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## Is Your Bedroom a Private Place - Fornication and Fundamental Rights

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# IS YOUR BEDROOM A PRIVATE PLACE? FORNICATION AND FUNDAMENTAL RIGHTS

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## I. INTRODUCTION

Many members of the general public are secure in their belief that the Constitution protects a right to privacy. They may also believe that the right to privacy includes the right to fornicate.<sup>1</sup> The reality is that the Constitution, as it has been interpreted by the Supreme Court, does not protect a blanket right to privacy. Instead the Supreme Court has protected only a specific set of private activities from governmental interference.

In *Seegmiller v. LaVerkin City*,<sup>2</sup> the Tenth Circuit Court of Appeals addressed the question of whether a right to privacy includes the right to fornicate. The court held that there is no fundamental right for adults to engage in consensual sex free from government regulation.<sup>3</sup> This finding sounds inconsistent with the Supreme Court's holding in *Lawrence v. Texas*.<sup>4</sup> There the Court ruled that the State of Texas could not criminalize homosexual sexual activity through the use of a sodomy statute.<sup>5</sup> Yet, the Tenth Circuit relied on the reasoning and holding of *Lawrence* to declare that there is no fundamental right to consensual sex. The court went on to uphold the employment penalties imposed by the City against a city employee who engaged in private sexual behavior.<sup>6</sup>

The thesis of this note is that the Tenth Circuit failed to apply the reasoning from *Lawrence* in the case of *Seegmiller*. Part II of this note describes the facts, procedural history, holdings and reasoning in the case of *Seegmiller*.<sup>7</sup> Part III examines the background law surrounding *Seegmiller* and focuses on two points. First it recounts the historical development of the fundamental rights doctrine.<sup>8</sup> Second, it juxtaposes Justice Blackmun's call for a fundamental right to privacy in his dissent in *Bowers v. Hardwick*<sup>9</sup> with an analysis of the *Lawrence* majority opinion.<sup>10</sup> Part IV, the analysis section, examines whether the Supreme Court should recognize a fundamental right to privacy and argues that *Seegmiller* was not correctly decided based on the reasoning of *Lawrence*.<sup>11</sup>

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1. BLACK'S LAW DICTIONARY 679 (8th ed. 2004) (defining fornication as "1. Voluntary sexual intercourse between two unmarried persons.").

2. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 769 (10th Cir. 2008).

3. *Id.* at 771.

4. 539 U.S. 558, 578 (2003).

5. *Id.*

6. *Seegmiller*, 528 F.3d at 771–72. Sharon Johnson was a police officer. *Id.* at 764.

7. *See infra* Part II.

8. *See infra* Part III.

9. 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

10. *See infra* Part III.

11. *See infra* Part IV.

## II. STATEMENT OF THE CASE

A. *Facts of the Case*

*Seegmiller* involves an abusive marriage, an affair, false allegations, and loss of employment. Sharon Johnson was a police officer at the LaVerkin City Police Department and was a SWAT team member for Washington County, both in Utah.<sup>12</sup> In March 2003, Ms. Johnson separated from her husband and filed divorce proceedings.<sup>13</sup> He reacted by violating a protective order and threatening to kill himself and her.<sup>14</sup>

While her divorce was pending, Ms. Johnson was sent to a police training conference paid for in part by LaVerkin City.<sup>15</sup> While at the conference, Sharon Johnson had a brief affair with an officer from a different department.<sup>16</sup> When her estranged husband learned of the affair, he falsely reported to her supervisors within the police department that she had been raped at the conference.<sup>17</sup> Her supervisor, Police Chief Kim Seegmiller, investigated the allegation and learned from Ms. Johnson that the affair had been consensual.<sup>18</sup> Chief Seegmiller took no disciplinary action against Ms. Johnson for her conduct at the conference.<sup>19</sup>

The inaction frustrated her estranged husband, so he made a second false allegation that Ms. Johnson and Chief Seegmiller had engaged in an affair.<sup>20</sup> He alleged that due to the affair, Chief Seegmiller was favoring Ms. Johnson with regard to job rules and procedures.<sup>21</sup> As a result, he claimed that Chief Seegmiller was unjustly pursuing domestic violence charges against him.<sup>22</sup> He reported this to a LaVerkin City Council member and filed a written complaint with the city.<sup>23</sup>

The City Council held a closed-door meeting in July 2003 and Ms. Johnson and Chief Seegmiller were placed on administrative leave while the City Council independently investigated the allegations.<sup>24</sup> In addition, Washington County asked Ms. Johnson to step down from her SWAT team position pending the investigation.<sup>25</sup> News of the story leaked and was printed on the front page of the local newspaper.<sup>26</sup> In her complaint, Ms. Johnson alleged that it also appeared in other newspapers and was on radio and television throughout Utah.<sup>27</sup>

Four days after Ms. Johnson and Chief Seegmiller were placed on administrative leave, her husband notified a councilman and the City Manager that his allegations were false.<sup>28</sup> Despite his recantation, Ms. Johnson and Chief Seegmiller

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12. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 764 (10th Cir. 2008).

13. *Id.* at 764–65.

14. *Id.* at 765.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

remained on administrative leave until August 6, 2003.<sup>29</sup> At the August 6, 2003, Council meeting, Mr. Johnson publicly apologized for his conduct, and the Council reinstated Chief Seegmiller and Ms. Johnson.<sup>30</sup>

During the investigation into the alleged affair, the Council learned of Ms. Johnson's conduct at the training conference.<sup>31</sup> At the recommendation of the Council's investigator, the Council ordered the City Manager to issue Ms. Johnson a reprimand.<sup>32</sup> The City Manager met with Ms. Johnson to discuss the punishment, but she refused to sign the written reprimand.<sup>33</sup> As a result, the City Manager issued an oral reprimand with essentially the same terms.<sup>34</sup> The oral reprimand was based on a provision in the law enforcement code of ethics requiring officers to "keep [their] private life unsullied as an example to all and [to] behave in a manner that does not bring discredit to [the officer] or [the] agency."<sup>35</sup> The reprimand stated that "Ms. Johnson had allowed 'her personal life [to] interfere with her duties as an officer by having sexual relations with an officer from Washington County while attending a training session out of town which was paid for in part by LaVerkin City.'"<sup>36</sup> Ms. Johnson was admonished to avoid the "appearance of impropriety" and to conduct herself in a manner that would be consistent with city and police department policies.<sup>37</sup> Ms. Johnson was warned that "further violations [would] lead to additional discipline up to and including termination."<sup>38</sup>

