DISSENTING OPINION BY LEVINSON, J.

I respectfully disagree with the majority's treatment of the defendant-appellant Pame Ann Mary Leilani Romano's argument that Hawai'i Revised Statutes (HRS) § 712-1200(1) (Supp. 1998),[1] as applied to her in the present matter, violates both the federal right to privacy articulated by the United States Supreme Court in Lawrence v. Texas, 539 U.S. 558 (2003), and the state constitutional protection provided by Article I, section 6 of the Hawai'i Constitution [hereinafter, "article I,

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[1] HRS § 712-1200, entitled "Prostitution," provides in relevant part:

> (1) A person commits the offense of prostitution if the person engages in, or agrees or offers to engage in, sexual conduct with another person for a fee.
> (2) As used in [paragraph] (1), "sexual conduct" means "sexual penetration," "deviate sexual intercourse," or "sexual contact," as those terms are defined in [HRS §] 707-700.
> . . . .
> (5) This section shall not apply to any member of a police department, a sheriff, or a law enforcement officer acting in the course and scope of duties.

HRS § 707-700 (Supp. 2001) provided in relevant part:

> "Married" includes persons legally married, and a male and female living together as husband and wife regardless of their legal status, but does not include spouses living apart.
> . . . .
> "Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

Effective May 10, 2004, the definition of sexual contact was amended in relevant part to read " . . . any touching, other than acts of "sexual penetration," of the sexual or other intimate parts of a person not married to the actor . . . " (new language underscored). See 2004 Haw. Sess. L. Act 61, §§ 3 and 8 at 303-04. Effective May 22, 2006, the definition was further amended in respects immaterial to the present matter. See 2006 Haw. Sess. L. Act 116, §§ 4 and 10 at 331-33.

section 6"].[2] Accordingly, I would reverse the district court's August 26, 2003 judgment .

I. BACKGROUND

Inasmuch as the disposition of the present matter relies significantly on its unique facts, I summarize them here.

The present matter arose out of an undercover operation conducted by the Morals Detail of the Honolulu Police Department (HPD) at the former Aston Waikiki Beach Hotel (the Aston). On August 13 and 26, 2003, the district court conducted a bench trial, at which the following relevant testimony was adduced.

A. The Prosecution's Case

On January 18, 2003, HPD Officer Jeffrey Tallion checked into a room in the Aston to investigate prostitution activity. His assignment that evening was to "set up appointments" with suspected prostitutes advertising in the telephone book, in the PennySaver, in MidWeek,[3] or on the internet.

Officer Tallion answered "a small little ad in the [PennySaver] Classified[s] that advertised massage service." The advertisement to which Officer Tallion responded read:

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[2] Article I, section 6 of the Hawai'i Constitution provides: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." This provision was drafted by the 1978 constitutional convention and added following voter approval in the general election of November 7, 1978.

[3] I would take judicial notice that the PennySaver is a free "buy and sell" publication distributed in Hawai'i and that MidWeek is similarly a free or inexpensive newspaper with heavy advertising content and wide distribution throughout O'ahu.

$30 1/2 HOUR
RELAXING/ACUPRESSURE
MASSAGE
BY **PAM (PAME)**
[telephone number]
SAME DAY
APPOINTMENT
[two Honolulu addresses]
(Lic: [### ###])

(Emphases in original.)[4] Officer Tallion "called the number for the massage" and spoke to a woman identifying herself as "Pame." Officer Tallion arranged for an "out-call[]" for $100.00 per hour. Officer Tallion conceded on cross-examination that, during the telephone conversation arranging the appointment, there was no "conversation about any kind of illicit conduct such as sexual acts."

Officer Tallion met Romano outside the Aston and confirmed that she was the woman he had spoken to earlier on the telephone. Romano was wearing neither "low-cut" nor "see-through" clothing but, rather, "regular clothes . . . nothing revealing." As Officer Tallion summarized, "[Romano] was not walking up and down the streets in any kind of revealing . . . attire." The two proceeded up to Officer Tallion's hotel room. The record indicates no discussion concerning massage or any topic of a suggestive nature until Romano and Officer Tallion were in the hotel room. Once inside the hotel room, Officer Tallion testifed, he

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[4] Testifying in her own defense, Romano confirmed that she was a self-employed massage therapist and had held an active license for nineteen years. She advertised under the "Body, Mind and Spirit," "Massage" or "Health and Fitness" sections of PennySaver, but never under its "Adult" or "Personal" sections.

