

# Prostitution, Constitution: Why Sex Work Prohibitions Violate Property Rights Guarantees

James J. Bernstein

## Abstract

*With the small exception of a few counties in Nevada, prostitution is illegal in the United States. Advocates in favor of legal sex work have brought challenges to these nearly one-hundred and fifty year old statutes - but to no avail: recently, the Ninth Circuit Court of Appeals upheld a California law which outlawed prostitution. Proponents in this case argued that, as an extension of Lawrence v. Texas, individuals have a Constitutional right to privacy in their bedroom. This right extends from the Fourteenth Amendment's Due Process Clause and its guarantees of "life, liberty, and property." However, these arguments may have overlooked an essential piece to the Clause that may have furthered their case - namely, the property rights portion of this Amendment. To both political theorists and jurists, one's body has been long seen as one's property - and, accordingly, to strip someone of the right to bodily autonomy is to strip someone of his or her property. It stands to reason, then, that prostitution prohibitions are, in essence, a violation of one's constitutional right to do with one's body as one sees fit. This does not mean, of course, that regulatory mechanisms cannot be put in place to ensure the safety of all participants - to the contrary, like other rights, it may be subject to regulations by the State. Regardless, our laws with respect to sex work in the United States are but another "morals legislation" which the Supreme Court must strike down as a fundamental violation of our citizen's constitutional rights.*

## I. Introduction:

In virtually every state in our nearly three-hundred years young country, you cannot practice the world's oldest profession.<sup>1</sup> Indeed, despite a repeal of sodomy laws and other kinds of "morals legislation," sex work is explicitly outlawed around the country save for a few counties in Nevada.<sup>2</sup> Strident challenges to these statutes have proved futile: courts have been reluctant to overturn these state laws.<sup>3</sup> Recently, challenges to California's prostitution ban have cited the Fourteenth Amendment-derived right to privacy: what business is it of the state what goes on between consenting adults?<sup>4</sup> Nevertheless, despite this ostensibly related precedent, the Ninth Circuit Court of Appeals found that California's law does not violate the Fourteenth Amendment.<sup>5</sup> The proponents of this strand of the argument have cited *Lawrence v. Texas*, which struck down anti-sodomy laws to ground their discussion: as Justice Anthony Kennedy wrote for the majority, "if the right to privacy means anything, it protects what consenting adults do in their bedrooms."<sup>6</sup> Admittedly, it is hard not to sympathize with these arguments - and, in fact, I do. But there is another, yet unexplored avenue, to these prohibitions which may further the case against outlawing prostitution: the property right guarantees of the Constitution through the very same Due Process Clause. Historically, the body has fallen within this category: private property does not just refer to, say, land but one's physical being as well (according to both political theory and law).<sup>7</sup> And, it then stands to reason that what one does with one's body,

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<sup>1</sup> See Olivea Myers, *Sex for Sale: The Implications of Lawrence and Windsor On Prostitution in the United States*, 5 Tennessee Journal of Race, Gender, & Social Justice 1 at 94

<sup>2</sup> See *id.*

<sup>3</sup> See *ESP v. Gascon*, 880 F. 3rd 450 (9th Cir. 2018)

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *Lawrence v. Texas*, 539 US 558 (2003)

<sup>7</sup> See Anita Bernstein, *The Common Law Inside the Female Body*, 22 (2018); see John Stuart Mill, *On Liberty* 8 (2002) [1859]; see John Locke, *Second Treatise of Government* (C.B. Macpherson ed., 1980) [1690]

given that is part of the Due Process clause by extension (like the right to privacy), is also of no business to the government.

Now, I surely recognize that there is something rather unique about prostitution when contrasted with other forms of property. Opponents to legal sex work cite the potential spread of disease, which is rightly a concern for many.<sup>8</sup> But the state - as it regulates the sale and trade of homes, for example - can also regulate the prostitution world just the same.<sup>9</sup> Or, as with other similar - but necessarily different - Fourteenth Amendment arguments, whatever activities consenting adults engage in, like marriage, may need state regulatory mechanisms.<sup>10</sup> But the prostitution-as-a-matter-of-liberty arguments fail to capture the transactional element of sex work. In short, then, legal prostitution cannot perfectly fall into a “liberty” conversation - in some ways, marginal state intervention is not only a tangential feature of this equation, it may be an essential component as it relates specifically to one’s property rights.

