 1 S.C.R. 104 (Can.).

203. *Oakes*, [1986] 1 S.C.R. at 138–39 (Can.).

204. *See, e.g.*, Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123 (Can. Man.); R. v. Downey, [1992] 2 S.C.R. 10, 40 (Can.).

205. R. v. Downey, [1992] 2 S.C.R. 10, 36 (Can.) (holding regulations are justified because they are "attempting to deal with a cruel and pervasive social evil").

206. Lowman, *supra* note 30, at 48.

207. Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 13 (1993) ("The gap between the promise of civil rights and the real lives of prostitutes is an abyss . . . . To speak of prostitution and civil rights in one breath moves the two into one world . . . exposing and narrowing the distance between them.").

eye.[208] Thus there is no necessary right to privacy involved in prostitution, since the end result of allowing such a right would be overwhelmingly negative for the women involved.[209]

The argument over whether government has a justification for regulation was seen in the *Bedford* decision, discussed next. The *Bedford* decision found that while the government did have some interests in the regulations, the governmental interests did not justify the infringement on the right to privacy.

2. Challenges in the Courts

Unlike constitutional challenges in the United States, the argument that prostitution regulations violate the right to security of person has garnered some success in Canadian courts in recent times. One such case is *Bedford v. Canada*, brought forth in Ontario.[210] Three women—Terri Jean Bedford, Amy Lebovitch, and Valerie Scott—brought forth an action for declaratory relief.[211] The three women had not been convicted of violating any laws, but rather challenged several regulations as in facial violation of the Charter.[212] Namely, the women challenged regulations that dealt only with adult prostitution.[213] Their standing rested on their personal stake in the constitutionality of the laws at issue.[214]

To prevail before the court, the *Bedford* plaintiffs would need to make two showings.[215] First, the plaintiffs would have to show that there had been a Section 7 violation of their "life, liberty, or security of the person."[216] Second, they would have to show that the government's limitations on this right did not comport with "principles of fundamental justice."[217] The court ruled that the *Bedford* plaintiffs prevailed on both prongs.[218]

To show a violation of security of person, the *Bedford* plaintiffs argued that the regulations on prostitution interfered with bodily rights in violation of Section 7.[219] The government countered with a narrow interpretation, arguing that the Charter contained no provision protecting a

208. *Id.* at 14 ("Security of the person is fundamental to a society. The point of prostitution is to transgress women's personal security. . . . [T]he personhood of women . . . is made more insecure.").

209. *Id.* at 15.

210. Bedford v. Canada, 2010 ONSC 4264 (Can. Ont. Sup. Ct. J.).

211. Criminal Code, R.S.C. 1985, c. C-46, ss. 210–13 (Can.); *Bedford*, 2010 ONSC at para. 4.

212. *Bedford*, 2010 ONSC at para. 8–13.

213. *Id.* at para. 6 ("The applicants do not challenge all of the prostitution-related provisions in the *Criminal Code*. They only challenge three provisions dealing with adult prostitution . . . .").

214. *Id.* at para. 58–62.

215. Adam Badari & Jim Young, Bedford v. Canada—*Appeal Under Way in Ontario Case that Struck Down Prostitution Laws*, CENTRE FOR CONSTITUTIONAL STUDIES (Jan. 11, 2011), http://www.law.ualberta.ca/centres/ccs/news/?id=361 [hereinafter Bedford v. Canada—*Appeal Under Way*].

216. *Id.*

217. *Id.*

218. *Bedford*, 2010 ONSC at para. 506–07.

219. *Id.* at para. 9.

right to engage in prostitution.[220] The *Bedford* plaintiffs further argued that morality could not constitute a "constitutionally valid legislative objective."[221] The Canadian government countered that legislation based on morality was constitutionally permissible where the "laws are a reflection of society's core values."[222]

Similar to U.S. jurisprudence, Canadian prostitution regulations had been repeatedly attacked as in violation of liberty interests.[223] The *Bedford* court decided to reexamine the issue, however, due to recent developments in the interpretation of Section 7 of the Charter.[224] The court reasoned that the "evolution of the principles of fundamental justice" required that the constitutional question be reexamined.[225]

The court first ruled that morality could be an appropriate legislative goal, but only to the extent such legislation is in line with the values of the Charter.[226] The court reasoned that the regulations which sought to curb the public aspects of prostitution were in line with charter values, under the theory that the government has an interest in preventing public nuisance.[227]

The court, however, ultimately agreed with the plaintiffs' security of person argument. The court recognized that "security of the person encompasses 'personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity . . . at least to the extent of freedom from criminal prohibitions which interfere with these.'"[228] The court found that the government restrictions effectively prevented individuals from safely engaging in acts of prostitution, thus making women choose between bodily autonomy and bodily safety.[229]

Because the *Bedford* plaintiffs prevailed on their showing that a fundamental right was implicated, the government was required to show how it advanced an interest in interfering with this fundamental right.[230] The standard employed is that the interference with the fundamental

220. *Id.* at para. 15–16.

