MORE BANG FOR THE BUCK: "FREAKS" AND THE INTIMATE-SEX-FOR-MONEY LICENSE

I. INTRODUCTION

Laws can have draconian consequences. Some people cannot experience intimate sex because they are immutably and disturbingly disfigured, deformed, or disabled,[1] and they risk arrest and conviction if they pay for it

1. By definition, an as-applied constitutional challenge to a law, as opposed to a facial challenge, requires only a single party with a unique set of facts. *See* Marc E. Isserles, *Overcoming*

in their neighborhood.[2] Some of them are advanced in age, yet still virgins.[3] Unlike daters, in general, their lovemaking deprivation isn't due to pickiness, career choices, or pleasing their friends and families à la *West Side Story*. Dating is brutal enough,[4] and many of these rare individuals are communally shunned and pejoratively characterized as human oddities, frights, and freaks.[5] Societally inflicted sexual oppression can be the source of their deepest pain.[6]

Tweaking state prostitution laws to permit an equitable, as-applied constitutionally mandated commercial, intimate sex licensing scheme is a face-saving remedy for those who otherwise confront staggering, intimate sex search costs; such a remedy could give birth to the "sexual citizen."[7] Those born with moles over their entire body,[8] a parasitic twin,[9] twisted limbs, extra limbs or none at all (e.g., Thalidomide babies), cherubism,[10]

Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 AM. U. L. REV. 359, 360 (1998).

2. *See infra* pp. 494-95. Generally speaking, engaging in sexual activity as a business (or soliciting such activity) is illegal under prevailing state laws.

3. *See* MARK O'BRIEN WITH GILLIAN KENDALL, HOW I BECAME A HUMAN BEING 213 (2003). The late Mark O'Brien, who never moved his arms and legs after the age of six, was still a virgin at the age of thirty-seven. *See id.* at 19-20, 213. He eventually chose to work with a sex surrogate. *Id.* at 213-14. Sex surrogates adhere to professional guidelines, will only see a client for a finite number of sessions, are limited in number, and require referral by a therapist. Cory Silverberg, *Is It Legal to See a Sexual Surrogate in the United States?*, ABOUT RELATIONSHIPS, http://sexuality.about.com/od/sexualhealthqanda/a/Are-Sex-Surrogates-Legal-In-The-United-States.htm (last visited Aug. 19, 2016). Nor is it clear that professional sex surrogacy is legal. *See id.*

4. *See* Gabi Conti, *Why Real-Life Dating Is Just as Brutal as Online Dating*, THOUGHT CATALOG (Sept. 29, 2014), http://thoughtcatalog.com/gabi-conti/2014/09/why-real-life-dating-is-just-as-brutal-as-online-dating. By age fifty, "twenty two percent of [ ] women" have had "no sexual partner in the past year." ROBERT T. MICHAEL ET AL., SEX IN AMERICA 86 (Warner Books 1995).

5. *See* ROBERT BOGDAN, FREAK SHOW *passim* (paperback ed. 1990); MARC HARTZMAN, AMERICAN SIDESHOW *passim* (1st trade paperback ed. 2006).

6. *Cf.* Tobin Siebers, *A Sexual Culture for Disabled People*, *in* SEX AND DISABILITY 37, 38 (Robert McRuer & Anna Mollow eds., 2012) (quoting Anne Finger, *Forbidden Fruit*, NEW INTERNATIONALIST 233, July 1992, at 9).

7. *See id.* at 37 (quoting Jeffrey Weeks, *The Sexual Citizen*, THEORY, CULTURE, AND SOCIETY, Aug. 1998, at 38-39) (explaining that "attention to sexual identity gives birth to the 'sexual citizen.'").

8. This condition is known as congenital melanocytic nevus. *See What is a Large/Giant Congenital Melanocytic Nevus?*, NEVUS OUTREACH, http://www.nevus.org/what-is-a-large-cmn_id554.html (last visited May 9, 2016).

9. This condition is known as congenital Craniopagus parasiticus. *See* Caleb Compton, *10 People with Shocking and Extreme Deformities*, LISTVERSE (Mar. 26, 2013), http://listverse.com/2013/03/26/10-people-with-shocking-and-extreme-deformities.

10. Cherubism is "a rare genetic disorder that causes an over-growth of fibrous tissue in the face." *Cherubism and Me*, NHS CHOICES, http://www.nhs.uk/Livewell/facialdisfigurement/Pages/VictoriaWright.aspx (last visited May 9, 2016). It can make sufferers look like Buzz Lightyear. *Id.*

eyeballs pushed out of their sockets,[11] conjoined twins, the shockingly crippled, and horrifically facially disfigured are but a sample of those with egregiously unsettling, immutable characteristics that conceivably militate against achieving intimate sex, particularly in light of current state criminal schemes. They should consider petitioning the court for declaratory judgment and injunctive relief in order to ply and tender funds to open-minded, willing intimate sex partners.

This Note proposes to distill the essence of *Lawrence v. Texas* down to (and thus provide a remedy for) one extraordinary subset of people—those who are intimately celibate due to interposing state measures—and in so doing, it debunks several misconceptions. It goes without saying that to hold prostitution prohibitions as a given, instead of constitutional rights, is to have the tail wag the dog.[12] Nor does the law necessarily subscribe to the fears and taboos, which surround the mixing of intimacy and economic activity.[13] There exists a constitutionally "myster[ious]"[14] right to engage in intimate sex,[15] not casual sex,[16] nor necessarily holding-out-for-butterflies (matches-everything-on-my-checklist) sex.[17] Thus upon considering the nature and scope of this right, a decisive question emerges: does a particular state scheme force an individual to be intimately celibate (even if not totally celibate)?[18] An immutably disfiguring, deforming, or disabling condition can be so perturbing, whereby mind-boggling intimate sex search costs due, in part, to the limited, perceived social capital that such an individual wields,[19] give rise to the probability that commercial sexual activity is the remaining reasonable pathway to bring into being intimate sex.[20] Notwithstanding

11. This condition is known as Crouzon syndrome. *See Crouzon Syndrome*, NIH, https://ghr.nlm.nih.gov/condition/crouzon-syndrome (last visited May 3, 2016).

12. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

13. *See* VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 78 (2005). Jane Austen's character, Elizabeth Bennet, declared that she fell in love upon "my first seeing his beautiful grounds at Pemberley." *See* JANE AUSTEN, PRIDE AND PREJUDICE 217 (Millennium Publ'ns 2014) (1813). Judge Richard Posner posits that even "[m]arriage is a relationship of exchange that can be modeled in economic terms even if neither spouse's motives are . . . pecuniary at all." RICHARD A. POSNER, SEX AND REASON 112 (1st Harvard University Press paperback ed. 1994).

14. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

15. *See infra* p. 499.

16. *See infra* p. 499.

17. *See infra* pp. 508-09.

18. *See infra* p. 499. A "freak's" access to fetish (casual) sex or commercial, exhibitory pornographic sex has little applicability to our discussion. *See id.*

19. *See infra* pp. 503-04.

20. *See infra* pp. 501-02.

Lawrence's broad reasoning,[21] most lower courts are reticent to extend its holding beyond its same-sex sodomy facts.[22] Yet, a sui generis challenge to a state measure that compels intimacy celibacy, as applied to a unique set of facts, should not be precipitously brushed aside.

Part II of this Note focuses on some of the profound implications of extreme disfigurement, deformity, and disability and their concomitant psychological, existential, and sexual consequences. The watershed Supreme Court case *Lawrence* is unpacked and explicated, too, in search of lovemaking-deprived individuals' constitutional rights.[23] What arguably emerges is a constitutionally protected threshold privacy interest to not be penetratively, intimately celibate.

Part III casts these "freaks of nature"[24] as would-be intimate sex seeker plaintiffs for purposes of exploring how to vindicate "disabled [and deformed] sexuality"[25] via an as-applied pecuniary sex license. The analysis brings to bear threshold questions of law and fact, which drill deeper in search of much-needed, equitable solutions.

II. BACKGROUND

Society associates disfigurement, deformity, and disability with evil and imperfection. This ethos is profoundly manifest in the dating world. Sex is a fundamental, existential human need; prostitution statutes conceivably derogate from profoundly, disfigured, deformed, and disabled individuals' abilities to self-actualize. Whereas *Lawrence* may not quite stand for the broad proposition that engaging in sex, in general, is a protected liberty interest, it does, presumably, minimally protect an individual's right not to be intimately celibate.[26] Thus, *Lawrence* paves the way for the intimate-sex-for-money license as applied to appropriate individuals.

21. *See* Lawrence v. Texas, 539 U.S. 558 *passim* (2003).

22. John Tuskey, *What's a Lower Court to Do? Limiting Lawrence v. Texas and the Right to Sexual Autonomy*, 21 TOURO L. REV. 597, 663 (2005).

23. *See infra* pp. 495-98.

24. *See* BOGDAN, *supra* note 5, at 6 (enumerating a long list of demeaning and imprecise terms used to characterize those exhibited as freaks).