To this end, the arguments in favor of overturning these archaic bans have been, largely, misguided: the recent challenge to California’s prostitution prohibition cited that individuals have essential “liberties” derived from *Lawrence*.<sup>11</sup> However, this case specifically did not deal with prostitution<sup>12</sup> - and, what’s more, the right of individuals to engage in private, intimate ways does not follow, perfectly, the same logic calling for legal sex work. Challenges to these laws have cited the Due Process Clause’s right to “liberty” - yet the right of individuals to engage in sexual acts in exchange for financial payment, it seems to me, is much more a matter of one’s agency to sell their property.

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<sup>8</sup> See Erwin Chemerinsky, “Why Laws Against Prostitution Are Unconstitutional,” SACRAMENTO BEE, October 26, 2017

<sup>9</sup> See *id.*

<sup>10</sup> See “Marriage,” Legal Information Institute, <https://www.law.cornell.edu/wex/marriage>

<sup>11</sup> See *supra* note 6

<sup>12</sup> See *supra* note 6

Naturally, it may follow, is a question of whether this is even right. Or, put another way, whether it is *morally* right for individuals to be employed as sex workers. *Lawrence* but especially *Obergefell v. Hodges*<sup>13</sup> answers this question, in part: the Supreme Court has largely rejected claims to uphold legislation which proscribes morals for people.<sup>14</sup> Thus, one's desire to ensure that individuals cannot sell their property in the name of unshared principals is not just a simple inconsistency but appears to be, given recent decisions, unconstitutional.

In turn, this piece will first explore the historical origins of the private property guarantees of the Constitution. Thereafter, we will discuss where the guarantees are manifest in the Constitution and, from a limited trove, challenges to the extent of these guarantees. From there, I will analyze the case of *Lawrence v. Texas* and how it rightly did not answer the question of legal prostitution - but arguments easily derive from its principal findings and arguments. Lastly, I will consider the larger trend that courts - especially the Supreme Court - have displayed in overturning "moral legislation."

## **II. The Body as Private Property:**

There is a historical basis for extending the property rights guarantees to citizens. The inclusion of property rights within the Constitution comes, in part, from those like John Locke.<sup>15</sup> In his *Second Treatise of Government*, Locke outlined that individuals are endowed with the essential and foundational rights to "lives, liberties, and estates, which [Locke calls] by the general name *property*."<sup>16</sup> In this instance, one may surmise, Locke referred to land; however, this view would fail to encapsulate the multiplicity of meanings of "property" for Locke. Indeed, Locke goes further to say that everyone "has a Property in [his or her] own person" and that

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<sup>13</sup> See *Obergefell v. Hodges*, 576 U.S. 644(2015)

<sup>14</sup> See *Lawrence*, *supra* note 6 (J. Scalia, dissenting);

<sup>15</sup> See Locke, *supra* note 7

<sup>16</sup> See *id.* at

“man” is both “master of himself and proprietor of his own person.”<sup>17</sup> In this way, property, for Locke, does not just refer to “traditional” understandings of property – say, land – but one’s own self, a body, as well. And, more importantly, “nobody else except [oneself] has a right in this property [one] holds”: the right to one’s body is one’s own alone.<sup>18</sup>

Locke notably also had a profound influence on the Constitution’s Framers. Thomas Jefferson, for one, borrowed heavily from Locke in his drafting of the Declaration of Independence (“life, liberty, and *the pursuit of happiness*”).<sup>19</sup> But James Madison, the oft-called architect of the Constitution, called upon Locke too, writing that every person, “is said to have a right to [one’s] property.”<sup>20</sup> Jefferson and Madison’s use of Locke should not be overlooked: taken as they meant to those that ratified these amendments, the right to one’s body as a function of his or her property rights follows from Locke’s conception of the right. In other words, even taking the most restrained interpretation of these amendments highlights the essential incorporation of the body as one’s own - and no other person or entity’s - natural property.

But there are exceptions to this rule as outlined by John Stuart Mill. In his seminal work, *On Liberty*, Mill stated that a human has dominion “over [him or herself], over [his or her] body and mind”<sup>21</sup> but further dictated that this notion applies only to those “in the maturity of their faculties.”<sup>22</sup> Children, then, do not have the same rights as adults given that they are “still in a state to require being taken care of by others” and, thus, “must be protected against their own actions as well as against external injury.”<sup>23</sup> This is an especially important point to outline

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<sup>17</sup> *See id.* at

<sup>18</sup> *See* Bernstein, *supra* note 7

<sup>19</sup> *See supra* note 16

<sup>20</sup> *See id.*

<sup>21</sup> *See* Mill, *supra* note 7

<sup>22</sup> *See id.*

<sup>23</sup> *See id.*

before exploring the rights of sex workers as a function of their bodily rights: this conversation applies specifically and exclusively to legal adults.

