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## Can Condoms Be Compelling? Examining the State Interest in Confiscating Condoms from Suspected Sex Workers

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**CAN CONDOMS BE COMPELLING?  
EXAMINING THE STATE INTEREST IN  
CONFISCATING CONDOMS FROM SUSPECTED  
SEX WORKERS**

*Meghan Newcomer\**

*Confiscating condoms from suspected sex workers leaves them at risk for HIV/AIDS, other sexually transmitted diseases, and unwanted pregnancy. Yet, police officers in New York, Washington, D.C., and Los Angeles collect condoms from sex workers to use against them as evidence of prostitution. Sometimes, the condoms are taken solely for the purpose of harassment. These actions put sex workers at risk of contracting sexually transmitted diseases because they may continue to engage in sex work without using protection.*

*In the landmark case of Griswold v. Connecticut, the U.S. Supreme Court established a fundamental privacy right in the use and access of contraceptive devices. While this right has been examined in the context of married couples and individuals, it has not been applied to the confiscation of condoms, a contraceptive device, by police officers. This Note shows that by taking condoms from suspected sex workers, police officers and departments are actually violating sex workers' constitutional right to privacy, and, therefore, the practice must be abandoned.*

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#### INTRODUCTION

“The police have told me . . . don’t carry more than three condoms on you because we can arrest you.”<sup>1</sup> This statement was made to Human Rights Watch by Lola L., a sex worker in Los Angeles. Lola also conducts street outreach work and expressed concern about the condoms-as-evidence policy. In New York City, Washington, D.C., and Los Angeles, police officers confiscate condoms to use as evidence of prostitution against suspected sex workers.<sup>2</sup> Police officers are entitled to stop people they reasonably believe are engaged in criminal activity,<sup>3</sup> at which time they are permitted to conduct a limited search of the suspect when they believe their

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1. MEGAN MCLEMORE, HUMAN RIGHTS WATCH, SEX WORKERS AT RISK: CONDOMS AS EVIDENCE OF PROSTITUTION IN FOUR U.S. CITIES 49 (2012).

2. *See id.* at 1.

3. *Terry v. Ohio*, 392 U.S. 1 (1968).

safety is at risk.<sup>4</sup> However, police officers are not following these requirements when confiscating condoms.<sup>5</sup> These officers not only take condoms for the purpose of evidence, but sometimes simply to throw away.<sup>6</sup> Human rights organizations have criticized this policy as detrimental to the health of sex workers and likely to increase the spread of HIV/AIDS in cities that have previously experienced AIDS epidemics.<sup>7</sup> In fact, in each of the three cities discussed above, “millions of condoms are distributed by the public health department each year as part of highly visible HIV prevention campaigns.”<sup>8</sup> Despite these pressing health needs, in the United States, 52 percent of surveyed sex workers have chosen not to carry condoms because they fear confrontation with police officers for possessing them, and consequently these workers continue to engage in unsafe sex.<sup>9</sup>

The U.S. Supreme Court has long upheld a right to privacy that includes the right to access and use contraceptives.<sup>10</sup> In *Carey v. Population Services International*, the Court held that regulations imposing burdens on the right to contraception are only valid when they are necessary to achieve a compelling state interest.<sup>11</sup> Any claimed state interest must be narrowly tailored so as to infringe on the smallest possible portion of any fundamental right.<sup>12</sup> While the Court has struck down regulations interfering with contraceptive rights in a variety of contexts, it has not examined police officers’ widespread confiscation of alleged sex workers’ condoms.<sup>13</sup>

This Note argues that confiscating alleged sex workers’ condoms violates their constitutional right to privacy because prosecuting prostitution is not a sufficiently compelling state interest to permit police officers to interfere with the right to contraceptives. Part I of this Note discusses fundamental rights protected under the Supreme Court’s substantive due process doctrine, then details the experience of sex workers in New York, Washington, D.C., and Los Angeles, examining the frequency and purpose behind the taking and use of condoms as evidence by police officers. Part

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4. *Id.* at 24.

5. McLemore, *supra* note 1, at 1.

6. *See id.* at 39 (“[T]he cops harassed me and told me to throw my condoms in the garbage.”).

7. *Id.* at 34; *see also* ACACIA SHIELDS, OPEN SOCIETY FOUNDATIONS, CRIMINALIZING CONDOMS: HOW POLICING PRACTICES PUT SEX WORKERS AND HIV SERVICES AT RISK IN KENYA, NAMIBIA, RUSSIA, SOUTH AFRICA, THE UNITED STATES, AND ZIMBABWE (2012).

8. *See* McLEMORE, *supra* note 1, at 10.

9. *See* SHIELDS, *supra* note 7, at 4; *see also* Garima Malhotra, *Good Intentions, Bad Consequences: How Congress’s Efforts To Eradicate HIV/AIDS Stifle the Speech of Humanitarian Organizations*, 61 CATH. U. L. REV. 839, 862 (2012) (discussing the risks most often associated with sex work, including police harassment, violence, exposure to sexually transmitted diseases, and unwanted pregnancies).

10. *See Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (holding that citizens are entitled to make decisions about contraception without unjustified government interference).

11. *Id.*

12. *Id.* at 686.

13. *See id.* at 678; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

II explains the Court's contraceptives jurisprudence and then examines the state interests in confiscating condoms for evidence while enforcing antiprostitution laws. Part III argues that this police practice violates the protections laid out in the Supreme Court's contraception cases.

I. THE CONSTITUTIONAL AND CRIMINAL LAW FRAMEWORK FOR  
ANALYZING THE CONFISCATION OF CONDOMS AS EVIDENCE FROM  
SUSPECTED SEX WORKERS

This Part describes the constitutional and criminal procedure framework for evaluating the constitutionality of police practices, before discussing the practice of confiscating condoms from suspected sex workers. Part I.A describes the constitutional law framework for evaluating infringements of rights that the Supreme Court has deemed fundamental. Part I.B describes criminal procedure laws that relate to stopping and searching people suspected of engaging in criminal activity. Part I.C discusses the international human rights law framework to which the United States is subject in relation to preventing the spread of sexually transmitted diseases. Part I.D then discusses the experience of sex workers in three cities, New York City, Los Angeles, and Washington, D.C., and their interactions with police officers who are engaged in confiscating condoms.

A. *Constitutional Law Framework*

The Constitution and the Bill of Rights protect fundamental rights. This section discusses the Supreme Court's history of upholding those protections and the extension of those protections to rights not specifically enumerated in the Bill of Rights.

1. Fundamental Rights Analysis Under the Due Process Clause of the  
Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment<sup>14</sup> provides that no state shall "deprive any person of life, liberty, or property, without due process of law."<sup>15</sup> From this amendment, the Supreme Court has created a detailed jurisprudence of due process.<sup>16</sup> There are two types of due process: procedural due process and substantive due process.<sup>17</sup> Procedural due process concerns whether the government has sufficiently provided the procedural protections guaranteed by the Constitution before taking away life, liberty or property.<sup>18</sup> Substantive due process issues arise when there is a question regarding whether the government has a sufficient goal or purpose to justify an action that infringes on a person's right to life, liberty,

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14. U.S. CONST. amend. XIV, § 1.

15. *Id.*

16. See Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 604 (2006).

17. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

18. *Id.*

or property.<sup>19</sup> Substantive due process protects both rights explicitly stated in the Bill of Rights and rights that the Supreme Court has decreed are “deeply rooted in our history and traditions, or . . . fundamental to our concept of constitutionally ordered liberty,”<sup>20</sup> including the right to privacy.<sup>21</sup> Under the privacy heading, the Supreme Court has held that due process protects the right to marry,<sup>22</sup> to have children,<sup>23</sup> to direct the education and upbringing of one’s children,<sup>24</sup> to enjoy marital privacy,<sup>25</sup> to use contraception,<sup>26</sup> to obtain an abortion,<sup>27</sup> and to maintain bodily integrity.<sup>28</sup> Because these rights are fundamental, the Supreme Court accords them the highest protection, the strict scrutiny test, discussed below.<sup>29</sup>

## 2. Three Levels of Scrutiny for Evaluating Fundamental Rights

The Supreme Court has defined three levels of scrutiny for determining whether a government action is unconstitutional: (1) the rational basis test, (2) intermediate scrutiny, and (3) strict scrutiny.<sup>30</sup> These different levels of scrutiny place varying burdens of proof on the government: a heavy burden for infringing on a fundamental right, but a lower burden in areas where the

19. *Id.*

20. *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).

21. *See Chemerinsky, supra* note 17, at 1501; *see also Poe v. Ullman*, 367 U.S. 497, 549 (1961) (“[T]he concept of ‘privacy’ embodied in the Fourth Amendment is part of the ‘ordered liberty’ assured against state action by the Fourteenth Amendment.”); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (“[T]he Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment] . . .”).

22. *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that a Virginia state miscegenation statute that forbade interracial marriages violates due process and equal protection guarantees).

23. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that a criminal law statute which allowed the sterilization of convicts violated one of the “basic civil rights of man” and was therefore unconstitutional).

24. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (declaring unconstitutional a state law that banned parochial schools as violating a parent’s right to control the upbringing of their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (ruling unconstitutional a statute that forbade the teaching of a foreign language in schools as violating parental rights to direct the upbringing of their children, a protected right under the Fourteenth Amendment).

25. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding unconstitutional a state law that interfered with married couples’ right to use contraception).

26. *Id.*; *see also Eisenstadt v. Baird*, 405 U.S. 438 (1972) (declaring unconstitutional a state law that forbade single individuals from obtaining contraception while permitting married couples to do so as violating the equal protection doctrine).

27. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992) (affirming the right to abortion as a fundamental right protected by the constitution); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing the right to obtain an abortion before fetal viability as a fundamental right).

28. *Rochin v. California*, 342 U.S. 165 (1952) (finding that forcing ingestion of a substance to produce vomiting into a person suspected of swallowing drugs violates the Due Process Clause of the Fourteenth Amendment).

29. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11 (1967); *see also infra* Part I.A.3–4.

30. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.5, at 552–54 (4th ed. 2011).

Court generally defers to the legislature.<sup>31</sup> The rational basis test is the least stringent standard of review and requires laws to be “rationally related to a legitimate government purpose” to be upheld.<sup>32</sup> Because this test only requires that a law be rationally related to a conceivable government purpose, most governmental actions reviewed under this standard are upheld.<sup>33</sup>

Under intermediate scrutiny, a law is upheld if it “substantially relate[s] to a legitimate government purpose.”<sup>34</sup> Courts sometimes refer to this standard as heightened scrutiny because of the stronger correlation required between the state’s law and purpose.<sup>35</sup> Laws that discriminate by gender, for example, are reviewed under this framework.<sup>36</sup>

The most demanding type of scrutiny is strict scrutiny, which requires that a law be “necessary to achieve a compelling government purpose” to be upheld.<sup>37</sup> This also means that “the State’s asserted purpose must be specifically and narrowly framed to accomplish that purpose.”<sup>38</sup> Courts use this highest level of scrutiny when considering laws based on racial classifications<sup>39</sup> and laws that infringe on rights deemed fundamental by the Supreme Court, including the right to access and use contraception.<sup>40</sup>

### 3. Requirements for Government Infringement of a Fundamental Right

There are four questions that are relevant to a fundamental rights analysis: Is there a fundamental right at issue?<sup>41</sup> Has that right been infringed by state action?<sup>42</sup> Is the government action justified by a compelling interest?<sup>43</sup> And are the means of effectuating the law

31. *Id.* § 6.5, at 551; *see also* Eric Heinze, *The Logic of Standards of Review in Constitutional Cases: A Deontic Analysis*, 28 VT. L. REV. 121, 123 (2004).

