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Volume 54
Issue 3 *Spring 2005: Symposium - Privacy and Identity: Constructing, Maintaining, and Protecting Personhood*

Article 10

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Donald H.J. Hermann

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Recommended Citation

Donald H. Hermann, *Pulling the Fig Leaf off the Right of Privacy: Sex and the Constitution*, 54 DePaul L. Rev. 909 (2005)
Available at: https://via.library.depaul.edu/law-review/vol54/iss3/10

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PULLING THE FIG LEAF OFF THE RIGHT OF PRIVACY: SEX AND THE CONSTITUTION

*Donald H.J. Hermann**

INTRODUCTION

In 1961, Justice John Marshall Harlan provided the first explicit recognition of a constitutional right of privacy in a Supreme Court opinion.[1] In his dissent in *Poe v. Ullman*, in which the majority sustained dismissal of a motion for declaratory judgment seeking to declare a state's anti-contraceptive laws unconstitutional, Justice Harlan supported recognition of "a claim based on the *right of privacy* embraced in the 'liberty' of the Due Process Clause," because "it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."[2] However, Justice Harlan was explicit in avoiding any claim that a constitutional right of privacy provided the basis for a more general protected right to engage in sexual relations. Justice Harlan concluded,

> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extramarital sexuality altogether . . . but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.[3]

It was not until 2003, in *Lawrence v. Texas*,[4] that the Supreme Court explicitly answered the broader question: "Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home vio-

* Professor of Law and Philosophy, DePaul University; A.B., 1965, Stanford University; J.D., 1968, Columbia University; L.L.M., 1974, Harvard University; M.A., 1979, Northwestern University; Ph.D., 1981, Northwestern University; M.A.A.H., 1993, School of the Art Institute of Chicago; M.L.A., 2001 University of Chicago. This Article grew out of a presentation made at the Symposium: *Privacy and Identity: Constructing, Maintaining, and Protecting Personhood*, held on March 13, 2004 at DePaul University College of Law.

1. Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).
2. *Id.* at 551–52 (Harlan, J., dissenting) (emphasis added).
3. *Id.* at 553 (Harlan, J., dissenting).
4. 539 U.S. 558 (2003).

lates their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment."[5] Writing for the Court, Justice Anthony Kennedy concluded: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows [even] homosexual persons the right to make this choice."[6]

This Article examines the opinions of the United States Supreme Court dealing with claims of constitutional protection from state regulations of sexual activity including sterilization, contraception, abortion, and sodomy. The Article concludes that ultimately, in *Lawrence v. Texas*, the Court recognizes the right of adults to freedom from limitations on the right to sexual intimacy based solely on moral grounds.

Part II begins with an examination of the apparent reluctance of the Court to address sexual questions except in conventional terms of procreational sex within marriage, and the seeming hesitation of the Court to recognize claims to sexual freedom derived from substantive due process. Part III examines a series of opinions striking down anti-contraceptive statutes originally within the context of marriage, and then extending the right to contraception to unmarried persons and minors. Special note is made of the Court's recognition of the possible implications of its contraception decisions for establishment of a broader right of sexual intimacy. Part IV then examines the Court's decisions recognizing a right to abortion. Part V reviews the Court's initial consideration of the constitutionality of criminal sodomy statutes and its formulation of the issue as: Whether there is a right to engage in homosexual sodomy. This Article next assesses the significance of dissenting opinions that challenged the constitutional issue posed by criminal sodomy statutes. The analysis of the Court's second sodomy opinion leads to the conclusion that the Court has recognized a right to sexual intimacy, which cannot be limited or regulated by state laws solely based on moral condemnation of the specific sexual conduct. Finally, Part VI examines a series of federal court opinions challenging parts of a state anti-obscenity statute prohibiting the sale of devices primarily used for stimulation of human genitals. I conclude that a statute regulating access of adults to sexual devices is constitutionally infirm in light of the Supreme Court's recognition in *Lawrence v. Texas* of a right to sexual intimacy.

5. *Id.* at 564.

6. *Id.* at 567.

II. JUDICIAL ASEXUALITY AND PROCREATIONAL SEX

It has taken almost a half century to arrive at the conclusion that the "liberty" protected by the U.S. Constitution, which includes a right of privacy, extends to sexual relations between consenting adults in private. The explanations for the gradual recognition of a right to engage in sex must include the religious history of the United States, which has linked sex outside of marriage to sin.[7] It is also important to recall when considering the evolving law addressing sexual issues, the development of contraceptives and family planning, the changing roles of women in American society, and changing sexual mores accompanying urbanization.[8]

Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit has suggested another reason why members of the judiciary have been hesitant to address issues of sex. In his monograph *Sex and Reason*, Judge Posner wrote:

> [J]udges know next to nothing about the subject [of sex] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary—especially the federal judiciary, with its elaborate preappointment investigations by the FBI and other bodies. This screening, along with the gap, for which the screening is in part responsible, in judges systematic knowledge of sex is a residue of the nation's puritan—more broadly of its Christian—heritage. Another residue is the large body of laws regulating sex which judges are called on to interpret and apply, and sometimes asked to invalidate.[9]

Support for the view that lack of experience and knowledge about sexual matters partially explains the apparent reluctance to extend explicit recognition of a liberty interest in sexual intimacy is provided by Justice Lewis Powell's decision to vote with the majority in *Bowers v.*

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7. LEE J. D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 4 (1997). In this religious history,

> [t]he idea that marriage was acceptable primarily as a way to channel lust and prevent sexual sin gave way to a belief that marital love, as well as the need to produce children, could justify sexual intercourse. At the same time, by placing a new emphasis on the importance of sexuality within marriage, Protestantism distinguished more clearly between proper sexual expression—that which led to reproduction—and sexual transgressions—acts that occurred outside of marriage and for purposes other than reproduction.

Id. Some religious denominations continue to condemn sexual relations outside of marriage and nonprocreative sex. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶ 2351, at 564 (2d ed. 2000) ("Sexual pleasure is morally disordered when sought for itself, isolated from its procreative and unitive purposes [between married persons.]").

8. D'EMILIO & FREEDMAN, *supra* note 7, at 326–43.

9. RICHARD A. POSNER, SEX AND REASON 1 (1992).

Hardwick, upholding Georgia's criminal sodomy law.[10] Justice Powell's biographer, John Jeffries, reported:

> Emblematic of Powell's difficulty with this [*Bowers*] case, and the most puzzling element in its history, was the remark that he had never known a homosexual. He said it at least twice, once to his clerk and once at the Conference on April 2 [1986]. [Justice] Blackmun later told his clerks that he thought of saying, "Of course you have. You've even had gay clerks." Instead Blackmun said, "But surely, Lewis, you were approached as a boy?" There is no record of a response.
>
> Was Powell being honest? He had in fact employed gay clerks and had also encountered homosexuals working elsewhere in the Court, as he must have encountered them in school, in private practice, in the army, and elsewhere. Of course Powell knew homosexuals. The question was whether he acknowledged anyone he knew as a homosexual. The answer is that he did not, largely because he did not want to. In his upbringing, homosexuality was at least a failing, if not a sin. He later came to think of it as an abnormality, an affliction for which its bearers perhaps should not be blamed but which was nevertheless vaguely scandalous. He would not make assumptions. He would not infer such misfortune without direct knowledge. Powell would not have known someone was homosexual unless that person told him so.[11]

In their book, *Courting Justice: Gay Men and Lesbians v. the Supreme Court*, published before the Supreme Court's decision in *Lawrence v. Texas*, Joyce Murdoch and Deb Price expressed optimism that Supreme Court Justices would become more accommodating of gay and lesbian claims to rights because of their greater acquaintance with homosexuals.[12] The authors wrote that Justice Harry Blackmun acknowledged continuing affection for a clerk following her disclosure to the Justice that she was a lesbian.[13] There was also a report that Justice Ruth Bader Ginsburg gave a gift to a lesbian former clerk on the occasion of the clerk's commitment ceremony.[14] The authors also report Justice Sandra Day O'Connor wrote a note of sympathy to a gay court employee upon the death of the employee's same-sex partner.[15]

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10. Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Powell, J., concurring).

11. JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 528 (1994).

12. JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT (2001). *See generally* Donald H.J. Hermann, *Homosexuality and the High Court: A Review of* Courting Justice: Gay Men and Lesbians v. the Supreme Court, 51 DEPAUL L. REV. 1215–24 (2002).

13. MURDOCH & PRICE, *supra* note 12, at 415–16.

14. *Id.* at 421.

15. *Id.* at 418.

There is, however, evidence of the Court's reluctance to deal with a claim to an interest in private sexual activity, both in relation to the Constitution, as well as in relation to non-constitutional issues, when the Court can alternatively identify a more traditional liberty interest, such as an interest in procreation. The Court was faced with such a situation in 1994 in its opinion in *Bragdon v. Abbott* where the Court considered whether asymptomatic HIV infection constitutes a disability under the Americans with Disabilities Act (ADA).[16] The Court was required to determine whether asymptomatic HIV infection met the three-prong definition of disability under the ADA by determining whether an HIV-infected individual had (1) a physical or mental impairment; (2) whether the impairment adversely affected a major life activity; and (3) whether the impairment substantially limited her ability to engage in the particular activity.[17] Finding that HIV infection constitutes a physical impairment, the Court reasoned that since the plaintiff was a woman of child-bearing age, and because HIV infection presented a danger to a sexual partner and to any child conceived by an HIV-infected woman, HIV adversely affected the woman's ability to engage in reproduction.[18] The Court concluded that "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself."[19]

The Court did not decide that sexual activity itself is a major life activity of a person that is limited by the presence of HIV infection. There is significance to the Court's focus on procreation rather than sexual activity itself. HIV-infected persons who are gay men, menopausal women, men who have had a vasectomy, women who have had a hysterectomy, and persons who are otherwise sterile all may be faced with the need to identify some other major life activity in order to establish that they are disabled within the terms of the ADA. The significance of the Court's focus on reproduction or procreational sex, rather than sexual intimacy per se is underscored by the dissenting opinion of Chief Justice William Rehnquist.[20] The Chief Justice found there was no evidence in the record that prior to becoming infected with HIV the plaintiff's major life activities included reproduction. According to the Chief Justice: "There is absolutely no evidence that, absent the HIV, respondent would have had or was even considering

16. Bragdon v. Abbott, 524 U.S. 624 (1998) (construing the Americans with Disabilities Act of 1990).

17. *Id.* at 631 (citing Americans with Disabilities Act, 42 U.S.C. §§ 12, 102(2) (1994)).

18. *Bragdon*, 524 U.S. at 639–40.

19. *Id.* at 638.

20. *Id.* at 657 (Rehnquist, C.J., dissenting).

having children."[21] One explanation for the Court's decision was that it was viewed more acceptable to base its opinion on a traditionalist view that sex should be linked to procreation and, therefore, reproduction was preferable to sexual intimacy per se as the major life activity to establish the plaintiff as HIV-disabled.

There is another significant aspect of the Supreme Court's jurisprudence on the right of privacy: The Court's rejection of a developed body of law based on substantive due process in its pre-1937 opinions, which had culminated in striking down significant New Deal economic legislation.[22] The Supreme Court previously had held there was a substantive feature to the Due Process Clause that empowered it to strike down statutes that were purely arbitrary or that unduly trenched upon fundamental rights.[23] In 1937, the Court abandoned the use of substantive due process as a basis for striking down economic legislation in *NLRB v. Jones L. Laughlin Steel Corp.*[24] In this case, the Supreme Court refused to exercise independent judgment using a substantive due process analysis when it upheld legislation regulating labor relations. Instead, the Court deferred to the findings of Congress that the regulated activities had a substantial economic effect and rested on a rational basis.[25]

Despite the abandonment of substantive due process in evaluating the constitutionality of economic legislation, in 1938, the Supreme Court in *United States v. Carolene Products Co.*,[26] indicated that it might nevertheless invoke substantive due process in dealing with issues involving specific constitutional guarantees or disadvantaged minority groups.[27] In footnote four to his opinion in *Carolene Products*, Justice Harlan Fiske Stone suggested that there could be a stronger

21. *Id.* at 659 (Rehnquist, C.J., dissenting).

22. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (invalidating a state law establishing minimum wages for women as a violation of the Due Process Clause of the Fourteenth Amendment); *see also* Lochner v. New York, 198 U.S. 45 (1905) (holding that a state may not generally prohibit private agreements to work more than a specified number of hours because the general right to contract in business is part of the individual liberty protected by the Fourteenth Amendment).

23. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that "liberty" protected by the Due Process Clause includes 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, to establish a home, or to bring up children).

24. 301 U.S. 1 (1937).

25. *Id.* at 41.

26. 304 U.S. 144 (1938) (rejecting a due process challenge to a federal prohibition of interstate shipment of skimmed milk mixed with non-milk fats (filled milk)).

27. *Id.* at 152–53 n.4.

case for judicial intervention in regulations dealing with personal matters rather than commercial transactions.[28]

In 1942, the Supreme Court first considered an issue of rights related to sex in *Skinner v. Oklahoma*.[29] The Court struck down a statute authorizing sterilization of some convicts, finding the statute used a system of arbitrary classification of convicts.[30] The Court reasoned that strict scrutiny of a sterilization statute was necessary to avoid invidious discrimination involving a basic personal right, namely procreation. The Court viewed the statute as implicating "one of the basic civil rights of man."[31] According to the Court,

> 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 . . . . There is no redemption for the individual whom the law touches. He is forever deprived of a basic liberty . . . . [S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.[32]

The opinion in *Skinner* initiated a body of case law that largely addressed the issue of rights to sexual intimacy by limiting it to a right to engage in procreational sex: "[A] right which is basic to the perpetuation of a race—the right to have offspring."[33] This linkage formed a significant basis for the Court's opinion in *Bowers v. Hardwick* where the Court opined:

> [W]e think it evident that none of the rights announced in those cases [including *Skinner* and the other cases discussed in this Article] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ."[34]

The *Bowers* opinion goes on to state unequivocally: "*[A]ny claim that these cases nevertheless stand for the proposition that any kind of pri-*

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28. *Id.* ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced with the Fourteenth [Amendment].").

29. 316 U.S. 535 (1942).

30. *Id.* at 540–41.

31. *Id.* at 541.

32. *Id.*

33. *Id.* at 536.