221. *Id.* at para. 218. "This case demonstrates the tension that exists around the moral, social and historical perspectives on the issue of prostitution and the effect of certain criminal law provisions on the constitutional rights of those affected." *Id.* at para. 2.

222. *Id.* at para. 219.

223. *See id.* at para. 227 (describing the history of prostitution regulation in Canada, as well as the history of challenges to these regulations).

224. *Id.* at para. 70.

225. *Id.*

226. *Id.* at para. 221–225 ("[A] law grounded in morality remains a proper legislative objective so long as it is in keeping with *Charter* values.").

227. *Id.* at para. 418 ("[T]he bawdy-house provisions seek to prevent harm to the community by protecting community health and safety, and preventing neighbourhood disruption."); *see also* Criminal Code, R.S.C. 1985, c. C-46, s. 210 (Can.).

228. *Bedford*, 2010 ONSC at para. 284 (quoting Rodriguez v. B.C. (Att'y Gen.) [1993] 3 S.C.R. 519, 587–88 (Can.)).

229. Elaine Craig, *Sex Work By Law:* Bedford*'s Impact on Municipal Approaches to Regulating the Sex Trade*, 16 REV. CONST. STUD. 97, 98–99 (2011).

230. *Bedford*, 2010 ONSC at para. 539.

right must not be "arbitrary."[231] After a lengthy examination of the statistics on the effects of prostitution laws, the court determined that the laws were ineffective in protecting the individuals engaged in prostitution, and many of the regulations were ineffective in curbing social nuisance.[232] Therefore, for many of the regulations, the government was unable to show that the regulation was not arbitrary.[233]

For example, the court acknowledged that the bawdy-house provisions do in fact seek to prevent a harm, that is, public nuisance.[234] The court, however, found that such provisions were not justified under the *Oakes* test because they are disproportionate to the purpose of preventing social nuisance; the court ruled that the "bawdy-house provisions are overly broad as they restrict liberty and security of the person more than is necessary to accomplish their goal."[235] The court further noted that the regulations on bawdy houses were not justified because, according to statistical evidence, complaints about bawdy houses were "rare."[236] Thus in actuality, the prostitution laws did little to advance a governmental interest in preventing a social nuisance.

The court also struck down the prohibition on living on the avails of prostitution.[237] The court conceded that this section does in fact have an important state interest; the provision seeks to prevent the financial exploitation of women engaged in prostitution.[238] The court, however, felt that this objective was not appropriately met by the regulation. The regulation created a "perverse choice."[239] Women could exercise their own liberty (through safely practicing prostitution), but only at the expense of the liberty of others who would live off the proceeds of prostitution, such as drivers or body guards, who would be arrested for violating this provision.[240]

The decision of the trial court in *Bedford* was appealed to the Ontario Court of Appeals.[241] The court of appeals upheld the trial court's decision that the criminal provision banning bawdy-houses was unconstitutional.[242] The court of appeals also upheld the trial court's decision that criminalizing living off of the avails of prostitution was unconstitution-

231. *Id.* at para. 368–69.
232. *Id.* at para. 504.
233. *Id.* at para. 435 ("I am of the view that the effects of each of these provisions are *per se* disproportionate to their legislative objective. The overall effect of the impugned provisions is to force prostitutes to choose between their liberty interest and their personal security."); Craig, *supra* note 229, at 111.
234. *Bedford*, 2010 ONSC at para. 385.
235. *Id.* at para. 401; *see also* Lowman, *supra* note 30, at 50 (explaining the reasoning behind *Bedford*'s rejection of the bawdy-house provisions).
236. *Bedford*, 2010 ONSC at para. 427.
237. *Id.* at para. 402, 429–31, 441.
238. *Id.* at para. 418–19.
239. *Id.* at para. 431.
240. *Id.* at para. 429; Lowman, *supra* note 30, at 50.
241. Canada (Att'y Gen.) v. Bedford, 2012 ONCA 186, para. 46–47 (Can. Ont. C.A.).
242. *Id.* at para. 194–216.