32. *See* CHEMERINSKY, *supra* note 30, § 6.5, at 552 (emphasis omitted).

33. *Id.* § 6.5, at 553; *see, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980) (holding that under rational basis review, the Supreme Court will not invalidate laws Congress enacts when they are supported by a conceivable government purpose).

34. *See* CHEMERINSKY, *supra* note 30, § 6.5, at 553 (emphasis omitted).

35. *See* Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a “Sliding Scale” Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 478 (1997).

36. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Craig v. Boren, 429 U.S. 190 (1976).

37. *See* CHEMERINSKY, *supra* note 30, § 6.5, at 554 (emphasis omitted).

38. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986).

39. *See, e.g.*, *Johnson v. California*, 543 U.S. 499 (2005) (holding that a prison policy of segregating prisoners based on race must meet strict scrutiny).

40. *See* CHEMERINSKY, *supra* note 30, § 6.5, at 554; *see also* Suzanne Davis & Paul Lansing, *When Two Fundamental Rights Collide at the Pharmacy: The Struggle To Balance the Consumer’s Right To Access Contraception and the Pharmacist’s Right of Conscience*, 12 DEPAUL J. HEALTH CARE L. 67, 86 (2009) (“[U]sing contraception is considered a fundamental right under right of privacy law and consequently it should be free from governmental interference.”); Gwendolyn Prothro, *Ru 486 Examined: Impact of a New Technology on an Old Controversy*, 30 U. MICH. J.L. REFORM 715, 721 (1997).

41. *See* CHEMERINSKY, *supra* note 30, § 10.1.2, at 814.

42. *Id.* at 816.

43. *Id.* at 817.



sufficiently tailored to the goal?<sup>44</sup> Under the strict scrutiny analysis used for fundamental rights, the government bears the burden of proving that the infringement of the constitutional right is necessary to achieve a compelling government purpose and that the law is narrowly tailored to involve the smallest infringement of the right.<sup>45</sup>

*a. The Law Serves a Compelling State Interest*

The government must prove that an infringement of a fundamental right is necessary for a law to accomplish a compelling government purpose, or the law will be struck down.<sup>46</sup> The Supreme Court has not articulated the criteria necessary for establishing when an infringement serves a compelling government purpose, but “the government has the burden of persuading the Court that a truly vital interest is served by the law in question.”<sup>47</sup>

While a compelling government purpose is a high bar to meet, the Supreme Court found that the government had a compelling interest in issues of wartime necessity in *Korematsu v. United States*.<sup>48</sup> In *Korematsu*, the Court upheld the internment of Japanese American citizens based solely on their race as the means necessary to protect national security.<sup>49</sup> Citing the hardships involved in war for all citizens, the Court found that an infringement of liberty on the basis of national origin was constitutional because of the compelling government interest in keeping America safe.<sup>50</sup> Referencing modern warfare abilities, the Court stated that “the power to protect must be commensurate with the threatened danger.”<sup>51</sup> This government interest in protecting American citizens during wartime was a sufficiently compelling state interest to meet the strict scrutiny standard.<sup>52</sup> In *Zablocki v. Redhail*<sup>53</sup> the Court also found a compelling state interest in the need to adequately care for children. A Wisconsin law prohibited marriage for parents with a minor child not in their custody unless the parent could prove that he or she had made all child support payments. The Court found that the ability to ensure that children are properly cared for was a “legitimate and substantial interest[,]”<sup>54</sup> however the state statute was overly broad and therefore did not satisfy the narrow tailoring requirement of strict scrutiny.<sup>55</sup>

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44. *Id.* at 817–18.

45. *Id.* § 6.5, at 554.

46. *Id.*

47. *Id.* § 10.1.2, at 817.

48. 323 U.S. 214 (1944).

49. *See id.* at 223–24.

50. *See id.* at 219–20. National origin classifications, like race, are subject to strict scrutiny.

51. *Id.* at 220.

52. *Id.*

53. 434 U.S. 374 (1978).

54. *Id.* at 388.

55. *Id.* at 389.

*b. The Law Is Narrowly Tailored to the State Interest*

To pass a strict scrutiny standard, the government must also be able to prove that the law, as enacted, is the “least restrictive” or “least discriminatory” alternative available.<sup>56</sup> This narrow tailoring requirement means that legislation cannot be under- or overinclusive, and that “the fit between the government’s action and its asserted purpose [must] be ‘as perfect as practicable.’”<sup>57</sup> In analyzing a state’s interest, any infringing regulation must be precisely tailored to avoid infringing on a fundamental right.<sup>58</sup> If the law could be enacted in a way that would result in less interference with a fundamental right, then the law will not survive the narrow tailoring analysis.<sup>59</sup> Moreover, the requirement against overinclusive regulations suggests that even if there is not a less intrusive alternative, the narrow tailoring requirement may still not be satisfied.<sup>60</sup> Because of this very high standard, most laws analyzed under strict scrutiny are struck down.<sup>61</sup>

*B. Criminal Procedure Framework*

The Fourth Amendment protects against unreasonable searches and seizures, requiring both federal and state actors to obtain a warrant before depriving a person of liberty or property.<sup>62</sup> The Supreme Court has created exceptions to the warrant requirement, allowing police officers to conduct searches or seizures without a warrant when there is a sufficient level of suspicion that criminal activity is occurring.<sup>63</sup> Police officers conduct

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56. See CHEMERINSKY, *supra* note 30, § 6.5, at 554; *see also, e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121–23 (1991) (stating that when a substantial burden on a right subject to strict scrutiny does not serve the government’s stated purpose, the narrow tailoring requirement will not be met).

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

58. *NAACP v. Button*, 371 U.S. 415, 438 (1963) (stating that “[p]recision of regulation” is the “touchstone” of narrow tailoring).

59. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1326 (2007).

60. *Id.* at 1328 (“Whereas the least restrictive alternative formulation invites the conclusion that a regulation that is necessary to promote a compelling governmental interest will therefore satisfy strict scrutiny as long as no narrower regulation would suffice, the prohibition against overinclusiveness suggests that a statute might be condemned for lack of narrow tailoring even if no less restrictive alternative existed.”).

61. See CHEMERINSKY, *supra* note 30, § 6.5, at 554; Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (calling strict scrutiny “strict in theory and fatal in fact”).

62. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”); *see also* *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the protections guaranteed in the Fourth Amendment against the states).

63. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968) (establishing the reasonable suspicion standard for limited stops).

warrantless searches of suspected sex workers based on the suspicion that they are engaging in sex work in violation of state criminal laws.<sup>64</sup>

### 1. Probable Cause Is Necessary To Initiate an Arrest

Because an arrest is an invasive seizure, the level of suspicion necessary to arrest a person is the high standard of probable cause.<sup>65</sup> Probable cause exists for an arrest when a reasonable police officer believes, in light of all the facts available, that a man of reasonable caution could believe that a crime was being or had been committed.<sup>66</sup> Once a police officer has placed a person under arrest, the officer may conduct a limited search of that person incident to the arrest for two purposes: to determine if the person has any weapons that pose a danger to the officer, and to collect evidence to prevent its destruction.<sup>67</sup> The Supreme Court's holding in *Chimel v. California* allows police officers to collect evidence "on the arrestee's person in order to prevent its concealment or destruction."<sup>68</sup> In *United States v. Robinson*,<sup>69</sup> the Court extended this ability to search incident to an arrest, giving police officers the ability to search any container on the person found during a lawful arrest, even without suspicion that the container holds a dangerous item posing a risk to officer safety.<sup>70</sup> This allows officers to search any container on a person for evidence of a crime incident to a lawful arrest.<sup>71</sup>

### 2. Terry Stops Can Be Conducted on the Basis of Reasonable Suspicion

In *Terry v. Ohio*,<sup>72</sup> the Supreme Court held that police officers may conduct a limited stop of a person based on reasonable suspicion that criminal activity is afoot.<sup>73</sup> The officer may also conduct a limited frisk of the stopped person if there is reasonable suspicion that the person is carrying a weapon that could harm the officer.<sup>74</sup> In permitting warrantless searches based on low levels of suspicion, the Court emphasized the importance of the state interest in protecting police officers and stopping crime, balancing that interest against the very limited intrusion that occurs

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64. See *infra* notes 77–82 and accompanying text.

65. See *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

66. *Carroll v. United States*, 267 U.S. 132, 162 (1925) (holding that probable cause exists when "the facts and circumstances within [an officer's] knowledge and of which [the officer] had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that" a crime was being committed).

67. *Chimel v. California*, 395 U.S. 752, 763 (1969).

68. *Id.* at 763; see also Wayne A. Logan, *An Exception Swallows a Rule: Police Authority To Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 391 (2001).

69. 414 U.S. 218 (1973).

70. See *id.*; see also James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1431.

71. See *Robinson*, 414 U.S. at 235.

72. 392 U.S. 1 (1968).

73. *Id.* at 30.

74. *Id.* at 24.

with a short stop and frisk.<sup>75</sup> Because the intrusion is so minimal, the Court found the lower standard of reasonable suspicion, instead of probable cause, sufficient to conduct what is now called a “*Terry* stop.”<sup>76</sup>

*C. The Police Practice of Taking Condoms from Suspected Sex Workers*

This section discusses the research conducted by human rights organizations laying out the experience of sex workers and outreach workers in New York City, Los Angeles, and Washington, D.C. It describes their interactions with police officers in relation to the condoms-as-evidence policies practiced in each city. It also discusses policies and pending legislation enacted as a result of growing criticisms of condoms-as-evidence practices.

1. The Practice of Taking Condoms As Evidence in New York City

This section discusses the law and policies that permit police officers in New York City to take condoms from suspected sex workers.

*a. New York Laws Governing Prostitution and Prostitution-Related Offenses*

New York State defines prostitution as occurring when a person “engages or agrees or offers to engage in sexual conduct with another person in return for a fee.”<sup>77</sup> New York law also makes it a crime to loiter for the purpose of prostitution, defined by the law as

[a]ny person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution.<sup>78</sup>

It is also a criminal act to promote prostitution,<sup>79</sup> patronize prostitution,<sup>80</sup> or engage in sex trafficking<sup>81</sup> in New York. Prostitution is a misdemeanor offense, while loitering for the purpose of prostitution is a violation or a possible misdemeanor.<sup>82</sup> For police officers to stop someone and search them for an attempted prostitution crime, there must be sufficient evidence

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75. *Id.*; see also Mark A. Godsey, *When Terry Met Miranda: Two Constitutional Doctrines Collide*, 63 *FORDHAM L. REV.* 715, 746 (1994) (discussing the limited intrusion involved in a *Terry* stop).

76. *Terry*, 392 U.S. at 30–31.

77. N.Y. PENAL LAW § 230.00 (McKinney 2012).

78. *Id.* § 240.37.

79. *Id.* §§ 230.15–.32.

80. *Id.* §§ 230.02–.10.

81. *Id.* § 230.34.