34. 478 U.S. 186, 190–91 (1986).

vate sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[35]

III. The Right to Contraception and Non-Procreational Sex

In this Article, I reexamine the opinions cited in the *Bowers* opinion to reveal that many of these opinions, in fact, protect a right of non-procreational sexual intimacy between consenting adults rather than marriage and procreation. This discussion supports the conclusion of the Supreme Court in *Lawrence v. Texas* that "*Bowers* was not correct when it was decided, and it is not correct today."[36]

A. The Birth Control Movement, Anti-Contraceptive Legislation, and Judicial Abstention

The development of a constitutional right to sexual privacy arose within the context of birth control and the Planned Parenthood movement.[37] Initial efforts to suppress the distribution of contraceptives and birth control information were made by applying Comstock laws, including a number of state and federal obscenity statutes prohibiting distribution of contraceptive information and materials.[38] Margaret Sanger, a leader of the birth control movement, was convicted in 1916 of violating a state statute that limited physicians in providing contraceptives; they could only provide contraceptives to prevent or cure disease. A New York appeals court affirmed Sanger's conviction, interpreting the statute as limited to permitting physicians to treat disease, rather than pertaining to others giving advice about contraception to individuals, irrespective of their medical condition.[39] The Supreme Court dismissed the appeal in *Sanger v. People*.[40]

Physicians continued to litigate to remove obstacles to access birth control information and devices. In 1936, the United States Court of Appeals for the Second Circuit ruled in *United States v. One Package*[41] that Congress had not intended to bar importation of diaphragms by doctors because a physician's goal of promoting health or saving lives was not immoral and, therefore, fell outside the subject matter of the

35. *Id.* at 191 (emphasis added).
36. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
37. *See infra* notes 73–88 and accompanying text.
38. Comstock Law, 17 Stat. 598 (1873).
39. People v. Sanger, 118 N.E. 637, 637–38 (N.Y. 1918).
40. 118 N.E. 637, *appeal dismissed*, 251 U.S. 537 (1919) (per curiam).
41. 86 F.2d 737 (2d Cir. 1932).

federal Comstock law.[42] *One Package* removed the final obstacle limiting private physicians' access to birth control information materials in interstate commerce.[43]

In 1879, Connecticut, as eventually many states did, adopted legislation prohibiting the use of birth control devices.[44] However, by 1960 Connecticut and Massachusetts were the only states with statutes banning contraceptives without providing a physician exception.[45] When faced with challenges to the constitutionality of Connecticut's statute prohibiting the use of drugs or instruments to prevent conception, and the giving of assistance or counsel in their use, the Supreme Court initially avoided considering the issue by invoking principles of justiciability. The subject of justiciability in federal courts is addressed by Article III of the Constitution, which restricts the Court's jurisdiction to cases and controversies.[46] The Court itself has developed rules to insure adversarial presentation of cases to the Court and to guarantee that the Court will operate within its appropriate role of deciding adversarial cases within the structure of the federal government.[47] In *Tileston v. Ullman*,[48] the Court considered the appeal of a physician who alleged that if the state's anti-contraceptive statute was applicable to him, the statute would prevent the physician from giving professional advice concerning the use of contraceptives to three patients whose health condition was such that their lives would be endangered by childbearing.[49] The Court found the physician lacked standing to attack the constitutionality of the statute since there was no allegation or proof that the physician's life was in danger, and since the patients, who could have asserted such danger, were not parties to the proceeding. According to the Court, the physician did not have standing to secure the adjudication of the patients' constitutional right to life since the patients were not themselves making any claim on their own be-

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42. *Id.*

43. *See* CAROLE MCCANN, BIRTH CONTROL POLITICS IN THE UNITED STATES 1916–1946, at 75 (1994).

44. Conn. Acts 1879, § 78; *see* Poe v. Ullman, 367 U.S. 497, 501 (1961). *See generally* DAVID KENNEDY, BIRTH CONTROL IN AMERICA (1970) (providing general historical information on contraceptive devices).

45. *See* Jack H. Hudson, *Birth Control Legislation*, 9 CLEV.-MARSHALL L. REV. 245, 255 (1960); *see also* CONN. GEN. STAT. § 53-32 (1958) (repealed 1969), providing: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days or more than one year or be both fined and imprisoned."

46. U.S. CONST. art. III; *see also* Muskrat v. United States, 219 U.S. 346 (1911).

47. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

48. 318 U.S. 44 (1943).

49. *Id.*

half.[50] The Court's finding that the physician petitioner lacked standing helped the Court to avoid a highly charged sexual issue.

The Supreme Court continued to invoke procedural dodges to avoid confronting the issue of a right to contraception in its 1961 decision in *Poe v. Ullman*.[51] Despite the declaration by a state prosecutor that he intended to prosecute any physician who provided contraceptives to a patient who sought contraception to avoid pregnancies, the Court refused to rule on the constitutionality of Connecticut's anti-contraceptive statute. The patients who were parties to the suit alleged that possible childbearing posed health threats to some of the prospective mothers and threatened the likelihood of giving birth to severely disabled neonates by another prospective mother. Justice Felix Frankfurter, writing for the Court, affirmed dismissal of the case because of lack of justiciability by finding the parties' lacked immediacy of prosecutorial threat.[52] The opinion of the Court underscores that the issue was framed in terms of the availability of contraceptives to married couples where pregnancy would constitute a serious threat to the health or life of the female spouse. The opinion makes no mention of the relevance of contraception to facilitating nonprocreative sexual intimacy.

In a dissenting opinion, Justice William Douglas was dismissive of the Court's strategy to avoid dealing with the issues raised by the case.[53] Justice Douglas wrote: "These cases are dismissed because a majority of the members of this Court conclude, for varying reasons, that this controversy does not present a justiciable question. *That conclusion is too transparent to require an extended reply.*"[54] The suggestion implicit in Justice Douglas's remark was that the Court wanted to avoid dealing with a highly charged issue involving sex. Justice Douglas found the threat of prosecution real with a resultant chilling effect on physicians' willingness to provide contraceptive information and materials. This threat of prosecution, according to Justice Douglas, should have moved the Court to confront the question of whether the Connecticut anti-contraceptive law "as applied to this married couple deprives them of 'liberty' without due process of law."[55] While Justice Douglas noted the health or medical concerns of the plaintiffs in this case, he suggested a broader issue of an interest of married

50. *Id.* at 46.
51. 367 U.S. 497 (1961).
52. *Id.* at 501.
53. *Id.* at 509–10 (Douglas, J., dissenting).
54. *Id.* (Douglas, J., dissenting) (emphasis added).
55. *Id.* at 515 (Douglas, J., dissenting).

partners to engage in nonprocreative sexual intimacy. According to Justice Douglas: "The regulation as applied in this case touches the relationship between man and wife. It reaches into the intimacies of the marriage relationship."[56]

Justice Harlan in his dissent maintained that the Court's refusal to rule on the constitutionality of the state anti-contraceptive statute "does violence to established concepts of 'justiciability,' and unjustifiably leaves these appellants under the threat of unconstitutional prosecution."[57] As indicated earlier in this Article, Justice Harlan viewed the case as limited "to the use of contraceptives by married persons."[58] Justice Harlan, however, did not see the issue of contraceptives as limited to health concerns but suggested that the issue of sexual relations was at stake when he wrote: "I believe that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[59] Justice Harlan observed the reason given by the state for barring contraceptives was primarily a moral objection to contraception similar to the state's justification for an anti-sodomy statute in *Bowers* and *Lawrence*, resting primarily on moral condemnation of homosexuality.[60] Justice Harlan noted the state claimed to be acting to protect the moral welfare of its citizens, both directly in that it considered the practice of contraception immoral in itself, and instrumentally, in that the availability of contraceptive materials tended to minimize "'the disastrous consequence of dissolute action,' that is fornication and adultery."[61]

Nevertheless, Justice Harlan maintained that the moral judgment of the state alone could not justify the restriction on use of contraception by married couples. According to Justice Harlan, "[T]he mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it im-

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56. *Id.* at 519 (Douglas, J., dissenting).

57. *Poe*, 367 U.S. at 522–23 (Harlan, J., dissenting).

58. *Id.* at 523 (Harlan, J., dissenting); *see supra* text accompanying notes 2–3.

59. *Id.* at 539 (Harlan, J., dissenting) (emphasis added).

60. *Compare id.* at 545 (Harlan, J., dissenting), *with* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Respondent "insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis."), *and* Lawrence v. Texas, 539 U.S. 558, 577 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ." (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting))).

61. *Poe*, 367 U.S. at 545 (Harlan, J., dissenting).

poses."[62] While arguing for recognition of a fundamental right to engage in marital sexual intimacy, Justice Harlan maintained that any claim to a right of sexual intimacy was properly limited to married couples. Justice Harlan explicitly rejected extending recognition of a right to sexual intimacy to consenting adults in private:

> Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.[63]

Writing for the Court in *Lawrence v. Texas*, Justice Kennedy wrote that a half century of laws and traditions "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[64] Justice Harlan, in his dissenting opinion in *Poe*, provided the first explicit recognition of a liberty interest in sexual intimacy, albeit he limited that liberty interest to persons within marriage.[65]

B. Constitutional Protection of Marital Sexual Intimacy

In *Griswold v. Connecticut*,[66] decided in 1965, the Supreme Court explicitly recognized that the Due Process Clause of the Fourteenth Amendment incorporates a constitutional right of privacy that protects marital sexual intimacy from regulation by a state anti-contraceptive statute.[67] The Justices used three different approaches of constitutional analysis to establish a basis for protecting marital sexual intimacy in *Griswold*. Writing for the Court, Justice Douglas found that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that create zones of privacy, thus protecting marital sexual intimacy from unjustified state intervention.[68] Justice Douglas went on to find that sexual intimacy in marriage is protected by the right of privacy:

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62. *Id.* (Harlan, J., dissenting).
63. *Id.* at 546 (Harlan, J., dissenting).
64. *Lawrence*, 539 U.S. at 572.
65. Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).
66. 381 U.S. 479 (1965).
67. *See generally id.*
68. *Id.* at 484. Justice Douglas stated:

> We deal with a right of privacy older than the Bill of Rights . . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[69]

Thus, Justice Douglas found protection within the right of privacy for marriage, which necessarily includes protection of marital sexual intimacy. It took the Court another seven years before it considered whether the protection of sexual intimacy extended to unmarried partners.[70]

Justice Arthur Goldberg concurred in *Griswold*, finding that the concept of liberty was incorporated into the Due Process Clause of the Fourteenth Amendment and protects those personal rights that are fundamental.[71] Justice Goldberg maintained that beyond the specific terms of the Bill of Rights, the Ninth Amendment provides additional fundamental rights, protected from governmental infringement, which exist alongside the fundamental rights specifically identified in the first eight constitutional amendments.[72] Justice Goldberg went on to identify a right of privacy that is included in the Ninth Amendment, which extends to marital sexual intimacy: "The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."[73] Justice Goldberg went on to determine whether Connecticut's anti-contraceptive law, as applied to preventing dissemination of information and materials for contraceptives to married persons, constituted a reasonable regulation of sexual intimacy. Justice Goldberg concluded that the state did not show the

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> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Id.

69. *Id.* at 486.
70. *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972).
71. *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring).
72. *Id.* at 486–88 (Goldberg, J., concurring).
73. *Id.* at 495 (Goldberg, J., concurring).

statute served any subordinating compelling state interest or was necessary to accompany a permissible state policy.[74] Justice Goldberg proceeded to show the inadequacy of the state's proffered justification for its anti-contraceptive statute as applied:

> The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of contraception. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples.[75]

It is clear that Justice Goldberg viewed that the protected right to sexual intimacy was based on its centrality to marriage and that he did not anticipate any extension of the protection to sexual relations outside marriage or between same-sex partners. Justice Goldberg noted that "it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."[76]

Justice Harlan, citing his own dissenting opinion in *Poe*,[77] took the view that "the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'"[78] Justice Byron White stressed that the subject before the Court was the "regulation of the intimacies of the marriage relationship."[79] However, instead of resting his analysis on an interest of married partners in nonprocreative sex or recreational sex, Justice White stressed the fact that the statute "forbids all married persons the right to use birth control devices, regardless of whether their use is dictated by considerations of family

74. *Id.* at 497–98 (Goldberg, J., concurring).

75. *Id.* at 498 (Goldberg, J., concurring) (citations omitted).

76. *Id.* at 498–99 (Goldberg, J., concurring).

77. *Griswold*, 381 U.S. at 500 (citing with approval his own *Poe v. Ullman* dissent).

78. *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); *see also supra* note 3 and accompanying text.

79. *Griswold*, 381 U.S. at 503 (White, J., concurring).

planning . . . health, or indeed even of life itself."[80] Justice White also found that the state did not give the reason for its adopting the anti-contraceptive statute as an outright condemnation of contraception per se but rather for the reason that such a statute would discourage sexual relations outside of marriage. According to Justice White,

> There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion. Rather, the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.[81]

While it is clear that Justice White found no constitutional obstacle to state regulation of non-marital sexual intimacy, he found the anti-contraceptive statute an unreasonable legislative device for achieving the state's proffered objective. Justice White concluded, "I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships."[82] Justice White suggested that there would be no constitutional objection to limiting an anti-contraceptive statute to persons engaging in prohibited sexual relationships, namely sexual intimacies between unmarried persons.[83]

C. *Recognition of the Right of Unmarried Persons and Minors to Birth Control*

Despite the clear linkage of constitutional protection of sexual intimacy to married couples within a right of privacy, the Court, in *Eisenstadt v. Baird*[84] removed any necessary linkage of protected sexual intimacy with marriage.[85] Without equivocation, Justice William Brennan declared, "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible."[86] In *Eisenstadt*, a non-physician, who was convicted of providing contraceptive material to a woman, challenged the constitutionality of the Massachusetts anti-contraceptive law.[87] The Massachusetts statute provided that

80. *Id.* (White, J., concurring) (citations omitted).
81. *Id.* at 505 (White, J., concurring).
82. *Id.* (White, J., concurring).
83. *Id.* at 507 (White, J., concurring).
84. 405 U.S. 438 (1972).
85. *Id.*
86. *Id.* at 453.
87. *Id.* at 440.

married persons could obtain contraceptives from a physician or druggist by prescription to prevent pregnancy, while unmarried persons could not obtain contraceptives from anyone to prevent pregnancy.[88] Justice Brennan acknowledged that in *Griswold* the right of privacy in question was found to be within the marriage relationship.[89] Nevertheless, Justice Brennan stated that whatever the rights of an individual to access contraceptives, that right is the same for the unmarried as well as for the married individual.[90] According to Justice Brennan,

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[91]

There is, however, something seemingly disingenuous about stating the question involving the interest of the two unmarried individuals as involving a "decision whether to bear or beget a child."[92] A more accurate statement of the interest of the two unmarried individuals is to engage in sexual relations without the likelihood of begetting a child.

Justice Brennan made a more persuasive point when he invoked an equal protection analysis.[93] Implicit in Justice Brennan's analysis is the view that *Griswold* established the right of privacy protecting sexual intimacy under the Due Process Clause, including sexual intimacy in marriage, from state regulation by an anti-contraceptive statute. According to Justice Brennan, "[I]f *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried

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88. *Id.* at 440–41. The statute

> under which Baird was convicted, provides a maximum five-year term of imprisonment for "whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception," except as authorized in § 21A. Under § 21A, [a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [And a] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

Id. at 441 (alteration in original) (quoting MASS. GEN. LAWS ANN. ch. 272, § 21).

89. *Eisenstadt*, 405 U.S. at 453.

90. *Id.*

91. *Id.* (citations omitted).

92. *Id.* at 453.

93. *Id.* at 454.

but not to married persons."[94] He thought the evil perceived by the state would be identical for married and unmarried persons, regardless of the justifications brought forward by the state for the anti-contraceptive statute, which included serving as a deterrent to fornication, as a health measure, or because contraceptives per se were considered immoral.[95] Justice Brennan concluded that by providing dissimilar treatment for married and unmarried people, Massachusetts's anti-contraceptive statute violated the Equal Protection Clause.[96]

The question arises whether the opinions in *Griswold* and *Eisenstadt* can be reconciled. One begins with the fact that *Griswold* was decided by interpreting the Due Process Clause, while *Eisenstadt* was based on an application of the Equal Protection Clause.[97] Next, it is necessary to determine how to characterize the question addressed by the Court in *Griswold*. Two alternative questions can be developed from the opinions: (1) Is there a marital right to engage in sexual relations free from state regulations by a state anti-contraceptive law; or (2) is there a right of an individual to engage in acts of sexual intimacy that includes married persons? Justice Brennan adopted the latter reading of *Griswold* as establishing that the Due Process Clause protects a liberty interest in privacy, which includes sexual intimacy. Given the justifications proffered by the state that such regulation is either a per se objection to contraception or a measure to discourage fornication, Justice Brennan then applied an equal protection analysis and found no relevant difference between married and unmarried persons insofar as their right to sexual intimacy is limited by a state anti-contraceptive law. Any moral objection to contraception per se was applicable to all persons using contraceptive materials, whether married or not. The statute was not reasonably related to its proffered purpose since both married and unmarried individuals are capable of engaging in fornication using contraceptives to prevent conception.