### **III. What Does the Constitution Say About Private Property?:**

The property right guarantees in our Constitution derive principally from two amendments, the Fifth and Fourteenth. Though challenges have arisen as to what constitutes the Fourteenth Amendment's right to "liberty" (discussed at length throughout this piece), few cases have explored the nature of the property rights guarantees in either of these amendments.

For instance, in the Fifth Amendment, the Constitution dictates through the Takings Clause that "private property [cannot] be taken for public use without just compensation."<sup>24</sup> When faced with interpreting this portion of the amendment, the Supreme Court has required compensation in some cases but it is still mostly unclear as to the degree of protection this clause establishes.<sup>25</sup> In *Kelo v. City of New London*, for example, the Court ruled that, when the city of New London, Connecticut condemned Ms. Kelo's property using eminent domain to give to a private developer, it did not violate the Takings Clause despite seemingly "[brushing] aside the 'public use' restraint on the power of government."<sup>26</sup> In conflict with this ruling, perhaps, is the case from approximately two decades earlier, *Loretto v. Teleprompter Manhattan CATV Corp.*, in which the Supreme Court held in that "any interference with property that could be characterized as physical invasion by government was a compensable taking."<sup>27</sup> These two cases highlight the disparate interpretations of the Taking Clause; however the undergirding theme in either of these respective legal challenges is one in which "property" is worthy of government protection - or even protection from government. Moreover, while neither *Loretto* nor *Kelo* dealt

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<sup>24</sup> See U.S. Const. amend. V

<sup>25</sup> See Roger Pilon, *Property Rights and the Constitution*, Cato Institute, <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/property-rights-constitution#related-content>

<sup>26</sup> See *Kelo v. City of New London*, 545 US 469 (2005)

<sup>27</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); see Bernstein, *supra* note 7 at 41

with one's body as a matter of property, both cases also underscore the relationship between property and compensation.

Additionally, as mentioned, other private property guarantees fall within the latter of these two amendments, the Fourteenth Amendment.<sup>28</sup> The Due Process Clause stipulates that one cannot be deprived of "life, liberty, or property without due process of law."<sup>29</sup> Thus, the Constitution guarantees one's right to all three - with the exception that one can equally have any of these revoked. In some cases, notably *Goldberg v. Kelly*, the Supreme Court has sought to outline what constitutes property.<sup>30</sup> As it relates to *Goldberg*, the Court ruled that "welfare benefits" amount to property.<sup>31</sup> From there, courts have evaluated depriving someone of property by assessing "the nature of the property right, the adequacy of the procedure compared to other procedures, and the burdens that other procedures would impose on the state."<sup>32</sup>

Nevertheless, despite these cases, there have been few property rights challenged in many courts. This is not grounds to understate the importance of including this right in the Constitution, though. To the contrary, including one's property as central to one's basic rights in these amendments underscores the importance of property to the Framers and later political figures. What's more, as it relates to the debate around legal sex work, this may be to the advocate's advantage: the Supreme Court has yet to appropriately outline the full extent of property rights and, in tandem with the fact that the Court would not have to grapple with overturning precedent, it would now have an opportunity to do so.

#### **IV. Beyond "Liberty":**

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<sup>28</sup> See U.S. Const. amend. XIV

<sup>29</sup> See *id.*

<sup>30</sup> See *Goldberg v. Kelly*, 397 US 254 (1970)

<sup>31</sup> See *id.*

<sup>32</sup> See Nathan S. Chapman and Kenji Yoshino, *Interpretation: the Fourteenth Amendment*, National Constitution Center <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/701>

This, then, returns us in a way to the United States' sex work criminalization. Specifically, the challenges to state laws, like those in California, focused on the right to one's liberty stemming from the Due Process Clause.<sup>33</sup> The motivations for pursuing this course of action are grounded in trying to expand upon precedent. In *Lawrence v. Texas*, the Supreme Court struck down anti-sodomy laws in the United States.<sup>34</sup> As recently as 1960, every state in the country had an anti-sodomy law – but only 37 had repealed or blocked by state courts.<sup>35</sup> Moreover, there had been challenges to these questionable laws: notably, in *Bowers v. Hardwick*, the Supreme Court did not strike down these laws for, in the words of Justice White's majority opinion, previous privacy cases dealt with "family, marriage, or procreation" while this particular case dealt with "homosexual activity."<sup>36</sup>