> [c]onfirmed that it was a hundred dollars for the out-call which was related . . . when I first made the appointment; and then . . . I asked if she did anything else. And she said, "Like what? Dance?" And I said, "No." And then she goes, "Well, what did you have in mind?"
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> At that time, I said, "Well, I was referring to a blowjob[."] And she goes, "No, hands only." I go, "So no blowjob, so handjob." She goes, "Yeah, I can do that." So at that time I go, "Well, does that cost extra?" She goes, "Add 20[."] So I go, "Oh, $20 for a handjob." And she replied, "Yes[."]

After the aforementioned dialogue, Officer Tallion gave a prearranged signal and other officers entered the room and arrested Romano. Officer Tallion estimated that their conversation inside the hotel room spanned ten minutes.

On cross-examination, Officer Tallion conceded that Romano never physically attempted to touch him sexually, nor did she exhibit a prophylactic, disrobe, or direct him to remove his clothing.

Officer Tallion further testified that, based on his knowledge and training as a police officer, Romano had offered him sexual conduct during their conversation: "'Handjob' is the street vernacular commonly used in prostitution for assisted masturbation." He indicated that Romano did not have time to "make any motions towards [him] to suggest that she was going to commit any sexual act" because, after he "obtained the violation," he signaled the arrest team. In other words, he "didn't go for an overt act" because he "didn't have to go that far."

B. Romano's Motion To Dismiss

In her motion to dismiss, Romano argued that Lawrence v. Texas effectively invalidated HRS § 712-1200(1), see supra note 1, as applied to Romano's private sexual activity with a

putatively consenting adult. In the written motion itself, Romano cited only article I, section 7 of the Hawai'i Constitution and the fourth amendment to the United States Constitution (concerning searches and seizures) as authority, but her entire memorandum in support discussed Lawrence, which concerned the due process clause of the fourteenth amendment to the United States Constitution and, by implication, the other privacy-related amendments and their penumbras, see infra part II.B.1. In the August 26, 2003 hearing on the motion, Romano elaborated orally that the interpretation of Hawaii's constitutional right to privacy in State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983), "w[ould] have to change" "in light of Lawrence." (Boldface omitted.) The sum total of Romano's argument was a challenge to HRS § 712-1200(1), not on its face but, rather, as applied to Romano's particular conduct. She impliedly analogized the present matter to Mueller and urged that a materially similar case should be resolved differently post-Lawrence, inasmuch as "this is not a situation of public conduct[;] . . . [t]his is a private activity":

> [I]n . . . Mueller, the defendant [Mueller] . . . entertained individuals at her home. Police officer[s] under cover approached her . . . in the privacy of her home. . . .
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> . . . .
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> . . . [I]f for argument's sake . . . the act was committed, . . .
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> . . . she was not out on the street. There was not commercial activity in front of individuals. This was a private conversation taking place in a room according to . . . [O]fficer[Tallion].

(Boldface omitted.)

The prosecution asserted that the applicability of Lawrence, by its own language, was limited to "consenting adults

where there is no fee included," not prostitution. Moreover, the prosecution offered up as state interests in criminalizing sexual conduct between consenting adults for a fee the potential for "disruption to the marital contract" and "sexual diseases that might get passed through promiscuous sex." Romano maintained that, in Lawrence, "the . . . State made the same arguments . . . about . . . sexually transmitted diseases . . . ; also, morality issues and the like," but that the Lawrence "Court said that doesn't apply between consensual adults in the privacy of their own home."

The district court denied Romano's motion, stating that "the court does not agree with the applicability of Lawrence . . . to the instant situation. What [Romano] is asking is for this court to prematurely second-guess the Hawai[']i Supreme Court as to how [it] would apply Lawrence to our particular statute here in . . . Hawai[']i." (Boldface omitted.)