There is a parallel in the way the Supreme Court initially dealt with the question of state regulation of sodomy and the way the Court dealt with the succession of cases involving anti-contraceptive statutes. The Court in *Bowers* formulated the issue before it as whether the Due Process Clause confers upon homosexuals a right to engage in

94. *Id.*

95. *Eisenstadt*, 405 U.S. at 454.

96. *Id.* at 454–55.

97. *Compare* Griswold v. Connecticut, 381 U.S. 479, 481 ("[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment."), *with* Eisenstadt v. Baird, 405 U.S. 438, 443 ("[W]e hold that the statute, viewed as a prohibition on contraception *per se*, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.").

sodomy.[98] Effectively the *Bowers* Court merged a due process inquiry with an equal protection analysis as did the *Griswold* opinion. In *Griswold* it was "contraception use during sex by married persons"[99] and in *Bowers* it was "sodomy as a sexual practice by homosexuals."[100] The Court in *Eisenstadt* interpreted *Griswold* to establish a right to sexual intimacy free from regulation by anti-contraceptive law, which it thus determined was available to unmarried persons as well as married persons. The Court in *Lawrence*, its second opinion dealing with sodomy, found that the proper formulation of the question before the *Bowers* Court was whether there was a protected right to sexual intimacy (including sodomy), which the Court in *Lawrence* found extended to homosexuals as well as heterosexuals.[101]

A significant factor in the recasting of *Griswold* was the Court's decision in a non-sexual case, *Stanley v. Georgia*,[102] decided in 1969 after its decision in *Griswold* in 1965, and before its decision in *Eisenstadt*, which was decided in 1972.[103] A parallel situation exists in the reformulation of the issue raised by criminal prosecution of homosexual sodomy into a right by homosexuals to engage in sodomy in *Bowers*, and further still, into an issue of a right to engage in acts of sexual intimacy including homosexual sodomy in *Lawrence* after the non-sexual decision in *Romer v. Evans*.[104] *Romer* held that equal protection prohibited adoption of a state constitutional amendment that prohibited the state and any of its agencies or subdivisions from adopting an anti-discrimination ordinance protecting homosexuals because, among other reasons, such a measure targeted a discrete minority on the basis of animus toward that minority.[105]

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98. Bowers v. Hardwick, 478 U.S. 186, 190 (1986) ("The issue presented is whether the Federal Constitution['s Due Process Clause] confers a fundamental right upon homosexuals to engage in sodomy.").

99. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

100. Bowers v. Hardwick, 478 U.S. 186, 190 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

101. Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("Their right to liberty under the Due Process Clause gives them [homosexuals] the full right to engage in their [private sexual] conduct without intervention of the government.").

102. 394 U.S. 557 (1969).

103. Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); *Griswold*, 381 U.S. 479.

104. Romer v. Evans, 517 U.S. 620 (1996); Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

105. *Romer*, 517 U.S. at 624. The Court held unconstitutional the 1992 Amendment 2 to the Colorado Constitution, which provided in part:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be

In *Stanley*, the Court held that the First and Fourteenth Amendment prohibited making mere private possession of obscene material a crime.[106] The Court found the material, seized during a search of a private home, consisted of obscene films that were not protected by the First Amendment. Nevertheless the Court observed,

> It is now well established that the Constitution protects the right to receive information and ideas . . . . This right to receive information and ideas, regardless of their social worth, is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy.[107]

While *Stanley* involved possession (and use) of obscene material in the home, the fact that the Court explicitly cited *Griswold* in its *Stanley* opinion suggests a recognition that at least some aspects of sexual activity, for example use of contraceptives in the home, merits protection under the Constitution from government regulation.[108] In *Stanley* the Court observed: "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."[109] There is a clear relationship between the Court's opinion in *Eisenstadt* and its analysis in *Stanley*: While the regulation of the sale and public distribution of obscene materials is justified, crime and punishment for private possession of obscene materials or regulation of obscenity in the privacy of the home is unconstitutional because it violates the constitutional right to privacy. The Court in *Eisenstadt* cited *Stanley* for the proposition that the right of privacy precludes government regulation limiting access and use of

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the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Id. at 624 (citing COLO. CONST. art. II, § 306).

106. *Stanley*, 394 U.S. at 568.

107. *Id.* at 564 (citations omitted). The majority quoted Justice Brandeis:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."

Id. (quoting Olmsted v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

108. *Stanley*, 394 U.S. at 564 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

109. *Id.* at 565.

contraceptives because such regulation constitutes an unwarranted government intrusion into matters of private sexual intimacy.[110]

D. Judicial Awareness of Possible Implications of Contraception Decisions

The decision of the Supreme Court in *Roe v. Wade*,[111] finding a state statute unconstitutional that limited abortion to life-saving procedures on behalf of a mother, reflects the Court's recognition of a protected interest in "decisional" interests related to sexual activity.[112] When this is considered in relation to protection of "spatial" interests, such as protection of the home at stake in *Stanley*, there is a basis for subsequent determination of a right or protected interest in private or intimate sexual activity. It is clear that the Court itself was not cognizant of the full implications of its decisions involving contraception and abortion for the ultimate recognition that the right of privacy implicates a right or liberty interest in sexual intimacy. This was illustrated by dicta in the Court's decision in *Carey v. Population Services International*,[113] decided in 1977, holding a statute unconstitutional that prohibited distribution of contraceptives to minors in furtherance of a state policy against promiscuous sexual intercourse among minors.[114] In footnote seventeen to the Court's opinion, Justice Brennan wrote,

> Appellees argue that the State's policy to discourage sexual activity of minors is itself unconstitutional, for the reason that the right to privacy comprehends a right of minors as well as adults to engage in private consensual sexual behavior. We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior among adults.[115]

This statement is significant in two ways. It clearly indicates that while a retrospective reading of the Court's contraceptive and abortion opinions reveals an implicit recognition of a protected interest in sexual intimacy, the Court was not willing to give explicit recognition to such a right, at least until *Lawrence*. It is equally clear that over twenty-five years before its decision in *Lawrence*, the Court was aware

110. *Eisenstadt*, 405 U.S. at 453 (citing *Stanley*, 394 U.S. at 564).

111. 410 U.S. 113 (1973).

112. *Id.* at 153. ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

113. 431 U.S. 678 (1977).

114. *Id.*

115. *Id.* at 694 n.17.

that its contraception and abortion decisions provided the basis for a plausible claim to a right to engage in private consensual sexual behavior.

The Court in *Carey* viewed the right of privacy to be one aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment, and this right of personal privacy was found to include "'the interest in independence in making certain kinds of important decisions.'"[116] At the same time the Court recognized that "the outer limits of this aspect of privacy have not been marked by the Court."[117] The Court referred to earlier opinions that recognized the specific right to make personal "decisions that an individual may make without unjustified government interference," including "decisions relating to marriage, procreation, contraception, family relationship, and child rearing and education."[118] The Court went on to state that it was dealing with "a field that by definition concerned the most intimate of human activities and relationships," apparently referring to sexual relations generally, and more specifically, sexual intercourse. The Court made clear that "decisions whether to accomplish or to prevent conception are among the most private and sensitive."[119]

The Court in *Carey* noted that state officials attempted to formulate the issue before the Court in the narrowest of terms. According to the Court's opinion, "Appellants argue that this Court has not accorded a 'right of access to contraceptives' the status of a fundamental aspect of personal liberty."[120] The Court formulated the issue more broadly as a right to decide whether "to bear or beget a child."[121] According to the Court: "the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unqualified intru-

116. *Id.* at 684 (quoting Whalen v. Roe, 429 U.S. 589, 599–600 (1977)).

117. *Id.*

118. *Id.* at 685 (citations omitted). The Court cited the following cases: Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (education, including the right to teach one's children a foreign language); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (child rearing and education); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541–42 (1942) (procreation); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Eisenstadt v. Baird, 405 U.S. at 453, 454 (1972) (contraception); Roe v. Wade, 410 U.S. 113 at 152–53 (1973) (abortion); *see also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) (mandatory maternity leave rules).

119. *Carey*, 431 U.S. at 685.

120. *Id.* at 686.

121. *Id.* at 687 ("the underlying premise of those decisions that the Constitution protects 'the right of the individual . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child.'" (alteration in original) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972))).

sion by the state."[122] This formulation implicitly raises the issue of whether there is a right to decide to engage in non-procreational sexual intercourse. The Court reasons that "[r]estrictions on the distribution of contraceptives clearly burden the freedom to make such decisions."[123] The Court in *Carey* was not, however, prepared to recognize a right to sexual intimacy. So like Homer in the *Illiad* steering between Scylla and Charybdis, the Court attempted to avoid both too narrow a formulation of the right at stake ("not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing")[124] and in avoiding too broad a formulation of the right, the Court was not yet prepared to recognize the right to engage in private, consensual sex ("the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private, consensual sexual] behavior among adults.").[125]

The Court went on to address the constitutionality of a statute prohibiting distribution of contraceptives to people under sixteen years of age.[126] The Court identified the reason for enacting the statute to be the state's goal of regulating the morality of minors by discouraging promiscuous sexual intercourse among minors.[127] The Court cited its decision in *Planned Parenthood of Central Missouri v. Danforth*,[128] holding the state could not require parental consent as a condition for a minor obtaining an abortion, as establishing that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults."[129] The Court discounted the state's asserted justification for the anti-contraceptive statute, noting the trial court's finding that "there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives."[130] The Court concluded the anti-contraceptive stat-

122. *Id.* ("This intrusion into 'the sacred precincts of marital bedrooms' made [the anticontraception] statute particularly 'repulsive'" (quoting Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965))).

123. *Id.*

124. *Id.* at 688.

125. *Carey*, 431 U.S. at 689 n.5 (alteration in original).

126. *Id.* at 691–92.

127. *Id.* at 692.

128. 428 U.S. 52 (1976).

129. *Id.* at 693 (citing Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74 (1976) (holding that a State "may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy")).

130. *Id.* at 695 (citing Population Servs. Int'l v. Wilson, 398 F. Supp. 321, 332 n.10 (S.D.N.Y. 1975)).

ute burdened the exercise of a fundamental right and that the state failed to establish the statute was a rational means for accomplishing its policy of discouraging minors' promiscuous sex.

IV. The Right to Abortion and Avoiding the Consequences of Sexual Relations

In 1973, the Supreme Court took the bold step of extending the right of privacy from its decisions finding a right of access to contraception in *Griswold v. Connecticut* and *Eisenstadt v. Baird*, to a right to abortion in *Roe v. Wade* and *Doe v. Bolton*. These cases held that the right of privacy recognized in its prior cases was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[131] The Court further held that, because a woman's right to decide whether to end a pregnancy is fundamental, only a compelling interest could justify any state regulation.[132]

In *Roe v. Wade*, the Court held that a Texas criminal abortion statute that proscribed procuring or attempting an abortion, except on medical advice for the purpose of saving the mother's life, was unconstitutional.[133] The Court held that during the first trimester of a pregnancy, a state may require only that an abortion be performed by a licensed physician, but no further regulation was justified.[134] After the first trimester, the *Roe* Court held that a compelling state interest in the mother's health permits reasonable regulations in order to perform such abortions.[135] After the fetus is viable[136] (usually at seven months or twenty-eight weeks, but which may occur as early as twenty-four weeks) the state has a compelling interest in the life of the

131. Roe v. Wade, 410 U.S. 113, 153 (1973); Doe v. Bolton, 410 U.S. 179, 186 (1973) (citing Griswold v. Connecticut, 381 U.S. 479 (1965)). *Doe*, a companion case to *Roe v. Wade*, cited earlier cases supporting the assertion that the basis for finding a right to decisional freedom involving sexual intimacy was implicit in earlier contraception decisions. *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972).

132. *Roe*, 410 U.S. at 155–56.

133. *Id.* at 118 n.1. The Court cited Texas Penal Code Articles 1191–1194 and 1196, which provide in part:

> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever, externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled.

Id. at 117–18 n.1 (quoting Tex. Penal Code Ann. § 1191).

134. *Roe*, 410 U.S. at 163, 165.

135. *Id.* at 163.

136. *See* Webster's Third New Int'l Dictionary 2518 (Philip Grove ed., 1981) ("A viable fetus has attained such form and development of organs as to be normally capable of living outside the fetus, this normally occurs at seven months or twenty-eight weeks.").

fetus so the state may prescribe abortion during the third trimester except when necessary to preserve the mother's life or health.[137]

The Court in *Roe* recognized that a person's desire to establish a right to abortion could be linked to a woman's desire to engage in sexual intimacy in marriage.[138] Without a right to abortion a woman could face the possibility of pregnancy if contraception failed. Thus, without a right to an abortion, a woman's ability to engage in sexual relations was burdened with the possibility of pregnancy, which posed a health danger to some women.[139] However, the Court was unwilling to grant standing to plaintiffs who sought review based on possible future contraceptive failure or pregnancy.[140] The Court limited its consideration to a direct attack on the Texas statute by a pregnant woman who claimed a right to terminate her pregnancy.[141] The Court concluded that "the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant."[142] The Court in *Thornburgh v. America College of Obstetricians and Gynecologists*,[143] which dealt with informed consent regulation of abortion, linked the right of abortion to other "personal and intimate" rights arguably implicating a right to engage in acts of sexual intimacy.[144] The Court in *Thornburgh* opined,

> 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 government . . . . Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental.[145]

The Court in *Roe* explicitly dealt with a woman's right to abortion; consequently, the Court found no new reason to frame the question of abortion in terms of a right to engage in sexual relations unburdened by state regulation. Nevertheless, the Court's decision in *Roe* implicated a woman's right to engage in sexual intimacy since the purpose of abortion is to avoid the consequence of sexual intercourse, namely

137. *Roe*, 410 U.S. at 150, 163–64.
138. *Id.* at 128.
139. *Id.*
140. *Id.* at 128–29.
141. *Id.* at 129.
142. *Id.* at 155.
143. 476 U.S. 747 (1986).
144. *Id.* at 772.
145. *Id.* (citations omitted).

pregnancy, which has occurred as a result of conception following a lack or failure of contraception.