After being reinstated with the City, Ms. Johnson attempted to resume her position on the SWAT team for Washington County.<sup>39</sup> The County required her to obtain a letter stating that she was in good standing with the City and was no longer on administrative leave.<sup>40</sup> Although the City supplied a letter stating Ms. Johnson was no longer on leave, Washington County decided not to reinstate Ms. Johnson.<sup>41</sup> Ms. Johnson resigned from the LaVerkin City Police Department a few months later because she believed her credibility as an officer had been "seriously undermined" by the City's actions.<sup>42</sup>

In her complaint, Ms. Johnson alleged that the reprimand led to lost employment opportunities and to her eventual resignation from employment.<sup>43</sup> Ms. Johnson and Chief Seegmiller brought a variety of federal civil rights and state tort claims against LaVerkin City and the LaVerkin City Manager.<sup>44</sup> The district court granted summary judgment in favor of the defendants on all of Ms. Johnson's claims. She appealed the grant of summary judgment with respect to two claims: (1) a substantive due process claim alleging the City's actions violated her federal

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 766.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 764.

44. *Id.*

constitutional rights, and (2) a negligence claim alleging that the City breached a state law duty of confidentiality.<sup>45</sup> The Tenth Circuit affirmed the grant of summary judgment on both claims.<sup>46</sup>

### B. *The Substantive Due Process Claim*<sup>47</sup>

To support her substantive due process claim, Ms. Johnson asserted that she had a fundamental right to “engage in a private act of consensual sex.”<sup>48</sup> The court rejected her characterization of the fundamental right and instead described the right more narrowly as the right of one police officer to have sexual relations with another officer while off duty at a training conference partially paid for and supported by the LaVerkin City Police Department.<sup>49</sup>

The court then addressed the question of whether the right Ms. Johnson asserted is “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”<sup>50</sup> The court relied on precedent stating that restraint should be used when recognizing a fundamental right.<sup>51</sup> The court limited its recognition of fundamental rights to those the Supreme Court had already recognized including “the right to marry, to have children, to direct the education and raising of one’s own children, to marital privacy, to use contraception and obtain abortion, and to bodily integrity.”<sup>52</sup> The court’s reasoning relied on the *Glucksberg* decision,<sup>53</sup> “[not] all important, intimate, and personal decisions are . . . protected [by substantive due process].”<sup>54</sup> As a result, the court found that the right to engage in a private act of consensual sex was not a fundamental right.<sup>55</sup>

To further support the holding that there is no fundamental right to engage in private consensual sex the court relied on *Lawrence*.<sup>56</sup> The Tenth Circuit concluded that in *Lawrence* the Supreme Court “declined ‘to recognize a fundamental right to sexual privacy . . . where petitioners and amici expressly invited the [C]ourt to do so.’”<sup>57</sup> The Court of Appeals further stated that the *Lawrence* Court applied rational basis to the homosexual sodomy law which indicates that there was no

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45. *Id.*

46. *Id.*

47. The Tenth Circuit Court of Appeals had other holdings with respect to the standard of review, the shocks the conscience test, and the negligence claim. *See id.* at 765–70, 772–74. These holdings will not be discussed in this case note.

48. *Id.* at 770. The court noted that the fundamental liberty interest must be carefully described and it is the burden of the plaintiff to provide that careful description.

49. *Id.*

50. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

51. *Seegmiller*, 528 F.3d at 770.

52. *Id.* at 770–71 (citing *Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007)).

53. In *Washington v. Glucksberg*, three terminally ill patients, four physicians, and a nonprofit organization brought action against the State of Washington claiming that the ban on assisted suicide violated the due process clause. Justice Rehnquist held that the right to assistance in committing suicide was not a fundamental right protected by the substantive due process clause and that the ban was rationally related to legitimate state interests. *See* 521 U.S. 702 (1997).

54. *Seegmiller*, 528 F.3d at 770–71.

55. *Id.* (citing *Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007)).

56. *See id.* at 771 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

57. *Id.* (citing *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1236 (11th Cir. 2004)).

fundamental right at stake.<sup>58</sup> The Court of Appeals concluded that *Lawrence* did not recognize a broad fundamental right to engage in private sexual conduct.<sup>59</sup>

Since the Tenth Circuit had determined that Ms. Johnson did not have a fundamental right to engage in private consensual sex, the court applied rational basis review to LaVerkin City's actions.<sup>60</sup> The court concluded that a police department may privately<sup>61</sup> discipline an officer for her personal conduct consistent with its code of ethics when the department believes it will either further discipline within the department or the public's respect for its officers.<sup>62</sup> Consequently, the court found the government's action to be constitutional because it furthered the legitimate state purpose of keeping the peace or promoting respect for police officers.<sup>63</sup>

### III. BACKGROUND

#### A. *The Development of Fundamental Rights*<sup>64</sup>

The Fourteenth Amendment states that no State shall "deprive any person of life, liberty, or property, without due process of law."<sup>65</sup> The substantive strand of the due process clause protects fundamental rights "requiring a governmental regulation infringing those rights to be narrowly tailored to serve a compelling state interest, when they are implicit in the concept of ordered liberty, or deeply rooted in the nation's history and tradition."<sup>66</sup> The recognition of fundamental rights has been slow. When a fundamental right has been recognized it has been based on common law conceptions such as the right to privacy.<sup>67</sup> The Supreme Court has not recognized a broad fundamental right to privacy.<sup>68</sup> Rather the Court has recognized a group of specific fundamental rights on a case by case basis.<sup>69</sup> The criteria

58. *See id.*

59. *Id.* (citing *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008) (stating "*Lawrence* did not identify a protected liberty interest in all forms and manner of sexual intimacy"); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 n.32 (5th Cir. 2008) (explaining "*Lawrence* did not categorize the right to sexual privacy as a fundamental right"); *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (holding "*Lawrence* . . . did not announce . . . a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct"); *Lofton v. Sec. of Dept. of Children and Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) ("We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right"); *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1239 (11th Cir. 2004)); *cf. In re Marriage Cases*, 183 P.3d 384, 420–22 (Cal. 2008) (following *Lawrence* approach to define issue involving same-sex marriage under state constitution as right of same-sex couples to enter into traditional marriage relationship, rather than recognizing new fundamental right to "same-sex marriage").

60. *Seegmiller*, 528 F.3d at 771–72.

61. One of Ms. Johnson's claims was that the City had publicly punished her by negligently letting the story leak to local newspapers. Thus, the court was clear that the punishment could be done in private. *See id.*

62. *Id.* at 772.