II. IN LIGHT OF *LAWRENCE* AND ARTICLE I, SECTION 6, ROMANO'S CONVICTION WAS UNCONSTITUTIONAL.

A. *Lawrence* Severely Undermined The Rationale Of *State v. Mueller* By Announcing A Federal Privacy Interest In Private Consensual Sex.

At first blush, this court's decision in Mueller would appear to foreclose Romano's position that HRS § 712-1200(1), see supra note 1, impermissibly abridged her constitutional right to privacy.[5] Similarly, in Mueller, the alleged barter of sex for

[5] It is unclear whether the defendant in Mueller based her arguments on both the federal and state constitutions, but this court based its decision on an analysis of both.

money "took place in . . . Mueller's apartment, the participants were willing adults, and there were 'no signs of advertising' anywhere in the apartment building." 66 Haw. at 618-19, 671 P.2d at 1354. Mueller argued "that the activity's private setting and the absence of public solicitation set her case apart 'from every other prostitution case.' And she maintained a decision to engage in sex with 'a voluntary adult companion' was 'well within her constitutional right to privacy.'" 66 Haw. at 619, 671 P.2d at 1354. The district court rejected her argument, finding that the state had a "'compelling interest in controlling prostitution in private residences as well as the streets.'" Id. This court affirmed on the basis that "we are not convinced a decision to engage in sex for hire is a fundamental right in our scheme of ordered liberty." 66 Haw. at 618, 671 P.2d at 1353. The Mueller court phrased "[t]he sole issue posed on appeal" as "whether the proscriptions of . . . []HRS[] § 712-1200 may be applied to an act of sex for a fee that took place in a private apartment." 66 Haw. at 619-20, 671 P.2d at 1354 (footnote omitted).

The Mueller court surveyed federal precedent construing an individual's right to privacy as derived from the federal bill of rights in the context of marriage, contraception, abortion, and pornography. Mueller, 66 Haw. at 620-22, 671 P.2d at 1354-55 (quoting Roe v. Wade, 410 U.S. 113, 152-54 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Stanley v. Georgia, 394 U.S. 557, 565, 568-69 (1969); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965)). Ultimately, however, the exercise was unhelpful inasmuch as the Mueller court determined that "there has been no clear and binding judicial statement on the matter of our present

concern." Mueller, 66 Haw. at 622, 671 P.2d at 1355. The Mueller court noted that, at least by 1983, "[w]hat little we ha[d] heard from the [United States Supreme] Court . . . ha[d] been in the muted tones of a summary affirmance of the decision of a three-judge [panel] upholding the constitutionality of a state statute making sodomy a crime and by way of dicta in other decisions." 66 Haw. at 622, 671 P.2d at 1355-56 (citing Doe v. Commonwealth's Attorney for City of Richmond, 425 U.S. 901 (1976), aff'g 403 F. Supp. 1199 (E.D. Va. 1975)). In short, at the time of this court's holding in Mueller, there was no federal precedent addressing whether the criminalization of an utterly private sexual activity (and its associated monetary component) abridged an individual's right to privacy.

Lawrence created just such a precedent, confirming that individual decisions by married and unmarried persons "concerning the intimacies of their physical relationship . . . are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[6] 539 U.S. at 578. The Court thereby overruled Bowers v. Hardwick, 478 U.S. 186 (1986), and, by implication, Commonwealth's Attorney.

In Lawrence, the charged conduct, denominated in the challenged Texas statute as "'deviate sexual intercourse with another individual of the same sex,'" was undertaken "in private and consensual[ly]." 539 U.S. at 562, 564 (quoting Tex. Penal Code Ann. § 21.06(a) (2003)). The analysis of the majority

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[6] See U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

opinion, authored by Justice Kennedy, centered on the private nature of the conduct in question and the protections afforded individuals "from unwarranted government intrusions into a dwelling or other private places," as well as "liberty of the person . . . in its more transcendent dimensions." See id. at 562, 564 (framing the question as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty"), 567 (noting that "adults may choose to enter upon [a homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons").