In *Roe*, the Supreme Court recognized that a woman's right to choose to have an abortion was part of a fundamental right to privacy, and that the state can only limit this liberty interest by establishing that any regulation promotes a state interest of compelling importance.[146] Nineteen years after its decision in *Roe*, the Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[147] in which a majority of Justices reaffirmed the ruling of *Roe* that recognized a woman's fundamental right to choose to abort a nonviable fetus.[148] Justice O'Connor, writing for a majority, found that a woman's right to choose to have an abortion of a nonviable fetus is grounded in the concept of liberty protected by the Due Process Clause of the Fourteenth Amendment.[149] The Court reaffirmed the essential holding of *Roe* on the basis of an independent analysis of the concept of liberty and on the basis of stare decisis.[150] Justice O'Connor wrote for the Court:

> It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State . . . . Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus . . . .[151]

Justice O'Connor linked the right to choose an abortion with other concerns involving personal and intimate choices: "These matters, 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."[152] Decisions about personal sexual intimacy easily can be linked, not only functionally, but also as a matter of choice defining personal identity. In the language of the Court, decisions about sexual intimacy are like "the abortion decision[, which] may originate within the zone of con-

146. *Roe*, 410 U.S. at 113.
147. 505 U.S. 833 (1992).
148. *See generally id.*
149. *Id.* at 846–47.
150. *Id.* at 853.
151. *Id.* at 846.
152. *Id.* at 851.

science and belief."[153] The Court opined, "It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection."[154]

The Court consciously linked the right to choose an abortion to the liberty interest in intimate relationships, of which personal sexual intimacy must be a quintessential interest. According to Justice O'Connor, "*Roe* is clearly in no jeopardy, since subsequent constitutional development have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the *liberty relating to intimate relationships*, the family, and decisions about whether or not to beget or bear a child."[155] The Court consciously linked the decision to abort to the desire to engage in nonprocreational sex "when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant."[156]

V. SODOMY AND THE RIGHT TO SEXUAL INTIMACY

A. Is There a Right To Engage in Homosexual Sodomy?

The Supreme Court's *Bowers* opinion now can be viewed as an anomaly or a departure from the body of cases already discussed.[157] It can also be viewed as a tentative answer to the question posed by the Court in its opinion in *Carey*, where Justice Brennan stated, "We observe that the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private, consensual sexual] behavior among adults."[158] However, the *Bowers* opinion, which only indirectly answered the question of whether there is a liberty interest in private, consensual, sexual behavior, found constitutional a Georgia statute criminalizing sodomy. In holding that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy,[159] the majority in *Bowers* avoided the broader question of whether there is a fundamental right to engage in acts of private, consensual, sexual inti-

153. *Casey*, 505 U.S. at 852.

154. *Id.*

155. *Id.* at 857 (emphasis added) (citing Carey v. Population Servs. Int'l, 437 U.S. 678 (1977); Moore v. City of E. Cleveland, 431 U.S. 494 (1977)).

156. *Id.* at 853.

157. *See id.*

158. Carey v. Population Servs. Int'l, 431 U.S. 678, 694 n.17 (1977).

159. Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

macy. Instead, the Court formulated, as narrowly as possible, the question in the following terms: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[160] The Court chose this narrow formulation despite the fact that the Georgia statute did not limit the proscription of sodomy to homosexual sodomy, but rather the statute applied to heterosexuals and homosexuals alike.[161] The Georgia statute provided in part: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."[162] In a footnote the Court noted that in addition to the defendant, Hardwick, who was charged with a violation of the statute based on an act of same sex-sodomy, a heterosexual couple sought to challenge the statute based on their desire to engage in sodomy.[163] The Court sustained the trial court's finding that the heterosexual couple lacked standing because they were in no immediate danger of prosecution.[164] As a consequence, the Court decided it need only consider Hardwick's challenge to the statute as applied to consensual homosexual sodomy and need express "no opinion on the constitutionality of the Georgia statute as applied to other [heterosexual] acts of sodomy."[165]

The Supreme Court also avoided the broader question, formulated by the United States Court of Appeals for the Eleventh Circuit, which held that "the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment."[166] The majority in *Bowers* rejected the Eleventh Circuit's analysis of the prior Supreme Court decisions, which the Eleventh Circuit viewed as dealing with childbearing, procreation, marriage, conception, and abortion, that taken together could be construed properly "to confer a right of privacy that extends to homosexual sodomy."[167] The Court in *Bowers* also rejected an analysis that construed these earlier Court decisions as implicating a more general

160. *Id.* at 190.
161. *Id.* at 188 n.1.
162. *Id.* (citing GA CODE. ANN. § 16-6-2 (1984)).
163. *Id.* at 188 n.2.
164. *Id.*
165. *Bowers*, 478 U.S. at 188 n.2.
166. *Id.* at 189 (citing Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985)).
167. *Id.* at 190–91.

right to sexual intimacy from which a right to engage in sodomy by homosexuals could be derived.[168] The Court reasoned,

> We think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.[169]

The majority cited *Carey* for the proposition that the right of privacy does not include a right of adults to engage in consensual acts.[170] According to the majority in *Bowers*, "the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far."[171] Despite the Court's unqualified statement about the text of *Carey*, a careful reading of the opinion reveals that the Court did not make such an assertion. Rather, the opinion is clear in its view that the question remained open whether the right of privacy included a right of adults to engage in acts of consensual intimacy. The *Carey* opinion states "the *Court has not definitively answered* the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private, consensual, sexual] behavior among adults, and we do not purport to answer that question now."[172] And later in the *Carey* opinion, the majority emphasizes: "We observe that *the Court has not definitively answered the difficult question* whether and to what extent the Constitution prohibits state statutes regulating such [sexual] behavior among adults."[173] It is clear that the majority in *Bowers* took the view that there is no protected right of adults to engage in private, consensual, sexual acts. The Court clearly rejected a possible interpretation that the *Griswold* line of cases sought to establish such a right of sexual intimacy. Such an interpreta-

168. *Id.* at 190.

169. *Id.* at 190–91.

170. *Id.* at 191.

171. *Bowers*, 478 U.S. at 191 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 688 n.5, 694 n.17 (1977)).

172. *Carey*, 431 U.S. at 688 n.5 (emphasis added) (alteration in original).

173. *Id.* at 694 n.17 (emphasis added).

tion was what the Eleventh Circuit did in its *Bowers* opinion,[174] and what the Supreme Court ultimately did in *Lawrence v. Texas*.[175]

The majority in *Bowers* decided, independent of precedent, that there existed no basis for finding "a fundamental right to engage in homosexual sodomy."[176] The Court found proscription of homosexual sodomy had ancient roots, including the fact that sodomy was a common law crime at the time the Bill of Rights was ratified and a crime in most states when the Fourteenth Amendment was adopted.[177] The Court explicitly rejected a claim that the opinion in *Stanley* provided protection for sexual conduct occurring in the home, even if such conduct could otherwise be subject to criminal prosecution.[178] According to the Court, the decision in *Stanley* was rooted in the First Amendment and provided no support for a claim that consensual sexual conduct, which was otherwise criminal, was immunized when it occurred in the home.[179] The Court reasoned that victimless crimes, such as possession and use of controlled substances, can be criminally prosecuted despite the fact that such conduct occurs in the home.[180] The Court concluded that even "if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home."[181] This same concern was expressed by Justice Antonin Scalia in his dissenting opinion in *Lawrence*.[182] The Court concluded in *Bowers* that because it failed to find any fundamental right at issue, the Georgia criminal sodomy statute would necessarily be constitutional if the state asserted a reasonable or rational basis for the statute.[183] The Court concluded that the legislature's finding that

174. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985).

175. Lawrence v. Texas, 539 U.S. 558, 572 (2003) (finding "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex").

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

177. *Id.* at 192–93.

178. *Id.* at 195 (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

179. *Id.*

180. *Id.* (citing Stanley v. Georgia, 394 U.S. 557, 568 n.11 (1969)).

181. *Id.* at 195–96.

182. Lawrence v. Texas, 539 U.S. 558, 586 (Scalia, J., dissenting). Scalia's dissent argued: "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices." *Id.* at 590 (Scalia, J., dissenting).

183. *Bowers*, 478 U.S. at 196.

homosexual sodomy is immoral provided an adequate rationale to support the criminal sodomy statute.[184]

B. *Posing the Question Raised by Criminalization of Sodomy*

Justice Blackmun, in his dissenting opinion in *Bowers*, rejected the Court's formulation of the right at stake as a "fundamental right to engage in homosexual sodomy."[185] Instead, he asserted that the proper formulation was "the right [of individuals] to decide for themselves whether to engage in particular forms of private, consensual sexual activity."[186] Justice Blackmun asserted that the values underlying the constitutional right to privacy protected the most intimate aspects of an individual's life, including the right of intimate association that extends to private, consensual, sexual activity, and including the right of homosexuals to engage in acts of sodomy.[187] Justice Blackmun suggested the right to sexual intimacy implicated two lines of Court opinions, one dealing with decisional privacy and the other dealing with "spatial aspects of the right to privacy."[188] The first line of cases recognized a privacy interest with references to decisions that are properly made by individuals.[189] The second line of cases recognized a privacy interest with reference to places such as the home.[190] A right to sexual intimacy includes the right to engage in sexual acts in private places, including the home.

Justice Blackmun faulted the majority for confining its analysis of previous Court precedents to the narrow reading of the language of the holdings in the opinions examined, rather than considering the underlying interests or values at stake in the precedents being reviewed.[191] According to Justice Blackmun,

> While it is true that these cases may be characterized by their connection to protection of the family . . . the Court's conclusion that they extend no further than this boundary ignores the warning . . . against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those

184. *Id.*

185. *Compare Bowers*, 478 U.S. at 189 (majority opinion), *with Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

186. *Id.* at 199 (Blackmun, J., dissenting).

187. *Id.* at 205–06 (Blackmun, J., dissenting).

188. *Id.* at 204 (Blackmun, J., dissenting).

189. *Id.* (Blackmun, J., dissenting) (citing Roe v. Wade, 410 U.S. 113 (1973); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

190. *Id.* (Blackmun, J., dissenting) (citing United States v. Karo, 468 U.S. 705 (1984); Payton v. New York, 445 U.S. 573 (1980); Rios v. United States, 364 U.S. 253 (1960)).

191. *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting).

> rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"[192]

This analysis led Justice Blackmun to view the decision striking down the state anti-contraceptive law in *Griswold* as an opinion not concerned with demographic considerations, but with an individual's self-definition.[193] Similarly, decisions regarding family are important because they affect individual happiness rather than supporting stereotypical households.[194] According to Justice Blackmun, "sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'"[195] Justice Blackmun went on to recognize that different decisions in expressions of sexual intimacy are not only protected by the Constitution but are to be expected and valued. Justice Blackmun wrote,

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.[196]

On the other hand, Justice Blackmun suggested that the Court's failure to recognize a particular form of sexual intimacy has significance for the protection of the right of other non-homosexuals in their expression of sexual intimacy. According to Justice Blackmun: "The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others."[197]

In exploring the Court's precedents recognizing a right to protection of private places such as protection for conduct occurring in the

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192. *Id.* (Blackmun, J., dissenting) (alteration in original) (citations omitted).

193. *Id.* at 205 (Blackmun, J., dissenting) (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

194. *Id.* (Blackmun, J., dissenting) (citing Moore v. City of E. Cleveland, 431 U.S. 494, 500–06 (1977)).

195. *Id.* (Blackmun, J., dissenting) (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

196. *Id.* (Blackmun, J., dissenting) (citing Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 637 (1980); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Roe v. Wade, 410 U.S. 113, 153 (1973)).

197. *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting).

home, Justice Blackmun suggested that the Court's reading of the meaning of *Stanley* was unconvincing and erroneous.[198] Justice Blackmun observed that the majority viewed *Stanley* as based on the First Amendment while disregarding its Fourth Amendment basis.[199] It was the fact that the material seized in *Stanley* was seized from within the home that the Court protected possession of obscene material that was otherwise subject to being banned or seized because it did not have the protection of the First Amendment. Justice Blackmun cited the quotation in *Stanley* from Justice Brandeis's dissenting opinion in *Olmstead v. United States*[200] asserting recognition of the individual's "right to satisfy his intellectual and emotional needs in the privacy of his own home."[201] This led Justice Blackmun to conclude that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be in the heart of the Constitution's protection of privacy."[202]

C. *Recognition of a Right to Sexual Intimacy*

Justice Stevens's dissenting opinion in *Bowers* not only provided a critique of the majority's opinion, but the opinion also provided a blueprint for the Court's ultimate recognition of the right to sexual intimacy.[203] In *Lawrence*, Justice Kennedy, writing for the majority, noted that "Justice Stevens'[s] analysis, in our view, should have been controlling in *Bowers*."[204] According to Justice Stevens the line of cases from *Griswold* to *Carey* not only implicated a right to sexual intimacy but also established the right to sexual intimacy that is central to the liberty from which the right of privacy is derived.[205] Justice Stevens wrote: "The essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisenstadt* and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that

198. *Id.* at 207 (Blackmun, J., dissenting) (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

199. *Id.* (Blackmun, J., dissenting).

200. 277 U.S. 438 (1928) (Blackmun, J., dissenting).

201. *Bowers*, 478 U.S. at 207 (Blackmun, J., dissenting) (citations omitted). The citation of *Stanley* by Justice Blackmun suggests the relevance to the ultimate recognition of a right to sexual intimacy of the Court's earlier recognition of protection of activity in private places such as the home and, as significantly, the reference to *Olmstead* suggests the relation of a protection of privacy and satisfaction of emotional needs including sexual intimacy, which was implicit in the Court's earlier privacy opinion.

202. *Id.* at 208 (Blackmun, J., dissenting).

203. *Id.* at 214 (Stevens, J., dissenting).

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

205. *Bowers*, 478 U.S. at 217, 218 (Stevens, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

others may consider offensive or immoral."[206] Justice Stevens maintained that heterosexuals and homosexuals have the same interest in sexual intimacy.[207] Since the Georgia statute proscribed sodomy independent of the sexual orientation of the individuals engaged in the conduct, Justice Stevens asserted the purpose of the statute was to condemn sodomy as immoral, not to judge the morality of homosexuality.[208] Moreover, since Georgia had not enforced the sodomy statute, even against homosexuals engaged in the conduct, for Justice Stevens the record of nonenforcement established the lack of significance of such an underlying moral judgment of sodomy, which arguably might provide a rational basis for the statute as a regulation of sexual intimacy.[209]

Seventeen years after issuing its opinion in *Bowers*, the Court overruled that decision, holding in *Lawrence* that a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct, denominated "deviate sexual intercourse," and violated the Due Process Clause of the Fourteenth Amendment.[210] In *Lawrence* the Court used an analysis that inquired whether there was a reasonable or rational basis for the criminal statute authorizing prosecution of individuals for engaging in same-sex sodomy, and concluded that no legitimate state interest supported a restriction on private sexual activity between two consenting adults in private that did not cause physical or mental harm to either of the participating parties.[211] Thus, the majority found no need to determine whether sexual intimacy, including sexual activity between unmarried persons or persons of the same sex, involved a fundamental right since the statute did not survive rational basis review, obviating the need to apply a strict scrutiny analysis.

