North Carolina Central Law Review

Volume 29
Number 1 *Volume 29, Number 1*

Article 7

10-1-2006

Where Sexual Privacy Meets Public Morality: How Williams v. King Is Instructive for the Fourth Circuit in Applying Public Morality as a Legitimate State Interest after Lawrence v. Texas

Douglas E. Nauman

CASENOTE

WHERE SEXUAL PRIVACY MEETS PUBLIC MORALITY: HOW *WILLIAMS V. KING* IS INSTRUCTIVE FOR THE FOURTH CIRCUIT IN APPLYING PUBLIC MORALITY AS A LEGITIMATE STATE INTEREST AFTER *LAWRENCE V. TEXAS*

DOUGLAS E. NAUMAN*

I. INTRODUCTION

The United States Supreme Court's decision in *Lawrence v. Texas*[1] purported to extend the recognition of an individual's fundamental right of privacy into new territory. In over-turning the decision in *Bowers v. Hardwick*,[2] *Lawrence* provided evidence of the Court's willingness to place private, consensual, homosexual relationships on the same footing as comparable heterosexual ones. Some predicted "the end of all morals legislation"[3] and a "massive disruption of the current social order"[4] as a result of the *Lawrence* decision.[5] However in *Wil-*

* B.S., Virginia Polytechnic Institute and State University, 1984; M.B.A., Wake Forest University, 1995; Mr. Nauman is a third year evening student at North Carolina Central University School of Law. Above all, thank you to my family, most especially my wife and daughter, without whom little would be possible and nothing would be worthwhile. Also, a special thank you to Michael J. Lewis, Esq, and David D. Daggett, Esq., for their trust, support, and counsel. And finally, to Therese (1969-2006), whose memory shall always serve to remind me of the virtue of humility.

1. Lawrence v. Texas, 539 U.S. 558 (2003). (*Lawrence* involved the constitutionality of a state statute that prohibited deviate sexual intercourse, including sodomy, with a member of the same sex. The Court resolved *Lawrence* by determining that homosexuals were free, as adults, to engage in private sexual conduct which is within the liberty of persons to choose, without being punished as criminals. The Court reiterated that attempts by the State, or a court, to define the meaning of a relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects should be avoided. In overruling *Bowers v. Hardwick*, the *Lawrence* Court focused on the *Bowers* Court's failure to appreciate the extent of liberty at stake when statutes are enacted that seek to control personal relationships by criminalizing the conduct that forms an integral part of those relationships. The Court held that the State cannot demean the existence of individuals or control their destiny by making their private sexual conduct a crime).

2. Bowers v. Hardwick, 478 U.S. 186 (1986).

3. *Lawrence*, 539 U.S. at 599.

4. *Id.* at 591.

5. See *Id.* at 586-605. (Justice Scalia criticized the majority for its failure to adhere to *stare decisis* in deciding *Lawrence*. Scalia saw the overruling of *Bowers*, in part, as the Court's abandonment of society's long-standing reliance on morality as a guiding principal of the rule of law. Reiterating that the majority did not recognize homosexual sodomy as a fundamental right, Scalia found that a legitimate state interest existed in the prohibition of certain forms of sexual

liams v. King,[6] the United States District Court for the Northern District of Alabama refused to broadly apply *Lawrence* and found that public morality remains a viable state interest in regulating sexual conduct, heterosexual and homosexual alike.

Lawrence does not equate the recognition of homosexual privacy rights with the abandonment of societal morality as a legitimate basis for state legislation. The cultural intensity of the present sexual rights debate, however, has the potential to overshadow this distinction. *Williams V* is particularly important in providing an alternative basis for understanding the *Lawrence* decision outside this charged context. The *Williams V* court based its decision not on a broad-based analysis of sexual privacy rights. Rather, they identified that a court's recognition of the privacy rights engendered by certain types of sexual relationships need not, in all instances, affect the acceptance of certain types of sexual conduct. Far from abandoning morality on a broad scale, the *Williams V* court identified that state legislation regulating sexual conduct does not necessarily infringe upon the legitimacy of the sexual relationship (and its concomitant privacy rights) the *Lawrence* majority recognized. *Williams V* thus establishes a conduct-based approach to analyzing sexual privacy legislation post-*Lawrence*. *Lawrence* itself described several conduct-based exceptions to its holding. *Williams V* expands that list and provides courts with a basis for continued refinement of the *Lawrence* holding.