However, in *Lawrence*, the Court was once again faced with a challenge to these archaic statutes – only to reach a different outcome.<sup>37</sup> When John Geddes Lawrence and Tyron Garner were allegedly caught engaged in a homosexual act, the state of Texas decided to charge them under their anti-sodomy laws.<sup>38</sup> Ultimately, five (of the six in the majority) ruled that these laws violated the Due Process Clause.<sup>39</sup> Anthony Kennedy, in the Court's majority opinion, wrote that "if the right to privacy" - derived from cases like *Griswold v. Connecticut*<sup>40</sup> and further supported by cases like *Loving v. Virginia*<sup>41</sup> - "means anything, it protects what consenting adults do in their bedrooms."<sup>42</sup> Justice Kennedy went on to state that "liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our [legal]

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<sup>33</sup> See *supra* note 3

<sup>34</sup> See *supra* note 6

<sup>35</sup> The Associated Press, *Supreme Court Strikes Down Texas Law Banning Sodomy*, N.Y. Times, June 26, 2003.

<sup>36</sup> *Bowers v. Hardwick*, 478 US 186 (1986)

<sup>37</sup> See *supra* note 6

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *Griswold v. Connecticut*, 381 US 479 (1965)

<sup>41</sup> See *Loving v. Virginia*, 388 US 1 (1967)

<sup>42</sup> See *supra* note 6



tradition the State is not omnipresent in the home...Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>43</sup> What’s more, the Court wrote as to why the *Bowers* decision was fundamentally wrong: as with the previously alluded to cases, the Constitution protects the right to privacy but also personal autonomy.<sup>44</sup> It should be noted, too, that *Lawrence* explicitly did not deal with prostitution.<sup>45</sup> Nonetheless, the principle finding of *Lawrence* stated that one can engage in private “intimate conduct” because the State does not belong “in the home.”

When sex work proponents challenged California’s prostitution prohibition at the appellate level in 2018 in light of this decision, the Ninth Circuit Court of Appeals did not sympathize with the *Lawrence*-driven argument.<sup>46</sup> In *ESP v. Gascon*, the Ninth Circuit affirmed the District Court’s judgement and sided with the state.<sup>47</sup> ESP, a collective of “erotic service providers” initially filed a complaint seeking “declaratory and injunctive relief”<sup>48</sup> against the district attorneys of different California counties and the Attorney General of California to invalidate Section 647(b) which, at its core, criminalized sex work, or makes “every person who...solicits or who agrees to engage in or who engages in any act of prostitution.”<sup>49</sup> As the opinion of the Ninth Circuit notes, “ESP’s primary argument is that *Lawrence*...prohibits a state from criminalizing prostitution engaged in by adults.”<sup>50</sup> Accordingly, ESP contended that “*Lawrence* guarantees...consenting adults a fundamental liberty interest to engage in private sexual activity” and “the State cannot wholly outlaw a commercial exchange related to the

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<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See supra* note 32

<sup>47</sup> *See id.*

<sup>48</sup> *See id.* At 6-7

<sup>49</sup> *See* California Penal Code §647(b) (2015)

<sup>50</sup> *See supra* note 32 at 10

exercise of such a liberty interest.”<sup>51</sup> Moreover, ESP cited another case – *IDK, Inc. v Clark County*<sup>52</sup> – in which the Ninth Circuit upheld regulations regarding sex work but which ESP believed had since been invalidated because of *Lawrence*.<sup>53</sup>

Ultimately, the Ninth Circuit did not reconsider its previous case though and upheld the state’s law. Among their justifications, the Ninth Circuit panel cited the fact that *Lawrence* did not involve prostitution and “absent clearer language from the Court regarding the nature of the right *Lawrence* actually does protect...we cannot ruled that...[this] is no longer good law.”<sup>54</sup> In other words, ESP’s charge that precedent must be reconsidered overlooked a fundamental facet of the *Lawrence* decision – that is, the cases were, though superficially similar, quite distinct.