Having overruled Bowers, the majority expressly limited the extent of its holding: "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused. It does not involve public conduct or prostitution." Id. at 578 (emphases added). No further explanation of prostitution's exclusion was forthcoming, but the thrust of the Lawrence majority's analysis supports the conclusion that the Court was focused on addressing only private sexual activity among adults capable of consenting and, therefore, to the extent that prostitution involves public solicitation, it departed from the realm of the private and, hence, from the scope of the Lawrence analysis. However, where two consenting adults swap money for sex in a transaction undertaken entirely in seclusion, the analysis of the Lawrence majority, despite the majority's attempt to avoid the notion, leads inexorably to the conclusion that the state may not

exercise its police power to criminalize a private decision between two consenting adults to engage in sexual activity, whether for remuneration or not. See 539 U.S. at 590 (Scalia, J., dissenting) (arguing that the majority's recognition of "'an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex' (emphasis added)," 539 U.S. at 572, renders prostitution laws based on morality unenforceable). Indeed, the Lawrence majority addressed the issue of consensual homosexual sex in the same terms many would use to describe prostitution:

> The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." Planned Parenthood . . . v. Casey, 505 U.S. 833, 850 (1992).

539 U.S. at 571. In short, the analysis in Lawrence severely undermines this court's federal constitutional analysis in Mueller, and article I, section 6, see supra note 2, casts further doubt on Mueller's viability. Indeed, article I, section 6 does not abide the criminalization of wholly private, consensual sexual activity between adults without the state's having demonstrated a compelling interest by way of "injury to a person or abuse of an institution the law protects," id., 539 U.S. at 568.

B. The Jurisprudence Of This Court And The Intent Of The Drafters Of Article I, Section 6, Require That The State's Criminalization Of A Private Transaction Be Justified By A Compelling Interest In Preventing Harm To Others.

1. The fundamental right "to be left alone"

The Mueller court next turned to the privacy provision adopted in 1978 as article I, section 6 of the state constitution. First, the court acknowledged that the "terse language" of article I, section 6 required it to resort to extrinsic aids to construction. The Mueller court noted that the delegates to the constitutional convention had recorded "the[ir] intent . . . to [e]nsure that privacy is treated as a fundamental right," Comm. Whole Rep. No. 15, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978 [hereinafter, "Proceedings"] at 1024 (1980), but the court also implied that Hawaii's newly codified privacy right was circumscribed by federal precedent. See 66 Haw. at 625-26, 671 P.2d at 1357-58. That is, the constitutional convention having mused that the watershed right to privacy "is similar to the privacy right discussed in cases such as Griswold . . . , . . . Baird, Roe, etc." (emphasis added), this court apparently viewed that language as conclusive proof that article I, section 6 embodied no broader privacy right than what already existed on the federal level. The Mueller court summarily abandoned all hope of discerning meaning beyond the federal bill of rights and its penumbra, finding itself "led back to Griswold, [Baird], and Roe

and . . . to have come full circle in our search for guidance on the intended scope of the privacy protected by the Hawai[']i Constitution." 66 Haw. at 626, 671 P.2d at 1358.

The Mueller court's narrow construction of article I, section 6 has since been called into question:

> "As the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai'i Constitution, we are free to give broader privacy protection than that given by the federal constitution." [State v.] Kam, 69 Haw. [483,] 491, 748 P.2d [372,] 377 [(1988)]. Moreover, unlike the federal constitution, our state constitution contains a specific provision expressly establishing the right to privacy as a constitutional right. Thus, . . . the text of our constitution appear[s] to invite this court to look beyond the federal standards in interpreting the right to privacy.

State v. Mallan, 86 Hawai'i 440, 448, 950 P.2d 178, 186 (1998) (emphases in original); see also Kam, 69 Haw. at 491, 748 P.2d at 377.

The roots of article I, section 6 extend deep into this court's jurisprudence. State v. Lee, 51 Haw. 516, 465 P.2d 573 (1970), considered an individual's liberty from unwarranted exercise of the state's police power:

> [W]here an individual's conduct, or a class of individuals' conduct, does not directly harm others the public interest is not affected and [such conduct] is not properly the subject of the police power of the legislature. However, where the legislature has determined that the conduct of a particular class of people recklessly affects their physical well-being and that the consequent physical injury and death is so widespread as to be of grave concern to the public and where the incidence and severity of the physical harm has been statistically demonstrated to the satisfaction of th[is c]ourt, then the conduct of that class of people affects the public interest and is properly within the scope of the police power. Of course, where the conduct sought to be regulated is in furtherance of a specific constitutional right, a different situation arises.