Writing for the Court, Justice Kennedy began his analysis with the premise that liberty protected by the Due Process Clause protected personal autonomy that includes freedom to engage in certain intimate conduct.[212] Justice Kennedy concluded that a statute criminalizing sex between two persons of the same sex is not supported by a rational state interest that would justify limiting the exercise of freedom to engage in private consensual acts of sexual intimacy.[213] In

206. *Id.* at 218 (Stevens, J., dissenting).
207. *Id.* at 218–19 (Stevens, J., dissenting).
208. *Id.* at 219 (Stevens, J., dissenting).
209. *Id.* at 219–20 (Stevens, J., dissenting).
210. *Lawrence*, 539 U.S. at 564–79, *overruling* Bowers v. Hardwick, 478 U.S. 186 (1986).
211. *Id.* at 567–73.
212. *Id.* at 562.
213. *Id.* at 567.

reaching this conclusion, Justice Kennedy placed heavy emphasis on the Court's *Griswold* decision.[214] According to Kennedy's analysis, *Griswold* should be understood as establishing a protected interest in a right to privacy, which initially emphasized protection of the marriage relationship and protected the space of the marital bedroom.[215] The Court's decision in *Eisenstadt* was recognized by Justice Kennedy as establishing that the right to make certain decisions regarding sexual conduct extended beyond that marital relationship to all adults, whether married or unmarried.[216] Justice Kennedy then considered the significance of the *Roe* abortion rights decision as recognizing the right of a woman to make certain fundamental decisions affecting her destiny, thus confirming that the protections of liberty under the Due Process Clause have a "substantive dimension of fundamental significance" in defining the rights of the person.[217] The decision in *Carey*, which struck down a law prohibiting the sale or distribution of contraceptives to persons under the age of sixteen confirmed, according to Justice Kennedy, that the protections at issue in the line of cases considered relevant were not limited to the protection of married adults to engage in nonprocreative sexual relations.[218]

Justice Kennedy criticized the *Bowers* opinion for formulating the issue as merely the right to engage in specified sexual conduct, namely homosexual sodomy.[219] According to Justice Kennedy,

> The laws involved in *Bowers* and here are, to be sure, statutes that purport to do more than prohibit a particular sexual act. Their penalties and purpose, though, have more far reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[220]

Justice Kennedy concluded that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[221]

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214. *Id.* at 564 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).
215. *Id.* at 564–65 (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965)).
216. *Lawrence*, 539 U.S. at 565 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972)).
217. *Id.* at 565 (citing Roe v. Wade, 410 U.S. 113 (1973)).
218. *Id.* at 566 (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)).
219. *Id.* at 566–67 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).
220. *Id.* at 567.
221. *Id.*

Justice Kennedy next examined whether there was some exception to the right of sexual intimacy that would justify exclusion of homosexual sodomy. An extensive examination of historical writing led to the conclusion that there is no longstanding history of laws specifically criminalizing homosexual sodomy.[222] Justice Kennedy's account found that laws specifically targeting homosexual sodomy were not enacted until the 1970s.[223] In addition, Justice Kennedy noted that the Model Penal Code, promulgated in 1955, recommended elimination of criminal penalties for consensual relations conducted in private.[224] There was also a trend in the states to repeal general sodomy statutes. In 1961, all fifty states had criminal provisions dealing with sodomy, but by 1986 only twenty-four states had sodomy statutes.[225] By the time the Court decided *Lawrence*, only eleven states had laws criminalizing sodomy.[226] This history led Justice Kennedy to conclude there was "an emerging awareness that liberty gives substantial pro-

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222. *Lawrence*, 539 U.S. at 568–70.

223. *Id.* at 570 ("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. See 1977 Ark. Gen. Acts no. 838; 1983 Kan. Sess. Laws p. 652; 1974 Ky. Acts p. 847; 1977 Mo. Laws p. 687; 1973 Mont. Laws p. 1339; 1977 Nev. Stats. p. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399; see also *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986) (sodomy law invalidated as applied to different sex couples)").

224. Lawrence, 539 U.S. at 572. Justice Kennedy discussed the Model Penal Code:

> In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for 'criminal penalties for consensual sexual relations conducted in private.' ALI, Model Penal Code § 213.2, Comment 2, p. 372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277–80 (Tent. Draft No. 4, 1955).

Id.

225. *Lawrence*, 539 U.S. at 572.

226. *See* ALA. CODE § 13A-6-63 (1975) (sodomy law in effect applied against both heterosexual and homosexual sodomy); FLA. STAT. ANN. § 800.01 (West 2000) (sodomy law in effect applied both to opposite- and same-sex acts); IDAHO CODE § 18-6605 (2004) (sodomy law in effect applied to both opposite- and same-sex acts); KAN. STAT. ANN. § 21-3505 (1995) (statute criminalized only same-sex acts); LA. REV. STAT. ANN. § 14:89 (2004) (sodomy statute applied to both opposite- and same-sex acts, *upheld* in State v. Smith, 766 So.2d 501 (La. 2000)); MISS. CODE ANN. § 97-29-59 (1972) (sodomy law applied to both opposite- and same-sex acts); N.C. GEN. STAT. § 14-177 (2003) (sodomy law applied to both opposite- and same-sex acts; statute found constitutional in *State v. Poe*, 252 S.E.2d 843 (N.C. Ct. App. 1979)); OKLA. STAT. ANN. tit. 21, § 886 (2002) (sodomy law in effect as to same-sex acts; invalidated as applied to different sex couples by *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986)); S.C. CODE ANN. § 16-15-120 (2003) (sodomy law applied to both opposite- and same-sex acts); TEX. PENAL CODE ANN. § 21.06 (2003) (sodomy law applied to both opposite- and same-sex acts); VA. CODE ANN. § 18.2-67.1 (1950) (sodomy law applied to both opposite- and same-sex acts).

tection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[227]

D. *Criticism of Substantive Due Process as the Basis for a Right to Sexual Intimacy*

Justice Kennedy went on to discuss the erosion of *Bowers*. First, he examined the Court's own decision in *Casey*, an abortion case, which Justice Kennedy asserted "confirmed that our laws and tradition offered constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[228] The second decision, *Romer v. Evans*, struck down class-based legislation directed at homosexuals because it violated the Equal Protection Clause. Justice Kennedy believed the decision had direct significance for the claim that homosexuals engaging in sodomy were protected, as well as heterosexuals, from criminal prosecution.[229] Just as in *Romer* a criminal statute directed at homosexual sodomy could be viewed as "born of animosity toward the class of persons affected" and as "having no rational relation to a legitimate governmental purpose."[230] Justice O'Connor concurred in *Lawrence* on just this point, that the Texas homosexual sodomy statute violated the Equal Protection Clause.[231] Nevertheless the majority in *Lawrence* refused to base its decision on the Equal Protection Clause because the majority viewed the question before the Court as involving the broader question of a right to sexual intimacy guaranteed by the Due Process Clause.[232] According to Justice Kennedy, "were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[233] Instead, the Court ruled that all persons have a constitutionally protected liberty interest in their acts of sexual intimacy.

In a strongly worded dissent, Justice Scalia not only criticized the willingness of the Court to overrule *Bowers* despite stare decisis, but also he maintained that the *Griswold* line of cases neither implicated nor established a right of adults to sexual intimacy.[234] According to Justice Scalia, the Court in *Lawrence* erroneously established a right

227. *Lawrence*, 539 U.S. at 572.
228. *Id.* at 573–74 (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992)).
229. *Id.* at 574–75 (citing Romer v. Evans, 517 U.S. 620 (1996)).
230. *Id.* at 574 (citing Romer v. Evans, 517 U.S. 620 (1996)).
231. *Id.* at 579–80 (O'Connor, J., concurring).
232. *Id.* at 574–75.
233. *Lawrence*, 539 U.S. at 575.
234. *Id.* at 586, 594–95 (Scalia, J., dissenting).

to sexual intimacy by using a substantive due process analysis from a reading of the *Griswold* line of cases.[235] Justice Scalia read *Griswold* as expressly disclaiming reliance on the doctrine of substantive due process and grounded his opinion in what he called "the so-called 'right to privacy' in penumbras of constitutional provision *other than* the Due Process Clause."[236] *Eisenstadt*, according to Justice Scalia, was based on an equal protection analysis and had nothing to do with substantive due process, although he does acknowledge *Eisenstadt* contains significant reference to the right of privacy established in *Griswold*.[237] *Roe*, according to Justice Scalia, was based on a substantive due process analysis resulting in the finding that the right to abortion was a fundamental right protected by the Due Process Clause.[238] However, Justice Scalia maintained that the holding in *Roe* had been eroded by the decision in *Casey* because the latter's holding that regulations of abortion narrowly tailored to serve a compelling state interest meant that the Court rejected by logical implication the finding that the right to abortion was a fundamental right.[239]

Justice Scalia's reading of the *Griswold* line of cases ignored the fact that all of these cases involve the recognition of rights not specifically enumerated in the Constitution and which necessarily involved a type of "substantive due process" analysis. It is important to remember that in *Griswold*, various approaches were put forth to establish a right to contraception by married couples, including not only Justice Douglas's opinion for the Court based on a right of privacy, but also Justice Harlan's concurring opinion using a straightforward substantive due process analysis, and Justice Goldberg's concurring opinion relying on the Ninth Amendment.[240] It is important to recall that these opinions were written in the aftermath of the Court's rejection of a substantive due process analysis of economic regulations and the *Carolene Products* doctrine, which suggested a greater justification for constitutional protection from state regulation of individual rights protected by the Constitution.[241] As to the Court's opinion in *Roe*, Justice Scalia completely ignored the statement in the majority opinion that links the right to abortion to a right of privacy. Justice Blackmun wrote that

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235. *Id.* at 594–95 (Scalia, J., dissenting).

236. *Id.* (Scalia, J., dissenting) (citing Eisenstadt v. Baird, 405 U.S. 438 (1972)).

237. *Id.* at 595 (Scalia, J., dissenting) (citing Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972)).

238. *Id.* (Scalia, J., dissenting) (citing Roe v. Wade, 410 U.S. 113, 155 (1973)).

239. *Lawrence*, 539 U.S. at 595 (Scalia, J., dissenting) (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992)).

240. *See supra* notes 53–78 and accompanying text.

241. *See supra* notes 22–28 and accompanying text.

> [t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate pregnancy.[242]

Not only does the Court's opinion in *Roe* establish the right to abortion in the right of privacy, but Justice Blackmun also acknowledged that the right is not absolute and is subject to regulation. Again, Justice Blackmun wrote: "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[243] Justice Scalia's ideologically based assertion that the decision in *Casey* eroded the *Roe* decision and, therefore eroded the right to abortion established by *Roe* did not square with the actual language of the Court's opinion in *Roe* no matter how many times he termed the right to abort a fetus which is not viable as "the right to abort an unborn child." Justice Scalia's reading of *Casey* simply did not square with the actual language of the Court in *Casey*. Justice O'Connor was perfectly clear when she wrote, "we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[244]

Justice Scalia not only criticized the reading of *Griswold* and its progeny, but also rejected the claim that these cases provide the basis for a claim that there is an implicit right to sexual intimacy that has become apparent as the various opinions of the Court have shown over time.[245] Justice Scalia dismissively quotes the majority opinion in *Lawrence* where Justice Kennedy wrote: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show *an emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*."[246] Justice Scalia's criticism is two-fold; first he asserts that "'an emerging awareness' does not establish a fundamental right."[247] It seems, however, that Justice Scalia misconstrues the meaning of Justice Kennedy's statement. The majority is not claiming that the Court is recognizing a new right to sexual

242. Roe v. Wade, 410 U.S. 113, 153 (1973).

243. *Id.* at 154.

244. Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

245. *Lawrence*, 539 U.S. at 597–98 (Scalia, J., dissenting).

246. *Id.* at 597 (Scalia, J., dissenting) (alteration in original) (quoting *Lawrence*, 539 U.S. at 571–72).

247. *Id.* at 598 (Scalia, J., dissenting).

intimacy because of an awareness that Americans have become more sexually permissive. The claim of the majority more correctly seems to be that implicit in the specific decisions involving assertion of a right to engage in specific conduct, the Court repeatedly has found implicit that there is a protection of individuals' right to sexual intimacy. The Court merely has "pulled the fig leaf off" the right of privacy.

Justice Scalia's second claim was that the statement of the Court about an emerging awareness of a right to sexual intimacy is incorrect because "[s]tates continue to prosecute all sorts of crimes by adults 'in matters pertaining to sex': prostitution, adult incest, adultery, obscenity, and child pornography."[248] Justice Scalia seemed to assert that if there is any regulation of sexual conduct, there can be no basis for a claim of a right to engage in sexual conduct. But of course no constitutional right is absolute, not even freedom of speech. As Justice Harlan wrote in *Konigsberg v. State Bar of California*,[249] "we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are absolutes."[250] Neither is the right to sexual intimacy absolute; the question is whether a statutory regulation of sexual intimacy is legitimate in that it is a reasonable or rational regulation necessary to achieve some valid stated purpose and narrowly drawn to achieve that purpose. The *Lawrence* majority found no reasonable basis for the state's criminal punishment of homosexual sodomy.[251] Justice Scalia, however, would uphold state regulation of sexual conduct when "society's belief that certain forms of sexual behavior are 'immoral and unacceptable.'"[252]

Justice Scalia's opinion is most significant for its critique of the language and analysis of the Court's opinion in *Lawrence* as a precedent for determining the significance of the asserted right of "adult persons in deciding how to conduct their private lives in matters pertaining to sex."[253] In his dissent in *Lawrence*, Justice Scalia correctly noted that the Court does not denominate the right to sexual intimacy to be a fundamental right. In his terms, "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the

248. *Id.* (Scalia, J., dissenting).

249. 366 U.S. 36 (1961).

250. Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961) (citation omitted).

251. *Lawrence*, 539 U.S. at 577 (stating that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice" (citation omitted)).

252. *Id.* at 599 (Scalia, J., dissenting).

253. *Id.* at 572, 586 (Scalia, J., dissenting).

Due Process Clause."[254] Nor does the Court choose to apply strict scrutiny to determine whether the Texas criminal sodomy statute as applied is constitutional. Justice Scalia maintains the Court would have "subject[ed] the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy [or sexual intimacy] *were* a 'fundamental right.'"[255] What the Court does is establish a liberty interest in sexual intimacy and evaluates a state sodomy statute as a regulation of the right of sexual intimacy against a rational or reasonable basis and finds the state's justification insufficient to justify the regulation. Justice Scalia describes this process dismissively: "[T]he Court simply describes petitioners' conduct as 'an exercise of their liberty' . . . and proceeds to apply an unheard-form of rational-basis review."[256] What the Court actually does is recognize a right to sexual intimacy and determines that a state criminal sodomy statute limiting that liberty interest is not a reasonable regulation on the state's mere justification of the law as necessary to preserve community morality.

Justice Scalia's critique of *Lawrence* has already been significant for how the right established by *Lawrence* has been understood by courts faced with the question of whether specific conduct is included in or protected by the right of sexual intimacy. Justice Scalia's critique is important because of the way the Court itself previously suggested the process by which it would approach claims of liberty protected by substantive due process. The Court articulated the framework to be used for determining substantive due process clause rights in *Glucksberg*,[257] where the Court declined to find a right to physician-assisted suicide.[258] Justice Scalia quotes *Glucksberg* for the proposition that "*only* fundamental rights which are 'deeply rooted in this Nation's history and tradition' qualify for anything other than rational-basis scrutiny under the doctrine of 'substantive due process.'"[259] Justice Scalia suggested the failure to specifically state that the right to sexual intimacy established in *Lawrence* is a fundamental right should be viewed as significant by other courts when construing any claim based on a right of sexual privacy. Justice Scalia suggested that lower courts limit their review of any statute or regulation of sexual conduct to a determination based on whether the state has asserted a reasonable or ra-

254. *Id.* at 586 (Scalia, J., dissenting).
255. *Id.* (Scalia, J., dissenting).
256. *Id.* (Scalia, J., dissenting).
257. 521 U.S. 702 (1997).
258. *Id.* at 728.
259. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (citations omitted).

tional basis for the statute at issue, and not subject any statutes regulating sexual privacy to strict scrutiny.

One should first recall the language of the Court in *Lawrence* suggesting the right to sexual intimacy had great significance. Recall that Justice Kennedy stated there was "an emerging awareness that liberty gives *substantial* protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[260] Further, the majority in *Lawrence* cites the Court's earlier opinion in *Casey*, as not only conflicting with *Bowers*, but also supporting the Court's holding in *Lawrence*.[261] The Court quotes *Casey* for the proposition that "'[t]hese matters, 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.'"[262] The Court in *Lawrence* also found that "[e]quality of treatment and the due process right to demand respect for *conduct protected by the substantive guarantee of liberty* are linked in important respects."[263] In deciding that the right to sexual intimacy includes "sexual practices common to a homosexual lifestyle" the Court further states, "Their right to liberty under the Due Process Clause gives them *the full right to engage in their conduct without the intervention of the government*."[264]

Justice Scalia is correct in his statement that the majority in *Lawrence* did not apply strict scrutiny to the Texas sodomy statute.[265] The reason, however, is not because the Court failed to find the right to sexual intimacy to be a fundamental right. The reason is there was no need to apply strict scrutiny because the Court found no valid justification for the Texas statute. In the Court's words, "The Texas statute furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual."[266] The Court's decision to strike down the Texas sodomy statute should be viewed as more compelling because after the Court fully considered the reason given for the enactment by the legislature of Texas, the Court found

260. *Id.* at 572 (emphasis added).