82. See *id.* §§ 230.00–240.37. If loitering for prostitution is characterized as a violation, the only penalty is a fine, however if it is punished as a misdemeanor, a person can face jail time, a fine, or both. *Id.* § 240.37.

that a reasonable police officer could believe that the crime of prostitution was occurring or was likely to occur.<sup>83</sup>

*b. Firsthand Accounts from Sex Workers in New York City*

In compiling their data on the use of condoms as evidence of prostitution, Human Rights Watch interviewed a group of sex workers to discuss their interactions with police and the process frequently undertaken when police officers suspect a person of being engaged in sex work.<sup>84</sup> Sex workers reported that not only were they stopped and searched by police officers, because of the low threshold necessary for initiating a stop and search,<sup>85</sup> police officers frequently took their condoms and commented on the number of contraceptives they had on their person.<sup>86</sup> One sex worker from Queens, New York, reported that, after being stopped by police officers and asked to empty her purse, she left condoms in the bottom of her purse.<sup>87</sup> When the police noticed the condoms, they told her that next time they caught her they would arrest her for carrying condoms, because condoms served as evidence that she was engaged in prostitution.<sup>88</sup> Another person engaged in sex work in Brooklyn, New York, stated that if police officers find a person is carrying more than three or four condoms “they will take them, they will be disrespectful.”<sup>89</sup> Still another sex worker stated that while working in Queens, two cops arrested her for carrying condoms.<sup>90</sup> She stated, “The charge was that I had more than one condom in my bag. They locked me up for two days for solicitation and prostitution . . . they said I had condoms, it was on the report.”<sup>91</sup>

In interviews conducted by the Urban Justice Center for a report on street-based prostitution in New York City, sex workers similarly reported that police officers interfered with their condoms.<sup>92</sup> The *Village Voice*, a New York City periodical, was also told stories about police officers taking condoms from people they suspected of engaging in sex work.<sup>93</sup> Both the Urban Justice Center report and the interviews conducted by the *Village Voice* corroborate the information provided to Human Rights Watch.<sup>94</sup>

In 2010, the New York City Department of Health and Mental Hygiene conducted a survey with local organizations to assess whether police

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83. See *Terry v. Ohio*, 392 U.S. 1 (1968).

84. See MCLEMORE, *supra* note 1, at 17.

85. See *supra* Part I.D.1.a.

86. See MCLEMORE, *supra* note 1, at 18.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 20.

91. *Id.* (alteration in original).

92. JUHU THUKRAL & MELISSA DITMORE, URBAN JUSTICE CENTER, SEX WORKERS PROJECTS, REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 79 (2003).

93. Emily Gogolak, *New York's Condom Bait-and-Switch*, VILLAGE VOICE (Mar. 6, 2013), <http://www.villagevoice.com/2013-03-06/news/nyc-s-condom-insanity/full/>.

94. See *supra* notes 84–93 and accompanying text.

officers were confiscating condoms, and what role that played in sex workers' decisions to carry them.<sup>95</sup> The Department surveyed sixty-three individuals involved in sex work.<sup>96</sup> Of those people surveyed, 57 percent had had condoms taken away from them by a police officer.<sup>97</sup> The survey also showed that 29 percent of those questioned had engaged in sex work at least once without carrying condoms for fear of confrontation with police officers.<sup>98</sup> Despite these findings, the Department of Health and Mental Hygiene, which originally stated that it supported pending legislation in the New York State Senate to end the condoms-as-evidence policy, changed its position.<sup>99</sup> The Department now contends that the policy "has not resulted in sex workers consistently failing to carry condoms because of fear of arrest" and that they "have seen no evidence that the current law undermines the public health aims of condom distribution."<sup>100</sup>

*c. New York Pending Legislation on Condoms As Evidence*

Pending legislation in the New York State Senate proposes to outlaw the police practice of taking condoms as evidence of prostitution.<sup>101</sup> The bill was passed by the New York State Assembly in June 2013, and is now awaiting passage in the state senate and signature by the governor.<sup>102</sup> This bill would outlaw the use of condoms as evidence in any trial, hearing, or proceeding concerning prostitution, and has been repropounded each term, but has continually died in committee.<sup>103</sup>

2. The Practice of Taking Condoms As Evidence in Los Angeles

This section discusses California laws governing the policing of prostitution before discussing the police policy in Los Angeles of taking condoms as evidence from suspected sex workers.

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95. PAUL KOBRAK, A REPORT TO THE NEW YORK CITY COMMISSIONER OF HEALTH, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE 2 (2010).

96. *Id.* at 3.

97. *Id.*

98. *Id.* at 6.

99. Jim Dwyer, *Giving Away, and Then Seizing, Condoms*, N.Y. TIMES, Apr. 24, 2012, at A18.

100. *Id.*

101. S. 2013-S1379, Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S1379-2013>.

102. Assemb. 2013-A2736, Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/A2736-2013>; see also *New York: Assembly Passes Condom Law*, HUM. RTS. WATCH (June 25, 2013), <http://www.hrw.org/news/2013/06/25/new-york-assembly-passes-condom-law>.

103. *Id.*

a. *California Laws Governing Prostitution and Prostitution-Related Offenses*

California law defines the act of prostitution as:

A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act.<sup>104</sup>

California penal law also prohibits prevailing upon a person to visit a place of prostitution,<sup>105</sup> and purchasing a person for purposes of prostitution.<sup>106</sup>

b. *Firsthand Accounts from Sex Workers in Los Angeles*

Los Angeles has a similar policy to New York that allows police officers to confiscate condoms from suspected sex workers, and “according to sex workers in Los Angeles, condoms are commonly used as one of the bases for arrest for prostitution.”<sup>107</sup> One sex worker interviewed by Human Rights Watch stated that police officers took six condoms out of her bag and then arrested her, and that the condoms were part of the evidence that was used to put her in jail.<sup>108</sup> Another sex worker reported that “condoms in purse” was listed on her arrest report, and that she no longer carries condoms in her purse for fear of being arrested again.<sup>109</sup>

Sex workers in Los Angeles share a belief that carrying more than three condoms is illegal.<sup>110</sup> This belief is propagated by police officers who tell sex workers that carrying more than three condoms will give the officers the right to arrest them for prostitution.<sup>111</sup> Human Rights Watch reports that sex workers told outreach workers involved in HIV/AIDS prevention that police tell them “that if they have more than two condoms in their purse, they can be charged with an act of prostitution.”<sup>112</sup> While police officers have been known to espouse this belief, there is no rule in Los Angeles that makes it illegal to carry more than three condoms.<sup>113</sup>

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104. CAL. PENAL CODE § 647 (West 2010).

105. *Id.* § 318.

106. *Id.* § 266(e).

107. *See* MCLEMORE, *supra* note 1, at 47.

108. *Id.* at 48 (citing Interview by Human Rights Watch with Alessa N., in L.A., Cal. (Mar. 13, 2012)).

109. *Id.* at 52 (citing Interview by Human Rights Watch with Serena L., in L.A., Cal. (Mar. 14, 2012)).

110. *Id.* at 48.

111. *Id.* at 49. As one sex worker stated, “The police have told me, when you’re in a high risk area, don’t carry more than three condoms on you because we can arrest you.” *Id.*

112. *Id.*

113. *See id.* at 48.

*c. Harassment of Outreach Workers Distributing Condoms*

Outreach workers in Los Angeles also experience harassment at the hands of the police when handing out condoms to sex workers.<sup>114</sup> While Los Angeles is concerned with stopping the spread of HIV/AIDS, even enacting syringe exchange programs for drug users to prevent the spread of the disease,<sup>115</sup> police officers frequently stop and question outreach workers when they are giving condoms to sex workers.<sup>116</sup> One service provider working on behalf of sex workers reported “that the outreach workers on her staff had been stopped and questioned several times by the police for distributing condoms.”<sup>117</sup>

*d. Current Bill in the California State Legislature*

A bill passed by the California State Assembly in May 2013 would heighten the requirements for introducing condoms as evidence in the prosecution of sex workers.<sup>118</sup> The bill originally sought to ban the use of condoms as evidence outright, but it was amended in assembly to achieve the necessary two-thirds majority vote for passage.<sup>119</sup> The bill requires prosecutors who intend to introduce condoms into evidence to alert the court and the defendant of the relevancy of the possession of condoms before being allowed to submit them as evidence of prostitution.<sup>120</sup>

3. The System of Taking Condoms As Evidence As Carried Out in Washington, D.C.

This section addresses the laws and policies that permit police officers in Washington, D.C. to confiscate condoms from people they suspect of engaging in sex work.

*a. Washington, D.C. Laws Governing Prostitution and Prostitution-Related Offenses*

In Washington, D.C. it is a crime to engage in prostitution, which criminal law statutes define as engaging in a “sexual act or contact with another person in return for giving or receiving a fee.”<sup>121</sup> The law also prohibits soliciting prostitution, defined as to “invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in

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114. *Id.*

115. *Syringe Exchange Programs*, CITY OF L.A. AIDS COORDINATOR’S OFFICE, [http://disability.lacity.org/aids/syringe\\_exchange.htm](http://disability.lacity.org/aids/syringe_exchange.htm) (last visited Oct. 21, 2013).

116. See MCLEMORE, *supra* note 1, at 48.

117. *Id.*

118. Assemb. 2013-AB336, Reg. Sess. (Cal. 2013), available at <http://legiscan.com/CA/bill/AB336/2013>.

119. *Id.*

120. *Id.*

121. D.C. CODE § 22-2701.01 (2001).



prostitution.”<sup>122</sup> The District of Columbia also makes it illegal to compel a person to engage in prostitution,<sup>123</sup> receive money for arranging prostitution,<sup>124</sup> or to operate a house of prostitution.<sup>125</sup>

In 2005, the District of Columbia enacted a measure entitled the Omnibus Public Safety Act, which provided for certain areas to be designated as Prostitution Free Zones (PFZ) by the police department.<sup>126</sup> Police officers can designate an area as a PFZ for up to 480 hours based on a high incidence of arrest for prostitution in the recent past, or because of verifiable evidence that there is a high incidence of prostitution occurring in the area.<sup>127</sup> The law allows officers to arrest people for congregating for the purpose of prostitution and states that the totality of the circumstances will be used to decide if a prostitution-related offense is occurring.<sup>128</sup> Once an area has been designated a PFZ, arrests in that area can be based on circumstantial evidence, similar to what is allowed under New York’s loitering for prostitution laws.<sup>129</sup>

*b. Firsthand Accounts from Sex Workers in Washington, D.C.*

In Washington, D.C., sex workers were most frequently targeted for carrying condoms during brief stops to enforce antiprostitution laws.<sup>130</sup> Sex workers in D.C. reported that police officers frequently questioned them about why they were carrying so many condoms and often told suspected sex workers to “throw [their] condoms in the garbage.”<sup>131</sup> One woman reported that after being stopped by a police officer, “[t]he cop told me I could have three condoms and threw the others out, I had ten altogether. Also, an open condom is a charge. I’ve been locked up for it, the cops told me they were locking me up for an open condom.”<sup>132</sup>

Like their counterparts in Los Angeles,<sup>133</sup> sex workers in Washington, D.C. also spoke of a “three condom rule,” which had been communicated to them either through fellow sex workers or through police officers in exchanges such as the one detailed above.<sup>134</sup> Outreach workers who were interviewed by Human Rights Watch also commented on the apparent

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122. *Id.*

123. *Id.* § 22-2705.