25. *See* SIEBERS, *supra* note 6, at 48 (explaining how "[d]isabled sexuality" affects the disabled). Tobin Siebers speaks of the anatomical and temporal qualities of disabled sex, whereas, this Note contemplates a fundamental, legal right not to be intimately celibate.

26. *See infra* p. 499.

A. Not Just Another Pretty Face

Humankind has long associated evil with disfigurement, deformity, and disability.[27] "Horror film 'monsters' are scarred, deformed . . . exceptionally large, exceptionally small . . . subnormal."[28] The beautiful, evil queen in *Snow White and the Seven Dwarfs* "had to be transformed into a wart-nosed hunchback."[29] "If they look bad, they are bad" is a formula to help the confused catch up on a movie plot.[30] The contemptuously scorned, human curiosity Joseph Carey Merrick was referred to as "The Great Freak of Nature—Half-a-Man and Half-an-Elephant"[31] (yet, the pejorative, "freak," tells us nothing about the person; it is a frame of mind, a social construct in which they find themselves).[32] In social interactions, "people stand a foot farther away from people who are disfigured,"[33] and "every social encounter is a risk, a dare."[34] For too many, there is no medical fix; for others, the financial cost is simply too high.[35]

"Freaks" generally start from a disadvantaged position upon dating[36] because in today's hot-or-not culture so much "hinge[s] on having good looks."[37] In an age of hotties, cuties, cougars, wolves, and MILFs, it comes as no surprise that at the Louvre, "all the visitors want[ ] their photographs taken with the statue of Venus . . . an ancient Greek beauty."[38] We have an "innate attraction to things symmetrical," which drives constant consumer demand to "fix even the slightest imperfections."[39] "In 2004, China crowned its first Miss Plastic Surgery."[40] As one scholar candidly put it, "[a]ppearance is a determinant of the acceptability of the person."[41] Judge Richard Posner

27. *See* BOGDAN, *supra* note 5, at vii.

28. *Id.*

29. *Id.*

30. *See id.*

31. MICHAEL HOWELL & PETER FORD, THE TRUE HISTORY OF THE ELEPHANT MAN 1 (Skyhorse Publ'g, Inc. 2010) (1980).

32. BOGDAN, *supra* note 5, at 3.

33. LAURA GREENWALD, HEROES WITH A THOUSAND FACES 4 (2007).

34. *Id.*

35. *Id.* at 6.

36. *Cf.* JAMES PARTRIDGE, CHANGING FACES: THE CHALLENGE OF FACIAL DISFIGUREMENT 115-16 (Changing Faces 4th ed. 2003) (1990).

37. *Id.* at 48.

38. GREENWALD, *supra* note 33, at 33.

39. *Id.* at 34. "[W]e tend to dislike unusual face shapes for fear that they mask a weird genetic mutation that we'd like to avoid passing on to our future offspring." HANNAH FRY, THE MATHEMATICS OF LOVE 12 (2015).

40. GREENWALD, *supra* note 33, at 34.

41. MICHAEL J. HUGHES, THE SOCIAL CONSEQUENCES OF FACIAL DISFIGUREMENT 17 (Ashgate Publ'g Ltd. 1998) (1991).

does not mince words: "[t]he more attractive someone is . . . the lower his costs of search for . . . partners will be."[42] Thus, the unattractive are more likely to patronize prostitutes.[43] Inescapably, an age-old ethos of associating abnormality and aberration with evil, imperfection, and unacceptability hugely impacts the sexuality of the profoundly disfigured, deformed and disabled, who are thus likely tempted by the underworld of illegal, commercial sex.

B. Maslowian Wasteland

Adding insult to injury, sexual fulfillment is no garden-variety need, but a fundamental human need.[44] The iconic psychologist Abraham Maslow, in his bold and innovative *A Theory of Human Motivation*, posits a seminal, existential question: "[i]t is quite true that man lives by bread alone—when there is no bread . . . [b]ut what happens to man's desires when there is plenty of bread."[45] His answer is simple and elegant: *"[a]t once other (and 'higher') needs emerge* . . . [a]nd when these in turn are satisfied, again new (and still 'higher') needs emerge and so on."[46] Human needs are thus nested within an unfolding hierarchy.[47] Maslow demonstrates that "[t]he organism is dominated and its behavior organized only by unsatisfied needs."[48] Surely, sexual activity must be of paramount importance to humans because it is the only need mentioned twice in Maslow's hierarchy: sex qua physiology,[49] and sex qua love and affection.[50]

Yet Judge Posner reminds us that "the United States criminalizes more sexual conduct than other developed countries do."[51] The world's oldest profession, prostitution,[52] is currently prohibited in all fifty states, except for

42. POSNER, *supra* note 13, at 122.

43. *Id.* ("We would therefore expect unattractive men to patronize prostitutes more than attractive men do . . . ."). According to Professor Erving Goffman, an implication of physical deformity is to be "unaccepted" and stigmatized as "not quite human." HUGHES, *supra* note 41, at 21.

44. *See* A. H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370 *passim* (1943).

45. *Id.* at 375.

46. *Id.*

47. *Id.* at 370, 375.

48. *Id.* at 375.

49. *Id.* at 372-73, 381. Maslow initially identifies sex as a starting-point physiological need (along with hunger). *Id.*

50. *Id.* at 380-81.

51. POSNER, *supra* note 13, at 78. Even if such laws are under-enforced, "they probably delay[] the emergence" of that particular sexual subculture. *See id.* at 81. Posner, in general, supports a "diminished role for government" in the area of sex laws. *Id.* at 441.

52. Jacqueline Motyl, Comment, *Trading Sex for College Tuition: How Sugar Daddy "Dating" Sites May Be Sugar Coating Prostitution*, 117 PENN ST. L. REV. 927, 934 (2013).

in several counties in Nevada.[53] Notwithstanding that "prostitution statutes vary from state to state, the Model Penal Code (MPC) defines prostitution," in a general sense, as "engag[ing] in sexual activity as a business,"[54] thereby prohibiting in one fell swoop an immense range of commercial, sex activities. Prostitution laws, in addition to being a relatively modern invention,[55] have also been accused of being liberty limiting, paternalistic, illogical, and morally based.[56]

Inexorably, these laws and the conceivably innumerable dating hardships encountered by many of the radically deformed, disfigured, or disabled conspire to create a Maslowian wasteland—a palpably, sexually deprived reality. In the end, masturbation cannot fulfill the need for love and intimacy, nor can platonic interactions satisfy the need for sex.[57] Yet all is not lost, because Maslow's dual sex needs likely find (under certain conditions) a safe harbor in *Lawrence*.

C. Lawrence *is No Quickie!*

In September 1998,[58] petitioners John Geddes Lawrence and Tyron Garner were engaged in consensual anal sex in Lawrence's Houston apartment when law enforcement lawfully entered the apartment and arrested them.[59] The act violated Texas' same-sex sodomy law.[60] The Supreme Court, in a pathmarking decision, held the Texas law to be unconstitutional because it deprived persons of liberty without due process of law.[61]

53. Dannia Altemimei, Note, *Prostitution and the Right to Privacy: A Comparative Analysis of Current Law in the United States and Canada*, 2013 U. ILL. L. REV. 625, 630 (2013). The plaintiff described in this Note does not necessarily live in those permitted areas in Nevada. More fundamentally, since the constitutional right to engage in intimate sex (and not casual sex) is implicated in plaintiff's claim, I see no reason why an appropriate individual seeking intimate sex while living in a permitted county could not, too, bring the herein described as-applied challenge. *See infra* Part III.

54. Motyl, *supra* note 52, at 935 (quoting MODEL PENAL CODE § 251.2(1)(a) (Proposed Official Draft 1962)). As of 2007, thirty-seven states have adopted some form of the MPC. *Model Penal Code (MPC)*, THE 'LECTRIC L. LIBR., http://www.lectlaw.com/mjl/cl014.htm (last visited Aug. 30, 2016).

55. *See* Altemimei, *supra* note 53, at 630.

56. Rosemarie Tong, *Prostitution*, *in* SEX, MORALITY, AND THE LAW 107, 108-12 (Lori Gruen & George E. Panichas eds., 1997).

57. These are straightforward, logical conclusions.

58. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 61 (2013).

59. Lawrence v. Texas, 539 U.S. 558, 562-63 (2003).

60. *Id.* at 563 (explaining that the prohibition of "deviate sexual intercourse with another individual of the same sex" includes anal sex).

61. *See id.* at 562, 578 ("Liberty presumes an autonomy of self that includes . . . certain intimate conduct . . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct.").

The decision is befuddling,[62] percolating with transcendent pronouncements of "[f]reedom extend[ing] beyond spatial bounds,"[63] and "[l]iberty presum[ing] an autonomy of self that includes . . . certain intimate conduct."[64] Justice Kennedy, writing for the majority, articulates à la *Star Trek*[65] a capacious, yet nebulous, right "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[66] More to the point, *Lawrence* elides the standard of judicial scrutiny applied,[67] ignores "analyz[ing] the interests of the government . . . nor makes any effort to imagine what legitimate purpose the statute might serve,"[68] and blurs any "distinction between equality and liberty."[69] Ironically, Lawrence and Garner "were never in a romantic or sexual relationship with each other, either before or after the sodomy arrests,"[70] and, finally—and quite remarkably—the Court did not "mention the relationship's status anywhere . . . in the opinion."[71]

Notwithstanding *Lawrence*'s mysterious ushering in of a mysterious right, it "is the leading case on all 'taboo' sexual topics."[72] *Lawrence*'s reach, not surprisingly, has yet to be fully probed,[73] and it is worth noting from the get-go that the Court in the well-known, but obscure, "what-*Lawrence*-isn't"[74] passage underscored that "[t]he present case does not involve . . .