261. *Id.* at 574–75 (citing Planned Parenthood v. Casey, 505 U.S. 833 (1972)).

262. *Id.* at 574 (emphasis added) (quoting *Casey*, 505 U.S. at 851).

263. *Id.* at 575 (emphasis added).

264. *Id.* at 578 (emphasis added). The Court goes on to quote *Casey* with approval: "'It is a promise of the Constitution that *there is a realm of personal liberty which the government may not enter*.'" *Lawrence*, 539 U.S. at 578 (quoting *Casey*, 505 U.S. at 847 (emphasis added)).

265. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) ("[N]or does [the Court] subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'" (emphasis added)).

266. *Id.* at 578 (emphasis added).

"no legitimate state interest" to justify the Texas criminal sodomy statute.[267]

A close reading of *Glucksberg* suggests that Justice Scalia may have overemphasized the need to include the term "fundamental right" for the Court to establish that its recognition of a right to sexual intimacy has the full significance of other rights protected by substantive due process guaranteed by the Due Process Clause. The Court in *Glucksberg* stated, "The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint."[268] The *Glucksberg* opinion goes on to cite a number of cases recognizing "certain fundamental rights" and liberties, including the very cases the Court in *Lawrence* cited as the basis for establishing a right of adults to decide how to conduct their private lives in matters pertaining to sex.[269] The Court's opinion cites a number of cases recognizing specific rights in which the right to sexual intimacy is implicit:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) . . . to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception; *ibid.*; . . . and to abortion, *Casey, supra*.[270]

Rather than being at odds with *Glucksberg*, the Court's opinion in *Lawrence* drew on the line of cases from *Griswold* to *Casey*, which evidences the very type of substantive due process analysis suggested by *Glucksberg*. The majority opinion in *Glucksberg*, written by Chief Justice Rehnquist, recommends an analytic approach for determining whether a claimed liberty interest or right is encompassed by substantive due process:

> In our view, however, the development of this Court's substantive-due-process jurisprudence . . . has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to reign in the subjective elements that are necessarily present in due process judi-

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267. *Id.*

268. Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (The "Due Process Clause 'protects individual liberty against certain government actions regardless of the fairness of the procedure used to implement them.'" (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992))).

269. *Id.* at 720.

270. *Id.*

> cial review. In addition, by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring a more than reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.[271]

The Court in *Lawrence* carefully considered the *Griswold* to *Casey* line of cases finding them to be "concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."[272] The Court in *Lawrence* maintained "[t]here are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases . . . the most pertinent beginning point is our decision in *Griswold*."[273] *Lawrence*'s finding that, "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" was derived from *Griswold*, where Justice Douglas concluded "[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."[274] Justice Douglas's final words in *Griswold* are strong support for the claim that the right to sexual intimacy was "so rooted in the traditions and conscience of our people as to be ranked as fundamental and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed."[275]

VI. Construing the Right to Sexual Intimacy

A. *Pre*-Lawrence *Challenges to Limiting Access to Devices for Sexual Stimulation*

The Court in *Lawrence* determined that the protected right or liberty interest of adults to engage in private sexual acts extends to individuals engaged in sexual practices common to a homosexual lifestyle, such as sodomy.[276] The question remains as to what extent the right established in *Lawrence* extends to other sexual conduct. Justice Scalia expressed concern that the reasoning of the majority in *Lawrence* will extend protection to "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."[277] A series of opinions from a federal district court in Alabama and the United States Court of Appeals for the Eleventh Circuit provide an opportunity to observe how these courts have

271. *Id.* at 722 (citations omitted).
272. *Id.*
273. Lawrence v. Texas, 539 U.S. 558, 564 (2003).
274. *Id.* at 572; *see also* Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
275. *Washington*, 521 U.S. at 721 (citing Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).
276. *Lawrence*, 539 U.S. at 578.
277. *Id.* at 590 (Scalia, J., dissenting).

considered claims based on a right to sexual intimacy and ultimately how lower courts have construed the Court's opinion in *Lawrence*.[278] These opinions consider constitutional challenges to the part of the Alabama Anti-Obscenity Enforcement Act that prohibits distribution for any device primarily used for stimulation of human genitals.[279] The first three opinions, captioned *Williams v. Pryor* were decided while *Bowers* was controlling precedent.[280] The most recent of these opinions by the Eleventh Circuit was decided in 2004 after *Lawrence* became controlling precedent.[281]

In its first opinion, the federal district court found that vendors and users of the sexual devices proscribed by the state had standing to challenge the constitutionality of the Alabama statute.[282] The plaintiff vendors of sexual devices and novelties alleged fear of prosecution and sought injunctive relief barring enforcement of the statute.[283] The other "user plaintiffs" asserted use of the sexual devices either for therapeutic purposes related to sexual dysfunction or as an alternative to sexual intercourse.[284] The court noted that the sexual devices at issue were used "to avoid the possibility of sexually transmitted diseases . . . to better stimulate intimate relationships with partners . . . to

278. Williams v. Pryor, 41 F. Supp. 2d 1257 (N.D. Ala. 1999), *rev'd*, Williams v. Pryor, 240 F.3d 944 (11th Cir. Ala. 2001), *on remand*, Williams v. Pryor, 220 F. Supp. 2d 1257 (N.D. Ala. 2002), *rev'd and remanded*, Williams v. Attorney Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004) *rehearing, rehearing en banc denied*, Williams v. Attorney Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004).

279. 1998 Ala. Acts. 98-467, § 6 (codified at Alabama Code § 13-12-200.2(a)(1)), provides:

> It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for stimulation of human genital organs for anything of pecuniary value. Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica for the sake of prurient appeal. Any person who violates this subsection shall be guilty of a misdemeanor and, upon correction, shall be punished by a fine of not more than ten thousand dollars ($10,000) and may be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year. A second or subsequent violation of this subsection is a Class C felony if the second or subsequent violation occurs after a conviction has been obtained for a previous violation. Upon a second violation, a corporation or business entity shall be fined not less than ten thousand dollars ($10,000) nor more than fifty thousand dollars ($50,000).

Id.

280. *Bowers* was decided in 1986. Bowers v. Hardwick, 478 U.S. 186 (1986). The first federal district decision in *Williams v. Pryor* was handed down in 1999; the first decision by the Eleventh Circuit was decided in 2001. *See supra* note 278.

281. The second federal district court opinion was issued in 2002. *Lawrence* was decided in 2003. The second Eleventh Circuit opinion captioned *Williams v. Attorney Gen. of Alabama* was issued in 2004. *See supra* notes 273, 278.

282. Williams v. Pryor, 41 F. Supp. 2d 1257 (N.D. Ala. 1999).

283. *Id.* at 1260.

284. *Id.*

achieve sexual satisfaction not otherwise available [to achieve] temporary or long-term sexual pleasure when a partner is not otherwise available, and as part of therapy for sexual dysfunction and marital problems."[285] One female plaintiff was a mature married woman who used sexual devices of the type proscribed by the statute, with her husband of twenty-five years, both to enhance their intimate relationship and to assist her in overcoming orgasmic difficulties.[286]

The plaintiffs in *Williams* asserted that enforcement of the Alabama statute imposed an unduly heavy "burden on their fundamental rights of privacy and personal autonomy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."[287] According to the district court, plaintiffs basically asserted that their right of privacy and personal autonomy constituted a "liberty interest" protected by the Due Process Clause of the Fourteenth Amendment.[288] The district court took the view that the plaintiffs did not seek recognition of a fundamental right, but rather sought to extend the "right to privacy," which the Supreme Court had recognized as fundamental in certain contexts.[289] According to the trial court, the plaintiffs framed the issue as "whether the right of privacy is broad enough to encompass an individual's decision to engage in private sexual activity *not* [properly] proscribed by law."[290] Of course this is ultimately what the Supreme Court in *Lawrence* decided when it found "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[291] The Attorney General of Alabama, however, maintained that the question raised by the case was "whether there is a constitutional right to obtain dildos, vibrators, and other marital aids 'designed or marketed as useful primarily for the stimulation of human genital organs.'"[292] This formulation parallels the way the Court posed the issue in *Bowers*, which the majority faulted in *Lawrence*. The *Lawrence* Court noted the issue formulated in *Bowers* was stated as follows: "'The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . .' That statement, we now conclude, discloses the Court's own failure to appreciate the extent of liberty at stake."[293]

285. *Id.* at 1262–63.
286. *Id.* at 1264.
287. *Id.* at 1274.
288. *Williams*, 41 F. Supp. 2d at 1274.
289. *Id.* at 1275.
290. *Id.*
291. Lawrence v. Texas, 539 U.S. 558, 572 (2003).
292. *Williams*, 41 F. Supp. 2d at 1275.
293. *Lawrence*, 539 U.S. at 566–67 (quoting *Bowers*, 478 U.S. at 190).

The trial court in *Williams* came closer to a *Lawrence*-like formulation of the issue when it stated: "This court must decide whether the concept of a constitutionally protected 'right to privacy' protects an individual's liberty to use devices 'designed or marketed as useful primarily for the stimulation of human genital organs' when engaging in lawful, private, sexual activity."[294]

The trial court held that the plaintiffs failed to establish a claim to a fundamental right that would have compelled the court to subject the Alabama statute to strict scrutiny.[295] The trial court's opinion stated that

> this court refuses to extend the fundamental right of privacy to protect plaintiffs' interest in using devices 'designed or marketed as useful primarily for the stimulation of human genital organs' when engaging in lawful, private, sexual activity, and thereby impose a strict scrutiny frame of analysis when reviewing the Alabama statute at issue.[296]

The trial court then determined whether the Alabama statute survived review under a rational basis test, requiring that the statute not be "unreasonable, arbitrary or capricious."[297] The trial court went on to determine whether the Alabama statute served a legitimate government interest and whether the statute had a rational relation to that interest.[298] The state's interest in morality was identified as a legiti-

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294. *Williams*, 41 F. Supp. 2d at 1275.

295. *Id.* at 1284. The court noted:

> Plaintiffs' most persuasive argument stems from the therapeutic and medical use these devices have for individuals afflicted with some form of sexual dysfunction. The argument presupposes the existence of a fundamental right to engage in lawful, private, sexual activity. This premise inheres in the fact that secondary decisions, which flow from the original decision to engage in sexual intercourse, are protected as fundamental liberty interests: for example, the right to procreate, *see Skinner v. Oklahoma,* 316 U.S. 535 (1942); the right to use contraceptives, *see e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972); and the right to choose to have an abortion, *see Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Thus, plaintiffs draw the conclusion that people who have a physiological or psychological need to use sexual devices in order to perform sexually should be accorded similar protection for this liberty interest as they and others are accorded for the liberty interest in lawful, sexual intercourse.

Id.

296. *Id.* at 1284.

297. *Id.* at 1284–85. Applying the standard of review using a rational basis test as set out in *Nebbia v. New York*, 291 U.S. 502, 525 (1934), the Court held:

> "[T]he Fourteenth [Amendment does] not prohibit governmental regulation for the public welfare. [It] merely condition[s] the exertion of the admitted power by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

Id. (alternation in original) (quoting Nebbia v. New York, 291 U.S. 502, 525 (1934)).

298. *Williams*, 41 F. Supp. 2d at 1285–86.

mate basis for the Alabama statute: "Alabama's interest in banning 'the commerce of sexual stimulation and autoeroticism, for its own sake' is an interest tied to social morality.[299] Implicit in a legislative ban on the *commerce* of devices used for 'sexual stimulation and autoeroticism' is disapproval of the type of activity."[300] The trial court also suggested that the state had an interest in its citizens not drawing the conclusion that the state endorsed the use of sexual devices by failing to proscribe them.[301] It concluded that the state's interest in public morality is directly connected to what is sold with the state's tacit approval; therefore, Alabama had a legitimate interest in prohibiting the sale of sexual devices.[302]

The trial court's opinion drew heavily on the Supreme Court opinions of *Carey* and *Bowers* to support its conclusion that the Court had not yet recognized a fundamental right to sexual privacy. The opinion in *Carey* was central to the trial court's analysis. According to the trial court: "The Supreme Court has clearly said that it has not yet decided whether lawful, private, sexual conduct is sheltered from state interference by the Constitution."[303] The trial court acknowledged that decisions such as *Eisenstadt* revealed an extension of the fundamental right of privacy to interests in sexual intimacy.[304] The trial court reasoned that "nevertheless, these opinions generally have been narrowly construed or discussed by the Court, for example, as protecting only major life decisions such as decisions related to childbearing and child rearing."[305] The trial court concluded that the *Griswold* to *Casey* line of cases "does not warrant the sweeping conclusion that any and all

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299. *Id.* at 1286–87.

300. *Id.* at 1287. The court also found the state had an "interest in shielding children and 'unwilling adults' from 'immoral,' obscene displays is a legitimate, constitutionally sound interest." *Id.* However, the trial court found the interest was "not rationally related to the provision at issue." *Id.* at 1288.

301. *Id.* at 1287. The court worried that

> allowing the sale of these devices, which inherently implicate the state's regulatory channels, is an implicit condonation of this activity. Furthermore, implicit state condonation of certain conduct, which is created by the absence of state proscription, is likely to give some semblance of approval by the general public. Without question, social approval or disapproval, or the appearance of either, will affect the mores of a particular society.

Williams, 41 F. Supp. 2d at 1287.

302. *Id.*

303. *Id.* at 1281. The trial court noted that "in *Carey* the court noted that it 'has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating (private consensual sexual) behavior among adults, . . . and we do not purport to answer that question now.'" *Id.* at 1281–82 (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 689 n.5 (1977)).

304. *Id.* at 1282 (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

305. *Id.* (citing Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992)).

important, intimate, and personal decisions are so protected," including decisions involving all aspects of sexual intimacy.[306]

The most significant opinion influencing the trial court, however, was the Supreme Court's decision in *Bowers*.[307] The trial court cited *Bowers* as rejecting the argument that the right of privacy encompasses all private sexual conduct.[308] The trial court quoted *Bowers* as establishing that the Supreme Court had not drawn from the privacy line of cases an explicit recognition of a protected right to sexual intimacy. Justice White stated in *Bowers* that

> any claim that these [fundamental right to privacy] cases . . . stand for the proposition that *any kind* of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause did not reach so far. . . .[309]

Now that *Lawrence* has overruled *Bowers*, the question is no longer whether there is a right to sexual privacy, but rather, what specific aspects of sexual privacy cannot be burdened by state regulation.

Notwithstanding the trial court's refusal to recognize a right to sexual intimacy, the trial court went on to determine that the Alabama statute banning the sale of sexual devices failed the "rational basis" test required of any state law because the statute was not rationally related to the state's legitimate interest in public morality, nor was it narrowly drawn to achieve some legitimate state interest.[310] The court noted the parties to the litigation stipulated that the use of the sexual devices by married couples served as an aid to marital relationships, including sexual relations.[311] The trial court found that "[b]anning commerce of sexual devices is not rationally related to this end [of protecting public morality], because such a ban inevitably interferes with sexual stimulation and anti-eroticism which *is* related to marriage, procreation, and familial relationships."[312] The trial court held

306. *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 727 (1997)).

307. *Id.* (citing *Bowers*, 478 U.S. at 186).

308. *Williams*, 41 F. Supp. 2d at 1282 (citing *Bowers*, 478 U.S. at 191).