63. *Id.*

64. *See generally* PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING CASES AND MATERIALS* 1339–1592 (5th ed. 2006).

65. U.S. CONST. amend. XIV, § 1.

66. *See Griswold v. Connecticut*, 381 U.S. 479, 499–502 (1965) (Harlan, J., concurring in the judgment).

67. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *see also* BREST ET AL., *supra* note 64.

68. *See Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003) (arguing that there should be a broad based right to privacy).

69. *Seegmiller v. Larkin City*, 528 F.3d 762, 770–71 (10th Cir. 2008) (citing *Does v. Munoz*, 507 F.3d 961, 964 (4th Cir. 2007)); *see also* *Carey v. Pop. Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Peirce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Collectively these cases have recognized "the right to marry, to have

for declaring an unenumerated<sup>70</sup> fundamental right is rigorous to avoid judges acting as legislators. In *Bowers v. Hardwick*, Justice White described the reasons for judicial restraint in defining fundamental rights.

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection.<sup>71</sup>

Two leading cases,<sup>72</sup> *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, paved the way for the development of the modern substantive due process analysis.<sup>73</sup> In *Meyer*, a parochial school instructor who was teaching German to a ten-year-old boy was charged with violating a state statute that prohibited the instruction of a foreign language to children below the eighth grade.<sup>74</sup> Writing for the majority, Justice McReynolds wrote that the state had infringed upon a constitutional right to liberty.

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>75</sup>

This right was further developed in *Pierce v. Society of Sisters*.<sup>76</sup> In that case, parochial and private schools challenged Oregon's Compulsory Education Act re-

children, to direct the education and raising of one's own children, to marital privacy, to use contraception and obtain abortion and to bodily integrity."

70. Specifically referring to rights that are not recognized in the text of the Constitution.

71. *Bowers*, 478 U.S. at 191.

72. These cases were decided during the *Lochner* era. The *Lochner* era refers to a period in American legal history spanning roughly from 1890-1937 when the Supreme Court struck down economic regulations and was widely criticized for imposing judicial judgment about economic policy for that of the legislators by invalidating legislation in the absence of clear textual Constitutional guidelines justifying the invalidation. Economic substantive due process defined the Court's decisions throughout this era. See generally David E. Bernstein, *Lochner Era Revisionism: Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, GEO. L. J. 1 (2003).

73. See BREST ET AL., *supra* note 64, at 1339-1592 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

74. *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923).

75. *Id.* at 399-400 (1923) (citing *Slaughter-House Cases*, 83 U.S. 36 (1873); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Minnesota v. Barber*, 136 U.S. 313 (1890); *Allegeyer v. Louisiana*, 165 U.S. 578 (1897); *Lochner v. New York*, 198 U.S. 45 (1905); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Chicago, Burlington & Quincy R.R. v. McGuire*, 219 U.S. 549 (1911); *Truax v. Raich*, 239 U.S. 33 (1915); *Adams v. Tanner*, 244 U.S. 590 (1917); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *Truax v. Corrigan*, 257 U.S. 312 (1921); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Wyeth v. Thomas*, 86 N.E. 925 (1909)). Justice McReynolds went on to articulate the standard for the protected liberty interest. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. *Meyer*, 262 U.S. at 399-401.

76. 268 U.S. 510 (1925).

quiring all children between the ages of eight and sixteen to attend a public school.<sup>77</sup> Justice McReynolds again wrote for the majority and stated,

Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>78</sup>

*Pierce* declared that the Constitution protects certain zones of privacy from state control.<sup>79</sup> This zone of privacy includes, “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”<sup>80</sup>

The *Lochner* Era ended in 1937,<sup>81</sup> but the Court continued to develop the fundamental rights doctrine.<sup>82</sup> In 1942, the Court invalidated Oklahoma’s Habitual Criminal Sterilization Act in *Skinner v. Oklahoma*.<sup>83</sup> The statute permitted the court to order sterilization of habitual criminals as long as a jury found that there was no threat to the defendant’s health.<sup>84</sup> Skinner had been convicted of the crime of stealing chickens in 1926, robbery in 1929, and robbery again in 1934.<sup>85</sup> After the Act was passed the attorney general instituted proceedings against him.<sup>86</sup> The judge instructed the jury that he had been convicted of felonies involving moral turpitude.<sup>87</sup> The jury found that sterilization could be performed without harm to his general health and Mr. Skinner was ordered to be sterilized.<sup>88</sup> Justice Douglas writing for the majority explained: “We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects.”<sup>89</sup>

The modern era of substantive due process started with *Griswold v. Connecticut*.<sup>90</sup> In this case, the Planned Parenthood League of Connecticut’s executive director and medical director were arrested inter alia for prescribing contraception to married couples.<sup>91</sup> The Court declared that the Connecticut law that banned

77. *Id.* at 529.

78. *Id.* at 534–35 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

79. *See id.*

80. *Id.*

81. The Court excluded economic interest from the special protection of the due process clause of the Fourteenth Amendment. *See supra* note 72.

82. *See BREST ET AL.*, *supra* note 64, at 1341.

83. 316 U.S. 535 (1942).

84. The statute stated that if a jury or court found “the defendant is an [sic] ‘habitual criminal’ and that he ‘may be rendered sexually sterile without detriment to his or her general health’, then the court ‘shall render judgment to the effect that said defendant be rendered sexually sterile.’” *Id.* at 537.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 541.

90. 381 U.S. 479 (1965); *see also BREST ET AL.*, *supra* note 64, at 1342.

91. *Griswold*, 381 U.S. at 480.

contraceptives intruded on the right to marital privacy.<sup>92</sup> Justice Douglas wrote, “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy.”<sup>93</sup>

Since *Griswold*, the Court has not relied on a “penumbra doctrine” to recognize a general fundamental right of privacy.<sup>94</sup> Instead it has identified specific fundamental rights that fall within the zone of privacy protected by the Fourteenth Amendment due process clause.<sup>95</sup> The primary fundamental rights within the zone of privacy the Court has recognized are child rearing and education,<sup>96</sup> family relationships,<sup>97</sup> procreation,<sup>98</sup> marriage,<sup>99</sup> and bearing a child.<sup>100</sup>

### B. *The Right to Privacy*—*Bowers v. Hardwick*<sup>101</sup> and *Lawrence v. Texas*<sup>102</sup>

This section of the Background Law looks at the right to privacy. It analyzes Justice Blackmun’s call for a fundamental right to privacy in his dissent in *Bowers* and contrasts it with the majority’s analysis in *Lawrence*.