62. *See* Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1578 (2004); Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1060 (2004) (arguing that Lawrence's decision is "opaque").

63. *Lawrence*, 539 U.S. at 562.

64. *Id.* Justice Kennedy similarly acknowledges a broad, yet undefined, "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 572.

65. Professor Jonathan M. Miller, a Constitutional Law professor at Southwestern Law School, affectionately refers to this mystery passage in this manner. Jonathan M. Miller, Professor of Law, Southwestern Law School, Constitutional Law II Lectures (2015).

66. *Lawrence*, 539 U.S. at 574 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

67. Lund & McGinnis, *supra* note 62, at 1578.

68. *Id.*

69. Richard D. Mohr, *The Shag-A-Delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 365, 368 (2004).

70. CARPENTER, *supra* note 58, at 45.

71. Tuskey, *supra* note 22, at 656.

72. Katie Rasfeld Terpstra, Comment, *Sexual Privacy in the Modern Era: Lowe v. Swanson*, 81 U. CIN. L. REV. 1127, 1138 (2013).

73. *See* Tuskey, *supra* note 22, at 652 (holding that Lawrence's progeny—consensual sadomasochism and bondage, prostitution, incest, and the sale of sex toys—are the stuff of hot debate, in part, due to Lawrence's "reliance on the mystery passage definition of due process liberty").

74. P. Landon Perkinson, *Sexual Privacy After Lawrence v. Texas*, 8 GEO. J. GENDER & L. 203, 212 (2007).

prostitution"[75] (an issue we shall, indeed, return to). But, what does emerge, conceptually (and valuably for purposes of our discussion), is that the Constitution, under certain conditions,[76] protects "sexuality . . . intimate conduct with another person" as part of "a personal bond that is more enduring;"[77] a rubric, which uncannily echoes Maslow's dual sex needs.[78] What precisely these conditions are is a scope-of-the-right question, which requires a rudimentary unpacking of *Lawrence*.

a. *Lawrence* Redux

The circuit courts fare no better at divining the *Lawrence* tealeaves being "sharply divided in their readings of *Lawrence*."[79] Perhaps, this is exacerbated, in part, by "underruling,"[80] or by allowing the "what-*Lawrence*-isn't"[81] dicta passage to "swallow[ ] its holding and spirit,"[82] thereby narrowing the scope of the right. Admittedly, sexual autonomy as an organizing principle should not extend to bestiality because it is likely not a "choice[ ] central to personal dignity."[83] But limiting *Lawrence* to same-sex sodomy is nonsensical given its broad reasoning and espousal of liberty as an unfolding dynamic.[84] More fundamentally, there exists other individuals and classes of people whose sexual plight mimics the conditions manifest in *Lawrence*.

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

76. *Id.* at 567 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice."); *id.* at 562 ("Liberty presumes an autonomy of self that includes . . . certain intimate conduct."); *id.* at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

77. *Id.* at 567. Even though John Lawrence and Tyron Garner "were not married, nor could they have married within the United States . . . the Court recognized their sexual union as entitled to constitutional protection." Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 807 (2006).

78. *See* Maslow, *supra* note 44, at 381.

79. Terpstra, *supra* note 72, at 1133.

80. Tuskey, *supra* note 22, at 602 (quoting Michael Stokes Paulsen, *Accusing Justice: Some Variation on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 82 (1989)). Underruling is when a lower court judge, in the name of upholding his or her oath to support the Constitution, refuses to follow a higher court's decision interpreting the Constitution. *Id.*

81. Perkinson, *supra* note 74, at 211.

82. *See* Belkys Garcia, Comment, *Reimagining the Right to Commercial Sex: The Impact of Lawrence v. Texas on Prostitution Statutes*, 9 N.Y. CITY L. REV. 161, 177-78 (2005).

83. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)); Tuskey, *supra* note 22, at 660.

84. *See* Marissa H.I. Luning, Comment, *Prostitution: Protected in Paradise?*, 30 U. HAW. L. REV. 193, 206 (2007); Terpstra, *supra* note 72, at 1134-35. In fact, *Lawrence* expressly condemned any attempt to frame the issue in terms of a particular sex act. *Lawrence*, 539 U.S. at 567.

Whereas, unquestionably, much turns on whether the scope of the sex right is broad or narrow, no matter what, *Lawrence's* progeny—"taboo" sex challenges—face a gauntlet of unpredictable hurdles due to *Lawrence's* aforementioned level of judicial review opacity,[85] "[f]ear of a slippery slope,"[86] and society's "emerging awareness" not yet encompassing the would-be challenged *right* (yet another scope issue).[87] The touchstone in unpacking *Lawrence*, however, in all likelihood is rooted in a *Lawrence* redux—identifying a plaintiff (or class) à la John Lawrence who is compelled to be intimately celibate due to an interposing state measure.[88] In other words, *Lawrence* becomes far less mysterious (and thus a would-be challenger finding refuge in its holding stands on much firmer ground) when viewed through the lens of *what it must minimally stand for rather than what it might maximally embrace*.

Lawrence's right's ceiling may be currently unknowable (the right to engage in incest, polygamy, consensual sadomasochism, etc.). But its floor—the right not to be intimately celibate—is, arguably, clear and comprehensible. Applying such a naked truth methodology to the plight of the shockingly disabled, deformed, and disfigured, brings us one step closer to assuaging their conceivable condition of intimate sex deprivation, via the court sanctioned intimate-sex-for-money license.

III. THE INTIMATE-SEX-FOR-MONEY LICENSE

A. Fundamental Right

Some choices "are so fundamental and central to human liberty that they are protected as part of a right to privacy under the Due Process Clause . . . the government may constitutionally restrict these decisions only if it has *more* than an ordinary run-of-the-mill governmental purpose."[89] *Lawrence's* liberty right to engage in private and intimate, sexual conduct is arguably

85. *See* Lund & McGinnis, *supra* note 62. *Compare* Muth v. Frank, 412 F.3d 808, 817-18 (7th Cir. 2005) ("Lawrence . . . did not apply strict scrutiny in reviewing the sodomy statute at issue."), *with* Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1252-54 (11th Cir. 2004) (Barkett, J., dissenting) (holding that *Lawrence* recognized a fundamental, substantive due process right to sexual liberty), *and* Witt v. Dep't of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008) (holding that *Lawrence* utilized an intermediate scrutiny balancing analysis).

86. Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 337 (2004).

87. *See Lawrence*, 539 U.S. at 572.

88. *See infra* Part III.

89. Lofton v. Sec'y of the Dep't. of Children and Family Servs., 377 F.3d 1275, 1304 (11th Cir. 2004) (Barkett, J., dissenting).

fundamental.[90] Thus, four questions immediately emerge: What is the nature and scope of the fundamental right? Is the constitutional right substantially infringed? Is there a compelling justification for the government's infringement of that right? Is the government's means necessary (sufficiently related to their purpose)?[91] Each of these questions will now be carefully considered in light of the intimate-sex-for-money license remedy.

a. What is the Fundamental Right?

Lawrence celebrates a sex in service to intimacy paradigm[92] as a "protected liberty interest."[93] What is intimate sex? Justice Kennedy's "romantic rubric" only gives refuge to sex "when it creates, solidifies or deepens an emotional bond between two individuals."[94] Intimate sex creates the "possibility"[95] of a "we" instead of a "you and me,"[96] and the term is, thus, a misnomer in the sense that no palpable, close, and personal relationship need be present at the get-go.[97] Penetrative sex, more than any other act, serves as a catalyst for the "promot[ion] . . . emotional intimacy."[98] Penetrative sex is, thus, potentially lovemaking. Intimate association is the objective of *Lawrence*'s intimate sex and, once achieved, represents a sea change in that it provides for the knowing of a whole person.[99]

90. *Id*. at 1304-07; Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*,, 15 COLUM. J. GENDER & L. 355, 387-89 (2006); McDonnell, *supra* note 86, at 346-47; David D. Meyer, *Gonzalez v. Carhart and the Hazards of Muddled Scrutiny*, 17 J.L. & POL'Y 57, 77 (2008); Perkinson, *supra* note 74, at 206; Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1917 (2004). Professor Tribe notes that there is no need to search for the magic words "fundamental" in the Court's analysis in light of "passage after passage," which invoke the same point. *Id.*

91. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 828-31 (5th ed. 2015).

92. *See* Lawrence, 539 U.S. at 567 ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 825 (2010).

93. Cook v. Gates, 528 F.3d. 42, 53, 56 (1st Cir. 2008).

94. Rosenbury & Rothman, *supra* note 92, at 825-27.

95. *Id.* at 827.