al.[243] Rather than striking the law in its entirety, the court noted that it could be made constitutional by limiting the scope of its application to situations of exploitation.[244] The court reasoned that while prostitutes may use security staff and other professionals to better promote safety, the law should still "target pimps or others who exploit" women.[245]

Although *Bedford*'s proponents largely saw the appeal as a triumph, it was not entirely successful. The court of appeals reversed the trial court's decision as to the provision criminalizing communication for the purposes of prostitution, and thus that regulation still stands.[246] The state has officially stated that it will appeal the decision up to the Supreme Court of Canada, and thus the future of the *Bedford* decision still remains on somewhat tenuous grounds.[247]

The *Bedford* decision is groundbreaking because it could have a "domino effect" for prostitution cases in other provinces.[248] This effect is already beginning. In the wake of the *Bedford* decision, there has been yet another high-profile Section 7 challenge to prostitution regulations. In Vancouver, a woman named Sheryl Kiselbach brought a declaratory challenge to regulations on prostitution.[249] Like the women challenging the regulations in *Bedford*, Kiselbach is not challenging a conviction, but rather seeking facial invalidation of the laws.[250] The issue of whether Kiselbach has standing to sue was picked up by the Canadian Supreme Court.[251] As the case does not involve anyone who was tried under criminal laws, the parties lack private standing.[252]

The Supreme Court of Canada, however, issued a ruling on September 21, 2012, granting the Downtown Eastside Sex Workers United Against Violence Society (a public interest group working on behalf of sex workers) and Sheryl Kiselbach public interest standing to sue.[253] In order to establish public interest standing, the petitioners were required to show that the case "raises a serious justiciable issue," that the parties bringing the case have a legitimate stake in the matter, and that the pro-

243. *Id.* at para. 240–46.

244. *Id.* at para. 249–251 (noting that, "[a]s it stands, the blanket prohibition on living on the avails [of prostitution] catches not just the driver or the bodyguard . . . but the accountant who keeps the prostitute's records and the receptionist who books appointments and checks credit card numbers").

245. *Id.* at para. 254.

246. *Id.* at para. 280.

247. LAURA BARNETT & JULIA NICOL, PROSTITUTION IN CANADA: INTERNATIONAL OBLIGATIONS, FEDERAL LAW, AND PROVINCIAL AND MUNICIPAL JURISDICTION 8 (2012), *available at* http://publications.gc.ca/collections/collection_2012/bdp-lop/bp/2011-119-eng.pdf.

248. *Id.*

249. Lowman, *supra* note 30, at 34, 37.

250. Youssef, *supra* note 28.

251. Lowman, *supra* note 30, at 48.

252. *Id.*

253. Canada (Att'y Gen.) v. Downtown Eastside Sex Workers United Against Violence Soc'y, 2012 S.C.C. 45, para. 9–10 (Can.).

posed suit is a "reasonable and effective" means for bringing the case to court.[254]

The Supreme Court held that the first two prongs were met, noting, "Indeed, the constitutionality of the prostitution provisions of the Criminal Code constitutes a serious justiciable issue and the respondents, given their work, have a strong engagement with the issue."[255] At issue in the appeal was the third prong, whether this suit was a "reasonable and effective" means for bringing the issue to the court.[256] The court first noted that the existence of other lawsuits challenging such regulations did not negate the third prong; based on the unpredictability of criminal trials, it is unlikely that all petitioners would get similar outcomes under the law.[257]

The court then noted that that public interest standing was effective here because, "[t]his case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. . . . It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it."[258] Thus, the constitutional challenge will be permitted to go to trial.

Although this decision only dealt with the standing of the parties, it signifies two important milestones. First, prostitutes who have not yet been convicted under the criminal code still may have a means to challenge regulations. Second, the Supreme Court explicitly noted the social and public importance of prostitution laws,[259] and moreover, the need to examine the constitutionality of such laws.

This shift in Canadian jurisprudence may seem recent, but it is actually backed by a movement that has been present for decades. Since the 1970s, Canadian political committees have advocated for the complete repeal of criminal sanctions for acts associated with prostitution.[260] Further, the Fraser Committee in the 1980s (which was met by much opposition from conservative groups) called for the allowance of prostitution in limited settings.[261] Unlike in the United States, where constitutional arguments against prostitution laws gain little support, constitutional arguments against prostitution in Canada have garnered a serious response within the courts as well as the legislature.