124. *Id.* § 22-2707.

125. *Id.* § 22-2712.

126. *Id.* § 22-2731.

127. *Id.* § 22-2731(b)(1).

128. *Id.* § 22-2731(d)(2); *see also* Dean Spade, *The Only Way To End Racialized Gender Violence in Prisons Is To End Prisons: A Response to Russell Robinson’s “Masculinity As Prison,”* 3 CALIF. L. REV. CIRCUIT 184, 193 (2012) (discussing how prostitution free zones are used to enhance the policing of sex work).

129. D.C. CODE § 22-2731; *see also supra* Part I.D.1.a.

130. *See* MCLEMORE, *supra* note 1, at 37.

131. *Id.* at 39; *see also* ALLIANCE FOR A SAFE & DIVERSE D.C., MOVE ALONG: POLICING SEX WORK IN WASHINGTON, D.C. 33 (2008), *available at* <http://dctranscoalition.files.wordpress.com/2010/05/movealongreport.pdf>.

132. *See* MCLEMORE, *supra* note 1, at 40.

133. *See supra* Parts I.D.2, II.B.2.

134. *See* MCLEMORE, *supra* note 1, at 40.

belief that having more than a few condoms could result in arrest or police harassment, even though Washington, D.C. does not have a law or statute that says police officers should confiscate condoms when a suspected sex worker is carrying more than three.<sup>135</sup>

*c. Harassment of Outreach Workers Distributing Condoms*

Outreach workers themselves report being harassed by police officers for distributing condoms to sex workers.<sup>136</sup> In one instance, outreach workers delivered condoms to a club known for prostitution.<sup>137</sup> When they left the club, police officers jumped out of nearby vans and demanded identification.<sup>138</sup> This type of interaction with police officers contributes to the difficulty of distributing condoms to prostitutes.<sup>139</sup>

*d. Recent Action by the Metro Police Department*

The Washington, D.C. Metro Police Department (MPD) recently released know-your-rights cards that clarified department policy on condoms.<sup>140</sup> The cards state that having three condoms is not an offense, and that the MPD supports the distribution of condoms for the prevention of sexually transmitted diseases.<sup>141</sup> The MPD also clarified that police may not conduct a stop or a search based on the fact that a person has condoms.<sup>142</sup>

4. San Francisco's Previous Policy on Confiscating Condoms

In 1994, San Francisco barred the use of condoms as evidence in prostitution for a trial period, before permanently ceasing the confiscation of condoms in 1995.<sup>143</sup> Following extensive research by the San Francisco Task Force on Prostitution, the San Francisco Board of Supervisors issued a nonbinding resolution recommending that the San Francisco Police Department and the district attorney cease confiscating condoms from suspected sex workers or using them in the prosecution of prostitution cases.<sup>144</sup> The resolution specifically pointed to the fact that taking condoms from suspected sex workers discouraged them from using protection, which increased the risk of HIV/AIDS in direct opposition to the city's policy on HIV prevention.<sup>145</sup> The resolution also emphasized that the public health

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135. *Id.* at 39 ("Clients take fewer condoms than they need because they fear the police.").

136. *See* ALLIANCE FOR A SAFE & DIVERSE D.C., *supra* note 131, at 20.

137. *Id.*

138. *Id.*

139. *Id.* at 57.

140. Press Release, AIDS United, Advocacy Coalition Supports MPD Clarification of Condom Policy (Mar. 11, 2013) (on file with *Fordham Law Review*).

141. *Id.*

142. *Id.*

143. THE S.F. TASK FORCE ON PROSTITUTION, FINAL REPORT 23 (1996).

144. *Id.* at 11.

145. *Id.* at 10 ("Completely contrary to the policy of improving public health, the San Francisco Police Department had a policy of confiscating condoms from people arrested for

value of condoms for HIV prevention greatly outweighed the value to law enforcement in enforcing prostitution laws.<sup>146</sup>

In response to the resolution, the District Attorney for San Francisco, Arlo Smith, agreed to suspend the condoms-as-evidence policy for a trial period.<sup>147</sup> Smith pointed out to the Director of Public Health that condoms were useful evidence in proving an act in furtherance of prostitution.<sup>148</sup> In 1995, Smith's office announced that they would permanently cease using condoms as evidence of prostitution, without further explanation.<sup>149</sup> While police officers no longer take condoms, they do still photograph condoms to use as evidence against suspected sex workers.<sup>150</sup> This policy, while less invasive than taking condoms outright, still inhibits sex workers' ability to carry condoms for fear that police officers will use the condoms against them.<sup>151</sup>

## II. IS THE STATE INTEREST IN POLICING PROSTITUTION SUFFICIENTLY COMPELLING TO JUSTIFY THE INFRINGEMENT OF CONSTITUTIONAL PROTECTIONS AFFORDED TO CONTRACEPTION?

While state officials have an interest in preventing prostitution in accordance with state laws, the Supreme Court has found a constitutional right to access and use contraception. Because taking condoms from sex workers hinders their ability to access and use contraception, the police policies may conflict with the constitutional right to contraception. If the practice does conflict with the protections afforded to contraceptives under Supreme Court jurisprudence, the state interest in taking the condoms must be sufficiently compelling to justify the infringement of the fundamental right, and the means of infringement must be narrowly tailored to the stated goal.

Part II.A of this Note discusses the line of Supreme Court decisions holding that the right to contraception is a fundamental privacy right. These cases discuss when the state's interest in denying contraception can outweigh the need to protect a fundamental right, resulting in the state action being declared constitutional. Part II.B examines the state interests involved in taking condoms for evidence against suspected sex workers. This section analyzes the necessity of using condoms in the policing and prosecution of prostitution.

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prostitution-related offenses. Many of the condoms taken had been given to street workers by the City Department of Health.”).

146. See MCLEMORE, *supra* note 1, at 57.

147. Letter from Arlo Smith, S.F. Dist. Attorney, to Sandra Hernandez, Dir. of Pub. Health (Sept. 6, 1994), available at <http://www.bayswan.org/CondomsAsEvidenceSFTFP.pdf>.

148. *Id.*

149. See THE S.F. TASK FORCE ON PROSTITUTION, *supra* note 143, at 23.

150. See MCLEMORE, *supra* note 1, at 60.

151. *Id.*

### A. Supreme Court Jurisprudence on Contraception

The Supreme Court has routinely held that the Constitution limits states' ability to interfere with individuals' privacy rights in the vein of family and family planning, and the Court has similarly protected people's right to bodily integrity.<sup>152</sup> The Court first recognized the right to privacy in contraception in *Griswold v. Connecticut* in 1965, when it held unconstitutional a Connecticut statute forbidding the use of contraceptives.<sup>153</sup> The Court found that forbidding contraceptive use for married couples intruded on the right to marital privacy and autonomy in decisions concerning reproductive choices.<sup>154</sup> Over the next two decades, the Court extended this privacy right to use contraceptives to individuals,<sup>155</sup> and then shortly after concluded that restrictions on access to contraceptives are also unconstitutional.<sup>156</sup> This section will discuss the Supreme Court's five main decisions concerning contraception and family planning, examining the fundamental right to privacy that the Supreme Court addressed in *Griswold* and extended afterwards.<sup>157</sup>

#### 1. Married Couples' Protected Privacy Right in the Use of Contraceptive Devices

In 1965, the Supreme Court first ruled on the right to possess contraceptives for the sole purpose of preventing pregnancy, finding that the state cannot interfere with that right without a compelling state interest.<sup>158</sup> In *Griswold*, the Supreme Court looked at a Connecticut statute that forbid medical professionals from providing information about contraception or contraceptive devices to married couples for the purpose of preventing pregnancy.<sup>159</sup> Connecticut state law did, however, permit the use of contraceptives to prevent the spread of disease.<sup>160</sup> *Griswold* involved a married couple that consulted a doctor about the best way to

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152. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 849 (1992); *see also* *Winston v. Lee*, 470 U.S. 753 (1985) (holding that intrusive surgery to retrieve a bullet from a robbery suspect's chest was unreasonable under the Fourth Amendment); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that state laws which forbid interracial marriages were unconstitutional and violated people's right to make decisions about their family); *Rochin v. California*, 342 U.S. 165 (1952) (holding that forcing a suspect who swallowed drugs to ingest a substance to induce vomiting violated the defendant's due process rights); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that an Oklahoma state penal law that allowed people convicted of multiple felonies to be sterilized violated the equal protection clause and was unconstitutional).

153. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

154. *Id.* at 485–86.

155. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

156. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding that when regulations impose burdens on decisions as important as whether or not to bear a child, the state interest must be sufficiently compelling to warrant adherence to the rule in light of infringing on individuals privacy rights).

157. *Griswold*, 381 U.S. at 479.

158. *Id.*

159. *Id.*

160. *Id.* at 506.

avoid conception.<sup>161</sup> The doctor was examining married patients and prescribing an appropriate birth control device or method, or giving general advice on how to prevent conception.<sup>162</sup> The state fined the doctor according to a Connecticut statute that forbid the use of any drug or device that prevented conception, in conjunction with a statute that forbid assisting in the commitment of any crime.<sup>163</sup> The doctor challenged the constitutionality of the statute, claiming that it violated the Fourteenth Amendment.<sup>164</sup>

The Supreme Court held that forbidding the use of contraceptives by married couples was unconstitutional because it was an intrusion on the right to marital privacy.<sup>165</sup> Justice William O. Douglas, writing for the Court, first looked to where the right to marital privacy originated, discussing the Bill of Rights and finding that those rights have penumbras, or extensions of privacy rights.<sup>166</sup> He found the penumbras of privacy rights to exist as emanations from the First, Third, Fourth, Fifth, and Ninth Amendment rights, describing these constitutional rights as creating zones of privacy within which the right to marital privacy falls.<sup>167</sup> Justice Douglas noted that the Self-Incrimination Clause in the Fifth Amendment creates a zone of privacy, so a citizen does not have to surrender to the government to his detriment.<sup>168</sup> He also emphasized that the Fourth and Fifth Amendments protect against government intrusion into the home and the “privacies of life.”<sup>169</sup> The Court looked to its recent decisions concerning Fourth Amendment law, recognizing that American citizens respected individual privacy rights.<sup>170</sup> Those rights extend to married

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161. *Id.* at 479.

162. *Id.*

163. *Id.* The first statute states: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” The second statute states: “Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” *Id.* at 480 (quoting CONN. GEN. STAT. §§ 53-32, 54-196 (1958) (internal quotation marks omitted)).

164. *Id.*

165. *Id.* at 485–86.

166. *Id.* at 484; see also David Helscher, *Griswold v. Connecticut and the Unenumerated Right of Privacy*, 15 N. ILL. U. L. REV. 33, 35 (1994).

167. *Griswold*, 381 U.S. at 484. Justice Arthur J. Goldberg wrote a concurring opinion highlighting the Ninth Amendment as the source of the right to marital privacy. *Id.* at 487 (Goldberg, J., concurring); see also Lackland H. Bloom, Jr., *The Legacy of Griswold*, 16 OHIO N.U. L. REV. 511, 523 (1989) (detailing how Justice Goldberg found that the Ninth Amendment protects unenumerated rights through the Due Process Clause). Justice John Marshall Harlan found the right to marital privacy to be protected under the liberty of the Due Process Clause. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring).