51 Haw. at 521, 465 P.2d at 577. As it applied this rule to the facts of Lee, however, this court observed "that the continued viability of our society requires that [motorcycle users] protect themselves from physical injury or death," that "[t]he burden imposed [(i.e., wearing a helmet while operating a motorcycle)] is directly and immediately related to the evil sought to be controlled," and that "a narrower means to protect motorcyclists could hardly be conceived." 51 Haw. at 522, 465 P.2d at 576-77. Justice Abe disagreed, implying that the helmet law "attempts to infringe upon and stifle fundamental personal liberties for one's own safety and is not concerned with the preservation of public order, safety, health and morals, or for the public welfare. Then, the fact that the general public considers it foolhardy to ride a motorcycle without a safety helmet . . . should not be used as a criterion for defining the non-use of a helmet a criminal offense." See 51 Haw. at 528, 465 P.2d at 580 (Abe, J., dissenting).

Justice Abe's concurring opinion in State v. Kantner, 53 Haw. 327, 334-39, 493 P.2d 306, 311-13 (1972) (Abe, J., concurring), in which the appellants appealed a conviction for marijuana possession, trumpeted the vitality of the principle that "one has a fundamental right of liberty to make a fool of [one]self as long as [one's] act does not endanger others, and that the state may regulate the conduct of a person under pain of criminal punishment only when [the person's] actions affect the general welfare -- that is, where others are harmed or likely to be harmed." 53 Haw. at 336-37, 493 P.2d at 312 (Abe, J., concurring) (citing Lee, 51 Haw. at 524-28, 465 P.2d at 578-80 (Abe, J., dissenting)). The plurality in Kantner did not

contravert Abe's assertion directly but, rather, began its analysis by noting that the appellants had conceded "that the State may properly regulate the possession of marihuana under the police power." 53 Haw. at 328, 493 P.2d at 307. In the view of the Kantner plurality, the appellants essentially argued "that the State has so unreasonably and irrationally exercised its police power that the present statutory scheme for the prohibition of possession of marihuana violates the constitutional guarantees of equal protection and due process of law" by classifying marijuana as a narcotic despite uncontroverted evidence it did not scientifically meet the definition of drugs in that class. 53 Haw. at 328-29, 493 P.2d at 307-08.

The Kantner plurality disposed of the appellants' argument by employing a standard equal protection/due process analysis, concluding that use of the term "narcotic" was not "so misleading as to confuse legislators in their law-making activities or to confuse persons of common understanding in their effort to determine whether possession of marihuana constitutes a crime" and that the disparate treatment of alcohol and marijuana was justified on the basis that little was known of marijuana's long-term health effects. 53 Haw. at 329-31, 493 P.2d at 308-09.

To the degree that the Kantner plurality did address the appellants' contention that the personal use of marijuana implicated a fundamental liberty interest leading to a heightened standard of review, it merely stated that "[w]e doubt . . . that the use of a mind[-]altering drug, absent an intimate connection with a 'preferred freedom[,'] requires the standard of review which [the] appellants suggest" (emphasis added), concluding

ultimately that "there is no fundamental guarantee protecting the use and possession of euphoric drugs," basing its conclusion wholly on the definition of a preferred freedom extant at the time under the federal constitution as an activity that is "essential, not merely desirable, for the exercise of the specifically enumerated rights." Id. (emphasis added) (summarizing Griswold). The plurality, therefore, did not dispute Justice Abe's assertions that individual liberty foreclosed the intrusion of the state's police power into wholly private activity that did not harm others and that any infringement of that preferred freedom mandated heightened scrutiny. Rather, the Kantner plurality concluded that, under federal precedent at the time, the possession of marijuana was not a fundamental right and, hence, no "preferred freedom" was infringed. 53 Haw. at 333, 493 P.2d at 310 (emphasis added).