92. *Id.* at 485–86.

93. *Id.* at 484. To support this idea of penumbras, Justice Douglas cited cases that reversed laws requiring disclosure of membership which he said invoke the penumbra of the First Amendment. Justice Douglas also discussed *Mapp v. Ohio* which dealt with the penumbra of the Fourth Amendment. 367 U.S. 643 (1961). In *Mapp*, the Court stated that the Fourth Amendment created a “right to privacy no less important than any other right carefully and particularly reserved to the people . . . .” *Id.* at 656. While *Griswold* is seen as the case that has led to the modern doctrine of fundamental rights, it has not been free of criticism. Judge Robert Bork criticized *Griswold* as

an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right or rather fails to define it. We are left with no idea of the sweep of the right of privacy and hence no notion of the case to which it may or may not be applied in the future.

Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971).

94. See generally *Carey v. Pop. Servs. Int’l*, 431 U.S. 678, 684–85 (1977) (providing a sketch of the fundamental rights that had been recognized by the Court within the zone of privacy protected by the Constitution).

95. See *id.*

96. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

97. See *Prince v. Massachusetts*, 321 U.S. 158, 161–62 (1944). *Prince* is the leading case recognizing a fundamental right in family relationships. In *Prince*, a Jehovah’s Witness took her nine year old daughter out on the streets at night to sell magazines relating to their faith. Mrs. Prince was charged with violating the child labor laws by allowing the girl to sell magazines. *Id.* This case is noteworthy for the right it recognized,

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

*Id.* at 166.

98. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

99. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”) The Lovings were charged and convicted of violating Virginia’s ban on interracial marriages. *Id.* at 2–3.

100. See *Carey v. Pop. Servs. Int’l*, 431 U.S. 678, 687 (1977); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

101. 478 U.S. 186 (1986) overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003). This note is not arguing *Bowers* was the correct law or should not have been overruled. The idea is that the dissent in *Bowers* by Justice Blackmun arguing for a fundamental right to privacy should be examined in contrast to the current fundamental rights doctrine that only recognizes certain rights under the blanket of the right to privacy.

102. 539 U.S. 558 (2003).

The Supreme Court first addressed the issue of a fundamental right to sex, specifically homosexual sex, in *Bowers*.<sup>103</sup> In that case, Hardwick was charged with violating Georgia's sodomy statute because he engaged in consensual homosexual sex in his own bedroom.<sup>104</sup> Justice White, writing for the majority, declared that there is no fundamental right in homosexual sodomy.<sup>105</sup> Justice Blackmun dissented, joined by Justice Brennan, Justice Marshall, and Justice Stevens, claiming that the constitutional right to privacy encompasses the right claimed by Hardwick.<sup>106</sup> He stated, "this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"<sup>107</sup>

Blackmun argued that there is a fundamental right to privacy.<sup>108</sup> He stated: "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of the government."<sup>109</sup> It has been posited that Justice Blackmun argued the "'right to be left alone' should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation [sic]."<sup>110</sup>

In his dissent, Justice Blackmun claimed that in construing the right to privacy, the Court has recognized a right to privacy not only with certain personal decisions, but also in regard to location where the activity occurs, regardless of the actual activity.<sup>111</sup> Blackmun looked at both the area of personal decisions as well as private places and determined that "the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, . . . [and] protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there."<sup>112</sup> Justice Blackmun said that the right to privacy "embodies the moral fact that a person belongs to himself and not others nor to society as a whole."<sup>113</sup> Blackmun claimed that the Court should recognize that the fundamental right to privacy is broader than a few specified rights.<sup>114</sup> He believed the fundamental right to privacy should allow individuals to control their own lives and protect their "right to be let alone."<sup>115</sup> Justice Blackmun

103. *Bowers*, 478 U.S. at 187–88.

104. *Id.*

105. *Id.* at 190–91.

106. *See id.* at 199 (Blackmun, J., dissenting).

107. *Id.* ("This case is no more about 'a fundamental right to engage in homosexual sodomy,' as the Court purports to declare . . . than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'") (citations omitted).

108. *See id.*

109. *Id.* at 203 (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986)).

110. Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun*, 26 HASTINGS CONST. L.Q. 59, 70 (Fall 1998).

111. *See Bowers*, 478 U.S. at 203–04 (Blackmun, J., dissenting).

112. *Id.* at 206.

113. *Id.* at 204 (internal quotations and citation omitted).

114. *See id.* at 199–214.

115. *Id.* at 199.

concluded that there is a fundamental right to privacy that encompasses more than a few narrowly defined acts.<sup>116</sup>

In *Lawrence*, the Supreme Court again addressed the issue of a fundamental right to sex.<sup>117</sup> With Justice Kennedy writing for the majority, the Court found Texas' sodomy statute to be unconstitutional and overturned *Bowers*.<sup>118</sup> John Geddes Lawrence and Tyron Garner were arrested when police officers lawfully entered Mr. Lawrence's house and found them engaging in a sexual act.<sup>119</sup> Both men were arrested, held in custody overnight, and convicted of deviate sexual intercourse.<sup>120</sup> Lawrence claimed that the statute violated the equal protection and due process clauses of the Fourteenth Amendment.<sup>121</sup> The Supreme Court determined that "the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."<sup>122</sup>

The Court looked at three issues when determining whether there was a fundamental right: (1) history and tradition, (2) current practices among the states, and (3) international law. Justice Kennedy began by analyzing the history in the United States with respect to laws directed at homosexual conduct.<sup>123</sup> He noted that early American sodomy laws were meant to prohibit non-procreative sexual activity, whether heterosexual or homosexual.<sup>124</sup> Further he stated: "Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private."<sup>125</sup> He noted that laws against homosexual sexual activity did not develop until the late twentieth century.<sup>126</sup>

Noting "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry,"<sup>127</sup> Justice Kennedy combed the nation's same-sex relations laws.<sup>128</sup> From this he observed: "It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so."<sup>129</sup> The *Bowers* opinion found that before 1961 all fifty States had outlawed sodomy.<sup>130</sup> In 1986 when *Bowers* was decided, twenty-four states had laws against sodomy.<sup>131</sup> At the time of *Lawrence*, that number reduced to thirteen, of which only four enforced their laws against homosexual con-

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116. *Id.* at 204-05.

117. *See Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

118. *Id.* at 578-79.

119. *Id.* at 562-63.

120. *Id.* at 563.

121. *See id.* at 564.