To that end, following the *Lawrence* decision, the Ninth Circuit’s finding appears justified: *Lawrence* dealt specifically with the *liberty* of individuals to engage in “intimate conduct” privately and expressly stated it did not involve prostitution cases.<sup>55</sup> However, sex work is not wholly a question of one’s liberty, per se: as Judge Consuelo Callahan asked during the Ninth Circuit’s oral arguments, “why should it be illegal to sell something that you can give away for free?”<sup>56</sup> Inadvertently, maybe, Judge Callahan highlighted a crucial distinction surrounding the argument in favor of a Constitutional right in favor of prostitution: this is about the sale and exchange of something. Perhaps, then, ESP’s second contention – that a State cannot outlaw a commercial exchange related to the exercise of *Lawrence*-derived “liberty”<sup>57</sup> – deserved more exploration and emphasis.

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<sup>51</sup> *See id.*

<sup>52</sup> *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1193 (9th Cir. 1998)

<sup>53</sup> *See supra* note 32 at 11

<sup>54</sup> *See id.*

<sup>55</sup> *See supra* note 6

<sup>56</sup> *See* Elizabeth Nolan Brown, *Federal Court Ponders Constitutionality of Prostitution Ban*, Reason.com, October 20, 2017

<sup>57</sup> *See supra* note 32 at 10

In short, the ability for one to engage in intimate, consensual activities in exchange for financial payment ultimately comes down to whether one has the ability to sell one's property. In *ESP*, the arguments followed the route drawn out on the *Lawrence* map: one clearly has the *liberty* to engage in private "intimate conduct" with whomever they consent to having it with, thus one should have the right to do so in exchange for money.<sup>58</sup> This avenue ended in a roadblock and an upholding of California's law.<sup>59</sup> However, in *Obergefell v. Hodges*, for example, - which codified a Constitutional right to marry for same-sex couples - the Supreme Court corroborated the fact that the activities of one's bedroom is not for the State to question.<sup>60</sup> So, while this type of reasoning has proven viable in some respects in other instances, it has failed to bear fruit.

This may be due to the fact that the fundamental question grounding one's right to engage in sexual acts for payment, it seems to me, is much more a matter of one's right to do with their property as one sees fit. As the Constitution makes clear, this right is inviolable without due process: one has the right to do whatever they want with one's body - equally one's property as already outlined - as a matter of right. Indeed, as attorney Louis Sirkin noted during arguments that *ESP* is, at its core, "not about sex trafficking, it's not about the abuse of women, and it's not about the abuse of minors. It is about consenting adults that *voluntary want to work in the sex for hire industry*"<sup>61</sup> (emphasis added). In other words, this is a voluntary, transactional engagement between consenting adults - not all that different than what came before it in *Bowers* or *Lawrence*, but necessarily distinct in so far as this (and cases like it) involve the prohibition of a commercial sale. It follows that this case is perhaps more apt for comparison to

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<sup>58</sup> See *supra* note 6; see *supra* note 32

<sup>59</sup> See *supra* note 32

<sup>60</sup> See *supra* note 13

<sup>61</sup> See Brown, *supra* note 42

voluntary transactions writ-large: it matters not what the particular industry is necessarily but, rather, the ability for one to participate in the marketplace.

To this specific end, too, the property argument in favor of prostitution also highlights the fact that restrictions, as a result of due process to be sure, are equally justified. One's right to be employed as a sex worker, then, is not immutable - to the contrary, one may, for various reasons, have this right stripped from them so long as it was subject to "due process of law."<sup>62</sup> But as a baseline stance, one starts with the right to protect and act with one's property as he or she sees fit: the State does not have a right to dictate decisions in this space on behalf of individuals as, again, humans are the "master of [themselves] and proprietor of [their] own person."<sup>63</sup>

#### **V. Recent Trends and a Hope for Change:**

Now, one may ask whether or not courts - especially the current composition of the United States Supreme Court - will be sympathetic with these arguments. As it relates specifically to prostitution, there are a dearth of cases; however, the Supreme Court has seen a recent trend of combatting so-called "moral legislation," like laws banning sodomy, same-sex marriage, and others.<sup>64</sup> Justice Antonin Scalia, for one, decried the holding of *Lawrence* in dissent, noting that "this [decision] effectively decrees the end of all moral legislation."<sup>65</sup> Scalia's dissent proved prescient: in the intervening decade-plus, the Supreme Court found that similar morally-driven state laws are unconstitutional.<sup>66</sup> Thus, just as it relates to the constitutional right to marry, to hone in whether the constitutionality of prostitution is "right," amounts to nothing less than assessing its moral character - and courts have shown that doing so is no longer the status quo.