The Lee tenet of individual liberty was reaffirmed a year later in State v. Cotton, 55 Haw. 138, 139, 516 P.2d 709, 710 (1973) ("We accept now . . . the fundamental tenet that the relationship between the individual and the state leaves no room for regulations which have as their purpose and effect solely the protection of the individual from his own folly."). It was neglected, but not repudiated, over the following years by State v. Baker, 56 Haw. 271, 535 P.2d 1394 (1975), State v. Renfro, 56 Haw. 501, 542 P.2d 366 (1975), and State v. Bachman, 61 Haw. 71, 595 P.2d 287 (1979). In Baker, the defendants were charged with possession of marijuana, but the district court, evidently tracking the analysis of Lee, Cotton, and the concurring and dissenting trio in Kantner -- Justices Abe, Bernard H. Levinson, and Kobayashi -- see Mallan, 86 Hawai'i at

475 n.26, 950 P.2d at 213 n.26 (Levinson, J., dissenting), "placed on the State the burden of showing clearly and convincingly that the possession of marijuana . . . constitutes a harm either to the individual or the community." Baker, 56 Haw. at 276, 535 P.2d at 1397. This court reversed the ruling of the district court, asserting that beginning, as the district court did, by considering the "fundamental right of liberty of a human being to conduct himself in a manner which neither harms himself nor others" is "to begin with the wrong end of the stick." 56 Haw. at 278-79, 535 P.2d at 1398. The Baker majority deferred to the legislature to determine the proper extent of the regulation of intoxicating substances, being careful, however, to distinguish its holding from the outcome in Stanley v. Georgia, 394 U.S. 557 (1969), in which the confronted Georgia statute "'infringe[d] . . . fundamental liberties protected by the First and Fourteenth Amendments.'" 56 Haw. at 279-80, 535 P.2d at 1399 (quoting Stanley, 394 U.S. at 567, 568 & n.11). The Baker court implicitly rejected the appellants' contention that the personal use of marijuana was a private act protected, as articulated in Griswold, 381 U.S. 479, by the federal right to privacy. Cf. 56 Haw. at 285, 535 P.2d at 1402 (Kobayashi, J., dissenting).

The Baker majority further concluded that, "[w]hile our State Constitution has a right of privacy provision,[7] we do not

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[7] Haw. Const. art. I, § 5 (1968) (renumbered as Haw. Const. art. I, § 7 (1978)) provided:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy 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 or the communications sought to be intercepted.

The privacy provision now enshrined in article I, section 6 had not yet been

find in that provision any intent to elevate the right of privacy to the equivalent of a first amendment right," 56 Haw. at 280, 535 P.2d at 1399 (one footnote omitted and one added). However, crucial to the present matter, the Baker court distinguished an opinion championed by the appellees: in Gray v. State, 525 P.2d 524 (Alaska 1974), the Alaska Supreme Court held that, under a newly enacted state constitutional amendment that expressly articulated a right to privacy,[8] a statute that infringes on the right to privacy must demonstrate a compelling state interest to survive a constitutional challenge. Id. at 527. The Baker court conceded that, if a fundamental right to privacy were implicated in the possession of marijuana, "it would take away from our . . . drug laws the presumption of constitutionality and require the showing of a compelling state interest before any of them could be enforced." 56 Haw. at 280, 535 P.2d at 1400. However, there being no equivalent privacy interest articulated in the Hawai'i Constitution yet, the court did not reach that question.

Finally, the Baker majority, while "not unmindful . . . ' . . . that the concern for public health and safety is relevant only insofar as the actions of one individual may threaten the well-being of others,'" first sidestepped Justice Abe's rationale on the basis that the appellees had conceded that the state's police power could regulate marijuana possession and then woodenly distinguished Lee and Cotton as "inapplicable" because they dealt with motorcycle helmets and goggles and not marijuana. See 56 Haw. at 282, 535 P.2d at 1400-01 (quoting United States v.

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adopted.

[8] Alaska Const. art. I, § 22, effective October 14, 1972, provides: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

Kiffer, 477 F.2d 349, 354 (2d Cir. 1973)). Renfro and Bachman subsequently relied on Baker to uphold the constitutionality of laws criminalizing marijuana possession in the face of similar challenges, see Renfro, 56 Haw. at 503, 542 P.2d at 368 (regurgitating the Baker court's reasoning "that neither the federal nor Hawaii constitutions has elevated the right of privacy to the equivalent of a first amendment right"); Bachman, 61 Haw. at 72, 595 P.2d at 287 ("What we said in . . . Baker and . . . Renfro is still determinative . . . .") (internal citations omitted).