122. *Id.* While this opinion did overturn *Bowers*, the Court noted that it was going to determine if the men had a fundamental right to engage in the private conduct they were caught engaging in. *See id.*

123. *Id.* at 567-71.

124. *See id.* at 568.

125. *Id.* at 569.

126. *See id.* at 570.

127. *Id.* at 572.

128. *See id.* at 570.

129. *Id.*

130. *Id.* at 572.

131. *See id.*

duct.<sup>132</sup> Justice Kennedy also indicated that there was a pattern of nonenforcement within the thirteen states that still had sodomy statutes.<sup>133</sup>

Besides looking at what the fifty states had done, Justice Kennedy looked to what other countries were doing with statutes relating to homosexual conduct.<sup>134</sup> Kennedy found: "A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. . . . Parliament enacted the substance of those recommendations 10 years later."<sup>135</sup>

Throughout the opinion Justice Kennedy spoke of the liberty protected by the Fourteenth Amendment which has led some to conclude that he was declaring a fundamental right. Those who argue that the Justice Kennedy opinion declared a fundamental right to sexual autonomy<sup>136</sup> point to two sentences. He stated: "[M]atters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."<sup>137</sup> He also stated: "The State cannot demean [one's] existence or control [one's] destiny by making their private sexual conduct a crime. [An individual's] right to liberty under the Due Process Clause gives [him/her] the full right to engage in . . . conduct without intervention of the government."<sup>138</sup> In spite of this interpretation, most courts have found one sentence in the opinion to be controlling.<sup>139</sup> Courts focus on: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual,"<sup>140</sup> and claim that the Supreme Court was applying rational basis review.<sup>141</sup> These courts argue that the Supreme Court failed to recognize a new fundamental right even though the Texas statute was declared to be unconstitutional.<sup>142</sup>

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132. See *id.* at 573.

133. See *id.*

134. See *id.* at 572–73. *Contra* Adam J. Homicz, Comment, *Substantive Due Process and the Not-So Fundamental Right to Sexual Orientation*—*Lawrence v. Texas*, 123 S. Ct. 2472 (2003), 37 SUFFOLK U. L. REV. 1249, 1253–54 (2004) (calling the reasoning flawed and stating that foreign precedent has no role in the Supreme Court's interpretation of the U.S. Constitution).

135. *Lawrence*, 539 U.S. at 572–73. Justice Kennedy also discussed a case from the European Court of Human Rights that was considered prior to *Bowers*. *Id.* In this European case, a resident of Northern Ireland stated that he was a practicing homosexual who wanted to engage in consensual homosexual sexual activities. *Id.* The laws of Northern Ireland forbade that conduct and he claimed that he feared criminal prosecution and that his home had been searched and he had been questioned. *Id.* The European Court of Human Rights found that the criminalization of that conduct was invalid under the European Convention on Human Rights. *Id.* As Justice Kennedy noted, at the time of the decision twenty-one countries were members of the Council of Europe and at the time of *Lawrence* forty-five countries were members and this decision would be authoritative law in all of the member countries. *Id.*

136. See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

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

138. *Id.* at 578.

139. See, e.g., *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008).

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

141. See *Seegmiller*, 528 F.3d at 772.

142. See *Lawrence*, 539 U.S. at 578–79.

## IV. ANALYSIS

A. *Fundamental Right to Privacy*

The United States was established with the guiding principal of limiting the power of government. Yet, the modern doctrine of fundamental rights under the Substantive Due Process Clause of the Fourteenth Amendment allows the government to interfere with many areas of an individual's life in which they may have an expectation of privacy, issues that "touch[ ] upon the most private human conduct."<sup>143</sup> Recognition of a general fundamental right to privacy would be consistent with our framers' intent.

Justice Blackmun argued for this broad right in his dissent in *Bowers*. He classified this right as "the right to be let alone."<sup>144</sup> Justice Blackmun argued that the Constitution embodied the right to privacy. To him, the notion of privacy encompassed a certain sphere of individual liberty to be kept beyond the reach of the government.<sup>145</sup>

The difficult issue is determining when the government may breach an individual's right to privacy to carry out its powers to protect the public. Courts have recognized that the government has a strong interest in protecting the public and it is not the place of the judiciary to substitute its values for those of the people. As a result, courts have developed a rigorous standard for declaring a fundamental right. This ensures that the government still has the ability to protect the public while reflecting the values of the people. Under current case law, it is unlikely that courts will declare a general fundamental right to privacy. The recognition of the broad right to privacy would hinder the government's ability to protect the people by raising the burden of the government to show a compelling interest and that the law is narrowly tailored to that interest.<sup>146</sup> Therefore, the Court should not recognize a broad fundamental right to privacy because it would hinder the government's ability to protect the public.

B. *Using the Reasoning of Lawrence*

The Tenth Circuit used the holding of *Lawrence* to conclude that there is no fundamental right to engage in heterosexual consensual sex. However, the Tenth Circuit failed to follow the reasoning and analysis that the Supreme Court used when it found Texas' sodomy law unconstitutional.

While the *Lawrence* opinion addressed the issue of sodomy laws, *Seegmiller* looked at the question of the right to fornication as it has been defined by American law.<sup>147</sup> In *Lawrence*, Justice Kennedy evaluated three factors when determining whether there was a fundamental right to sodomy: (1) the history and tradition to determine if the prohibition was deeply rooted; (2) the current trend in the states to determine the current morality; and (3) what other countries were doing.

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143. *Id.* at 567.

144. *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

145. *See supra* Part III.B.

146. There are many areas where the government has an interest in interfering with a person's private life to protect the public. Examples that seem most obvious are protection of children (child labor and abuse) and domestic violence.

147. *Supra* note 1.

### 1. The First Step in *Lawrence*

First, Justice Kennedy determined whether prohibitions against sodomy were deeply rooted by analyzing the history of the laws directed at homosexual sodomy in the United States. He found that while all fifty states had prohibited sodomy prior to 1961, he concluded that those laws had not been enforced. He held that prohibition of homosexual sodomy was not deeply rooted.

In applying the first step of *Lawrence* to *Seegmiller*, the issue to be addressed is whether the prohibition of fornication is deeply rooted in our history and tradition. In reviewing state statutes on fornication, twenty one states never prohibited fornication.<sup>148</sup> Of the states that have valid fornication statutes, many have noted a pattern of nonenforcement.<sup>149</sup> Fornication is rarely prosecuted except where it is added to sexual assault or public nudity when the government doubts it can attain a conviction on the primary charge.<sup>150</sup>

Justice Kennedy held that the prohibition on sodomy was not deeply rooted because it had not been widely enforced even though all states had at one point outlawed sodomy. By contrast, 42 percent of states have never prohibited fornication. Of the twenty-nine states which have historically banned fornication, many states did not widely enforce their statutes. Thus, the evidence that the prohibition against fornication is not deeply rooted in our history and tradition is even stronger than the prohibition against homosexual sodomy was in *Lawrence*.