168. *Griswold*, 381 U.S. at 484 (majority opinion).

169. *Id.*

170. *Id.* at 484–85 (stating that the Fourth and Fifth Amendments provide “protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life’” (quoting *Boyd v. United States*, 116 U.S. 616 (1886))); see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 811 n.195 (1994) (discussing the Fourth Amendment as a source for privacy rights and emphasizing its use in *Griswold*).

couples making decisions about whether to conceive a child, because marriage is “a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”<sup>171</sup>

Having decided that married couples have a fundamental privacy right in their ability to choose whether to use contraception, the Court considered the statute at issue.<sup>172</sup> Because the law completely forbid the use of contraceptives, instead of attempting to regulate the sale of contraceptives, the Court held the law to be overly broad.<sup>173</sup> The Court stated that the “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”<sup>174</sup> Because the law attempted to forbid all married couples from using contraceptive methods and devices in violation of the expectation of privacy guaranteed to married couples, the Court found the law insufficiently narrowly tailored to pass the strict scrutiny standard, and therefore unconstitutional.<sup>175</sup>

In an opinion concurring in the judgment, Justice Arthur J. Goldberg discussed the state interest in forbidding married couples’ access to contraception.<sup>176</sup> Listing the purpose of the statute as protecting marital fidelity, Justice Goldberg found that while this interest was compelling, the means taken to enforce the interest were not narrowly tailored.<sup>177</sup> Because Connecticut had statutes forbidding adultery and fornication, the statute’s intrusion into marital privacy was unnecessary and therefore not precisely tailored to the stated goal.<sup>178</sup> Thus, the broadly sweeping statute was unconstitutional, despite the state interest in protecting marital fidelity.<sup>179</sup> This case was the first to lay out the right to privacy in decisions about the use of contraceptives, and the Court continued to expand this right over the next decade.<sup>180</sup>

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

172. *Id.*; see also Donald H.J. Hermann, *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 924 (2005).

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

174. *Id.* (quoting *NAACP v. Alabama*, 337 U.S. 288, 307 (1964)) (internal quotation marks omitted); see also Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 288 (1973).

175. *Griswold*, 381 U.S. at 485–86 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

176. *Id.* at 498 (Goldberg, J., concurring).

177. *Id.*

178. *Id.*; see also Robert E. L. Richardson, *A Police Officer’s Legal, Consensual, Off-Duty Sexual Relationship Is Not Protected by the Right of Privacy Under Either the Federal or Texas Constitutions: City of Sherman v. Henry*, 28 TEX. TECH L. REV. 187, 204 (1997) (discussing Justice Goldberg’s analysis of adultery statutes as sufficient to protect against marital infidelity, thus making the anticontraception law invalid).

179. *Griswold*, 381 U.S. at 498–99.

180. See CHEMERINSKY, *supra* note 30, § 10.3, at 835–38.

## 2. The Privacy Rights Inherent in Contraceptives for Unmarried Individuals

Seven years after establishing married couples' right to access contraceptives, the Supreme Court considered the rights of unmarried individuals to obtain and use contraception in *Eisenstadt v. Baird*.<sup>181</sup> In *Eisenstadt*, the Court struck down a Massachusetts statute that allowed only married couples to obtain contraceptive devices, claiming that it violated the rights of single people under the Equal Protection Clause.<sup>182</sup> The Court found that privacy rights are inherent in the individual; thus, because married couples had a right to use contraceptive devices, individuals did as well.<sup>183</sup> The Court held, "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>184</sup> Because the right to access and use contraceptives was declared a fundamental right in *Griswold*,<sup>185</sup> the state had to demonstrate a compelling state interest in forbidding unmarried individuals from obtaining contraception and that the statute was narrowly tailored to achieve that interest.<sup>186</sup>

The government argued that the purpose of the Massachusetts statute was to discourage premarital sex.<sup>187</sup> The Court found that purpose to be inconsistent with the legislation and therefore invalid, stating that Massachusetts could not possibly intend for unwanted pregnancy to serve as a punishment for engaging in premarital sex.<sup>188</sup> The ban on distribution of contraceptives was only "marginally" related to the state's purpose and therefore could not be considered rationally related to an important government purpose as required under a strict scrutiny analysis.<sup>189</sup> The government next argued that forbidding single people from accessing contraception was a necessary health measure.<sup>190</sup> Declaring this argument invalid, the Court cited the fact that contraceptives are not dangerous, and that doctors are able to effectively supply them to married couples, therefore forbidding that same access to single persons was discriminatory.<sup>191</sup> Moreover, because almost no health risks exist in taking

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181. 405 U.S. 438 (1972).

182. *Id.* at 441–43.

183. *Id.*

184. *Id.* at 453.

185. See *supra* notes 165–71 and accompanying text; see also Hermann, *supra* note 172, at 924 (noting that Justice William J. Brennan's analysis of *Griswold* implies that sexual privacy is a fundamental right protected from interference by anticontraceptive statutes).

186. *Eisenstadt*, 405 U.S. at 452–54; see *supra* notes 38–45 and accompanying text.

187. *Id.* at 448.

188. *Id.*; see also Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 558 (1986).

189. *Eisenstadt*, 405 U.S. at 448; see also Kathleen A. Ward, *A Dose of Reality: The Prescription for a Limited Constitutional Right to Privacy in Pharmaceutical Records Is Examined in Douglas v. Dobbs*, 12 MICH. ST. U. J. MED. & L. 73, 88 (2008).

190. *Eisenstadt*, 405 U.S. at 451–52.

191. *Id.* at 451; see also Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1544 (1994).

contraception, the law was overly broad and did not fulfill the government's stated purpose.<sup>192</sup> The Court found that prohibiting pharmacists from distributing condoms served no legitimate government purpose, even when the state construed the action as necessary as a health measure.<sup>193</sup> In a footnote, Justice William J. Brennan noted that the government purpose was not even sufficient to overcome rational basis review under the Equal Protection analysis, let alone meet the heightened standard of strict scrutiny necessary for the fundamental right to make decisions about contraception established in *Griswold*.<sup>194</sup>

### 3. The Fundamental Privacy Right To Make Decisions About Family Planning

In *Carey v. Population Services International*<sup>195</sup> the Supreme Court examined a New York State law that prohibited the selling or distribution of contraceptives to anyone under the age of sixteen.<sup>196</sup> The law also forbid the distribution of contraceptives to persons over the age of fifteen by anyone but a licensed pharmacist.<sup>197</sup> Finally, the law prohibited the advertisement or display of any contraceptive device.<sup>198</sup> After reviewing the cases which established autonomy in choices of procreation as a fundamental right—and drawing on the language used in *Eisenstadt*<sup>199</sup>—the Supreme Court held that “where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.”<sup>200</sup> The Court found that limiting the distribution of nonprescription contraceptives to only licensed pharmacists placed a heavy burden on individuals who wished to purchase and use contraception.<sup>201</sup> Even though the burden was not as great as would be imposed by a total ban on contraception, it was significant enough to limit access to contraception and stifle price competition, and, therefore, the law was an overly broad intrusion on a fundamental privacy right that could not survive the strict scrutiny test.<sup>202</sup>

In *Carey*, the Court considered the state interest in depth, concluding that none of the justifications offered by the state were sufficiently compelling to permit interference with a fundamental right.<sup>203</sup> The appellants argued that limiting the sale of contraceptives to only pharmacists helped keep

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192. *Eisenstadt*, 405 U.S. at 451–52.

193. See CHEMERINSKY, *supra* note 30, § 10.3, at 837.

194. *Eisenstadt*, 405 U.S. at 447 n.7.

195. 431 U.S. 678 (1977).

196. *Id.* at 681.

197. *Id.*

198. *Id.*

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

200. *Carey*, 431 U.S. at 686.

201. *Id.* at 689; see also Vanessa Lu, *The Plan B Age Restriction Violates a Minor's Right To Access Contraceptives*, 44 FAM. L.Q. 391, 398 (2010).

202. *Carey*, 431 U.S. at 689.

203. *Id.* at 686–702.



young people from selling contraceptives, worked to protect contraceptive devices from being tampered with, and facilitated the enforcement of other parts of the statute concerning contraceptives.<sup>204</sup> None of these arguments were sufficient for the Court to find a compelling state interest.<sup>205</sup>

In analyzing the state's first argument, the Court found that the statute forbidding the sale of contraceptives by anyone other than a pharmacist was not substantially related to the stated goal of preventing young people from selling contraceptives.<sup>206</sup> The Court also found that pharmacists are not better able to prevent tampering with contraceptives than any other person, and, therefore, the stated goal of the statute was not a sufficiently compelling state interest to justify an intrusion into a fundamental right.<sup>207</sup> Finally, the Court pointed out that a state's desire to avoid enacting more administrative regulations, such as to prevent tampering with contraception, had never been found to be a sufficiently compelling reason to interfere with a constitutional right.<sup>208</sup> The lack of a compelling state interest left the Court no choice but to strike down the statute.<sup>209</sup>

In analyzing the statute, which prohibited the sale of contraceptives to anyone under the age of fifteen, the Court again found that the state interest was not sufficiently compelling to justify the interference with the fundamental right to contraception.<sup>210</sup> The appellants argued that the statute was constitutional as an effort in furtherance of New York State policies prohibiting minors from engaging in promiscuous sex.<sup>211</sup> The Court first noted that despite the ability of states to make laws for minors that were more restrictive than those for adults, outright prohibitions on minors' ability to obtain abortions and mandatory parental consent requirements had recently been found to be unconstitutional.<sup>212</sup> While the Court was willing to give credence to the argument that preventing teenage promiscuity was important, it was not a sufficiently compelling state interest to justify the burden on access to contraceptives imposed by the statute.<sup>213</sup> Because excluding minors from accessing contraceptives was not in any way linked to decreasing teenage promiscuity, the Court found that the law was not related to a sufficiently compelling government

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204. *Id.* at 690.

205. *Id.* at 691.

206. *Id.* at 690–91.

207. *Id.* at 691.

208. *Id.*; see also Angela Patterson, Carey v. Population Services International: *Minors' Rights To Access Contraceptives*, 14 J. CONTEMP. LEGAL ISSUES 469, 471 (2004).

209. *Carey*, 431 U.S. at 690–91.

210. *Id.* at 695–96.

211. *Id.* at 692.

212. *Id.* at 693 (citing *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (holding that outright prohibitions on minors obtaining abortions was unconstitutional)); see also Hazel Glenn Beh & Milton Diamond, *The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex*, 15 COLUM. J. GENDER & L. 12, 52 (2006) (explaining that *Carey* lays out the protections for minors procreative rights).