Baker, Renfro and Bachman -- and the federal grounds upon which Mueller in part relied -- were rooted in the inability of this court, in considering the activity in question, to discern any infringement of a fundamental right similar to those emanating from and incorporated into the states through the first, third, fourth, fifth, ninth, and fourteenth amendments to the United States Constitution, cf. Griswold, 381 U.S. at 484. Inasmuch as the activities in those cases did not implicate a fundamental right, this court reasoned, the respective statutes criminalizing those activities could stand on mere rational bases. Lawrence renders that reasoning inapposite in the present matter by discerning, within the scope of the federal right to privacy, a fundamental right to private sexual relations.

2. The genesis of article I, section 6

Concomitantly, this court has, in the past, recognized that the drafters of article I, section 6 intended that the right to be left alone be guarded by a compelling interest standard of scrutiny and, hence, a presumption against the constitutionality of criminalizing private behavior.

Kam, which quoted with approval the constitutional convention's Committee on Bill of Rights, Suffrage and Elections, summarized the "harm to others" concept as the boundary between the state's police power and the fundamental right to privacy:

> Perhaps the most important aspect of privacy is that it confers upon people the most important right of all -- the right to be left alone. As Justice Brandeis said in his now celebrated and vindicated dissent in Olmstead v. U[nited]S[tates], 277 U.S. 438[, 479] (1928)[(Brandeis, J., dissenting)]:
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> > "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the most valued by civilized [people]."
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> It gives each and every individual the right to control certain highly personal and intimate affairs of his own life. The right to personal autonomy, to dictate his own lifestyle, to be oneself are included in this concept of privacy. As Justice Abe stated in his concurring opinion in State v. Kantner, 53 H[aw]. 327, [336,] 493 P.2d 306[, 312] (1972)[(Abe, J. concurring)]: each person has the "fundamental right of liberty to make a fool of himself as long as his act does not endanger others, and that the state may regulate the conduct of a person under pain of criminal punishment only when his actions affect the general welfare -- that is, where others are harmed or likely to be harmed."
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> . . . .
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> It should be emphasized that this right is not an absolute one but, because similar to the right of free speech, it is so important in value to society that it can be infringed upon only by the showing of a compelling state interest. If the State is able to show a compelling state interest, the right of the group will prevail over the privacy rights or the right of the individual. However, in view of the important nature of this right, the State must use the least restrictive means should it desire to interfere with the right.
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> . . . 1 Proceedings . . . at 674-75 . . . (emphas[e]s added).

Kam, 69 Haw. at 492-93, 748 P.2d at 378 (some emphases in original and some added). The Kam court proceeded to cite the report of the Convention's Committee of the Whole: "'[The right to privacy] is treated as a fundamental right subject to interference only when a compelling state interest is

demonstrated. By inserting clear and specific language regarding this right into the Constitution, your Committee intends to alleviate any possible confusion over the source of the right and the existence of it.'" Kam, 69 Haw. at 493, 748 P.2d at 378 (emphasis in Kam) (quoting 1 Proceedings at 1024). The Kam court then concluded that, "[b]ased on the clear and unambiguous reports, a compelling state interest must exist before the government may intrude into those certain highly personal and intimate affairs of a person's life." Id. (internal quotations and brackets omitted).

In sum, the plain language of article I, section 6 compels the conclusion that the right to privacy, expressly including the right to harm oneself and oneself alone, is a fundamental right, an infringement upon which must manifest more than a mere rational basis. An honest articulation of the privacy interest at stake is a prerequisite, however, to any analysis that would purport to adhere to the intent of the drafters to protect individual liberties.

C. Rejecting The Fallacy Of Trivialization

To frame the question at bar as whether "a decision to engage in sex for hire is a fundamental right in our scheme of ordered liberty," as did our predecessors in Mueller, 66 Haw. at 618, 671 P.2d at 1353-54, and as the majority appears to do in the present matter, majority opinion at 23, is to indulge in a "fallacy of trivialization," see Mallan, 86 Hawai'i at 498, 950 P.2d at 236 (Levinson, J., dissenting), demean the crucial role individual liberty plays in the concept of ordered liberty, and

pervert the article I, section 6 framers' "intent . . . to [e]nsure that privacy is treated as a fundamental right for purposes of constitutional analysis," see 1 Proceedings at 1024.