### 2. The Second Step in *Lawrence*

After reviewing the history and tradition of sodomy laws in the United States, Justice Kennedy considered social morality at the time of *Lawrence*. To determine whether the social mores around homosexual sodomy had changed over the course of our history, Justice Kennedy conducted a fifty-state survey to ascertain which states still maintained anti-sodomy laws at the time of the *Lawrence* opinion. He found that only thirteen out of fifty states, or 26 percent, had sodomy statutes on the books. Of those thirteen states, Justice Kennedy found that only four enforced their laws against homosexual conduct. From this data, he concluded that the social mores around homosexual sodomy had changed because of the repeal of statutes and lack of enforcement.

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148. "Fornication was not a common-law crime but was made punishable by statute in a few states as a misdemeanor." ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 455 (3d ed. 1982). In fact, no statute existed on the books for the states of Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Missouri, Montana, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Vermont, Washington, and Wyoming. See *infra* app. 1.

149. See Jared Richard, Note, *Turning a Blind Eye to Unmarried Cohabitants: A Look at How Utah Laws Affect Traditional Protections*, UTAH L. REV. 215, 216 (2007); see also *Berg v. State*, 100 P.3d 261, 266 (Utah Ct. App. 2004) ("[T]he State will occasionally use the [fornication and sodomy] statutes against two classes of people: (1) individuals charged with rape or forcible sodomy, and (2) individuals who engage in consensual sodomy with minors."); Traci Shallbetter Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 781 (1998).

150. See RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 98 (1996); see also *supra* note 149.

Applying this step to *Seegmiller*, as of 2009 thirteen states have valid fornication statutes.<sup>151</sup> Twenty-one states never had fornication statutes on the books, ten states have repealed their fornication statutes, and four states have held their statutes to be unconstitutional.<sup>152</sup> Furthermore, as noted previously, even those thirteen states with valid fornication statutes rarely enforce them.

In the *Lawrence* opinion, Justice Kennedy reasoned that repeal of statutes and nonenforcement show a change in social morality. Thirteen states currently have fornication statutes; this is similar to the thirteen states that had valid sodomy statutes at the time of the *Lawrence* decision. While 74 percent of states had repealed their sodomy statutes, 55 percent of the twenty-nine states that ever banned fornication have repealed their statutes. Given the pattern of nonenforcement of fornication, society has begun to see this activity as socially acceptable. This is similar to what society had purportedly done with sodomy at the time of *Lawrence*. But there is an even stronger argument that society accepts fornication, because at no time in history have all states outlawed it.

### 3. The Third Step in *Lawrence*

In the third step of his analysis in *Lawrence*, Justice Kennedy reviewed the sodomy laws of other countries. Justice Kennedy cited a European Court for Human Rights case which stated that sodomy could not be criminalized. He also noted that the British Parliament had repealed its law criminalizing sodomy in 1973.

To apply this step of *Lawrence* to *Seegmiller*, the laws of fornication of other countries must be examined. A recent 2007 case in the United Kingdom recognized that in 1860 the court had declared that fornication was not a criminal offense.<sup>153</sup> Furthermore, the European Union Constitution declares a fundamental right to privacy, which includes a fundamental right to sex.<sup>154</sup>

Justice Kennedy implied that the acceptance of sodomy in other countries was important in the analysis of declaring a fundamental right. British Parliament repealed the law against sodomy in 1973, whereas a British court noted that in 1860 fornication was not a criminal offense. In addition, the European Union Constitution recognized a fundamental right to privacy which further shows the international communities' acceptance of a right to sex, whether homosexual or heterosexual. Therefore, while there was evidence that other countries had accepted sodomy as a social norm prior to the *Lawrence* decision, there is even

151. Those states are Florida, Idaho, Illinois, Massachusetts (which has proposed to repeal the statute), Michigan, Minnesota, Mississippi, North Dakota, Pennsylvania, South Carolina, Utah, West Virginia, and Wisconsin. *See infra* app. 1.

152. No statute existed on the books for the states of Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Missouri, Montana, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Vermont, Washington, and Wyoming. *See infra* app. 1. The following states have repealed their statutes: Arizona, Indiana, Kentucky, Maine, Maryland, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, South Dakota, Texas, and the District of Columbia. *See infra* app. 1. The following states have held their statutes unconstitutional: Georgia, Louisiana, North Carolina, and Virginia. *See infra* app. 1.

153. *See* L v. Crown Prosecution Service, [2007] EWHC (Admin) 1843, [7], 2007 WL 2024856 (Eng.) (citing *Hayes v. Stephenson* (1860) 25 JP 39) (stating "fornication was not a criminal offence").

154. *See* EUROPEAN UNION CONST. art. II-67 ("Respect for private and family life. Everyone has the right to respect for his or her private and family life, home and communications.").

stronger evidence that fornication has been accepted because sodomy was criminalized for a century longer than fornication.

Justice Kennedy failed to recognize a fundamental right to homosexual sex even though he found that there was a change in social morality and that other countries had rejected the criminalization of sodomy. He instead invalidated the sodomy statute under rational basis review. Yet, a stronger argument exists for the recognition of fornication as a fundamental right because there is not a history of criminalizing this act in the United States or foreign countries.

While the Tenth Circuit purported to apply *Lawrence* to determine whether there was a fundamental right to heterosexual consensual sex, it did not apply the reasoning and analysis of *Lawrence*. The historical record, current social morality, and international law of the time all support the conclusion that there is a fundamental right to fornication. Therefore, while *Lawrence* did not recognize a fundamental right to homosexual sex, the reasoning of *Lawrence* leads to the conclusion that there is a fundamental right to consensual heterosexual sex.<sup>155</sup>

## V. CONCLUSION

There should not be a declaration of a broad fundamental right to privacy because it would hinder the government's ability to protect the public. Even though the European Union has a fundamental right to privacy and Justice Blackmun suggested the declaration of a general fundamental right to privacy, the better path is to recognize individual fundamental rights on a case by case basis. With declaring a fundamental right to privacy the main issue would be how to determine when the government's interest in protecting the public would overcome the individual's right to privacy. There is a strong governmental interest in protecting the public, and a blanket right to privacy would hamper the state in protecting that interest.