96. *Id*. at 826 (quoting Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 (1980)).

97. *Id*. at 827.

98. *Id.* at 824.

99. *See* Karst, *supra* note 96, at 634. Karst wrote the abovementioned article before *Lawrence* was decided and speaks of the already accomplished state of intimate association typically manifest in sexually, loving relationships. *Id.* at 624.

Make no mistake. *Lawrence* is a metamorphic holding; imagine what life would be like without it. Professor J. Kelly Strader compellingly contends that if sodomy laws were allowed to persist, gay people would be "confined to a life of celibacy."[100] A prescient attorney precociously noted before *Lawrence* that "[l]aws that force such undertakings on individuals may properly be called 'totalitarian,' and the right to privacy exists to protect against them."[101] The ability to make constitutionally protected decisions about sex "is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy."[102] Forcing any man or woman to choose between celibacy and prison might even run afoul of the Eighth Amendment by imposing on him or her cruel and unusual punishment.[103]

Notwithstanding the brouhaha surrounding the nature and scope of *Lawrence*'s right, it is a relatively feckless due process right, indeed, if it merely prohibits sodomy laws, but tolerates government enforced intimacy celibacy everywhere else.[104] When intimacy celibacy is at stake, "the degree of intrusion into the petitioners' private sexual life caused by the statute"[105] is colossal. With, presumably, an untangled scope of *Lawrence's* interest now in hand—in the sense that the right not to be penetratively,[106] intimately celibate is not a ceiling, but arguably an unassailable and sacrosanct floor—we are, at last, ready to explore how the tendering of funds will enable many "freaks" to finally bid farewell to their sexual shackles.

i. Tender Funds

The immutably and disturbingly disfigured or disabled intimate sex seeker's as-applied petition for declaratory judgment and injunctive relief is strikingly sui generis. Plaintiff, preliminarily, will claim that plaintiff's constitutional rights are being violated and seek a temporary injunction. This will allow plaintiff (payor) to solicit a list of on-the-dating-market payees (whom our payor desires to be intimate with in exchange for funds) without

100. J. Kelly Strader, *Lawrence's Criminal Law*, 16 BERKELEY J. CRIM. L. 41, 77 (2011).

101. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 802 (1989).

102. Bowers v. Hardwick, 478 U.S. 186, 202 n.2 (1986) (Blackmun, J., dissenting).

103. *Id.*; Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 465 (2012).

104. *See* Antonio M. Haynes, *The Bestiality Proscription: In Search of a Rationale*, 21 ANIMAL L. 121, 144 n.130 (2014).

105. *See* Cook v. Gates, 528 F.3d. 42, 56 (1st Cir. 2008).

106. Lawrence overturned a Texas Statute that prohibited "[d]eviate sexual intercourse," which included "any contact between any part of the genitals of one person and the mouth or anus of another person" of the same sex. Lawrence v. Texas, 539 U.S. 558, 563 (2003). Obviously, the Court felt compelled under the Constitution to allow all forms of sexual penetration in order to allow for the creation of potentially enduring bonds.

any interference from the state. Plaintiff will then proffer this list to the court and seek a declaration that plaintiff possesses a constitutional right to engage in intimate sex with these payees for funds as part of a comprehensive licensing scheme to be supervised by a court appointed administrator. Plaintiff ultimately seeks a permanent injunction precluding the state from interfering with the licensing scheme.

Plaintiff carries the burden of proof on the nature and scope of the constitutional right.[107] Plaintiff, thus, will claim that *Lawrence* minimally must stand for the proposition that a state measure may never block the remaining reasonable pathway to intimate sex—which, in this case, is the payor-payee intimate sex arrangement—for otherwise, that right is barren.[108] Plaintiff[109] carries the burden, too, on whether the state is, indeed, the proximate cause of the significant infringement of plaintiff's right,[110] and thus will need to demonstrate that after exhausting any and all reasonable dating modalities plaintiff continues to remain intimately celibate. *Simply put, but for state prostitution laws, plaintiff would not be intimately celibate.*

Plaintiff has run out of viable options due to a perturbing, immutable trait. State law proscribes the remaining reasonable choice of tendering funds as part of a private, lovemaking, licensing schema. The court will be hard-pressed, without question, to flippantly suggest that a three-legged man change dating coaches or cities,[111] or that Rudy Santos, the Octoman,[112] change his wingman. Nor could a court, in good faith, propose that a two-headed woman[113] consider speed dating. Would justice be served by any

107. E-mail from Erwin Chemerinsky, Dean of the University of California, Irvine School of Law, to author (Nov. 22, 2015, 7:20 AM) (on file with author).

108. *See* Karouni v. Gonzales, 399 F.3d 1163, 1173 (9th Cir. 2005) (holding that "living a life of celibacy" or "facing persecution" is a completely unacceptable Hobson's choice); *supra* p. 500.

109. Payor, plaintiff, and intimate sex seeker are interchangeable terms here that refer to the same party.

110. E-mail from Erwin Chemerinsky, Dean of the University of California, Irvine School of Law, to author (Oct. 5, 2015, 10:46 AM) (on file with author).

111. Judge Richard Posner wrote about (before *Lawrence* was decided) a hypothetical village with a single homosexual; he is apt to move to a city in order to practice his lifestyle because homosexual urbanization (the migration of homosexuals to cities) lowers the costs for homosexuals collectively in their search for suitable partners. Thus, although, our intimate sex seeker, as part of his or her burden of proof, needs to exhaust any and all reasonable dating modalities before seeking a declaratory judgment, at some point, due to his or her sui generis deformity, the costs of perpetually, conventionally searching in the name of love become unreasonable. *See* POSNER, *supra* note 13, at 126.

112. Rudy, one of the most deformed people in the world, has an additional pair of arms and legs attached to his abdomen and pelvis. Sathish, *6 Most Deformed People in the World*, TOP SIX LIST (May 30, 2013), http://www.topsixlist.com/2013/05/30/top-6-people-with-shocking-and-extreme-deformities.

113. *Id.*

stretch of the imagination in finding fault in the proteus syndrome sufferer (whose legs may measure one meter in circumference)[114] because he or she isn't peacocking enough? Johnny Eck, the Living Half-Boy, was born without a lower body and walked on his hands;[115] should a similarly situated plaintiff today be refused a court remedy because of the ubiquity of pick-up communities? Put simply, it takes no Einstein to realize that doing the same thing over and over again yields the same results (and is precisely what happens, and will likely continue to happen if we ignore the Elephant Man or Woman in the room).[116]

After establishing the nature and scope of the right and that the state prostitution scheme is the sole proximate cause of his or her liberty deprivation,[117] the burden shifts, at which point, the state measure is presumptively unconstitutional.[118] Moreover, our claimant, as mentioned, comes to court with a groundbreaking remedy in hand. Without getting too far ahead of ourselves, he or she does not seek the company of a conventional prostitute (which is the stuff of casual sex and, thus, does not implicate *Lawrence*) or sex surrogate (a scheme involving professionals, which typically features limited visits,[119] thereby incapable, too, of providing for any enduring bonds). Nor is plaintiff necessarily wealthy enough given his or her grievous predicament to attract any gold diggers in possession of reciprocal romantic "feelings," and, thus, legally fornicate with (without, thus, any need for court solutions).[120] Plaintiff knows, however, that money creates possibilities,[121] and possesses sufficient funds, with the court's blessing, to woo appropriate and desirable payees to *perform* under his or her one-of-a-kind intimate licensing scheme.[122]

Plaintiff seeks to purchase opportunities to engage in intimate acts with appropriate payees (who have submitted to criminal and civil background checks) because such activity represents plaintiff's most efficient use of his

114. *Id.*

115. HARTZMAN, *supra* note 5, at 146.

116. *See* Dcarmack, *Lost Forever. . .*, DCARMAK (Jan 2, 2016), https://dcarmack.com/2016/01/02/lost-forever.

117. This may all sound simple enough—the state scheme precludes the financial license described herein—but as described below, there is much more involved. *See infra* Part III.A.b.

118. The state must now demonstrate that its measure protects compelling interests via narrowly tailored means. *See infra* pp. 515-16; CHEMERINSKY, *supra* note 91, at 831.

119. *See* Silverberg, *supra* note 3.

120. *See infra* pp. 510-12.

121. *See* Jeff Haden, *7 Things Remarkably Happy People Do Often*, INC. (Mar. 24, 2014), http://www.inc.com/jeff-haden/7-things-remarkably-happy-people-do-more.html.

122. Sweden, for example, considers sex a matter of voluntary contract like the U.S. housing market. *See* POSNER, *supra* note 13, at 167.

or her limited, perceived social capital. Payor's administrator-vetted list of on-the-dating-market payees forms the basis for a licensing scheme featuring constitutional coitus for funds on a per visitation basis. Simply put, Plaintiff avails himself or herself of a remarkable truth; sexual activity between appropriate parties is potentially metamorphic and, thus, by very nature, intimate per *Lawrence*.