254. *Id.* at para 1.
255. *Id.* at para 4.
256. *Id.* at para 2.
257. *Id.* at para 7.
258. *Id.* at para 9.
259. *Id.* at para 8.
260. Lowman, *supra* note 30, at 37; *see also* RECENT SOCIAL TRENDS IN CANADA, 1960–2000, at 516–17 (Lance W. Roberts et al. eds., 2005).
261. THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION, PORNOGRAPHY AND PROSTITUTION IN CANADA 684 (1985).

IV. RESOLUTION

The United States has not much responded to constitutional right-to-privacy challenges to prostitution, whereas Canada has gradually moved towards acceptance of such arguments. The United States should move in a similar direction for three main reasons.

First, U.S. jurisprudence often recognizes the patterns and movements of international law, especially of those countries which are socially similar.[262] International law can aid in constitutional interpretation by helping the United States to align its ideals with those of other Western democracies.

Second, the Canadian response to privacy challenges represented a shift of Canadian constitutional law toward allowing more private, sexual behavior. The United States has been experiencing a similar shift in recent times in fields other than prostitution.[263] From a theoretical standpoint, it is logical to extend the expansion of allowing more private behavior in the realm of prostitution.

Finally, there are positive practical effects to decriminalization, including better regulation of the profession and more safety for the women who participate.[264] Such practical implications are best evidenced by the Nevada model of regulation.[265] The fact that such a model has worked in practice in the United States provides a policy reason for accepting privacy challenges to prostitution regulations.

A. Recognition of International Law

Although U.S. courts do not explicitly implement international law (unlike courts in other Western democracies), one of the interpretive tools employed by the Supreme Court in debated issues of the law is the use of international precedent and trends.[266] The Supreme Court has invoked international precedent in interpreting the social or modern application of several constitutional amendments.[267]

Notably, the Supreme Court invoked international norms in interpreting the right to sexual privacy in *Lawrence v. Texas*.[268] The Court

262. *See infra* Part IV.A.

263. *See infra* notes 268–70 (discussing the decriminalization of sodomy by invoking a constitutional right to sexual privacy).

264. *See infra* Part IV.C.

265. *See infra* Part IV.C.

266. *See generally* Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004) (explaining the various uses of international law in constitutional interpretation).

267. *Id.* at 84 (including the Thirteenth, Eighteenth, and Eighth Amendments).

268. Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."); Steven G. Calabresi, Lawrence, *The Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1101–02 (2004).

noted the shift in decriminalizing sodomy in other Western nations.[269] In this way, the Court addressed constitutional sexual privacy in terms of human rights afforded under international law.[270]

Part of this influence derives from the fact that two sources of fundamental rights exist—those provided by the U.S. Constitution, and those under the norms of international law.[271] This "multiplies the possibilities for competing influences on the interpretation of the right."[272] This use of international norms in interpretation serves an important institutional purpose in U.S. law. By using international norms in interpreting constitutional provisions, the United States effectively aligns itself with the prevailing international view of which rights should be protected and in which way.[273]

Using international precedent would also be useful for the United States in a highly practical way. As it stands, the current regime criminalizing prostitution has been extremely problematic, in its failure to prevent prostitution or provide health and safety to sex workers.[274] By using international norms, the United States can implement proposed laws that have already been tested by other nations, and thus use empirical evidence on what is effective and what is not.[275]

Finally, the use of international precedent would help prompt the United States to reexamine a body of law that has become largely antiquated.[276] Prostitution laws in the United States have not undergone major reform since 1959.[277] The same underlying justifications for the criminalization of prostitution that existed at the turn of the twentieth century may no longer be relevant in modern times. For example, since prostitution laws in the United States were put into place, Western society has become far more egalitarian.[278] Further, less emphasis is placed on morality, and more is placed on the right to privacy.[279] Using international law to interpret constitutional principles "challenges states to reexamine the justifiability of their practices."[280] When reexamined, the prostitution laws of the United States are no longer in line with Western democratic ideals.

269. Neuman, *supra* note 266, at 89 n.41.

270. *Id.* at 89.

271. *Id.* at 84–85.

272. *Id.* at 85.