213. *Carey*, 431 U.S. at 694–95; see also Patterson, *supra* note 208, at 472 (noting that even the appellants conceded that limiting access to contraceptives was not likely to stop young people from engaging in sexual intercourse).

purpose.<sup>214</sup> Despite the appellant's argument that the statute still permitted physicians to sell contraceptives to minors, the Court found the burden on the fundamental right to be too great to survive strict scrutiny.<sup>215</sup> By applying the strict scrutiny standard, the Court affirmed its previous decisions in *Griswold* and *Eisenstadt*, recognizing that choices about contraceptive use and family planning were fundamental privacy rights.<sup>216</sup>

#### 4. Constitutionally Protected Privacy Rights Extended to Abortion

In *Roe v. Wade*,<sup>217</sup> the Supreme Court extended the privacy rights identified in *Griswold* and *Eisenstadt* to include a woman's right to obtain an abortion.<sup>218</sup> *Roe* was a challenge to a Texas statute that prohibited the termination of a pregnancy except in cases of risk to the mother's life.<sup>219</sup> Justice Harry A. Blackmun, writing for the Court, proceeded through an in-depth discussion of the history of abortion and the right to privacy, ultimately concluding that the right to obtain an abortion was a fundamental right.<sup>220</sup> He spent a considerable period of time discussing the right to reproductive autonomy.<sup>221</sup> The Court concluded that the right to privacy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . [or] in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>222</sup> The Court held that the Texas statute criminalized abortion too broadly by outlawing abortion except in the case of a life-saving procedure for the mother.<sup>223</sup> While the Court recognized two important state interests—the protection of maternal health and the interest in the life of the fetus—neither

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214. *Carey*, 431 U.S. at 696 ("[W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.").

215. *Id.* at 697.

216. See CHEMERINSKY, *supra* note 30, § 10.3, at 838 (explaining that for the government to justify any law that restricts access to contraception, the strict scrutiny standard must be met). The Court clarified the right they were establishing by stating that the violation was not occurring "because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*." *Carey*, 431 U.S. at 688–89. The Court's opinions in total have been read to establish a fundamental right to use and purchase contraception, requiring any state interference with that right to meet the strict scrutiny standard. See, e.g., Davis & Lansing, *supra* note 40, at 86; Prothro, *supra* note 40, at 721.

217. 410 U.S. 113 (1973).

218. *Id.* at 154.

219. *Id.* at 120–21.

220. *Id.* at 130–52.

221. *Id.*; see also CHEMERINSKY, *supra* note 30, § 10.3, at 840.

222. *Roe*, 410 U.S. at 153.

223. *Id.* at 164.

of these interests were sufficiently compelling to outlaw abortion at all stages of pregnancy.<sup>224</sup>

The state argued that the ability to recognize and protect the fetus was a compelling state interest that justified infringement on the right to privacy in procreation.<sup>225</sup> The Supreme Court held that the Constitution does not include unborn fetuses in the definition of “person,” so the state could not argue that the right to protect the life of the fetus was sufficient to ban abortion at all stages of pregnancy.<sup>226</sup> In deciding when the life of the fetus was sufficiently compelling to justify a ban on abortion, the Court found that during the first trimester, the state has no compelling interest in the life of the fetus because it would not be viable outside of the woman,<sup>227</sup> and forcing a woman to carry a child to term greatly burdens the mother.<sup>228</sup> However, the state interest changes as the fetus develops and becomes viable.<sup>229</sup> The state interest becomes compelling only at viability, or once the fetus could survive outside the mother.<sup>230</sup> It is at this point that the state may proscribe abortion in the interest of protecting life, because the state interest in the life of the fetus is sufficiently compelling to be balanced against the privacy rights of the mother.<sup>231</sup>

In considering the state interest in maternal health, the Court found that the state does have an interest in regulating abortion procedures for the protection of the health of the mother.<sup>232</sup> This interest only becomes compelling after the first trimester, where the risks associated with obtaining an abortion are higher than with continuing to carry the fetus.<sup>233</sup> Even after finding the state interest in maternal health to be compelling after the first trimester, the Court still limited the type of regulations states could impose on abortion to those substantially related to the goal of protecting the mother.<sup>234</sup>

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224. *Id.* at 163–64; *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 920–21 (1973).

225. *Roe*, 410 U.S. at 156.

226. *Id.* at 157.

227. *Id.* at 163.

228. *Id.* at 153 (“The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved.”).

229. *Id.* at 162–63; *see also* Judith G. Waxman, *Privacy and Reproductive Rights: Where We’ve Been and Where We’re Going*, 68 MONT. L. REV. 299, 306–07 (2007) (explaining that government interests grow as the woman’s pregnancy continues).

230. *Roe*, 410 U.S. at 163.

231. *Id.* at 163–64; *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 976 (1987) (discussing the apparent balancing the Court proposes to undertake when conducting constitutional analysis).

232. *Roe*, 410 U.S. at 163.

233. *Id.*

234. *Id.* The Court pointed to very specific interests that the state could cite in line with protecting the mother’s health, including: “requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.” *Id.*

### 5. The Most Recent Iteration of the Right To Have an Abortion

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>235</sup> the Supreme Court affirmed their previous decision in *Roe* that abortion was a protected fundamental privacy right; however, they reconsidered the state interests in fetal viability and the test for analyzing a state's interest.<sup>236</sup> The Court held that strict scrutiny was too stringent a standard of review for regulations concerning abortion, and that the state interest must be analyzed under an undue burden framework.<sup>237</sup> The Court found that it is "[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision [that] the power of the State reach[es] into the heart of the liberty protected by the Due Process Clause."<sup>238</sup> The Court concluded that state regulations may encourage women to carry a fetus to term, as the state has some interest in the life of the fetus, without infringing on the woman's privacy interest in making decisions about contraception.<sup>239</sup> The Court noted, however, that any such regulation must only be in place to help inform a woman's choice in deciding whether to carry the baby to term, and could not be used to hinder that free choice.<sup>240</sup> The Court would consider any substantial interference with the right to obtain an abortion unconstitutional if it is not backed by a compelling state interest sufficient to meet strict scrutiny.<sup>241</sup>

In analyzing the Pennsylvania law under the undue burden standard, the Court upheld a twenty-four-hour waiting period before obtaining an abortion, the requirement that women be informed of the detailed information available about the fetus, and extensive reporting and record keeping requirements for doctors.<sup>242</sup> The Court struck down the spousal notification provision as unconstitutional, arguing that it would prevent a significant number of women from obtaining an abortion, and therefore posed an undue burden on the woman's right of free choice.<sup>243</sup> While the undue burden standard is not as rigorous as strict scrutiny, the Court affirmed the privacy interests inherent in the right to make decisions about contraception and family planning.<sup>244</sup> Moreover, when deciding to place

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235. 505 U.S. 833 (1992).

236. *Id.* at 870.

237. *Id.* at 873–74.

238. *Id.* at 874.

239. *Id.* at 872–73; *see also* Waxman, *supra* note 229, at 309.

240. *Casey*, 505 U.S. at 877. *But see* Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 *YALE J.L. & FEMINISM* 317, 353 (2006) (explaining that many federal courts have manipulated the undue burden standard in ways that undermine the protections guaranteed by *Roe* and *Casey*).

241. *Casey*, 505 U.S. at 877.

242. *Id.* at 879–901; *see also* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 *HASTINGS L.J.* 867, 879 (1994) (discussing how the Court in *Casey* applies the undue burden standard as a complete substitute for analyzing state interests, never once mentioning strict scrutiny or even rational basis review).

243. *Casey*, 505 U.S. at 892–95.

244. *Id.*

more limits on abortion, the Court did so because of the state interest in preserving fetal life.<sup>245</sup>

*B. Police Officers in New York City, Los Angeles, and Washington, D.C.  
Confiscate Condoms from Suspected Sex Workers To  
Enforce Antiprostitution Laws*

This section lays out the police practice of confiscating condoms from suspected sex workers in three locations under three different sets of state laws. The section then discusses the state interest behind the practice of taking condoms as necessary for the enforcement of antiprostitution laws.

1. New York City Police Practice and Rationale

As described in Part I, police officers in New York City take condoms from sex workers, sometimes for the purpose of use as evidence, sometimes simply to throw the condoms away.<sup>246</sup> As state actors entrusted with the safety of the public, police officers in New York City have an interest in preventing prostitution in accordance with the New York Penal Code, which prohibits prostitution, promoting prostitution, patronizing prostitution, and loitering for purposes of prostitution.<sup>247</sup> In accordance with the stop-and-frisk doctrine discussed above, police officers may stop persons suspected of prostitution if there is reasonable suspicion that they are engaged in one of the above-listed acts.<sup>248</sup> It is during these encounters for the purpose of policing prostitution that officers confiscate condoms from suspected sex workers.<sup>249</sup> After an arrest occurs, the New York Police Department Patrol Guide lists factors which officers should list on arrest reports when processing an arrest for prostitution.<sup>250</sup> Those factors include: the length of time the officer observed a suspect, the action that caused the arrest, the location of the officer when the arrest occurred, the attire of the suspect, and any other necessary information.<sup>251</sup> When making an arrest for loitering for prostitution, the factors also include the conduct and clothing of the arrestee and whether or not the person is a known prostitute.<sup>252</sup> The Patrol Guide also states that when an officer is making an arrest for prostitution based on an overheard conversation, the officer

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245. See Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & L. 147, 153 (1996) (discussing the moral reasoning behind the limits on abortion in *Casey*, stating that “[w]hat emerged was a still-recognized but diminished right of a woman to choose abortion, a right which frequently paled in comparison to an increasingly valued state interest in preserving fetal life”).

246. See *supra* Part I.D.1.a.

247. See *supra* Part I.D.1.a.

248. See *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that police officers may conduct limited stops based on reasonable suspicion that criminal activity is occurring).

249. See *supra* Part I.D.

250. N.Y.C. POLICE DEP’T, PATROL GUIDE §§ 208-44 to -45 (2007).

251. *Id.* § 208-44.

252. *Id.* § 208-45.

should add loitering for prostitution to the charges against the suspect.<sup>253</sup> New York City's Prostitution Complaint Forms provide space for police officers to write down how many condoms they found on a person suspected of engaging in prostitution or prostitution-related offenses.<sup>254</sup> The borough of Brooklyn's Prostitution Complaint Form contains a specific line that reads "(fill in number) \_\_\_\_\_ condoms" under a section where police officer can include additional information that indicates a suspect was engaged in or attempting to engage in prostitution.<sup>255</sup>

The Office of the District Attorney for the borough of Queens, New York stated that condoms "are useful items of evidence in prostitution-related offenses, and banning condoms as evidence 'would seriously damage . . . cases.'"<sup>256</sup> The office pointed to the fact that condoms frequently serve as evidence in situations where prostitutes are victims of exploitation, such as in sex trafficking cases, or attempts to close brothels.<sup>257</sup> In regard to these cases, the office estimated that of seven sex trafficking cases and sixty-five cases for prostitution-related offenses, condoms were expected to be part of the prosecution's evidence in two of the cases.<sup>258</sup> A report by the Columbia Law School Sexuality and Gender Law Clinic found that condoms were used as evidence in thirty-nine cases.<sup>259</sup> In discussing why condoms should be confiscated to serve as evidence, the Queens District Attorney's office also pointed to the fact that pimps frequently facilitate prostitution by providing condoms, so collecting them as evidence can be useful in prosecuting pimps as well.<sup>260</sup>

In cases concerning prostitution, the prosecutor must prove that a person is engaging in or attempting to engage in a sexual act for a fee.<sup>261</sup> For example, in *People v. Benjamin*,<sup>262</sup> a woman was charged with engaging in prostitution after exchanging emails with an undercover police officer, during which she specified the time and place they should meet for her to provide a massage for the cost of \$200.<sup>263</sup> When the officer met the

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253. *Id.*

254. See MCLEMORE, *supra* note 1, at 91–100.

255. *Id.* at 98. In May 2013, Charles J. Hynes, the Brooklyn District Attorney, told police officers that the Brooklyn District Attorney's office would no longer use condoms as evidence in prostitution and loitering for prostitution cases. See J. David Goodman, *Police in Brooklyn Are Told Not To Seize Condoms of Prostitutes*, N.Y. TIMES, May 30, 2011, at A30.