Existentially speaking, one cannot "kn[o]w" another romantically unless they fornicate with them.[123] The intimate sex seeker, courtesy of *Lawrence*'s likely legacy of the threshold right to not be intimately celibate, and desirous of finally putting his or her best foot forward, in a sense, is already in possession of carnal knowledge—he or she *knows* that each act of sex can transform the at arm's length and skin deep into the close at hand and deep seated, and that accompanying funds is the price plaintiff must pay to more than play. If money talks, imagine what a brew of cash and coitus can do for an open-minded payee who, in general, is also looking to find Mr. or Ms. Right. Many wooers flash money in order to, ultimately, purchase romance; the intimate sex seeker, under the protection of a court approved license, efficaciously wields his or her limited, perceived social capital by purchasing tactile, sexual rendezvous in the name of "your hand touching mine, this is how galaxies collide."[124]

Touch and intimacy are uniquely powerful.[125] Touch is the first sense to develop in babies and the primary means of providing love.[126] The briefest touch can elicit strong, extreme reactions.[127] Physical intimacy is nothing short of intoxicating.[128] Each payor-payee rendezvous can be drenched with meaning, connection, and ecstasy.

Plaintiff understandably has had no luck at conventional dating—roses, restaurants, and a revolving door of first dates simply do not work. Fast-tracking commercial sex here with legitimately on-the-market-for-love payees, however, and thus dispensing with *been there and done that* unworkable solutions, presents plaintiff with a fighting chance to level the playing field by effectually channeling the magic of sex in the privacy of

123. *Genesis* 4:1.

124. Sanober Khan, *Quotes About Touching*, GOODREADS, https://www.goodreads.com/quotes/tag/touching (last visited Sept. 4, 2016).

125. Aaron Ben-Zeév, *Why a Lover's Touch Is So Powerful*, PSYCHOLOGY TODAY (May 18, 2014), https://www.psychologytoday.com/blog/in-the-name-love/201405/why-lovers-touch-is-so-powerful.

126. *Id.*

127. *Id.*

128. Kristin Luce, *The Unique Power of Deeply Intimate Sex*, ELEPHANT JOURNAL (Mar. 29, 2014), http://www.elephantjournal.com/2014/03/the-unique-power-of-deeply-intimate-sex-kristin-luce/.

plaintiff's home (away from the leering, judgmental gaze of society) into plaintiff's love quest. Normative daters can and do release a largesse of social facets incrementally and still *stay in the game*; the intimate sex seeker, however, must front load his or her highly potent, but limited social capital in order to avoid *game over*. This prudent utilization of circumscribed, perceived social capital places plaintiff on daters' radars. This scheme is to bet on: if you "kn[o]w" me, you will know me.

Plaintiff thus seeks declaratory judgment and injunctive relief against the relevant state prostitution scheme as applied to his or her intimate-sex-for-money arrangement. Plaintiff does not seek to abolish prostitution laws, but desires requisite fundamental-right breathing room,[129] because he or she must date in reverse. Whereas daters at large can afford to save the best for last, the intimate sex seller stands and falls by first impressions. To make a long story short, *but for the tendering of funds for intimate sex in accord with a licensing rubric, plaintiff will be precluded from experiencing intimate sex*.

1. Love for Sale

But does not the notion of commercial sex militate against the idea of intimate sex, destroying the very right striven for?[130] Fundamentally, "[e]conomic exchange is not foreign to intimate relations," for it actually "produces intimacy" and is "a source of freedom and equality for intimates."[131] Moreover, the intimate sex seeker's licensing scheme possesses critical, built-in safety features. Plaintiff will choose payees based on chemistry and compatibility, not casualness. The administrator will perform thorough criminal and civil background checks and preliminarily

129. It is important to distinguish between a temporary and permanent injunction. A temporary injunction is interlocutory and "designed to last only until the end of the suit," REMEDIES: CASES, PRACTICAL PROBLEMS AND EXERCISES 4 (Russell L. Weaver, David F. Partlett, Michael B. Kelly & W. Jonathan Cardi eds., 4th ed. 2004), whereas a permanent injunction is "designed to last forever (absent . . . dissolution.)." *Id.* Plaintiff might want to demonstrate to the court that potential payees exist and thus, preliminarily, seeks permission to begin soliciting payees immediately before his or her rights are finally determined. But a preliminary injunction, which enjoins the state from preventing these necessary overtures, will only issue if plaintiff proves, among, other things, irreparable harm in the absence of this preliminary injunction.

130. *See* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1836 (2007) (positing that *Lawrence* distinguishes prostitution from constitutionally protected intimate sex because prostitution lacks any potential for an enduring bond between the participants).

131. Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 493 (2005). Meretricious contracts between nonmarital partners in which sexual acts are inseparably part of the consideration cannot be enforced. Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976). There is, however, arguably, nothing illicit or unlawful in payor's proffering money here for constitutionally condoned coitus.

will insist on STD testing. Thus, it is unlikely that prostitutes and other sex professionals would participate.

Additionally, the intimate rendezvous are designed to take place within the privacy of the home, "the place where most intimate associations are centered."[132] Payees are thus more predisposed to freely make up their own minds without embracing certain conventional, social viewpoints.[133] Despite payees' lack of any romantic feelings for payor *at this time*,[134] their putative receptivity to the possibility of a change of heart as evidenced by the well-known transformative powers of sex, the sub rosa nature of the encounters, the fact that payees are on the market for love and subject to the administrator's regulations, means that payees cannot be characterized as a "prostitutes" if the as-applied challenge is successful.[135]

In general, "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem."[136] The Court prefers "to enjoin only the unconstitutional applications of a statute while leaving other applications in force."[137] "It is axiomatic that a 'statute may be invalid as applied to one state of facts and yet valid as applied to another.'"[138] Thus "the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'"[139] The intimate sex seeker will thus plead for relief "just and proper,"[140] per the carefully crafted intimate-sex-for-money arrangement. Provided that the court is mindful not to nullify more of a statute than is necessary, nor to rewrite it or circumvent legislative intent, it may issue a declaratory judgment featuring an injunction prohibiting the state's prostitution law's unconstitutional application.[141]

132. Karst, *supra* note 96, at 634.

133. *Id.*

134. If payee already possesses feelings for payor and participates in conventional social interactions, the court-sanctioned, money-for-sex license is completely unnecessary notwithstanding any and all exchanges of funds. *See infra* pp. 510-12.

135. This is because the state scheme would likely be deemed unconstitutional as applied to the entire licensing scheme—any and all acts of commercial sex between this particular payor and any administrator-approved payees. In the end, it is not the labels that matter here, but whether a given act is deemed illegal, or not, under the circumstances. Whether the administrator would require payees to be single raises fascinating questions about intimacy and adultery, which are beyond the scope of this Note.

136. Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 328 (2006).

137. *Id.* at 328-29.

138. *Id.* at 329 (quoting Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921)).

139. *Id.* (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985)).

140. *Id.* at 331.

141. *See id.* at 329-31.

ii. In Search of Two-Way Streets

Does *Lawrence*'s blueprint for potential sexual intimacy demand bilateralism? What if payees, in the manner of typical prostitutes, foresee never developing any romantic feelings for the cash- and sex-providing payor? Can unilateral sexual intimacy really exist? The intimate sex seeker stands on much firmer ground when his or her choice is rooted in payees who are on the market for love and thus receptive to coitus's metamorphic capacity for foreseeably tugging at the heartstrings.[142] Sexual intimacy likely requires a plausible mutuality,[143] consistent with, as one expert put it, 'see[ing] an entire picture . . . the candles, the wine, the dating."[144] *Lawrence*'s sex is no quickie,[145] but fornication becomes formal when redolent with the possibility of even casual dating.[146] Payees' authentic participation in the aforementioned pay to more than play dynamic arguably will satisfy *Lawrence's* bilateralism imperative. By nature, such an arrangement may lead to something more than meets the eye.[147]

*iii. The What-*Lawrence*-Isn't Passage*

What about *Lawrence's* passage that "[t]he present case does not involve . . . prostitution"?[148] The intimate sex seeker will argue that this "what-*Lawrence*-isn't"[149] paragraph is dictum and, thus, the Court never properly considered narrowing the scope of the right in the situation

142. Whereas normative sexual intimacy likely involves individuals with varying, respective levels of feelings, a basic mutuality is typically present, and even if not, in the absence of a commercial arrangement, no state laws are implicated. When economic exchanges are involved, however, it is critical to be on the lookout for the possibility of enduring feelings and normative, social interactions. While it remains true that many clients likely develop feelings for individual prostitutes, this in no way alters the fact that these "professionals" (who are not on the market for love) typically hold no reciprocal enduring feelings, nor ever will, and thus such a "relationship" remains generally illegal.

143. *See supra* notes 94-98 and accompanying text.

144. Anderson v. Morrow, 371 F.3d 1027, 1042 (9th Cir. 2004) (Berzon, J., concurring in part and dissenting in part) (quoting the prosecution's expert). It is important to note that we are not concerned here with payee's liberty interest because he or she is not the plaintiff. Payee's foreseeable openness to developing future romantic feelings, however, is critical upon examining the legitimacy of payor's constitutional right.

145. *See supra* pp. 495-97, 499.