The United States Fourth Circuit Court of Appeals, the federal district courts of the Fourth Circuit, and the North Carolina state courts have yet to directly apply the holding in *Lawrence*. Of the cases in which these courts reference *Lawrence*, none have reached beyond the express exclusions of the Supreme Court's holding regarding sexual conduct involving minors,[7] non-consensual or coercive conduct,[8]

behavior on moral grounds. Scalia concluded that when the *Lawrence* majority reached the opposite conclusion, it was effectively signaling the end of all morals legislation.).

6. Williams v. King *(hereinafter Williams V)*, 420 F. Supp. 2d 1224 (N.D. Ala. 2006).

7. *See generally* United States v. Peterson, 294 F. Supp. 2d 797 (D.S.C. 2003) (upholding portion of Child Pornography Prevention Act prohibiting possession of child pornography on computer and computer disks transported via interstate commerce against First and Fifth Amendment challenges; the regulation of obscene materials involving actual children does not interfere with privacy or free speech rights), *aff'd*, 145 Fed. Appx. 820 (4th Cir. 2005); United States v. Whorley, 386 F. Supp. 2d 693 (E.D. Va. 2005) (affirming existence of compelling state interest in regulation of obscene material involving minors transported via interstate commerce where obscene emails and child pornography cartoons were downloaded to government office computer); United States v. Sherr, 400 F. Supp. 2d 843 (D. Md. 2005) (finding no legitimate privacy or free speech issues implicated by state regulation of sexually explicit materials involving minors posted to the Internet); State v. Clark, 588 S.E.2d 66 (N.C. Ct. App. 2003) (upholding statutory rape provision of statue against Equal Protection challenge, the court reaffirms state's interest in regulating sexual conduct of minors, whether or not such conduct is consensual), *discretionary rev. denied*, 593 S.E.2d 81 (N.C. 2004); State v. Oakley, 605 S.E.2d 215 (N.C. Ct. App. 2004) (involving charge of sexual activity by a substitute parent, court notes difference

public conduct or prostitution.[9] *Williams V*, provides an instructive basis for the limits of *Lawrence* in cases involving conduct or relationships beyond those express limitations.

This note first analyzes the case of *Williams v. King (Williams V)* and its predecessors.[10] Second, the note focuses on the historical development of the constitutional right of privacy, particularly as it relates to personal sexual conduct. Third, the note examines the holding of *Lawrence v. Texas*. Lastly, with that background, this note analyzes the potential significance of *Williams v. King* (*Williams V*) for courts applying morality as a legitimate state interest after *Lawrence v. Texas*.

II. THE CASE

In 1998, the State of Alabama amended the Alabama Code to make the distribution of certain sexual devices a criminal offense.[11] Six plaintiffs brought an action seeking to enjoin the Attorney General of the State of Alabama from enforcing the amended code.[12] They contended that "implementation of th[e] statute [would] infringe upon their fundamental right to privacy and personal autonomy secured by the United States Constitution."[13] "The plaintiffs further argue[d] that the challenged legislation d[id] not bear a reasonable relationship to a proper legislative purpose."[14]

The United States District Court for the Northern District

---

between consensual adult sexual relationships and those involving minors), *discretionary rev. denied*, 610 S.E.2d 386 (N.C. 2005); State v. Moore, 606 S.E.2d 127 (N.C. Ct. App. 2004) (involving statutory rape, court notes *Lawrence* decision did not extend to minors); and State v. Browning, 629 S.E.2d 299 (N.C. Ct. App. 2006) (involving statutory rape and indecent liberties with a child, rejecting jury instruction for mistake of age defense argued for under *Lawrence,* noting state's interest in regulating sexual conduct involving minors).