273. *See* Calabresi, *supra* note 268, at 1097 ("[F]oreign constitutional law is most relevant to good policy-making or to assessments of reasonableness . . . .").

274. *See supra* Part IV.C.

275. Neuman, *supra* note 266, at 87; *see infra* notes 278, 282 and accompanying text (discussing the regulatory model in the Netherlands).

276. *See supra* Part II.A.1.

277. Saraga, *supra* note 23, at 169.

278. *See* Judith Kilvington et al., *Prostitution Policy in Europe: A Time of Change?*, 67 FEMINIST REV. 78, 80 (2001).

279. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 582 (2003); Romer v. Evans, 517 U.S. 620, 634–35 (1996); Stanley v. Georgia, 394 U.S. 557, 568 (1969).

280. Neuman, *supra* note 266, at 87.

In contrast to the United States, Canadian courts often look to international law and trends in interpreting provisions under the Canadian Charter of Rights and Freedoms.[281] Part of the push in further deregulating prostitution in Canada came from the movement toward deregulation in other Western democracies, notably several Nordic countries and the Netherlands.[282]

This movement toward decriminalization in Western democracies is a response to the call for a more egalitarian approach to women's rights.[283] Women who engage in prostitution are no longer seen as criminals in need of punishment; instead, emphasis is placed on the need to afford such women basic access to health and safety.[284] Canada has followed such a shift in viewpoint. Because of the need to align constitutional principles to international viewpoints, the United States would be well served by making a similar shift.

B. The Public and Private Distinction

Yet another reason to extend the constitutional right to privacy to prostitution is consistency with past jurisprudence of the United States. Since the implementation of prostitution laws based on morality, the right to privacy has been broadened to cover more and more sexual behavior. While the right to private sexual autonomy was first seen as only extending to the sexual behavior of married couples,[285] it has since been extended to the sexual autonomy of single individuals as well.[286] Even the *Lawrence* decision noted that the right to privacy is meant to expand to serve the needs and realizations of subsequent generations.[287]

Although some aspects of prostitution take place publicly, such as solicitation or loitering, the engagement itself is a private act. The law can recognize this through what is deemed a "two-track model."[288] A two-track model criminalizes prostitution and solicitation of prostitution in public, while regulating indoor or private prostitution.[289] This model is desirable because it allows for the government to regulate public harms while still granting the right of bodily autonomy and privacy.[290]

281. *Id.* at 86.

282. Kilvington et al., *supra* note 278, at 78, 81–83 ("[I]n the Netherlands, health and safety regulations will be introduced as in any job . . . in Sweden there was initially a tenfold decrease in the numbers of women working visibly on the streets, and some workers have left the industry.").

283. *Id.* at 80.

284. *Id.* at 80–81.

285. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (extending the right to privacy to married couples purchasing contraceptives).

286. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (extending the right to privacy to a single individual purchasing contraceptives).

287. *See supra* notes 82–83 and accompanying text.

288. WEITZER, *supra* note 44, at 59–60 (explaining how a two-track model functions and why it is desirable).

289. *Id.*

290. *Id.* ("Indoor work by one or a few providers was seen as preferable . . . since it gives the

To the extent there is public behavior, the law can provide for separate punishment. One principle of law in the United States is "the distinction between law and morality, between public nuisance and private choices."[291] Certain acts should not be made criminal specifically because criminalization requires the acts to actually be discovered; in certain cases, the attempt to discover these acts alone necessarily involves an intrusion into privacy.[292] Thus the government interest in regulation (unlike for public acts) must be strong enough to justify an intrusion into privacy that is otherwise constitutionally protected.

For example, the government can criminalize public obscenity because of the risk that unwilling parties will be exposed to such prurient materials.[293] The Supreme Court, however, has held that the government is not permitted to criminalize the *private* possession of obscenity because to do so would necessarily involve an intrusion on individual privacy.[294] The need to protect the public is simply not present when wholly private acts are involved.[295] At that point, the prevailing interest becomes protection of the constitutional right to privacy rather than protection of the public.

While the *Lawrence* decision itself explicitly states that it does not extend to prostitution, it is notable that it also emphasizes that it does not extend to *public* acts.[296] Prostitution does not always involve an act of public nuisance, and in fact can be regulated through other laws in the event that a public nuisance is caused.