146. The Court never demanded that Lawrence and Garner become or remain a couple. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

147. Payees' sense of foreseeability is thus indicia of payor's authentic pursuit of his or her liberty interest.

148. *Lawrence*, 539 U.S. at 578.

149. *See* Perkinson, *supra* note 74, at 212.

contemplated by this Note.[150] Moreover, even if the passage is part of the holding, intimating an arguably compelling reason to distinguish sodomy from prostitution, the commercial scheme suggested here commences in the sacrosanct halls of justice, a far cry from street walkers. This sui generis licensing scheme shares very little in common with what one court has described as the "'public . . . sexual conduct'"[151] aspects of prostitution. Nonetheless, the government will contend that the "what-*Lawrence*-isn't" passage unequivocally "limit[s] the scope" of the right,[152] perhaps due to a long, rooted history of the states generally punishing any and all acts of commercial sex,[153] or will contend, in the alternative, that in the absence of *Lawrence* squarely addressing prostitution, state legislatures possess the unfettered right to proscribe it.[154]

But when push comes to shove, *Lawrence*'s manifesto of "[l]iberty presum[ing] an autonomy of . . . intima[cy]," [155] is hollow, indeed, if it fails to mitigate the plight of a bottlenecked, penetratively, intimately celibate human who urgently demands a game-changing remedy. If the right to not be intimately celibate represents the threshold, due process take-away from *Lawrence*, which, arguably, it does, then why would the Court be more interested in the fact of celibacy of one group and not another? Moreover, even if commercial sex *was* inimical to *Lawrence*'s weltanschauung at the moment the ruling was handed down, *Lawrence* itself proffered a future escape hatch by conceding that in private "matters pertaining to sex" liberty interests are malleable and capable of reflecting "an emerging awareness,"[156] thereby setting the stage for a twenty-first century and state-of-the-art, limited and exceptional, commercial remedy (for those who face what many would call "a fate worse than death") all in the name of "'due process of law,' 'liberty' . . . were purposely left to gather meaning from experience."[157] From a policy perspective, in the absence of a commercial remedy, a drastically, disabled, deformed, and disfigured plaintiff might, irrespective of the current state of the law, offer money for illegal sex given the Hobson's

150. *See* Garcia, *supra* note 82; Strader, *supra* note 100, at 58.

151. State v. Thomas, 891 So. 2d 1233, 1237 (La. 2005) (quoting State v. Baxley, 633 So. 2d 142, 145 (La. 1994)).

152. Lofton v. Sec'y of the Dep't of Children and Family Servs., 377 F.3d 1275, 1285 (11th Cir. 2004).

153. *See* Cook v. Gates, 528 F.3d. 42, 53-54 (1st Cir. 2008).

154. *See Lofton*, 377 F.3d at 1285.

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

156. *Id.* at 572.

157. Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

choice he or she now faces.[158] Furthermore, the intimate sex licensing scheme fosters a sense of community because plaintiff, with the court's blessing, engages in foreseeably far-reaching and fulfilling, funded reciprocal fornication rather than remain a social pariah and shattered victim of an often brutal, mating system.

b. Is the Right Substantially Infringed?

If the nature and scope of the right is fundamental, the state measure must substantially burden the aforementioned right to intimate sex before the state need justify its actions.[159] A logical corollary of this is that plaintiff may never accuse the state of causing a substantial burden if any quantum of this burden is due to plaintiff's own choice making.[160] Plaintiff carries the burden on this issue too.[161]

A substantial burden test must look at the right holder's alternative means.[162] The perturbingly, disabled, deformed, and disfigured plaintiffs considered in this Note differ radically from daters at large.[163] The general population can reasonably modify their preemptive dating criteria[164]—their lifestyles, habits, or levels of dating-pickiness—in the hope of better results,[165] and upon doing so, more often than not succeed. They, thus, have a hand in choosing to be intimately celibate or not due to a proverbial laundry list of must-haves, deal-breakers, and no-nos.[166] After all, let's not conflate a right to intimate sex with a right to matches-everything-on-my-checklist (holding-out-for-butterflies) sex. Choices concerning how busy to be, or who to befriend,[167] or which dating coach or technique to use, shut or open the door on intimate lovemaking opportunities, and, thus, determine the presence

158. As discussed above, casual sex is arguably devoid of any possibility of longstanding intimacy, and, thus, remains generally illegal when purchased.

159. *See* CHEMERINSKY, *supra* note 91, at 830.

160. *See* Chemerinsky E-mail, *supra* note 110.

161. *See* Chemerinsky E-mail, *supra* note 107.

162. *See infra* note 195.

163. Whether little persons or those who suffer from Down syndrome can prevail as plaintiffs per the reasoning of this Note largely depends upon the unavailability of suitable partners in the absence of the intimate-sex-for-money license remedy. Why would anyone go to the trouble of paying for intimate sex and petition a court to do so if they could experience intimate sex legally and for free?

164. *See* FRY, *supra* note 39, at 8.

165. Obviously, commensurate with any individual's inability to make these and other changes is his or her chance to petition the court successfully.

166. *See* FRY, *supra* note 39, at 8.

167. Hannah Fry writes about a close friend who dumped someone simply because he "wore black shoes with blue jeans to a date," and a "chum who insists that he cannot date a woman who uses exclamation marks!" *Id.*

or absence of conditions of intimacy celibacy (there is no point in blaming the state for what really amounts to acts of self-sabotage).[168] Daters at large thus, by quarterbacking their own degree of intimacy celibacy, must first wage an, arguably, hopeless, uphill battle (before claiming any right to avail themselves of a licensing scheme) and prove to the court that the scope of *Lawrence*'s right is capacious enough to include not having to be celibate from particular, matches-every-thing-on-my-checklist individuals (thereby, demonstrating that the state remains the sole obstacle in their desire to tender funds for sex to the persons of their dreams).[169]

In contrast, the intimate sex seeker, as we speak, occupies the as-applied "high ground" because he or she does not conflate celibacy qua particular persons (holding-out-for-butterflies sex) with celibacy qua intimacy celibacy. Plaintiff, by choice, has not turned away any potential partners in whom sex could foreseeably lead to wine and candles. Plaintiff has also, by necessity, reasonably evolved to meet the innumerable challenges of plaintiff's dating world, has had zero success, and has a right to not be "consign[ed] . . . to dying alone."[170] If the intimate sex seeker, along the way, rejects or accepts the one-night stand—that which lacks a mutual foreseeability of "fireworks"—this refusal or acceptance never implicates fundamental rights, and thus in no way militates against the fact that plaintiff, in the end, is compelled to remain penetratively, intimately celibate. The profoundly and immutably, afflicted plaintiff's lovemaking search costs, after exhausting reasonable and viable options, have "approach[ed] infinity."[171] The tendering of funds in order to engage in reciprocal fornication with appropriate payees are the remaining, efficacious tools that plaintiff can, finally, bring to bear.

The in-the-market-for-love payor's remuneration jump-starts a constitutionally compliant coitus. Appropriate and open-minded payees become parties to a regulated, let's-see-how-it-goes dynamic, featuring a raw, penetrating, and up-close payor away from the judgmental gaze of society. In the end, it is the government alone, by failing to think equitably, which bears responsibility for plaintiff's perpetual state of unhappy endings.

168. *See, e.g.*, Seth Meyers, *The "Picky Problem" in Dating: How to Stop Sabotaging Your Love Life*, EH BLOG, http://www.eharmony.com/blog/the-picky-problem-in-dating-how-to-stop-sabotaging-your-love-life (last visited Aug. 15, 2016).

169. As explicated in this Note, they will be hard-pressed to prove such a maximal right exists and, thus, in the end, cannot carry their burden.

170. FRY, *supra* note 39, at 58.

171. POSNER, *supra* note 13, at 121.

i. Sugar Dating

But why can't a seriously disfigured, deformed, or disabled plaintiff avail himself or herself of the already-legal and ubiquitous, sugar daddy (or mommy) dating model? In the Sugar Culture, a "mutually beneficial relationship" is known as an "arrangement."[172] "An arrangement consists of . . . (1) a sugar daddy, (2) a sugar baby, and (3) an allowance. A sugar daddy is . . . [a] . . . wealthy individual who is willing to pay . . . in exchange for the company of a younger . . . cohort . . . a sugar baby is . . . seeking . . . support."[173]

One type of set up consists of the "exchange of sex for money without including any form of social companionship."[174] In such arrangements, an allowance is "given to her on a per meeting basis instead of a monthly basis, making the exchange of money more temporally proximate to the sexual act."[175] Under this model, they both "may be guilty of prostitution,"[176] because the sugar baby has likely engaged in sexual activity as a business (and the sugar daddy has engaged in solicitation of the same prohibition).[177] Even if the money is exchanged on a monthly basis, the transaction typically is still prohibited because it places the payee "on retainer for sexual services."[178]

Even if the visits between the intimate sex seeker and payees were not solely sexual, the licensing scheme would still be required. "[T]he visits could offer social companionship such as a dinner outing,"[179] but, in the absence of genuine romantic feelings, the companionship and sex are "solely for financial purposes," and the arrangement, once again, arguably remains prohibited.[180] Payees, by participating in the licensing scheme, are putatively open to the idea of discovering a diamond in the rough because they are on the market for love and are willing to engage for funds in an activity known for its metamorphic propensities. But as things stand now, this is primarily a business opportunity and, thus, arguably illegal in the absence of the as-applied *intimate-sex-for-money* remedy. Payees, as we speak, have no

172. Motyl, *supra* note 52, at 931.

173. *Id.* at 931-32.