256. McLemore, *supra* note 1, at 31. But see COLUMBIA LAW SCH. SEXUALITY & GENDER LAW CLINIC, NO CONDOMS AS EVIDENCE: A CRITICAL STEP TO PROTECTING PUBLIC HEALTH 8 (2010), available at <http://web.law.columbia.edu/sites/default/files/microsites/clinics/sexuality-gender/images/criminal5.pdf> (explaining that condoms are not probative evidence of prostitution because the question in a prostitution case is whether sex was exchanged for a fee, and condoms offer no proof that a fee was exchanged).

257. See MCLEMORE, *supra* note 1, at 31.

258. *Id.*

259. See COLUMBIA LAW SCH. SEXUALITY & GENDER LAW CLINIC, *supra* note 256, at 9 n.59 (stating that in one borough of New York, over a two year period, condoms served as evidence of prostitution in thirty-nine cases).

260. See MCLEMORE, *supra* note 1, at 31.

261. See *supra* note 77 and accompanying text.

262. 860 N.Y.S.2d 899 (N.Y. Crim. Ct. 2008).

263. *Id.* at 901.

defendant and asked if she would perform sexual services for him during the massage, she stated that the \$200 fee included sexual services.<sup>264</sup> It was this exchange of a fee for sexual acts that resulted in the defendant's charge for engaging in prostitution.<sup>265</sup>

While police officers take condoms as evidence, one judge has refused to accept them as evidence of prostitution in court. Because most cases involving charges for prostitution are handled outside of court, it is very rare for a prostitution case to make it to the courthouse.<sup>266</sup> In a rare case that made it to court over a prostitution charge, Judge Richard M. Weinberg of the Criminal Court of the City of New York refused to allow the prosecutor to enter the condoms as evidence.<sup>267</sup> Judge Weinberg stated, "I don't care about the condoms. This is the 21st Century."<sup>268</sup> After the prosecutor voiced his objection and argued that the condoms were "circumstantial evidence of defendant's intent," the judge declared that it was also the intent of "every other woman and man who wants to protect themselves in the age of AIDS."<sup>269</sup> The judge ruled that the condoms were not probative of any crime, and therefore refused to admit them as evidence.<sup>270</sup>

## 2. Confiscation of Condoms As Carried Out by Police Officers in Los Angeles

The Los Angeles Police Department (LAPD) confiscates condoms as evidence of prostitution in line with their enforcement of antiprostitution laws.<sup>271</sup> According to the LAPD's documentation of arrests, prostitution offenses most often result in a complaint being sought. In 2010, 4,775 adults were arrested on prostitution related offenses; misdemeanor complaints were entered against 4,716 of those people.<sup>272</sup> In 2011, 3,833 adults were arrested for prostitution-related offenses, and complaints were sought in all 3,833 arrests.<sup>273</sup> The LAPD stated that it "maintain[s] a strong enforcement campaign against prostitution, largely in response to citizen

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264. *Id.*

265. *Id.* at 900.

266. See MCLEMORE, *supra* note 1, at 14.

267. *Id.* at 16.

268. *Id.*

269. *Id.*

270. THE PROS NETWORK & SEX WORKERS PROJECT, PUBLIC HEALTH CRISIS: THE IMPACT OF USING CONDOMS AS EVIDENCE OF PROSTITUTION IN NEW YORK CITY 12 (2012), available at <http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf>.

271. See MCLEMORE, *supra* note 1, at 54.

272. L.A. POLICE DEP'T, INFO. TECH. DIV., MGMT. REPORT UNIT, *Statistical Digest* 3.8 (2010), available at [http://www.lapdonline.org/crime\\_mapping\\_and\\_compstat/content\\_basic\\_view/9098](http://www.lapdonline.org/crime_mapping_and_compstat/content_basic_view/9098) (click the "Statistical Digest" hyperlink under the 2010 heading).

273. L.A. POLICE DEP'T, APPLICATION DEV. & SUPPORT DIV., MGMT. REPORT UNIT, *Statistical Digest* 9.4 (2011), available at [http://www.lapdonline.org/crime\\_mapping\\_and\\_compstat/content\\_basic\\_view/9098](http://www.lapdonline.org/crime_mapping_and_compstat/content_basic_view/9098) (click the "Statistical Digest" hyperlink under the 2011 heading).

complaints about the activity occurring in their neighborhoods.”<sup>274</sup> The LAPD lieutenant in charge of the Special Enforcement Division stated that condoms are useful evidence in proving that a person is loitering for prostitution or is engaging in an act in furtherance of prostitution.<sup>275</sup> While the officer expressed concern that sex workers might not use condoms for fear of arrest, and denied a policy that two or three condoms was enough for an officer to initiate an arrest, he “defended condoms as targets of stops and searches of persons suspected of prostitution, stating that ‘the average citizen isn’t walking around with condoms in their pocket.’”<sup>276</sup>

When speaking with Human Rights Watch, the Office of the City Attorney of Los Angeles said that condoms are “routinely catalogued” as evidence and are introduced at trial to support prostitution charges; however, they are not a focal point of filing charges against suspected sex workers.<sup>277</sup> The deputy chief of the Safe Neighborhoods and Gang Division stated that condoms are “particularly probative evidence where there [are] a large number of condoms in someone’s possession or at a business site such as a massage parlor.”<sup>278</sup> The deputy chief emphasized that Los Angeles did not wish to discourage condom use, and that there had been no evidence that this was occurring among sex workers.<sup>279</sup> The deputy chief also pointed out that it was very “rare” to arrest a person for prostitution and not find condoms on his or her person, which highlights the state interest involved in the practice of using condoms as evidence of prostitution.<sup>280</sup>

### 3. The Police Practice of Taking Condoms As Evidence of Prostitution in Washington, D.C.

Police officers in Washington D.C. are similarly tasked with enforcing the prohibition of prostitution.<sup>281</sup> Assistant Chief of Police Peter Newsham explained that “prostitution cases are not a high priority” and that most arrests for prostitution in the D.C. area arise out of complaints from members of the public.<sup>282</sup> Officials in Washington, D.C., while expressing concern for the fact that condoms-as-evidence policies might discourage condom use among sex workers, stated that condoms can be used as supplementary evidence of prostitution when collected incident to an

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274. See MCLEMORE, *supra* note 1, at 54; Dakota Smith, *LAPD, Community Vow To Stop Prostitution on Lankershim Boulevard*, L.A. DAILY NEWS (Mar. 13, 2012, 9:00 PM), <http://www.dailynews.com/general-news/20120314/lapd-community-vow-to-stop-prostitution-on-lankershim-boulevard>.

275. See MCLEMORE, *supra* note 1, at 54.

276. *Id.* at 54.

277. *Id.* at 54–55.

278. *Id.* at 55.

279. *Id.* at 54.

280. *Id.*

281. See *supra* Part I.D.3.

282. MCLEMORE, *supra* note 1, at 41; see also ALLIANCE FOR A SAFE & DIVERSE D.C., *supra* note 131, at 16.



arrest.<sup>283</sup> Assistant Chief Newsham spoke to the importance of collecting condoms as evidence to prosecute human trafficking cases.<sup>284</sup> He “asserted that condoms may be helpful as supplementary evidence in [human trafficking] cases and will continue to be collected at the scene.”<sup>285</sup> However, Assistant Chief Newsham was concerned that police officers were “editorializing” about the number of condoms a person could legally carry, particularly in a way that made suspected sex workers feel threatened that simply possessing condoms could lead to arrest.<sup>286</sup> He emphasized the fact that searches of suspected sex workers could only be made if probable cause for arrest exists at the time of the search.<sup>287</sup>

In 2011, the Metropolitan Police Department reported 940 arrests of adults for prostitution or commercialized vice.<sup>288</sup> This number was lower than the reported arrests in 2010 for prostitution, which amounted to 1,409 arrests of adults.<sup>289</sup> In 2012, the number of adult arrests for prostitution was even lower, coming in at 619.<sup>290</sup>

While police officers take condoms from suspected sex workers for evidentiary purposes, these condoms are not always admitted in trials.<sup>291</sup> Judge Linda Kay Davis, who heads the special prostitution docket in Washington, D.C., said that she has never seen condoms actually entered into evidence in individual prostitution cases in the two years she has been presiding over the docket.<sup>292</sup>

### III. THE STATE INTEREST IN POLICING PROSTITUTION IS NOT SUFFICIENTLY COMPELLING TO JUSTIFY THE INFRINGEMENT OF THE FUNDAMENTAL RIGHT TO ACCESS CONTRACEPTIVES

As discussed above, once the Supreme Court identifies a fundamental right, laws cannot interfere with that constitutional right unless they are sufficiently compelling and narrowly tailored to the state’s interest. This Part argues that there is a fundamental right to contraception, and that the police do not have a sufficiently compelling state interest in policing prostitution to justify the confiscation of condoms from suspected sex workers. Part III.A discusses the fundamental right for sex workers to use and access condoms. Part III.B argues that police officers confiscation of condoms from sex workers violates that fundamental right. Part III.C argues that the state interest in policing prostitution is not sufficiently

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283. MCLEMORE, *supra* note 1, at 41.

284. *Id.* at 42.

285. *Id.*

286. *Id.*; *see also* ALLIANCE FOR A SAFE & DIVERSE D.C., *supra* note 131, at 57.

287. MCLEMORE, *supra* note 1, at 42; *see also supra* Part I.B.

288. METRO. POLICE DEP’T, ANNUAL REPORT 2011, at 28 (2012), *available at* [http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/ar\\_2011\\_0.pdf](http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/ar_2011_0.pdf).