It is ironic that the reasoning used to find no fundamental right to consensual homosexual sex would lead to the conclusion that there is a fundamental right to consensual heterosexual sex. Yet, the reasoning of *Lawrence* leads to that exact conclusion. Had the Tenth Circuit correctly followed the reasoning of *Lawrence*, the result in *Seegmiller* would have been different.

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155. Yet, *Seegmiller* is distinguishable from *Lawrence*. In *Lawrence*, violation of the sodomy statute resulted in criminal prosecution. In contrast, Ms. Johnson received an oral reprimand and lost her SWAT team position. There were never any charges filed against her, however, perhaps charges could have been filed in violation of Utah's fornication statute. See *infra* app. 1. Therefore, when the Tenth Circuit concluded that the appropriate standard to apply was rational basis, the correct result was to determine that the government's actions were rationally related to the interest of promoting public trust in police officers. Unlike the *Lawrence* decision where there was not a legitimate governmental interest that was rationally related to the criminalization of sodomy, in *Seegmiller* there was the legitimate interest of promoting public trust and that was rationally related to the reprimand Ms. Johnson received. However, it would be interesting to see if a person who was prosecuted for violation of a fornication statute could argue that the law fails to meet the rational basis standard of review, just like the sodomy law at issue in *Lawrence* did.

## APPENDIX 1

State	Valid Fornication Statute	Proposed to be Repealed	Held Unconstitutional	Repealed
Alabama	No Statute <sup>156</sup>			
Alaska	No Statute <sup>157</sup>			
Arizona				ARIZ. REV. STAT. § 13-409 <sup>158</sup>
Arkansas	No Statute <sup>159</sup>			
California	No Statute			
Colorado	No Statute <sup>160</sup>			
Connecticut	No Statute <sup>161</sup>			
Delaware	No Statute			
Florida	FLA. STAT. ANN. § 798.02, Misdemeanor <sup>162</sup>			
Georgia			GA. CODE ANN. § 16-6-18 <sup>163</sup>	
Hawaii	No Statute <sup>164</sup>			
Idaho	IDAHO CODE ANN. § 18-6603 <sup>165</sup>			
Illinois	720 ILL. COMP. STAT. 5/11-8, Class B Misdemeanor <sup>166</sup>			

(Continued)

156. *But see* ALA. CODE § 45-2-40.10 (1975) (massage parlors are not allowed to permit acts of fornication; resulting in loss of license).

157. *But see* ALASKA STAT. § 25.24.050 (2007) (listing adultery among the grounds for divorce).

158. ARIZ. REV. STAT. ANN. § 13-409 (1998) (repealed 2001).

159. *But see* ARK. CODE ANN. § 5-26-202 (1987) (outlawing incest).

160. *But see* COLO. REV. STAT. ANN. § 18-6-201 (West 2007) (relating to the crime of bigamy).

161. *But see* CONN. GEN. STAT. ANN. § 52-237 (West 2004) (“Words imputing to a man the commission of the crime of fornication are actionable per se.”); *Page v. Merwine* 8 A. 675 (Conn. 1886) (“Words spoken of an unmarried woman charging her with fornication are actionable per se.”).

162. FLA. STAT. ANN. § 798.02 (West 2006) (outlawing “lewd and lascivious behavior.” *See generally* DeLaine v. State, 262 So. 2d 655 (Fla. 1972) (discussing Florida’s repealed fornication statute, FLA. STAT. ANN. § 798.03).

163. GA. CODE ANN. § 16-6-18 (2009), *invalidated by* *Abrams v. Massell*, 586 S.E.2d 435 (Ga. Ct. App. 2003).

164. *But see* *Territory v. Martin*, 19 Haw. 201 (Haw. Terr. 1908) (upholding law prohibiting fornication).

165. IDAHO CODE ANN. § 18-6603 (2001) (“Any unmarried person who shall have sexual intercourse with an unmarried person of the opposite sex shall be deemed guilty of fornication . . . punished by a fine of not more than \$300 or by imprisonment for not more than six months or by both such fine and imprisonment; provided, that the sentence imposed or any part thereof may be suspended with or without probation in the discretion of the court.”); *see also* *State v. Herr*, 554 P.2d 961, 965 (Idaho 1976) (stating that the element of consent distinguishes the crime of fornication from common law fornication).

166. 720 ILL. COMP. STAT. 5/11-8 (1990) (behavior must be “open and notorious”).

State	Valid Fornication Statute	Proposed to be Repealed	Held Unconstitutional	Repealed
Indiana				IND. CODE § 35-1-82-1 <sup>167</sup>
Iowa	No Statute			
Kansas	No Statute <sup>168</sup>			
Kentucky				KY. REV. STAT. ANN. § 436.070 <sup>169</sup>
Louisiana			LA. REV. STAT. ANN. § 14:89 <sup>170</sup>	
Maine				17 ME. REV. STAT. ANN. § 101 <sup>171</sup>
Maryland				MD. CODE ANN. Criminal Law § 10-501 <sup>172</sup>
Massachusetts		MASS. GEN. LAWS ANN. ch. 272 § 18 <sup>173</sup>		
Michigan	MICH. COMP. LAWS ANN. § 750.335 <sup>174</sup>			
Minnesota	MINN. STAT. ANN. § 609.34, Misdemeanor <sup>175</sup>			

(Continued)

167. IND. CODE § 35-1-82-1 (1971) (repealed 1995) (relating to “Incest, Carnal Knowledge, Adultery”).

168. *But see* KAN. STAT. ANN. § 21-3507 (2008) (punishing adultery as a misdemeanor).

169. KY. REV. STAT. ANN. § 436.070 (West 1942) (repealed 1974).

170. LA. REV. STAT. ANN. § 14:89 (1951), *invalidated* by *La. Electorate of Gays and Lesbians, Inc. v. Connick*, 902 So. 2d 1090 (La. Ct. App. 2005); *see also* Johnny Gaspard, Comment, *Is Private Sexual Conduct By Consenting Adults Protected by the Louisiana Constitution?* 28 S.U. L. REV. 171 (2001) (providing a history of Louisiana’s right to privacy statute and how it affects the crimes against nature statute).

171. ME. REV. STAT. ANN. § 101 (repealed 1976).

172. MD. CODE ANN. Criminal Law § 10-501 (repealed 2002).

173. MASS. GEN. LAWS ANN. ch 272 § 18 (West 2000); *see also* S.B. 905, General Court of the Commonwealth, 185th Sess. (Mass. 2007) (proposing repeal of the fornication statute).