8. *See generally* State v. Pope, 608 S.E.2d 114 (N.C. Ct. App. 2005) (upholding solicitation of crimes against nature statute, noting state's interest in regulation of public conduct and prostitution), *discretionary rev. denied*, 612 S.E.2d 636 (N.C. 2005); and State v. Whiteley, 616 S.E.2d 576 (N.C. Ct. App. 2005) (upholding constitutionality of crimes against nature statute when coercive or non-consensual prohibited sexual act involved, though the statute was misapplied in petitioner's case).

9. *See generally* State v. Pope, 608 S.E.2d 114 (N.C. Ct. App. 2005) *discretionary rev. denied*, 612 S.E.2d 636 (N.C. 2005).

10. Williams v. Pryor (*Williams I*), 41 F. Supp. 2d 1257 (N.D. Ala. 1999); Williams v. Pryor (*Williams II*), 240 F.3d 944 (11th Cir. 2001); Williams v. Pryor, (*Williams III*) 220 F. Supp. 2d 1257 (N.D. Ala. 2002); Williams v. Morgan, (*Williams IV*), 378 F.3d 1232 (11th Cir. 2004).

11. ALA. CODE § 13A-12-200.2(a)(1) (1975) (amended 1998) ("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 the stimulation of human genital organs for any thing of pecuniary value.".)

12. Williams v. Pryor (*Williams I*), 41 F. Supp. 2d 1257, 1260 (N.D. Ala. 1999).

13. *Id.*

14. *Id.*

of Alabama framed the issue as: whether the plaintiffs' interest "[in] us[ing] devices 'designed or marketed as useful primarily for the stimulation of human genital organs' when engaging in lawful, private, sexual activity" is an extension of the fundamental right of privacy.[15] The court found no constitutional precedent for extending the right of privacy to encompass all private sexual conduct.[16] Referring to the fundamental rights analysis developed in *Washington v. Glucksberg*,[17] the court went on to find that there was no deeply rooted liberty interest in the plaintiffs' use of sexual devices.

Having found no fundamental right at issue and thus no basis for a strict scrutiny review of the statute, the court turned to the question of whether the state had a rational basis to support the statutory restrictions in the distribution of sexual devices.[18] The court held that effecting a sense of public morality was a legitimate state objective.[19] However, the court found that the statute as written was not rationally related to the state's interest in preserving public morality.[20] The court concluded that "innumerable measures far short of the absolute ban on the distribution of sexual devices [set out in the statute] would have accomplished the state's goals."[21]

On appeal, the plaintiff-appellees reiterated their argument that the statute infringed upon their fundamental right of privacy. The plaintiffs challenged the constitutionality of the statute on its face and as applied.[22] The United States Court of Appeals for the Eleventh Circuit reviewed the district court's decision *de novo* on the constitutionality of the statute. The court first considered the district court's rational basis analysis and found that they erred in determining that the statute lacked a rational basis because "the [s]tate's interest in public morality was a legitimate interest rationally served by the statute."[23] The court next considered the plaintiffs' fundamental rights arguments. The plaintiffs invoked the Supreme Court's recognition of a constitutionally protected fundamental right to privacy, arguing that the statute's restriction on the distribution of sexual devices infringed on their fundamental "right to use" sexual devices.[24]

15. *Id.* at 1275.
16. *Id.* at 1283.
17. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) ("[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'").
18. Williams v. Pryor (*Williams I*), 41 F. Supp. 2d 1257, 1284 (N.D. Ala. 1999).
19. *Id.* at 1286.
20. *Id.* at 1288.
21. *Id.*
22. Williams v. Pryor (*Williams II*), 240 F.3d 944, 952-53 (11th Cir. 2001).
23. *Id.* at 949.
24. *Id.* at 953.