309. *Id.* (alteration in original) (citing *Bowers*, 478 U.S. at 191).

310. *Williams*, 41 F. Supp. 2d at 1293, *overruled by* 240 F.3d 944 (11th Cir. 2001).

311. *Id.* at 1289–90. The trial court noted:

> The court finds that the information above establishes that the sexual devices in issue are used by married individuals to aid their marital relationships, and to facilitate or enable sexual performance with their respective spouses. It follows that a ban on the commerce of these devices interferes with "sexual stimulation and auto-eroticism" which is *related* "to marriage, procreation[,] or familial relationships."

Id.

312. *Id.* at 1289.

"that the prohibition on the distribution of sexual devices, found in Alabama Code §13A-12-200.2(a)(1), bears no reasonable, rational relation to a legitimate state interest and is, therefore, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[313]

The Eleventh Circuit, prior to the Supreme Court's decision in *Lawrence*, in a de novo review, reversed the trial court's decision.[314] The appellate court not only found the Alabama statute rationally served the state's interest in public morality, but also found that the trial court erred in invalidating the statute under minimal scrutiny.[315] The Eleventh Circuit held that the Alabama statute, which made it a criminal offense to commercially distribute sexual devices, was rationally related to the state's legitimate government interest in public morality.[316]

The Eleventh Circuit agreed with the trial court that no fundamental right was at issue and that the statute did not target a suspect class; therefore, strict scrutiny of the statute was inappropriate.[317] The Eleventh Circuit went on to state that minimal scrutiny is a highly deferential standard of review that limits only the outer boundaries of legislative power.[318] According to the Eleventh Circuit, "A statute is constitutional under rational basis scrutiny so long as 'there is *any reasonably conceivable state of facts* that could provide a rational basis for the' statute."[319]

The Eleventh Circuit found the district court erred in finding the statute lacked a rational basis,[320] and held that the state's interest in public morality is a legitimate interest and that the statute rationally promoted that interest.[321] According to the Eleventh Circuit,

> "A ban on the sale of sexual devices and related orgasm stimulating paraphernalia is rationally related to a legitimate legislative interest in discouraging prurient interests in autonomous sex" and that "it is

313. *Id.* at 1293.

314. Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001).

315. *Id.* at 956.

316. *Id.*

317. *Id.* at 947–48.

318. *Id.* at 948.

319. *Id.* ("On rational-basis review, . . . a statute . . . comes to us bearing a strong presumption of validity [of the statute], and those attacking the rationality of the [statute] have the burden to *negative every conceivable basis which might support it.*" (alteration in original) (quoting FCC v. Beach Communications, 508 U.S. 307, 314 (1993))).

320. *Williams*, 240 F.3d at 949.

321. *Id.* ("The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny. A statute banning the commercial distribution of sexual choices is rationally related to this interest." (citations omitted)).

> enough for a legislature to reasonably believe that commerce in the pursuit of orgasms by artificial means for their own sake is detrimental to the health and morality of the State." The criminal proscription on the distribution of sexual devices certainly is a rational means for eliminating commerce in the devices which is itself a rational means for making the acquisition and use of the devices more difficult.[322]

This led the Eleventh Circuit to "hold the Alabama sexual devices distribution criminal statute is constitutional under rational basis scrutiny because it is rationally related to at least one legitimate State interest."[323] Thus, the Eleventh Circuit held that the regulation of public morality was at least one legitimate state interest justifying the statute.[324]

The Eleventh Circuit went on to fault the trial court for not adequately or fully considering the as-applied challenge to the Alabama statute raised by the married women-plaintiffs who used sexual devices with their husbands, and two divorced women who began using sexual devices while married but were single at the time of the litigation.[325] The Eleventh Circuit stated that the statute likely was constitutional as applied "to those who sell to minors sexual devices which are deemed harmful to minors."[326] However, the Eleventh Circuit found the as-applied challenges raised by the married and unmarried plaintiffs arguably could implicate an interest in sexual privacy.[327] Thus, the Eleventh Circuit remanded the case for consideration of "whether or to what extent the Alabama statute infringes a fundamental right to sexual privacy of the specific plaintiffs in [the] case."[328] The Eleventh Circuit went on to provide a relatively broad charge to the trial court on remand to consider "whether our nation has a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried persons [or] whether contemporary practice bolsters or undermines any such history."[329]

It is significant to note that in his dissent in *Lawrence*, Justice Scalia cited this first opinion of the Eleventh Circuit in *Williams* as a reason for not overruling *Bowers*, because of the Eleventh Circuit's reliance on a state interest in public morality as a basis for upholding a state

322. *Id.* at 949–50 (citation omitted).
323. *Id.* at 950.
324. *Id.* at 951.
325. *Williams*, 240 F.3d at 955.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.* at 955–56.

statute's regulating sexual intimacy by limiting the distribution of sexual devices.[330] Justice Scalia wrote that "[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."[331] Justice Scalia went on to make specific reference to the Eleventh Circuit opinion.[332] Justice Scalia failed to mention that notwithstanding the Eleventh Circuit upholding the statute regulating the sale of sexual devices on public morality grounds, the appeals court remanded the case for a determination of whether there was a protected interest in private sexual activity that made that statute unconstitutional because it was not narrowly tailored to support the state's interest.[333]

On remand, the United States District Court for the Northern District of Alabama was more than willing to consider the question apparently posed by the Eleventh Circuit of whether there is a constitutionally protected interest in sexual intimacy.[334] As the trial court considered plaintiffs as-applied constitutional challenges to the Alabama statute, plaintiffs renewed their motion for summary judgment asserting that the statute violated their constitutional right to privacy.[335] The trial court concluded that the plaintiffs had standing to challenge the constitutionality of the statute; that the plaintiffs had a constitutional right to privacy that encompassed sexual privacy of married and unmarried persons including the right "to use sexual devices within the confines [of] private, consensual, adult, sexual relationship[s;]" that the statute burdened the right of privacy; and that the statute was "not narrowly tailored to effectuate a compelling state interest."[336]

In its second opinion in the *Williams* case, the trial court effectively anticipated the Supreme Court's opinion handed down nine months later in *Lawrence*. In the second *Williams* opinion, the trial court found that "plaintiffs have shown that the fundamental right of privacy, long-recognized by the Supreme Court as inherent among our

330. Lawrence v. Texas, 539 U.S. 558, 589 (2003) (Scalia, J., dissenting) (citing Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001)).

331. *Lawrence*, 539 U.S. at 589 (Scalia, J., dissenting).

332. *Id.* (Scalia, J., dissenting). Justice Scalia wrote: "*See, e.g. Williams v. Pryor*, 240 F.3d 949, 949 (C.A.11 2001) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that '[t]he crafting and safeguarding of public morality . . . indisputably is a legitimate interest under rational basis scrutiny.'"). *Id.* (Scalia, J., dissenting) (alteration in original).

333. *See Williams*, 240 F.3d at 955–56.

334. Williams v. Pryor, 220 F. Supp. 2d 1257, 1259 (N.D. Ala. 2002), *overruled by* 240 F.3d 944 (11th Cir. 2001).

335. *Id.* at 1260–61.

336. *Id.* at 1300.

constitutional protections, incorporates a right to sexual privacy."[337] The Supreme Court in *Lawrence* held petitioner's "right to liberty under the Due Process Clause gives them the full right to engage in their [private sexual] conduct without intervention of the government."[338]

On remand, the trial court found that the constitutional guarantees that accompanied the plaintiffs' fundamental right of privacy prevented Alabama from prohibiting adults from purchasing sexual devices for use within their private, adult, consensual, sexual relationships since the state failed to establish a compelling reason for the statute.[339] After an extensive review of recent writings on the history of sexuality in America from the colonial period to the present, the trial court concluded that there was evidence of a substantial history, legal tradition, and contemporary practice of state non-interference in private, consensual, sexual relationships of married and unmarried adults.[340]

The trial court next considered the relevance of the Supreme Court opinions dealing with marriage, procreation, contraception, and abortion.[341] The trial court concluded that the Supreme Court's opinions, supplemented with evidence from "history, legal tradition, and practice," led to the conclusion that "there exists a constitutionally inherent right to sexual privacy that firmly encompasses state *non-*

337. *Id.* at 1259.

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

339. *Williams*, 220 F. Supp. 2d at 1259–60.

340. *Id.* at 1277–91.

341. *Id.* at 1291–94. The trial court discussed Supreme Court cases and their holdings:

> *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925), which recognized the "liberty of parents and guardians to direct the upbringing and education of children under their control," and *Meyer v. Nebraska*, 262 U.S. 390 (1923), which also protected parental control over education . . . . *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court acknowledged procreation, "the right to have offspring" as "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 536, 541 (overturning a state law that provided for sterilization for criminals). Later twentieth century decisions of the Supreme Court confirmed: a right to privacy in the body, see *Rochin v. California*, 342 U.S. 165 (1952) (overturning state criminal conviction for violation of due process where evidence was forcibly extracted from defendant's mouth and stomach); the right to marital privacy, *see Griswold v. Connecticut*, 381 U.S. 479 (1965) (overturning state law forbidding use of contraceptives as unconstitutional); the right to marry, *see Loving v. Virginia*, 388 U.S. 1 (1967) (overturning Virginia antimiscegenation statute); the right to privacy as incorporating a right to use contraceptives, *see Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding unconstitutional a state law prohibiting the distribution of contraceptives to single persons, but not to married persons); and the right of privacy as incorporating a right to reproductive choice, *see Roe v. Wade*, 410 U.S. 113 (1973) (overturning state law that prohibited abortion).

Id. at 1291–92.

interference with private, adult, consensual sexual relationships."[342] The trial court suggested that the constitutional protection was not limited to traditional procreative sex: "The court notes that this right to sexual privacy cannot be limited to a mere right to 'sex,' when the decisions of the Supreme Court protecting abortion, contraception, and the right to privacy in our bodies are considered."[343]

The trial court went on to determine whether the "fundamental right of sexual privacy between married and unmarried adults in private, consensual, sexual relationships encompasses a right to use sexual devices like vibrators, dildos, anal beads, and artificial vaginas."[344] The court found that sexual devices are used in intimate sexual acts for medical, therapeutic, and sexual reasons.[345] The trial court took special note that these devices can be used for masturbatory purposes and that masturbation had never been a crime in any state.[346] Moreover, the trial court found the use of sexual devices was intrinsic to the sexual relationships for some people with spouses or other partners.[347] The court concluded that the "use of these sexual devices is an important part of their sexual relationships and, consequently, is protected by their right to sexual privacy."[348]

The trial court then turned to a determination of whether the State of Alabama justified its regulation of private sexual conduct by a regulation prohibiting the sale of sexual devices.[349] Since the trial court found that the Alabama statute burdened a fundamental right, the statute was subject to strict scrutiny, which requires that a "statute be narrowly tailored to achieve a compelling government interest."[350] The trial court determined that there were two possible state interests compelling a ban on the sale of sexual devices, including both an interest in regulating obscenity and an interest in protecting public moral-

342. *Id.* at 1296.

343. *Id.*

344. *Williams*, 220 F. Supp. 2d at 1296.

345. *Id.*

346. *Id.*

347. *Id.* at 1297.

348. *Id.* The trial court discussed how

> [a] statute solely prohibiting the sale of a product can nevertheless unconstitutionally infringe on the rights inherent in the "zone of privacy created by several fundamental constitutional guarantees," because, in essence, a ban on the *sale* of these sexual devices can amount to an impermissible burden on their *use*.

Id. at 1298 (citations omitted).

349. *Williams*, 220 F. Supp. 2d at 1299.

350. *Id.* at 1299–1300. The Court noted: "If the challenged law burdens a fundamental constitutional right, then the law can survive only if the State demonstrates that the law advanced a compelling state interest and is narrowly tailored to meet that interest." *Id.* at 1300 (citing Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 222 (1989)).

ity.[351] Nevertheless, the court concluded that "Alabama's total prohibition of the distribution of sexual devices is not narrowly tailored" to meet the state's suggested possible interests.[352]

B. *Post*-Lawrence *Consideration of the Regulation and Sale of Devices for Sexual Stimulation*

The Eleventh Circuit, which issued its second opinion a year after the Supreme Court's opinion in *Lawrence*, reversed the trial court's finding that the Alabama statute prohibiting commercial distribution of sexual devices was unconstitutional.[353] It is significant that the Eleventh Circuit in *Williams* found that *Lawrence* did not provide a controlling precedent establishing a right to sexual privacy.[354] Instead, the appeals court held that there is no fundamental, substantive right of consenting adults to engage in private intimate sexual conduct that would trigger a strict scrutiny review of any statute burdening acts of sexual intimacy.[355]

The Eleventh Circuit recalled that in its initial opinion it had reversed the district court's conclusion that the Alabama statute lacked a rational basis and held that promotion and preservation of public morality provided a rational basis, but had remanded the case for further consideration of an as-applied fundamental rights challenge.[356] The Eleventh Circuit found itself reviewing a second district court decision finding the statute unconstitutional based on the district court's recognition, on remand, of a fundamental right to sexual privacy that encompassed the right to use sexual devices. Moreover, the trial court had determined the statute failed strict scrutiny.[357]

The Eleventh Circuit began its de novo review of the district court's decision asserting that no opinion of the Supreme Court, including that in *Lawrence*, provided a decisive recognition of a right to sexual privacy.[358] The Eleventh Circuit invoked the dicta in *Carey*, written sixteen years prior to the Supreme Court's opinion in *Lawrence*, stating that the Court "has not definitely answered the difficult question

351. *Id.* at 1303–06.

352. *Id.* at 1305.

353. Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1233 (11th Cir. 2004).

354. *Id.* at 1234–35 ("[W]e reaffirm our conclusion in *Williams II*, 240 F.3d at 954, that no Supreme Court precedents, including the recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), are decisions on the question of the existence of such a right.").

355. *Id.* at 1238 ("[W]e decline to extrapolate from *Lawrence* and its *dicta* a right to sexual privacy triggering strict scrutiny.").

356. *Id.* at 1234.

357. *Id.*

358. *Id.* at 1234–35 (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

whether and to what extent the Constitution prohibits state statutes regulating private consensual sexual behavior among adults."[359] The Eleventh Circuit recognized that "many of the Court's 'privacy' decisions have implicated sexual matters."[360] Nevertheless, they took the view that not only did the *Griswold* to *Casey* line of cases not establish a right to sexual privacy, but also concluded that the Supreme Court in *Lawrence* had not answered the question posed in *Carey* because it did not "recognize a fundamental right to sexual privacy" or "a new fundamental right to private sexual intimacy."[361] The Eleventh Circuit provided a narrow reading of the opinion in *Lawrence*:

> *Lawrence* clearly established the unconstitutionality of criminal prohibitions on consensual adult sodomy, "it is a strained and ultimately incorrect reading of Lawrence to interpret it to announce a new fundamental right"—whether to homosexual sodomy specifically or, more broadly, to all forms of sexual intimacy.[362]

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359. *Williams*, 378 F.3d at 1235–36 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 688, n.5 (1977)).

360. *Id.* at 1236 (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992) (abortion); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (contraceptives)).

361. *Id.*

362. *Id.* (citing Lofton v. Sec. of Dep't of Children and Family Servs., 358 F.3d 804, 815–17 (11th Cir. 2004)). *Lofton* upheld a Florida statute prohibiting homosexuals from adopting children, where the Eleventh Circuit Court of Appeals initially provided a reading of *Lawrence v. Texas*, concluding that the Supreme Court had not identified a new fundamental "right to sexual intimacy" that could "be extrapolated to create a right to adopt for homosexual persons." Lofton v. Sec. of Dep't of Children and Family Servs., 358 F.3d 804, 815, 817 (11th Cir. 2004). The appeals court provided a constrained reading of the *Lawrence* opinion. According to the appeals court:

> *Lawrence*'s holding was that substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct. The effect of this holding was to establish a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct.