174. *Id.* at 945.

175. *Id.*

176. *Id.*

177. *See* MODEL PENAL CODE §§ 5.02(1), 251.2(2) (AM. LAW. INST., Proposed Official Draft 1962).

178. Motyl, *supra* note 52, at 947.

179. *Id.*

180. *Cf. id.*

articulable feelings for, nor wish to date payor, nor do they necessarily want to be spotted hand-in-hand with payor in public.

If, however, payees develop romantic feelings for payor, their actions, notwithstanding the transfer of funds, suddenly become delightfully untethered from any prostitution proscriptions,[181] because a legal transformation has occurred. What began for payees as "I am acting out of financial motivations" (sex *for* money) has now become "I am permissibly engaging in sugar dating" (romantic sex *for* money—the sex is the result of real feelings; the funds simply play a part in why payees now are in possession of those feelings).[182]

The touchstone of the intimate sex seeker's game plan is to transmute cash-based coitus under the protection of injunction into, minimally, the ubiquitously, legal type of sugar baby dating model, and maximally, into something even more conventional and enduring. The licensing scheme should not be viewed as a Pandora's box, but as a potential panacea. Payor, who has historically squandered massive amounts of time, effort, and funds, is now matched with incentivized payees willing to take the next step. Payor is simply not wealthy enough given payor's condition to proffer sufficient funds to *instantly* create love. But payees are now parties to a sufficiently inebriating licensing rubric, whereby they can make informed decisions in regards to the incipiency of wine and candles as they experience an unleashed, up-close, unplugged, passionate, playful, and permeating payor. If at some point, the tendered funds, in whole or in part, create romantic feelings on payees' part, the relationship is likely deemed a legal form of sugar dating (without any need for a license) in that it mimics a traditional dating relationship. If payees develop feelings for payors without any needs for funds, the relationship is deemed conventional.

If, however, individual payees and payors never develop feelings within the license's circumscribed period of time, and conclusively preclude the possibility of an enduring bond, the license may not be renewed vis-à-vis those parties.[183] If payor, due to pickiness, turns down payees who are now in possession of real feelings for payor, payor's license must terminate altogether. This dialectical splitting of hairs may seem exhausting, but it ultimately grants the intimate sex seeker a remaining, reasonable, and

181. *See id.*

182. Payees in our scenario begin with no romantic feelings for payor, but they are broad-minded enough to foresee that possibility. If they ultimately develop those feelings, even if the money is part of the reason for possessing those feelings, they can theoretically keep insisting on being paid à la many other sugar daters in society.

183. This schema is no different than the one found in many states that have legalized medical marijuana in the sense that if a patient no longer experiences medical symptoms, there is no longer a bona fide need for a license.

available pathway to immediately cut to the chase. Ideally, these licensed sub rosa rendezvous can be nurtured, protected, and allowed to develop authentically, until they either terminate on their own due to a lack of interest, or are ready to *come out of the closet* qua more normative dating modalities.

Cannot payees dispense with the licensing arrangement and simply allege from the get-go that payees already *have the hots for* payor? That would be lying. The jarring nature of payor's disfigurement, deformity, or disability, is atypical, to say the least, even by sugar dating standards, and thus precludes any easy decision on payees' part. Payees' authenticity in general, however, is clearly underscored by their participation in the aforementioned court-sanctioned licensing scheme.

ii. Looking for Love in All the Right Places

But there is yet another elephant in the Elephant Man's room. Cannot he find an Elephant Woman? Isn't he being picky too? For starters, the Court in *Lawrence* never demanded that homosexuals embrace heteronormativity.[184] The Elephant Man, too, cannot be forced to feel things he does not feel. But if we are willing to acknowledge a degree of immutable, biological wiring, doesn't this blur the distinction between the Elephant Man and everybody else? After all, let's reframe the question: what if a dater, at large, concedes that *Lawrence*'s scope isn't broad enough to protect the right to not be penetratively celibate from a particular person (holding-out-for-butterflies sex), but claims, nonetheless, that he or she is not holding-out, but is authentically the victim of natural wiring for a particular person or set of persons (and thus needs a license, too)? Are not the Elephant Man and the dater who demands to be with a specific person either both picky or both legitimately biologically driven towards the object of their desire?

The simple answer is that, like so much in dating, it is all about the numbers. The analysis so far has deliberately culled those aspects of the intimate sex seeker's love quest that are reasonable and changeable from the immutable and unreasonable. An Elephant Man on the prowl faces an unthinkably merciless courtship asymmetry—there are likely so few people per capita within a reasonable target group, distance, and time period willing to engage in intimate sex with him, and who he is wired to have an interest in, despite any and all legitimate efforts on his part to self-promote. In the words of Judge Richard Posner, his search costs "may approach infinity"[185] because at some point, alas, the fat lady has sung, and the Elephant Man's

184. *See* Lawrence v. Texas, 539 U.S. 558, 603 (2003).

185. POSNER, *supra* note 13, at 121.

additional investment in time, funds, or in going the distance, all in the name of *maybe* becomes onerous, futile, and unreasonable.

In contrast, the intimate-sex-for-money license is a game-changer in that it is a *sure thing*. If the court allows it, he can immediately engage in intimate sex, which, by very nature, is always characterized as a *maybe* because of its capacity to *possibly* create enduring and emotional bonds. But, at least, the Elephant Man no longer faces two *maybes*: *maybe* he will one day find a partner (without the use of funds) to have intimate sex with, which *might* itself lead to emotional bonding. *Lawrence*, zealously mindful of the bottlenecking propensity of the first *maybe*, arguably sets it aside, and, thus assuages the Elephant Man's sexually deprived, existential plight.

Despite the perpetual rejections, the court, likely, will require before granting any license that the Elephant Man plod forward, play the field, and normatively create romantic possibilities by turning off numerous dating filters. But, sooner or later, we run into the danger of compelling the Elephant Man to *have a thing for* the Elephant Woman, an immutable no-no. Daters, at large, however, in truth face vastly different lovemaking ratios, and thus the court, as the finder of fact, should investigate any putative ratio asymmetries and be poised to unequivocally ferret out those plaintiffs who are wired to be desirous of more individuals, but insist on claiming otherwise.

But have we not put the cart before the horse? If sex is such a powerful tool, is it not capable of shaping and influencing any and all "immutable" wiring? Should not the intimate sex seeker, before turning to the Constitution, be compelled to accept any reasonable offer of intimate sex (even from the Elephant Lady he is so desperately trying to steer clear of) in the hope that performance alone will give rise to that powerfully transcendent and elusive aforementioned "we"?[186] Not if the "we"[187] is biologically unforeseeable. Sexual autonomy[188] implies the license "to define one's own concept of" sex,[189] an ideal utterly devoid of meaning if we fail to account for visceral hunches and gut feelings. As tempting as it may be to subject the Elephant Man to a taste of his own medicine, strong-arming sex to precipitate passion and pleasure vitiates notions of liberty, privacy, and autonomy.[190]

186. *Supra* note 96 and accompanying text.

187. *Id.*

188. *See Lawrence*, 539 U.S. at 562.

189. *Id.* at 574.

190. The lynchpin of payor's claim is that payees may in time overcome their *initial* sense of biological wiring, once sufficiently incentivized to engage in the magic of sexual activity with payor. But payees' constitutional rights are not before the court, and, thus, their sense of biological wiring is, to a certain degree, moot. They are never strong-armed into anything; they may join or refuse to join the licensing scheme and are also free to negotiate any per rendezvous price. Payor,

Lawrence's not-so-bizarre jurisprudence thus arguably articulates a need to consider the foreseeability of lovemaking[191] (which unquestionably begins with an examination of biological wiring) from opposing perspectives. On-the-market-for-love payees, whose right to intimate sex is not before the court for consideration, putatively may be deemed open to the possibility of overcoming their *initial* sense of biological wiring due to financial incentives and the metamorphic propensity of sex to allow for "know[ing]."[192] This vantage point guarantees that payor is in compliance with *Lawrence's* sex in service to intimacy paradigm. If payees come to possess authentic romantic feelings for payor, whether this is a result of funds or any sense of biological wiring is entirely moot.

Payor's foreseeability, on the other hand, is from the get-go largely (if not entirely) measured by pure, raw desire;[193] a bellwether for what a court (who now has to declare payor's rights) cannot stipulate—that payor give the cold-shoulder to any initial biological proclivities in the name of a *turn off*. In the end, payor, here, obviously is not soliciting participating payees who payor is not *turned on* by, and *Lawrence's* insistence on the wielding of a basic quantum of unfettered, sexual autonomy subsumes a right not to be steered towards lessons in rewiring.