174. MICH. COMP. LAWS ANN. § 750.335 (West 2004) (Anyone committing the crime of fornication “is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than \$1,000.00. No prosecution shall be commenced under this section after 1 year from the time of committing the offense.”).

175. MINN. STAT. ANN. § 609.34 (West 1971); *see also* *State v. Gieseke*, 147 N.W. 663, 666 (Minn. 1914) (“The term ‘fornication’ has a definite, well-understood meaning, and a single clandestine act of intercourse constitutes fornication in the usual acceptance of the term.”).

State	Valid Fornication Statute	Proposed to be Repealed	Held Unconstitutional	Repealed
Mississippi	MISS. CODE ANN. § 97-29-1 <sup>176</sup>			
Missouri	No Statute			
Montana	No Statute <sup>177</sup>			
Nebraska	No Statute			
Nevada	No Statute <sup>178</sup>			
New Hampshire				N.H. REV. STAT. ANN. Tit. LVIII, Ch. 579 <sup>179</sup>
New Jersey				N.J. STAT. ANN. § 2A:110-1 <sup>180</sup>
New Mexico				N.M.S.A. 1978 § 30-10-2 <sup>181</sup>
New York	No Statute			
North Carolina			N.C. GEN. STAT. ANN. § 14-184 <sup>182</sup>	
North Dakota	N.D. CENT CODE 12.1-20-09 <sup>183</sup>			
Ohio				OHIO REV. CODE ANN. § 2905.08 <sup>184</sup>
Oklahoma	No Statute <sup>185</sup>			
Oregon				OR. REV. STAT. § 167.030 <sup>186</sup>

(Continued)

176. MISS. CODE ANN. § 97-29-1 (1998).

177. *But see Ex parte Gosoda*, 123 P. 20 (Mont. 1912) (referencing “the crime of living together in open and notorious cohabitation in a state of fornication”).

178. *But see* NEV. REV. STAT. § 201.180 (2007) (prohibiting incest).

179. N.H. REV. STAT. ANN. Tit. LVIII, Ch. 579 (repealed 1973).

180. N.J. STAT. ANN. § 2A:110-1 (West 1989) (repealed 1978).

181. N.M.S.A. 1978 § 30-10-2 (repealed 2001).

182. N.C. GEN. STAT. ANN. § 14-184 (West 1994), *invalidated by* *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008 (N.C. 2006).

183. N.D. CENT CODE 12.1-20-09 (1997) (if in a public place then a Class A Misdemeanor; if a minor then a Class B Misdemeanor).

184. OHIO REV. CODE ANN. § 2905.08 (1972).

185. *But see* OKLA. STAT. ANN. tit. 21, §§ 871, 885 (West 2002) (prohibiting adultery and incest).

186. OR. REV. STAT. § 167.030 (1969) (repealed 1971).

State	Valid Fornication Statute	Proposed to be Repealed	Held Unconstitutional	Repealed
Pennsylvania	68 PA. STAT. § 467, Misdemeanor <sup>187</sup>			
Rhode Island	No Statute <sup>188</sup>			
South Carolina	S.C. CODE ANN. § 16-50-60 <sup>189</sup>			
South Dakota				S.D. CODIFIED LAWS § 22-22-16 <sup>190</sup>
Tennessee	No Statute <sup>191</sup>			
Texas				No Statute <sup>192</sup>
Utah	UTAH CODE ANN. § 76-7-104, Class B Misdemeanor <sup>193</sup>			
Vermont	No Statute <sup>194</sup>			
Virginia			VA. CODE ANN. § 18.2-344 <sup>195</sup>	
Washington	No Statute			
West Virginia	W. VA. CODE § 61-8-3, Misdemeanor <sup>196</sup>			

(Continued)

187. 68 PA. STAT. § 467 (2004) (“Any building . . . used for the purpose of fornication . . . is hereby declared to be a common nuisance.”).

188. *But see* R.I. GEN. LAWS § 11-6-1 (1956) (prohibiting bigamy).

189. S.C. CODE ANN. § 16-50-60 (1976) (“Punished by a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment for not less than six months nor more than one year or by both fine and imprisonment, at the discretion of the court.”).

190. S.D. CODIFIED LAWS § 22-22-16 (2005) (repealed 1976).

191. *But see* TENN. CODE ANN. § 29-24-101 (1956) (“Any words written, spoken, or printed of a person, wrongfully and maliciously imputing to such person the commission of adultery or fornication, are actionable, without special damage except as otherwise provided in § 29-24-105.”).

192. *See supra* note 150; *but see* Koger v. State, 165 S.W. 577 (Tex. Crim. App. 1914).

193. UTAH CODE ANN. § 76-7-104 (1973). “Any unmarried person who shall voluntarily engage in sexual intercourse with another is guilty of fornication.”. *See generally* Berg v. State, 100 P.3d 261, 266 (Utah Ct. App. 2004) (“the State will occasionally use the [fornication and sodomy] statutes against two classes of people: (1) individuals charged with rape or forcible sodomy, and (2) individuals who engage in consensual sodomy with minors”); Richard, *supra* note 149, at 215.

194. *But see* VT. STAT. ANN. tit. 13, § 205 (1959) (“Persons between whom marriages are prohibited by the laws of this state who . . . commit fornication . . . shall be imprisoned not more than five years or fined not more than \$1000.00, or both.”).

195. VA. CODE ANN. § 18.2-344 (1975), *invalidated by*, Martin v. Zitherl, 607 S.E.2d 367 (Va. 2005); *see also* Singson v. Commonwealth, 621 S.E.2d 682, 688 (Va. Ct. App. 2005) (recognizing Virginia’s fornication statute as unconstitutional).

196. W. VA. CODE § 61-8-3 (1882).

<b>State</b>	<b>Valid Fornication Statute</b>	<b>Proposed to be Repealed</b>	<b>Held Unconstitutional</b>	<b>Repealed</b>
Wisconsin	WIS. STAT. ANN. § 944.15, Class A Misdemeanor <sup>197</sup>			
Wyoming	No Statute			
District of Columbia				D.C. CODE § 22-1601 <sup>198</sup>

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197. WIS. STAT. ANN. § 944.15 (2005) (criminalizing public fornication; in public “means in a place where or in a manner such that the person knows or has reason to know that his or her conduct is observable by or in the presence of persons other than the person with whom he or she is having sexual intercourse”).

198. D.C. CODE § 22-1601 (1948) (repealed 1981).