The United States Supreme Court, in Lawrence, recognized the danger of the fallacy of trivialization when it asserted that the Bowers Court had "misapprehended the claim of liberty" at stake by framing the question as "whether there is a fundamental right to engage in consensual sodomy." 539 U.S. at 567. Similarly, the present case is no more about a fundamental right "to engage in sex for hire" than Baird was about a fundamental right to engage in sex out of wedlock. The proper question before this court, rather, is whether Romano enjoys a fundamental right to freedom from the state's interference in, and criminalization of, her private conduct without a compelling and narrowly tailored justification. I would hold that she does indeed enjoy such a right.

D. The Narrow Import Of My Analysis

The majority asserts that I argue "that a logical extension of Lawrence precludes the states from exercising their police power to curb prostitution." Majority opinion at 18. The majority mischaracterizes the import of my reasoning. My analysis draws a clear line between purely private behavior between consenting adults -- requiring demonstration of a compelling state interest before criminal penalties may be imposed -- and the public realm, where the state retains broad power to impose time/place/manner regulations. Adoption of my analysis by the majority, would not, therefore, compel the legalization of prostitution in its usual manifestations: streetwalking, escort services, or even hostess bars.

I merely assert that HRS § 712-1200(1), see supra note 1, as applied to Romano in the present matter is unconstitutional. Romano's prosecution and conviction reflect an extraordinarily cramped application of HRS § 712-1200(1). The uncontroverted evidence in the present matter demonstrates that Romano was held criminally accountable for wholly private, though admittedly sexual, behavior with another consenting adult. As its majority noted, Lawrence presupposed private sexual activity between two adults fully capable of giving valid consent. 539 U.S. at 578. Neither the present matter nor Lawrence concerned "persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused." See id. And, as I have emphasized, this case does not implicate public solicitation, streetwalking, or salacious advertising, which are not private activities. Rather, the present record reflects that the charged transaction could not conceivably have hurt anybody other than Romano, which renders her conviction under HRS § 712-1200(1) -- absent a showing of a compelling interest from the prosecution -- a violation of her federal and state constitutional rights to privacy as articulated in Lawrence and by the drafters of article I, section 6.

With regard to demonstrating the necessary compelling interest, at the hearing on Romano's motion to dismiss, the prosecution did speak generally to the state's interest "in making prostitution illegal," e.g., avoiding the "disruption to the marital contract," and "any sexual diseases that might get passed through promiscuous sex." However, such concerns as moral depravity, the salacious reputation of a community, and disease and their attendant impact on productivity, tourism, etc., are

commonly trotted out in the name of the "general welfare," are generally speculative and attenuated, and can be moderated through "less restrictive" time, place, and manner regulations.[9] The prosecution's unelaborated theory does not constitute evidence at all, let alone proof of a compelling state interest and narrow tailoring justifying Romano's criminal conviction. As Justice Levinson wrote in his Kantner dissent, "it is self-evident that '[r]egulation and prohibition are not coextensive.'" See generally Mallan, 86 Hawai'i at 473-74, 496 n.55, 498, 504, 507, 960 P.2d at 211-12, 234 n.55, 236, 242, 245 (Levinson, J., dissenting) (quoting Kantner, 53 Haw. at 346, 493 P.2d at 317 (Levinson, J., dissenting)).

In light of the foregoing analysis, I would reverse the district court's August 26, 2003 judgment.

Steven H. Levinson

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[9] See, e.g., Brothel Licence Conditions 1-5 (Prostitution Licensing Auth. (Queensl., Austl.) Sept. 12, 2003), available at http://www.pla.qld.gov.au/pdfs/brothels/brothel_license_condtions.pdf [sic] ("The licensee must . . . : 23. . . . Provide written information about sexually transmitted infections (STIs) in the client waiting area and ensure written information about STIs is available to all staff and sex workers. 24. Ensure sex workers hold a current sexual health certificate.").