In Canadian law, this public/private distinction is excellently illustrated through the analysis of bawdy-house and communication provisions in the *Bedford* decision. Bawdy houses are largely a place of private engagement in prostitution, in comparison to other methods such as street solicitation.[297] *Bedford* struck down provisions that criminalized bawdy houses.[298] The decision noted that bawdy houses may create some level of public nuisance, but that such a small level did not justify criminalization.[299]

Additionally, the court noted that laws prohibiting public communication too broadly impinged on personal liberty. The law could be more narrowly drawn to only punish public communication that caused some

workers maximum autonomy and shields them against exploitation by pimps or other managers.").

291. Saraga, *supra* note 23, at 169.

292. Al Katz, *Privacy and Pornography:* Stanley v. Georgia, 1969 SUP. CT. REV. 203, 205.

293. *Id.* at 207.

294. *See generally* Stanley v. Georgia, 394 U.S. 557 (1969) (ruling a First Amendment violation occurred when police arrested a man for possessing pornography in the privacy of his own home).

295. Katz, *supra* note 292, at 207.

296. Lawrence v. Texas, 539 U.S. 558, 560 (2003); State v. Romano, 155 P.3d 1102, 1119 (Haw. 2007) (Levinson, J., dissenting); ESKRIDGE, JR. & HUNTER, SEXUALITY, *supra* note 38, at 237.

297. Bedford v. Canada, 2010 ONSC 4264, para. 397–401 (Can. Ont. Sup. Ct. J.).

298. *Id.* at para. 401.

299. *See supra* notes 234–36 and accompanying text.

actual, identifiable public harm such as street congestion or noise.[300]

These broad provisions were struck down because they regulated not only the public aspects of prostitution, but the private aspects as well. The court seemingly would have accepted a more narrowly drawn set of regulations, which focused in on the public nuisance aspects associated with prostitution.[301] The court felt, however, that these provisions constituted "a more serious impairment of the individual's freedom than the avowed legislative objective would warrant."[302]

Additionally, Canadian legislatures have recommended the further move toward drawing a public versus private distinction within the prostitution regulations.[303] It has been recommended that the legislature define where prostitution can occur, and that it would be best to allow it to occur in a private setting.[304] On the public end, prostitution could be regulated in the event that it causes an *actual* public nuisance, such as interfering with traffic or causing a disturbance in neighborhoods.[305]

Although it is a prevalent theory, in practice the public/private distinction has not gained the same momentum in the field of prostitution regulation as it has in other areas of the law in the United States.[306] In Canada, however, both courts and the legislature have used the public/private distinction to argue for reforms to prostitution regulation.

The public/private distinction that has been utilized in Canadian prostitution law should be utilized in U.S. prostitution law as well. Since U.S. law generally draws a highly important distinction between public and private acts, a position on the distinction in prostitution law similar to that in Canadian law would be logical.

C. Practical Implications

Beyond the theoretical basis of the constitutional right to privacy, the United States should move toward decriminalization for practical reasons. By fully criminalizing prostitution, the law effectively criminalizes sex workers themselves.[307] In contrast, regulation provides a means of state control, without automatically labeling sex workers as criminals in need of punishment.

The current Nevada model provides useful guidance for prostitution law reform in several ways. The fact that this model has been operating for over forty years shows that decriminalization should not "be dis-

300. Lowman, *supra* note 30, at 51.
301. *Bedford*, 2010 ONSC at para. 472–73.
302. *Id.* at para. 472 (internal citation omitted).
303. Lowman, *supra* note 30, at 37.
304. *Id.*
305. *Id.*
306. *E.g.*, Lawrence v. Texas, 539 U.S. 558, 576 (2003) (drawing a distinction between public and private sexual acts).
307. Brents & Hausbeck, *supra* note 12, at 307–09 ("Informal mandates and enforcement patterns . . . render prostitution invisible and at the same time criminaliz[e] the women who practice it.").

missed as a utopian ideal."[308] A workable model of regulation has, in fact, been in place.[309]

Further, it effectively addresses the public/private distinction as discussed above. The location of brothels is carefully zoned in order to prevent neighborhood disturbance.[310] Laws also prohibit the advertisement of brothels on public streets or highways in any county where prostitution is prohibited.[311]

Additionally, since counties can, to some extent, control the level of regulation, communities can respond to their own public needs through implementing more or less stringent regulation.[312] In fact, brothel owners often go out of their way to avoid disturbing the community, in order to maintain a positive business image.[313] This ability to operate as a legitimate business has very positive implications. Brothel owners are less stigmatized within their communities, and community members are more likely to agree that prostitutes should be entitled to work.[314]