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<sup>62</sup> See *supra* note 19

<sup>63</sup> See Mill, *supra* note 7

<sup>64</sup> See Myers, *supra* note 1 at 101

<sup>65</sup> See *supra* note 14

<sup>66</sup> See *Obergefell*, *supra* note 13

The “morality” against prostitution specifically derives from the Christian Church which “publically endorsed chastity as a virtue” and “romantic love was a response to the contractual nature of marriage during the Middle Ages due to the influence of the Christian Church.”<sup>67</sup> Presumably, these rules did not apply to the parabolic characters of Boccaccio or Chaucer, where priests and nuns violated these “virtues” regularly.<sup>68</sup> I don’t mention this to be glib; on the contrary, I mean to highlight the loose applications of this code as laws outlawing prostitution - along with banning same-sex marriage or the rights of couples to purchase contraception - derived in part from this moral system.

In turn, courts must ask themselves whether these prohibitions are a criminalization of personal actions stemming from an unshared and unequally applied moral doctrine determined by another party. As it relates to the question of legal sex work, then, is it for another party to determine what one does with his or her property based on these principals? I believe the answer is decidedly no. As with other cases of liberty, the State cannot be “omnipresent.”<sup>69</sup> In other words, the State cannot mandate how individuals behave beyond any kind of reasonable expectation. Does this mean that no restrictions may be put in place? Of course not: the State regulates the number of marital partners, for example, for a variety of reasons and prostitution should not be exempt from these kinds of regulatory mechanisms.<sup>70</sup> California argued in *ESP* that the state is “justified to prevent the spread of disease and combat trafficking.”<sup>71</sup> But, “if prostitution were legal, it could be regulated” in ways such as “required health check-ups [which protects] health for sellers and buyers.”<sup>72</sup> Trafficking, too, is a tremendous problem that the State

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<sup>67</sup> See *supra* note 48

<sup>68</sup> See Giovanni Boccaccio, *The Decameron* at 192 (3rd ed., 2003) [1353]; see Geoffrey Chaucer, *The Canterbury Tales* at 293 (5th ed., 2003) [1392]

<sup>69</sup> See *supra* note 6

<sup>70</sup> See Chemerinsky, *supra* note 8

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

has a vested interest in prohibiting.<sup>73</sup> In point of fact, though, “illegality actually makes it harder to deal with this problem because prostitution is driven underground.”<sup>74</sup> Thus, to borrow from Justice Louis Brandeis, in this context “sunlight [may be] the best disinfectant”<sup>75</sup>: if prostitution were legal, the present nefarious practices would be brought to the surface and could be regulated against. Simply put, then, should litigants ask courts whether the right to prostitution is a matter of one’s property rights, this does not prohibit seemingly strict mechanisms to fight against manipulative and dangerous practices. As a result, states can protect against the existing, darker sides of the industry without calling upon morals to ground their arguments. To reiterate, though, the question of whether one’s body is constitutionally his or hers is not subject to debate: the Constitution, though the Fifth and Fourteenth Amendment, guarantees that the individual alone is in charge from the outset.

## **VI. Conclusion:**

In sum, the recent challenges towards various state’s prostitution prohibitions are right in their aims: it is unconstitutional to legislate how individuals behave privately, especially around morals. However, where these arguments break down is at their foundation: simply, the right for individuals to be employed as sex workers is not a purely a matter of liberty. Rather, courts must assess whether prostitution is a matter of one’s property rights. As our Constitutional states clearly, one may not be “deprived of life, liberty, or property without due process of law.”<sup>76</sup> While one’s liberty may govern who one engages in intimate acts with in the privacy of one’s own home or who one marries, the right for an individual to engage in these same intimate acts in exchange for financial payments is much more a question of whether one has the right to sell

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<sup>73</sup> *See id.*

<sup>74</sup> *See id.*

<sup>75</sup> *See* Louis Brandeis, “What Publicity Can Do,” *Harper’s Weekly* (1913)

<sup>76</sup> *See supra* note 19

their property. The Framers of our Constitution were influenced by, among others, John Locke who made clear that one's body is one's property. Centuries later, John Stuart Mill echoed this point: human beings are endowed with the right to assert dominion over their body and property alone, it is not a question for the State to answer. In point of fact, actually, it is only a question for the State how to protect this right.<sup>77</sup> However, regulations around this issue are more than warranted and should be welcomed by proponents of legal prostitution for they seek to protect all participants. Thus, should another appeals court or even the Supreme Court be faced with a question with respect to the dubious prohibitions of prostitution, the arguments should focus on, and rightly affirm, the property rights guaranteed by the Constitution.

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<sup>77</sup> See Locke, *supra* note 7