Framing the facial challenge as whether a constitutionally protected right to privacy protects an individual's liberty to use sexual devices when engaged in lawful, private, sexual activity, the court found that there was no controlling precedent that established the facial unconstitutionality of the statute.[25] The court found that the Supreme Court's recognition of such a privacy right had only extended to private decisions not to procreate without government interference.[26] Because the statute under consideration had potential constitutional applications, the court found that the district court had correctly rejected the plaintiff's facial challenge.[27]

In regard to the as-applied challenge, the court found that the record was too narrow to permit a decision on whether the statute infringed on the right to sexual privacy of the specific plaintiffs in the case.[28] The court remanded the case for further consideration by the district court.[29]

On remand from the Eleventh Circuit Court of Appeals, the district court considered whether the Alabama statute was unconstitutional as applied to the individual plaintiffs in the case. The court employed the two-part substantive due process analysis outlined in *Glucksberg* to determine whether constitutional protection should be extended to the plaintiffs' asserted right of privacy.[30] Under this review of the case, the court framed the issue as whether "the fundamental right to privacy recognized by the Supreme Court incorporate[d] a fundamental right to sexual privacy between married persons and between unmarried persons which, in turn, 'encompasse[d] a right to use sexual devices.'"[31] Under this due process analysis, the plaintiffs' burden was to demonstrate that such a right was deeply rooted in the nation's history and traditions.[32] After an exhaustive review of the history and legal traditions related to sexual privacy in the United States, the court found that such a right to sexual privacy existed.[33]

Finding that the right to use sexual devices was encompassed by an individual's right to sexual privacy, the court turned to the question of

25. *Id.* at 954.
26. *Id.*
27. *Id.* at 955.
28. *Id.*
29. *Id.* at 956.
30. Williams v. Pryor, (*Williams III*) 220 F. Supp. 2d 1257, 1275 (N.D. Ala. 2002). "The first feature of this test requires a plaintiff to demonstrate that the fundamental right alleged is, objectively, 'deeply rooted in this Nation's history and tradition'. . . ." *Id.* at 1275 (citing Moore v. East Cleveland, 431 U.S. 494, 503, (1977)). "The second part of the substantive due process test requires that this court carefully describe the fundamental liberty interest at issue." *Id.* at 1275 (citing *Glucksberg*, 521 U.S. at 720-21).
31. *Id.* at 1277.
32. *Id.*
33. *Id.* at 1296.

whether Alabama's statutory ban on the distribution of such devices "impermissibly burdened the plaintiffs' rights to sexual privacy."[34] Under a strict scrutiny review, the court reasoned that any burden imposed by the statute on the plaintiffs' right to sexual privacy "may be justified only by [a] compelling state interest[ ] and must be narrowly drawn to express only those interests."[35] Noting that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly," the court found that Alabama's ban on the sale or distribution of sexual devices resulted in an impermissible burden on their use.[36] Applying the strict scrutiny standard, the court found that Alabama's statute was not narrowly tailored to meet Alabama's purported interest in regulating obscenity.[37] Moreover, even if the state had a compelling interest in regulating obscenity generally, the court questioned whether that interest was compelling in the context of a ban on sexual devices carried out simply because the state "abhor[red] 'the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation, or familial relationships.'"[38]

On appeal for a second time by the State of Alabama, the Eleventh Circuit Court of Appeals considered whether the statute, as applied, violated a fundamental right protected under the Constitution.[39] This was the first time the appeals court had considered the case since the decision in *Lawrence v. Texas*.

The court of appeals characterized the case as one involving a "hitherto unarticulated fundamental right."[40] The court declined to read the *Lawrence* decision as creating a fundamental sexual privacy right. Instead, the court argued that rather than establishing a fundamental sexual privacy right, the *Lawrence* court had in fact declined to do so, stating that "the [Supreme] Court has never indicated that the mere fact that an activity [wa]s sexual and private entitle[d] it to protection as a fundamental right."[41] The court interpreted the holding in *Lawrence* as only establishing the unconstitutionality of a criminal prohibition on consensual adult sodomy.[42] Primary among its reasons was the fact that the Supreme Court had applied a rational basis analysis when deciding *Lawrence*. The court of appeals reasoned that a ra-

34. *Id.* at 1297.
35. *Id.* at 1301.
36. *Id.* at 1297.
37. *Id.* at 1304.
38. *Id.* at 1302.
39. Williams v. Morgan, (*Williams IV*), 378 F.3d 1232, 1233 (11th Cir. 2004).
40. *Id.* at 1234.
41. *Id.* at 1236.
42. *Id.*

tional basis analysis would be inapplicable had the Supreme Court sought to establish a broader fundamental right in sexual privacy.[43]