Second, there are practical health benefits for sex workers involved in the regulation model.[315] Under a criminalization regime, sex workers rarely have reliable access to health care.[316] The results can be devastating, considering prostitution carries a very high risk of sexually transmitted infections (STIs).[317]

Under a regulation model, however, sexual health can be closely controlled. Sex workers applying to work at brothels must be tested for all STIs before being permitted to work.[318] Further, in-house physicians give sex workers STI testing every month, or in many cases once a week.[319] If a sex worker tests positive, she is not permitted to work until the STI has been cured. If she tests positive for HIV, the state will no longer permit her to be licensed as a sex worker.[320]

Since the testing program has been implemented, no licensed prosti-

308. WEITZER, *supra* note 44, at 61 ("The Rhode Island and Nevada cases show that versions of the two-track policy *have been in effect* in contemporary America—for . . . 40 years in Nevada. Thus, the policy cannot be dismissed as a utopian idea.").

309. Daria Snadowsky, *The Best Little Whorehouse is Not in Texas: How Nevada's Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 NEV. L.J. 217, 222–25 (2005) (discussing the prior history and current state of regime in Nevada).

310. Brents & Hausbeck, *supra* note 12, at 313.

311. *Id.*

312. *Id.* at 327.

313. *Id.*

314. *Id.*

315. *See, e.g.*, Rodgers, *supra* note 8, at 13–14.

316. Tracy M. Clements, *Prostitution and the American Health Care System: Denying Access to a Group of Women in Need*, 11 BERKELEY WOMEN'S L.J. 49, 66–71 (1996).

317. Brents & Hausbeck, *supra* note 12, at 320–21.

318. *Id.* at 313–14, 320 ("Regulating the spread of STDs among prostitutes and 'john' populations and only allowing brothels free of any 'health hazards' to continue operation are powerful rhetorical devices that are regularly invoked by officials who support the brothel system.").

319. *Id.* at 314.

320. *Id.*

tute working in a Nevada brothel has contracted HIV.[321] One study found that out of 5000 reported cases of gonorrhea in a given year in Nevada, only nine were reported in licensed brothels.[322] The health and well-being of sex workers is greater in the more prevalent criminalization regime.

Additionally, there is evidence that a regulation regime may be more effective at preventing violence toward women than a criminalization regime. Violence against sex workers is one of the most pervasive issues within prostitution.[323] A regulation regime could prevent violence against sex workers in several different ways.

First, regulation would shift the focus of law enforcement. Instead of imposing criminal sanctions on sex workers, law enforcement officials could focus efforts on preventing violence toward prostitutes.[324] This shift would also encourage more prostitutes to report assaults, without the fear of being subject to criminal penalties.

Second, evidence shows that violence and assault are simply less prevalent in regulated brothels than in unregulated street prostitution.[325] In street prostitution, sex workers are out in public, where they are often vulnerable to assaults or muggings.[326] Brothels, however, allow sex workers to screen clients. Further, there is no evidence that these clients generally harbor a proclivity towards physical violence.[327] Indeed, studies show that regulated brothel sex workers experience far fewer physical assaults—one study shows that seventy-eight percent of indoor sex workers in Britain had never experienced an attack, and yet another shows that seventy-seven percent of indoor sex workers in Belgium had never experienced an assault.[328]

Finally, regulation prevents violence by creating a safer atmosphere. Unregulated street prostitutes often have no resources to prevent violence. They are generally exposed on the streets, and pimps do little to provide protection, considering the prostitute has no legal recourse.[329] In contrast, regulated brothels are required to provide a safe environment.[330] This includes various protections such as client screening and bodyguards.[331]

Such practical considerations are important because they show that the constitutional right to privacy can in fact be used for decriminaliza-

321. *Id.* at 321.
322. *Id.*
323. *See, e.g.*, Rodgers, *supra* note 8, at 2–4.
324. WEITZER, *supra* note 44, at 57.
325. *Id.* at 26–27.
326. *Id.* at 19.
327. *Id.* at 30–31.
328. *Id.* at 26.
329. *See id.* at 18–19.
330. *Id.* at 25–27.
331. *Id.*

tion, without leading to negative secondary consequences.[332] This shows that the constitutional analysis is not only theoretically sound, but also practically viable.