Id. at 815 (citing *Lawrence*, 539 U.S. at 567). The court of appeals's reading of *Lawrence* seems to invert the opinion deriving a right of consenting adults to engage in private sexual conduct from the Court's finding that the state was prohibiting from imposing a criminal sanctions on consensual homosexual conduct. The Court's opinion in *Lawrence* actually reaches the opposite conclusion by finding the right of homosexuals to engage in sexual "practices common to a homosexual lifestyle" is derived from the broader "protection [afforded] to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence*, 539 U.S. at 572, 578.

In *Lofton*, the court of appeals seemed to rely more on Justice Scalia's dissenting opinion than on the majority's opinion in *Lawrence*. The appeals court observed that "[n]owhere, however, did the Court characterize this right as 'fundamental.'" *Lofton*, 358 F.3d at 816 (Scalia, J., dissenting) (citing *Lawrence*, 539 U.S. at 586)). The appeals court went on to observe that the Court in *Lawrence* did not "locate this right directly in the Constitution, but instead treated it as the by-product of several different constitutional principles and liberty interests." *Id.*

The Eleventh Circuit went on to consider whether the Court in *Lawrence* had met the requirements for recognition of a fundamental right under the substantive due process analysis set out by the Court in *Washington v. Glucksberg*. *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997)). The court of appeals in *Lofton* found that "the *Lawrence* opinion contains virtually

The Eleventh Circuit made two significant findings that effectively limited the significance of *Lawrence* for determining whether statutes burdening adult, private, consensual, sexual relations are constitutional. The court found that *Lawrence* (1) "*did not employ—fundamental-rights analysis*" and (2) "ultimately applied *rational-basis review, rather than strict scrutiny, to the challenged statute.*"[363] The Eleventh Circuit majority maintained that those arguing that *Lawrence* recognized a substantive due process right of consenting adults to engage in private intimate sexual conduct, such that all infringements of this right must be subjected to strict scrutiny, cannot identify a specific holding to that effect in the Court's opinion in *Lawrence*, but are compelled to rely on "scattered dicta from Lawrence" to establish a right to sexual intimacy.[364]

The Eleventh Circuit rejected any claim that a right to sexual intimacy was implicit in the *Griswold* to *Casey* line of cases or that such a right was made explicit in *Lawrence*. According to the Eleventh Circuit, "these precedents recognize various substantive rights *closely related* to sexual intimacy, [but] none of them recognized the overarching right to sexual privacy."[365] They went on to conclude that

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no inquiry into the question of whether the petitioner's asserted right [to sexual intimacy] is one of 'those fundamental rights and liberties which are, 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.'" *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). The appeals court found another flaw in the *Lawrence* opinion barring recognition of a fundamental right to sexual intimacy: "[T]he opinion notably never provides the 'careful description of the asserted fundamental liberty interest' that is to accompany fundamental-rights analysis." *Id.* (citing *Glucksberg*, 521 U.S. at 721).

The Eleventh Circuit placed further emphasis on Justice Scalia's dissenting opinion in *Lawrence*. The appeals court in *Lofton* quoted Justice Scalia questioning the significance of the majority opinion in *Lawrence* because it did not "subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'" *Id.* at 817 (quoting *Lawrence*, 539 U.S. at 586). The appeals court similarly stated: "Most significant, however, is the fact that the *Lawrence* Court never applied strict scrutiny, the proper standard when fundamental rights are implicated, but instead invalidated the Texas statute on rational basis grounds." *Lofton*, 358 F.3d at 817. This criticism, however, ignores the fact that the Court did not need to apply strict scrutiny analysis because the Court in *Lawrence* found that the sodomy statute failed the rational basis test because it lacked any legitimate justification.

363. *Williams*, 378 F.3d. at 1236–37 (emphasis added). The Eleventh Circuit's opinion in *Williams v. Attorney General of Alabama* refers to the quotes in the dissenting opinion as constituting mere dicta, failing to establish a fundamental right to sexual intimacy including: "[T[he Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." *Id.* at 1253–54 (citing *Lawrence*, 539 U.S. at 564–66), and that "liberty gives substantial protection to adult persons in deciding how to *conduct their private lives in matters pertaining* to sex." *Id.* at 1237 n.7 (emphasis added) (citing *Lawrence*, 539 U.S. at 572).

364. Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1236–37 (11th Cir. 2004).

365. *Id.* at 1237.

"we decline to extrapolate from *Lawrence* and its *dicta* a right to sexual privacy triggering strict scrutiny."[366]

The Eleventh Circuit turned to an examination of the trial court's independent finding of a "generalized 'right to sexual privacy'" that was developed without reliance on *Lawrence*.[367] The appeals court found the district court's adoption of a right of sexual privacy terminology failed to carefully frame any right at stake: "As formulated by the district court, the right potentially encompasses a great universe of sexual activities, including many that historically have been, and continue to be, prohibited."[368] Again echoing Justice Scalia's dissent in *Lawrence*, the Eleventh Circuit observed that "[i]f we were to accept the invitation to recognize a right to sexual intimacy, this right would theoretically encompass such activities as prostitution, obscenity, and adult incest—even if we were to limit the right to consenting adults."[369]

The Eleventh Circuit took the view that broad rights to "privacy" and "sexual privacy" were not implicated by the Alabama statute banning the commercial distribution of sexual devices.[370] According to the court, "the putative right at issue is the right to sell and purchase sexual devices."[371] However, later in its opinion the Eleventh Circuit recognized that the Supreme Court finding in *Carey* of a right to sell contraceptives implicates the right to use contraceptives.[372] However, the Eleventh Circuit appears to forget that the right to use contraceptives was originally derived from the right of privacy.[373] Instead, they

366. *Id.* at 1238. Echoing Justice Scalia's dissent in *Lawrence*, the Eleventh Circuit refused to recognize a right to sexual privacy because "it would be answering questions that the *Lawrence* Court appears to have left for another day." *Id.* The appeals court further observed: "We save for a later day consideration of whether Justice Scalia's (perhaps ominous) prediction that public morality may no longer serve as a rational basis for legislation after *Lawrence*." *Id.* at 1238 n.9.

367. *Id.* at 1239. The Eleventh Circuit recognized that its earlier opinion remanding the case could be read as referencing a fundamental right to sexual privacy: "It appears that this impression in our language was, at least in part, the source of the district court's over-broad framing of the right on remand." *Williams*, 378 F.3d at 1239 n.10 (citing *Williams III*, 220 F. Supp. 2d at 1276).

368. *Williams*, 378 F.3d at 1239–40.

369. *Compare id.* at 1240, *with* Lawrence v. Texas, 539 U.S. at 590 ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices." (Scalia, J., dissenting)).

370. *Williams*, 378 F.3d at 1241.

371. *Id.* at 1241–42.

372. *Id.*; *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 689 (1977) ("Limiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so.").

373. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ("The present case [involving constitutional challenge to Connecticut statute forbidding use of contraceptives], then, concerns a

adopted a "slippery slope" or "parade of the horribles" argument that a right to use sexual devices, which are directly related to acts of sexual intimacy, would establish a right to use other illicit materials, such as controlled substances, during acts of sexual intimacy:

> The mere fact that a product is used within the privacy of the bedroom, or that it enhances intimate conduct, does not in itself bring the use of that article within the right to privacy. If it were otherwise, individuals whose sexual gratification requires other types of material or instrumentalities—perhaps hallucinogenic substances, depictions of child pornography or bestiality, or the services of a willing prostitute—likewise would have a colorable argument that prohibitions on such activities and materials interfere with their privacy in the bed chamber. Under this theory, all such sexual-enhancement paraphernalia (as long as it was used only in consensual encounters between adults) would also be encompassed within the right to privacy—and any burden thereon subject to strict scrutiny.[374]

Even if such illicit materials were used as part of acts of sexual intimacy, then it is likely that statutes regulating or proscribing their use would survive strict scrutiny. There is a stark contrast between the justification for controlled substance statutes that prohibit use of hallucinogenic drugs, whether or not that use occurs during acts of sexual intimacy, and a statute that has no valid justification, effectively preventing the use of sexual devices during acts of sexual intimacy. The Eleventh Circuit concluded that the district court failed to establish affirmative protection of a right to use such devices.[375] The Eleventh Circuit rejected the claim that the constitutional right of privacy protected commercial distribution of sexual devices and went on to "hold that the district court committed reversible error in concluding that the Due Process Clause 'encompasses a right to use sexual devices like . . . vibrators, dildos, anal beads, and artificial vaginas.'"[376]

The dissenting opinion in *Williams* provides a much more convincing reading of *Lawrence*. It supports the conclusion that the Alabama statute prohibiting sale of sexual devices violated the substantive due process right of adults to engage in private, consensual, sexual activity, and that the statute therefore lacked a rational basis since the only justification given for the statute was the furtherance of public moral-

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relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

374. Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1241 n.12 (11th Cir. 2004).

375. *Id.* at 1244.

376. *Id.* at 1250.

ity.[377] The dissent paralleled the analysis in *Lawrence* by formulating the issue as a matter involving "the constitutionally protected right to be left alone in [the] privacy of their bedrooms and personal relationships" rather than "about sex or about sexual devices."[378] The dissent observed that the majority in *Williams* recognized that the majority in *Lawrence* found the Texas criminal sodomy statute unconstitutional, but the majority failed to recognize the basis of the Court's ruling.[379] In the dissent's view, "*Lawrence* held that a state may not criminalize sodomy because of the existence of the very right to private sexual intimacy that the majority [in the instant case] refuses to acknowledge."[380]

The Eleventh Circuit dissenting opinion asserted that "[t]here is no question that *Lawrence* was decided on substantive due process grounds."[381] The dissent observed that the *Lawrence* Court relied on the right of privacy line of opinions from *Griswold* to *Casey* for its finding in *Lawrence* that "[i]ncluded within the right to privacy is the ability to make decisions about intimate sexual matters."[382] According to the dissent, however, the Supreme Court gave explicit recognition to the right of sexual privacy that was implicit or implicated in the Court's prior privacy decisions. The dissent observed, "*Lawrence* found that at the time of the *Bowers* decision the Court's prior holdings had already made 'abundantly clear' that individuals have a substantive due process right to make decisions 'concerning the intimacies of their physical relationship[s], even when not intended to produce offspring.'"[383] The dissent argued that the Supreme Court invalidated the Texas sodomy statute because it violated a fundamental right to sexual privacy: "In invalidating the sodomy statute at issue in *Lawrence*, the Court reaffirmed this right to sexual privacy, finding

377. *Id.* at 1250–60 (Barkett, J., dissenting) (construing Lawrence v. Texas, 539 U.S. 558 (2003)).

378. *Compare id.* at 1250 (Barkett J., dissenting), *with Lawrence*, 539 U.S. at 567:

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct [right of homosexuals to engage in sodomy] demeans the claim the individual put forward. . . . [Criminal sodomy statutes] have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.

Id.

379. *Williams*, 378 F.3d at 1251 (Barkett, J., dissenting) (citing majority opinion at 1236).

380. *Id.* at 1251 (Barkett, J., dissenting).

381. *Id.* at 1252 (Barkett, J., dissenting).

382. *Id.* at 1252–53 n.7 (Barkett, J., dissenting) (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (right to use contraception); Planned Parenthood v. Casey, 505 U.S. 833, 869 (1992) (right to seek out an abortion)).

383. *Williams*, 378 F.3d at 1254 (Barkett, J., dissenting) (alteration in original) (citations omitted).

that private homosexual conduct is likewise encompassed within it."[384] Likewise, this led the dissent to conclude that the right of sexual privacy encompasses the right to use sexual devices with the result that the Alabama statute preventing the use of sexual devices is invalid. The dissent further argued that "[a]pplying the analytical framework of *Lawrence* compels the conclusion that the Due Process Clause protects a right to sexual privacy that encompasses the use of sexual devices."[385]

The dissent in *Williams* noted the manner in which the Supreme Court in *Lawrence* formulated the issue raised by the challenge to the constitutionality of the Texas criminal sodomy statute: "We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private [sexual] conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment."[386] The dissent declared unequivocally that the opinion of the Supreme Court in *Lawrence* established a fundamental right to sexual intimacy. Moreover, the dissent asserted that "[t]he *Lawrence* Court's answer to its question of whether adults have a right to engage in private sexual conduct is clearly a binding holding."[387] The dissent found that the Alabama statute prohibiting the sale of sexual devices involved the same vital liberty interest in adult sexual intimacy threatened by the sodomy statutes addressed first in *Bowers* and then in *Lawrence*. The dissent maintained that like the finding regarding the criminal sodomy law in *Lawrence*, the state statute prohibiting the sale of sexual devices represented an invalid burden on the interest in sexual intimacy because Alabama failed to establish any valid justification for the statute.[388]

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384. *Id.* at 1253 (Barkett, J., dissenting) (citing *Lawrence*, 539 U.S. at 562).

385. *Id.* at 1251 (Barkett, J., dissenting).

386. *Id.* at 1256 (Barkett, J., dissenting) (quoting *Lawrence*, 539 U.S. at 564).

387. *Id.* at 1256 (Barkett, J., dissenting).

388. *Id.* at 1256 (Barkett, J., dissenting). The dissent argued:

> The majority states that *Lawrence* held that sodomy laws fail rational basis review. However, the majority neglects to address whether Alabama's statute has a rational basis even though Alabama relies upon the same justification for criminalizing private sexual activity rejected by *Lawrence*—public morality. In *Lawrence*, Texas had explicitly relied upon public morality as a rational basis for its sodomy law. *Lawrence* summarily rejected Texas' argument . . . . In *Williams II*, this Court previously upheld Alabama's law on rational basis grounds, relying on the now defunct *Bowers* to conclude that public morality provides a legitimate state interest . . . . Obviously, now that *Bowers* has been overruled, this proposition is no longer good law and we must, accordingly, revisit our holding in *Williams II*.

Id. at 1259–60 (Barkett, J., dissenting) (citations omitted).

VII. Conclusion

The recognition of a constitutional right to sexual intimacy has involved almost a half century of Supreme Court opinions grappling with a right of privacy that was established applying the concept of substantive due process under the Due Process Clause of the Fourteenth Amendment. Confronting issues of marriage, procreation, contraception, and abortion, the Supreme Court's opinions established rights that implicated a broader claim to a right of adults to engage in acts of private, consensual, sexual intimacy. While initially finding in *Bowers* that homosexuals had no right to engage in sodomy, the *Lawrence* Court's review of the holding explicitly found that adults have a liberty interest in consensual, private, sexual activity, which includes the right of heterosexuals as well as homosexuals to engage in private, consensual sodomy. The fact that the Court failed to explicitly state that the right of sexual privacy is a fundamental right, and because it applied a rational basis test in striking down a state criminal sodomy statute that had been justified only on the inadequate grounds of public morality, some courts remain uncertain as to the existence, scope, and status of the right to sexual privacy established by *Lawrence*. This uncertainty is apparent in recent decisions of the Eleventh Circuit dealing with a state statute proscribing the sale of sexual devices. A close reading of the opinions in that case suggests that the dissenting opinion in *Williams* is correct in its conclusion that the majority in *Lawrence* established a right to sexual intimacy on substantive due process grounds that should be recognized as a fundamental right, thus requiring that any state regulation of adult private, consensual, sexual intimacy be justified by a compelling state interest, and that any such legislation must be narrowly drawn.