Ultimately, those born with moles all over their body, a parasitic twin, or extra limbs or none at all, or with eyeballs pushed out of their sockets, present unique and multifarious dating matrices for a court's consideration. The consideration of the rightholder's alternative means, which lies at the heart of a substantial burden inquiry, not only requires judicial fact-finding, but also must be ever mindful of autonomy of choice. This autonomy ineluctably turns on the interplay of the immutable, foreseeable, and reasonable.

Should payor have to travel to those counties in Nevada where prostitution is legal?[194] The buyer of intimate sex does not seek casual sex.

however, akin to Lawrence and Garner, cannot be forced to ignore payor's sense of biological wiring.

191. Lovemaking here is meant in the sense of sex, which can *possibly* lead to bonding. *See supra* note 94 and accompanying text.

192. *Id.* at 840-41.

193. Payor, obviously, is in far less need here, of utilizing the magic of sexual contact in order to gain feelings for payees.

194. *See* Deborah C. England, *Prostitution in Nevada, Laws and Penalties*, CRIMINAL DEFENSE LAWYER, http://www.criminaldefenselawyer.com/resources/prostitution-pimping-and-pandering-laws-nevada.htm (last visited Mar. 18, 2016).

Moreover, having to travel to another state or county could significantly burden payor's access to a fundamental right.[195]

When contemplating whether a right is significantly burdened, it is worth noting that some burdens are direct while others are incidental.[196] An incidental burden may be a substantial one—"for example, a law requiring the concurrence of two doctors before any surgery is performed may not target abortion but does make obtaining an abortion extremely difficult in regions where doctors who perform abortions are scarce."[197] In contrast, "a direct burden may be insubstantial—for example, a one-penny tax on abortions but not other medical procedures."[198]

The government will argue that prostitution laws never target intimate sex per se, but target *all* sex for money. Thus, the state police power's primary purpose is not the frustration of the exercising of a fundamental, liberty right; the state measure only incidentally burdens the intimate sex seeker's purported liberty interest. This is likely a powerful argument. But, because the intimate sex seeker's incidental burden remains substantial nonetheless, "some form of heightened scrutiny" (perhaps even strict scrutiny) will still be required.[199]

c. Compelling?

The government carries the burden on whether its interests are compelling.[200] Prostitution laws are associated with preventing social ills such as disease, crime, and violence against women.[201] Preserving public health and safety are compelling state interests.[202]

195. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1235-36 (1996).

196. *Id.* at 1176.

197. *Id.* at 1221.

198. *Id.*

199. *See id.* at 1200, 1221, 1232-33.

200. Chemerinsky E-mail, *supra* note 107.

201. *See* Nicole A. Hough, Note, *Sodomy and Prostitution: Laws Protecting the "Fabric of Society,"* 3 PIERCE L. REV. 101, 109-10 (2004).

202. *See* Aaron K. Block, *When Money Is Tight, Is Strict Scrutiny Loose?: Cost Sensitivity as a Compelling Governmental Interest Under the Religious Land Use and Institutionalized Persons Act of 2000*, 14 TEX. J. C.L. & C.R. 237, 245 (2009); June Coleman, Comment, *Playing God or Playing Scientist: A Constitutional Analysis of State Laws Banning Embryological Procedures*, 27 PAC. L.J. 1331,1375 (1996); Stuart G. Parsell, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to Employment Division v. Smith*, 68 NOTRE DAME L. REV. 747, 760-61 (1993).

d. Are the State's Means Necessary?

Under strict scrutiny, the state carries the burden on whether the means they employ are "necessary."[203] "Narrow tailoring demands that the fit between the government's action and its asserted purpose be 'as perfect as practicable.'"[204] In all likelihood, the intimate sex seeker's licensing scheme assuages state fears by utilizing a proven model partly based on practices found in several counties in Nevada.[205] Firstly, the arrangement will demand regular STD monitoring and require the use of condoms.[206] Secondly, the parties will submit to criminal background checks and thus pimps, prostitutes, and other sex professionals will be "eliminate[ed]" from participation.[207] Thirdly, all rendezvous will take place (unless the parties decide otherwise) within the privacy of the home.[208] Finally, the agreement will not become a vehicle for exploitation, fraud, or coercion because payees will be subjected to civil background checks and the court-appointed administrator will wield substantial discretion. At the end of the day, the state's means *here* in combatting potential crime, disease, or exploitation are unnecessary. They are anything but "narrowly tailor[ed]."[209]

B. Intermediate Scrutiny

Because of the above-mentioned indirect burden here, the government may rightfully argue that they only need to satisfy intermediate scrutiny,[210] or alternatively, that *Lawrence*, anyway, was decided à la intermediate scrutiny.[211] Intermediate scrutiny, more than anything, is a balancing test,[212] which "requires the government to demonstrate that the law in question serves actual, important governmental objectives and is closely related to the achievement of those objectives."[213] "[U]nlike strict scrutiny or rationality

203. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 360 (2006).

204. *Id.* (quoting John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 933 n.85 (1983)).

205. *See* Hough, *supra* note 201, at 113.

206. *See id.* at 114-15.

207. *See id.* at 114.

208. *See* Karst, *supra* note 96, at 634.

209. *See* Siegel, *supra* note 203, at 360.

210. *See supra* pp. 58-59.

211. *See* Witt v. Dep't of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008); Cook v. Gates, 528 F.3d. 42, 56 (1st Cir. 2008); Anderson v. Morrow, 371 F.3d 1027, 1044 (9th Cir. 2004) (Berzon, J., concurring in part and dissenting in part).

212. *See Witt*, 527 F.3d at 819.

213. Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 317-18 (1998).

review, the tier of scrutiny that the Court decides to apply does not predetermine the outcome of the case; with intermediate scrutiny, sometimes the state wins, and sometimes it loses."[214]

Preliminarily and undeniably, if prostitution laws serve compelling state interests,[215] they certainly serve important government interests too. Furthermore, under the more forgiving tailoring of intermediate scrutiny, the state "need not show that it has used the least rights-restrictive means" upon establishing laws.[216] Nevertheless, given "the degree of intrusion into the petitioners' private sexual life caused by the statute,"[217] and the lack of any manifest, significant health, safety, or exploitative risks plaintiff's singular circumstances, the state's prostitution scheme, arguably, should still be found to be unconstitutional as applied.

C. Rational Basis Review

"[S]ubstantive due process requires, first, that every law must address in a relevant way a legitimate governmental purpose."[218] A law may not be "arbitrary and capricious," and it "must address a permissible state interest in a way that is rationally related to that interest."[219] If *Lawrence* "based its holding on rational-basis grounds,"[220] thus viewing sexual privacy not as a fundamental right,[221] but as a garden-variety socioeconomic right, then the constitutionality of the state prostitution scheme should simply be presumed.[222] This is hands-down the state's most persuasive argument.

But, notwithstanding *Lawrence*'s constitutional implications, it stands for criminal propositions, too.[223] *Lawrence*'s harm principal may require "clearly identifiable physical, psychological, or economic harm that the defendant has caused or threatened to another person."[224] Harm to society in

214. *Id* at 318.

215. *See generally supra* note 202.

216. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992).

217. Cook v. Gates, 528 F.3d. 42, 56 (1st Cir. 2008).

218. Lofton v. Sec'y of the Dept. of Children and Family Servs., 377 F.3d 1275, 1304 (11th Cir. 2004) (Anderson, J., dissenting).

219. *Id.*

220. *Id.* at 1288 (Majority opinion); People v. Williams, 811 N.E.2d. 1197, 1198-99 (Ill. App. Ct. 2004).

221. *Lofton*, 377 F.3d at 1290; *Williams*, 811 N.E.2d. at 1198..

222. *See* United States v. Carolene Products, 304 U.S. 144, 152 (1938).

223. *See* Strader, *supra* note 100, at 70.

224. *Id.*

the abstract will not cut it.[225] Payor and payees, as described, do not cause, nor are they the target of, any palpable or detectable harm.

IV. CONCLUSION

In conclusion, *Lawrence*'s right to sexual autonomy is relatively feckless and denuded of remedial substance if its scope fails to mitigate the plight of individuals who due to interposing state measures face à la Lawrence and Garner a state of penetrative, compelled intimacy celibacy because of unreasonable search costs that "approach infinity."[226] A drastically disfigured, deformed, or disabled person who is authentically, biologically attracted to another, and in possession of no reasonable, alternative dating pathway, should petition the court as an intimate sex seeker. A carefully crafted court-approved licensing scheme, which avails itself of the metamorphic propensity of sub rosa sexual rendezvous and financial incentives, arguably will foment enduring feelings between payor and on-the-market payees. This game-changing stratagem provides plaintiff with a fighting chance at breaking the lovemaking bottleneck by fast-tracking and front loading payor's limited, perceived social capital to potentially bring into being a more above ground "see[ing] [of] an entire picture . . . the candles, the wine, the dating."[227] Such a *more than meets the eye* remedy is constitutionally viable, equitable, face-saving, and furthers substantive and humane policy considerations.

*Aron Hier**

225. *Id.* at 75.

226. *See* POSNER *supra* note 13 and accompanying text.

227. *See* Anderson v. Morrow, 371 F.3d 1027, 1042 (9th Cir. 2004).

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