Further, these practical implications are an important piece of the constitutional right to privacy analysis. As discussed above, the government can overcome a fundamental right to privacy if it has a compelling interest.[333] One of the major governmental justifications used for criminalization is curbing "secondary effects," for example, the prevention of disease.[334] These practical studies show, however, that regulation more effectively prevents disease and curbs violence toward women.[335] Since the government's contentions regarding secondary effects are simply untrue in practice, the government should be unable to use the secondary effects argument to overcome the fundamental right to privacy.

V. CONCLUSION

The constitutional right to privacy is a cornerstone of both the U.S. Constitution and the Canadian Charter of Rights and Freedoms. In practice, however, this important provision is characterized by an ambiguity that often leaves its application up for interpretation.[336] This ambiguity helps explain the divergence between the application of the right to privacy in the United States and Canada. While constitutional right to privacy arguments have largely been rejected in the United States, such arguments have been a vehicle for reducing regulations within Canada, both through judicial and legislative action.[337]

Prostitution is completely criminalized in virtually all of the United States, through both state and federal law. Right-to-privacy arguments were utilized for decades against prostitution criminalization in the United States. Recently in the United States, the right to privacy was extended to private, consensual, sexual conduct through *Lawrence v. Texas*.[338] The *Lawrence* decision seemed to leave the door open for an extension of the right to privacy to prostitution. Though the decision itself in dicta said it did not extend to prostitution,[339] such a broad reading of the right to privacy and Justice Kennedy's implications that the right to privacy

332. *See id.* at 61.

333. *See supra* Part II.B.1.

334. *See supra* Part III.A.1.b.

335. *See, e.g.*, Rodgers, *supra* note 8, at 10–14.

336. *See, e.g.*, David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 957 (1979) ("In particular, critics, both on and off the Supreme Court, have questioned the methodology of the Court in inferring an independent constitutional right to privacy that is not within the contours of the rights expressly guaranteed by the Constitution . . . .").

337. *See supra* Part III.B.2 (discussing the recent *Bedford* decision as well as legislative movements towards a more liberal regime).

338. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

339. *Id.*

could expand further left the debate open.[340]

In practice, however, lower courts have not read *Lawrence* as extending to prostitution. These courts take a narrow view of the decision, reading it as explicitly extending only to the criminalization of homosexual sodomy. Courts also tend to follow the textual hook that the decision does not extend to prostitution, despite that fact that the portion is mere dicta.[341]

Unlike the United States, Canada does not completely criminalize prostitution.[342] The industry is heavily regulated by the state. In recent decades, there has been a movement toward less state regulation. Some of these most successful arguments have been found through the right to privacy. Privacy arguments in Canada have been found in the right to security of person under the Canadian Charter of Rights and Freedoms.[343] The right to security of person has recently been interpreted as conferring a right to bodily privacy; such a right entails the right to control one's own body. In contrast to the United States, the argument that the right to security of person extends to prostitution has found support within the courts—notably, in the *Bedford* decision, and potentially in the forthcoming *Kiselbach* decision.[344]

The United States, in comparison to Canada, has not seen the same expansion of the right to privacy in the area of prostitution law. Although the right to privacy in the United States has been expanding in other fields in recent decades, the same cannot be said for prostitution laws. The United States should follow the current trend of using the right to privacy to invalidated regulations in Canada for three main reasons.

First, by following international constitutional trends, the United States could better align its own constitutional right to privacy with human rights norms in other Western democracies and reform a body of antiquated law.[345] Second, the Canadian expansion of the right to privacy is largely centered on a public/private dichotomy; such a dichotomy also exists in the United States.[346] Finally, practical considerations of the health and welfare of sex workers are best served by a move towards a regulation regime.[347]

The law is meant to both serve public interest and comply with constitutional liberties. As it stands, the current criminalization regime in the United States does neither. Though many challenges can be made,

340. Garcia, *supra* note 24, at 161.

341. *See supra* Part III.A.2 (discussing how *People v. Williams* and *State v. Romano* rejected an extension of *Lawrence*).

342. *See supra* Part II.A.2.

343. *See supra* Part III.B.2.

344. *See supra* Part III.B.2.

345. *See supra* Part IV.A.

346. *See supra* Part IV.B.

347. *See supra* Part IV.C.

the constitutional right to privacy is among the most appropriate. Ultimately, the United States should follow Canada's lead in using the right to privacy and bodily autonomy to move towards a more liberal model of regulation.