289. *Id.*

290. METRO. POLICE DEP’T, ANNUAL REPORT 2012, at 30 (2013), *available at* [http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/2012\\_AR\\_1.pdf](http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/2012_AR_1.pdf). The 2012 data calculation did not include commercialized vice with prostitution. *Id.*

291. MCLEMORE, *supra* note 1, at 42

292. *Id.*

compelling to allow the police to infringe on that fundamental right. Finally, Part III.D argues that the confiscation of condoms for use as evidence is not the least restrictive or least discriminatory alternative available to police officers. Because the state interest is not sufficiently compelling and the state action is not narrowly tailored, taking condoms to use as evidence against sex workers is unconstitutional.<sup>293</sup>

*A. There Is a Fundamental Right To Access and Use Contraceptives*

The cases of *Griswold*, *Eisenstadt*, and *Carey* establish a fundamental right to contraceptive use free from overly burdensome state interference.<sup>294</sup> In *Griswold*, the Supreme Court recognized a fundamental right to marital privacy in decisions about whether to use contraceptives.<sup>295</sup> The Court extended this right in *Eisenstadt*, finding that unmarried individuals have a privacy right to access and use contraception.<sup>296</sup> In *Carey*, the Court once again protected the access and use of contraception as a fundamental right, finding that states cannot limit a minor's access to contraceptives.<sup>297</sup> Going even further to protect the fundamental right to contraception, in *Roe* and *Casey* the Supreme Court upheld a woman's right to choose to terminate her pregnancy through abortion.<sup>298</sup> These Supreme Court cases establish a fundamental right to access and use contraception. Sex workers carry condoms to use as protection against HIV/AIDS, other sexually transmitted diseases, and unwanted pregnancy.<sup>299</sup> Sex workers have a fundamental right to access and use condoms and that right cannot be infringed upon unless a compelling state interest is at stake and the method of enforcement of that interest is narrowly tailored.<sup>300</sup>

*B. Police Policies Constitute an Infringement on the Fundamental Right To Access and Use Contraceptives*

Taking condoms from suspected sex workers deprives them of the ability to access and use contraceptives.<sup>301</sup> Because the Supreme Court has established a fundamental right to use contraceptives, law enforcement confiscation of condoms as evidence constitutes an infringement on that right and must satisfy strict scrutiny.<sup>302</sup> In *Griswold*, the Supreme Court struck down a state statute that allowed contraceptive use for the purpose of preventing disease but not for preventing pregnancy.<sup>303</sup> When simply limiting access to condoms constitutes a substantial interference with a

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293. See *supra* Part I.A.

294. See *supra* Part II.A.1–3.

295. See *supra* notes 157–75 and accompanying text.

296. See *supra* notes 181–94 and accompanying text.

297. See *supra* notes 195–214 and accompanying text.

298. See *supra* Part II.A.4–5.

299. See *supra* notes 41–46 and accompanying text.

300. See *supra* notes 41–47 and accompanying text.

301. See *supra* Part I.C.1–3.

302. See *supra* notes 37–40 and accompanying text.

303. See *supra* notes 160–71 and accompanying text

fundamental right, as the Supreme Court held in *Carey*, taking condoms from sex workers and depriving them of access to contraceptives constitutes an even greater infringement on the fundamental right.<sup>304</sup> Taking condoms from suspected sex workers is only constitutional if it is narrowly tailored and done for a sufficiently compelling state purpose.<sup>305</sup>

*C. State Actors Do Not Have a Sufficiently Compelling State Interest To Justify the Infringement on the Fundamental Right to Contraceptives*

The police practice of taking condoms to use as evidence in New York City, Los Angeles, and Washington, D.C. is not conducted for a sufficiently compelling state interest to justify the interference with the fundamental right to make family planning decisions and use contraceptives.<sup>306</sup> Police officers confiscate condoms for the purpose of using them as evidence in the prosecution of suspected sex workers.<sup>307</sup> Prosecutors, however, are not using the condoms as evidence.<sup>308</sup> In some cases, police officers are simply taking the condoms to throw in the trash.<sup>309</sup> A compelling state interest must be the actual purpose behind a state action, and the Supreme Court has never stated what exactly constitutes a compelling state interest.<sup>310</sup>

The Court has identified a compelling state interest in the protection of the country during wartime,<sup>311</sup> in ensuring the safety of children,<sup>312</sup> in the protection of the health of a pregnant woman, and in the life of a fetus once it has reached viability.<sup>313</sup> Invading a fundamental right simply to aid in the prosecution of criminal laws is not a sufficiently compelling interest when measured against interests the Court has previously found compelling.<sup>314</sup> The protection of life and country are much more compelling governmental goals than enforcing nonviolent criminal laws in a way that infringes on a fundamental right.<sup>315</sup> Moreover, all three cities are currently questioning the practice of taking condoms as evidence, thereby demonstrating that there is not a compelling reason to continue the action.<sup>316</sup> Because the state interest is not compelling, taking condoms from suspected sex workers is an unconstitutional infringement of a fundamental right.<sup>317</sup>

In New York, the state interest in fighting HIV/AIDS has led the Department of Health and Mental Hygiene to give out free condoms throughout New York City, where there is a heightened occurrence of

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304. *See supra* notes 206–10 and accompanying text.

305. *See supra* Part I.A.4.

306. *See supra* notes 45–47 and accompanying text.

307. *See supra* Part II.B.1–3.

308. *See supra* notes 291–92 and accompanying text.

309. *See supra* note 6 and accompanying text.

310. *See supra* notes 45–46 and accompanying text.

311. *See supra* notes 48–52 and accompanying text.

312. *See supra* notes 53–55 and accompanying text.

313. *See supra* Part II.B.4–5.

314. *See supra* notes 311–13 and accompanying text.

315. *See supra* Part I.B.1–2.

316. *See supra* Part I.D.1.c, I.D.2.d., I.D.3.d.

317. *See supra* note 200 and accompanying text.

HIV/AIDS.<sup>318</sup> Taking condoms from people who are engaged in sex work is directly in opposition to the state's interest in protecting health.<sup>319</sup> While police officers have a state interest in upholding antiprostitution laws, the small number of cases that actually make it to court where the condoms could be used as evidence is too low to justify the infringement on the fundamental right.<sup>320</sup>

The Queens District Attorney estimated that of seventy-two cases for prostitution-related offenses, condoms were expected to be part of the prosecution's evidence in a mere 2.77 percent of the cases.<sup>321</sup> Moreover, a state court judge's refusal to accept condoms as evidence further indicates a divide between the constitutional right to be free from state interference with a fundamental right and the legitimate government purpose.<sup>322</sup> If the courts are unwilling to admit the evidence, then the confiscated condoms no longer serve the government purpose of enforcing antiprostitution laws.<sup>323</sup>

The Supreme Court has found a state interference with a fundamental right to be valid during times of war or when necessary for the protection of children.<sup>324</sup> The interest in carrying out ordinary criminal law enforcement will not justify the infringement of the fundamental right to contraception, particularly when the evidence so rarely makes it to court.

In Washington, D.C. and Los Angeles, outreach workers experience harassment at the hands of police officers for distributing condoms to sex workers.<sup>325</sup> The Supreme Court established a right to advertise for and distribute condoms when it stated in *Carey* that limiting the access to distribution of contraceptives was sufficient to constitute an unconstitutional violation of a fundamental privacy right.<sup>326</sup> Police officers cannot argue that they are confiscating condoms from outreach workers to use in the enforcement of antiprostitution laws.<sup>327</sup> Because there is no compelling state interest in prohibiting outreach workers from distributing condoms, police officers' infringement on the right to contraception is unconstitutional.<sup>328</sup>

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318. *NYC Condom: Why Use Them?*, N.Y.C. DEPARTMENT HEALTH & MENTAL HYGIENE, <http://www.nyc.gov/html/doh/html/living/nyc-condoms.shtml> (last visited Oct. 21, 2013) (detailing how condoms should be used because they prevent both diseases and pregnancy).

319. *Id.*

320. *See supra* notes 258–60 and accompanying text.

321. *See supra* note 258 and accompanying text.

322. *See supra* Part I.B.1.

323. *See supra* notes 266–70, 291–92 and accompanying text.

324. *See supra* notes 48–55 and accompanying text.

325. *See supra* Part I.B.2–3.

326. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 689 (1977) (striking down a statute that restricted the distribution channels for obtaining contraception because limiting public access to contraceptive devices interfered with the fundamental right to make decisions regarding family planning).

327. *See supra* notes 114–17, 134–35 and accompanying text.

328. *See supra* notes 45–47 and accompanying text.

*D. The Government Action Is Not Narrowly Tailored to the Goal of Policing and Prosecuting Prostitution*

Not only is the state interest in enforcing criminal laws not sufficiently compelling to justify an infringement of a fundamental right, the police practice is not narrowly tailored to the purpose of policing prostitution. Any infringement on a fundamental right must be narrowly tailored, and “the fit between the government’s action and its asserted purposed [must] be ‘as perfect as practicable.’”<sup>329</sup> The police practices in New York City, Los Angeles, and Washington, D.C. are not narrowly tailored to the goal of policing prostitution because police officers do not need to deprive sex workers of access to condoms to enforce antiprostitution laws.<sup>330</sup> Sex workers may still engage in sex work even if their condoms have been confiscated, demonstrating that taking condoms does not stop prostitution from occurring.<sup>331</sup> Moreover, it is not necessary for police officers to take the condoms if the goal is to use them as evidence against suspected sex workers.<sup>332</sup>

The policy changes enacted by the city of San Francisco demonstrate that confiscation of condoms is not necessary to use those condoms as evidence.<sup>333</sup> The city of San Francisco previously had a policy that allowed police officers to confiscate condoms from suspected sex workers.<sup>334</sup> The district attorney permanently banned the use of condoms as evidence of prostitution in 1994.<sup>335</sup> Currently, San Francisco law prohibits police officers from taking condoms, and only allows them to photograph the condoms found on persons suspected of engaging in prostitution.<sup>336</sup> While this policy still causes fear of interactions with police officers and discourages sex workers from carrying condoms, it demonstrates that states do not need to confiscate the condoms to use them as potential evidence.<sup>337</sup>

This type of police action is also not narrowly tailored because condoms are not probative of whether sex is being exchanged for a fee.<sup>338</sup> In all three cities with condoms-as-evidence policies, the act that needs to be proven to prosecute someone for prostitution is engaging in sex acts in exchange for a fee.<sup>339</sup> Condoms cannot prove that someone is exchanging sex acts for a fee.<sup>340</sup> They merely prove that someone is protecting themselves from sexually transmitted diseases and unwanted pregnancy while engaging in sex.<sup>341</sup> Because police infringement on the right to

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329. See Siegel, *supra* note 57, at 360.

330. See *supra* notes 256, 261–65 and accompanying text.

331. See *supra* note 98 and accompanying text.

332. See *supra* notes 261–65 and accompanying text.

333. See *supra* Part I.D.4.

334. See *supra* note 143 and accompanying text.

335. See *supra* notes 147–49 and accompanying text.

336. See *supra* note 150 and accompanying text.

337. See *supra* note 151 and accompanying text.

338. See *supra* note 256 and accompanying text.

339. See *supra* Part I.D.1.a, I.D.2.a., I.D.3.a.

340. See *supra* note 256 and accompanying text.

341. See *supra* note 318 and accompanying text.

contraception is not narrowly tailored, it cannot pass the strict scrutiny standard necessary for an infringement on a fundamental right to be deemed constitutional.<sup>342</sup>

#### CONCLUSION

Sex workers throughout the United States use condoms to protect themselves from sexually transmitted diseases and unwanted pregnancy. Police officers confiscate these condoms for the purpose of using them as evidence in the prosecution of prostitution. The Supreme Court has recognized fundamental rights that states cannot infringe upon unless a law or policy is narrowly tailored to achieve a compelling state interest. The right to access and use contraception is one of those fundamental rights.

Because the Supreme Court has identified a right for all individuals to be free from state interference in their choice of whether to use contraceptive devices, state actors confiscating condoms from suspected sex workers infringes on that constitutionally protected privacy right. The government's lack of a compelling state interest in taking condoms, coupled with the failure to narrowly tailor the policy so as to involve the least restrictive infringement of the right, means that the conduct cannot survive strict scrutiny. For this reason, New York City, Washington, D.C., and Los Angeles are enforcing unconstitutional policies and must stop confiscating condoms from suspected sex workers.

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342. *See supra* Part I.A.4.