The court of appeals also took issue with how the district court framed the constitutional issue on remand. Although they cited with approval the initial formulation, the court went on to say that the district court abandoned this limited framing and thus reviewed the issue too broadly as a right to sexual privacy rather than a right to use sexual devices.[44] On this basis, the court found that the district court impermissibly extended the potential scope and bounds of its holding into areas of conduct that had been and continued to be legitimately prohibited.[45] The court reversed the district court's decision, finding that no fundamental right existed for the use of sexual devices.[46] The court rejected the plaintiffs' argument to redefine the constitutional right to privacy to cover the commercial distribution of sex toys.[47] The court left open the question of whether public morality remained a sufficient rational basis to justify the constitutionality of Alabama's statute after the decision in *Lawrence*.[48]

On February 22, 2005, the United States Supreme Court denied a petition for writ of certiorari in the case.[49]

On March 15, 2006, the United States District Court, on remand from the court of appeals, took up the issue of whether Alabama's law had a rational basis and remained good law after *Lawrence*. The district court acknowledged the Supreme Court's language in *Lawrence* indicating that a state's traditional view of a "particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[50] However, the court also found that the Eleventh Circuit had continued to uphold the viability of public morality as a rational basis for legislation post-*Lawrence*.[51]

Ultimately, the district court reasoned that "[t]o hold that public morality can never serve as a rational basis for legislation after *Lawrence* would cause [the] 'massive disruption of the current social or-

43. *Id.*

44. *Id.* at 1239. "[T]he district court's initial opinion 'narrowly framed the analysis as the question whether the concept of a constitutionally protected right to privacy protects an individual's liberty to use sexual devices when engaging in lawful, private, sexual activity.' On appeal we affirmed this formulation. . . ." *Id.* at 1239.

45. *Id.* at 1239-40.

46. *Id.* at 1250.

47. *Id.*

48. *Id.* at 1238.

49. Williams v. King, 543 U.S. 1152 (2005) *denying cert. to* Williams v. Attorney Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004).

50. Williams v. King (*Williams V*), 420 F. Supp. 2d 1224, 1247 (N.D. Ala. 2006) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

51. *See id.* at 1248.

der'" predicted by Justice Scalia in his dissent to *Lawrence*.[52] The court indicated its unwillingness to set such a disruption in motion. Rather, the court considered whether the decision in *Lawrence*, as applied specifically to the Alabama statute, was sufficient to strike it down.[53] The court interpreted the *Lawrence* decision as recognition by the Supreme Court that the criminalization of certain acts served to reinforce a "vicious cycle of distancing and stigma that preserve[d] the equilibrium of oppression" among societal groups.[54] In the district court's view, because the *Lawrence* case dealt with the criminalization of homosexual acts subject to the kind of distancing and stigma the Supreme Court sought not to reinforce, their holding was appropriate. However, the district court found that such an interpretation did not benefit the plaintiffs in *Williams* nor did it justify a similar holding.[55]

The court distinguished *Williams V* from *Lawrence* by finding that the *Lawrence* majority limited the scope of the holding to the single consideration of "two adults . . . engaged in [private, consensual,] sexual practices common to a homosexual lifestyle."[56] The Alabama statute, by comparison, was "not limited to private sexual conduct, or . . . any other activities . . . within the private lives of consenting adults."[57] As a result, the court found that their case did not fit within the mold of *Lawrence* and thus upheld the constitutionality of the Alabama statute.[58] The court held that public morality remained a viable rational basis for determining the constitutionality of the Alabama statute despite the Supreme Court's decision in *Lawrence*.[59]

III. BACKGROUND

A. *Historical Development: Right of Privacy*

"While not specified in the Federal Constitution, the right of privacy has been recognized by the Supreme Court as a distinct constitutional right protecting privacy against unlawful government intrusion."[60] Although the Supreme Court has held that the right to privacy is not absolute, the Court has recognized a fundamental right

52. *Id.* at 1249-1250 (quoting Lawrence v. Texas, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting)).

53. *See id.* at 1250.

54. *Id.* (quoting Lawrence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name,* 117 HARV. L. REV. 1893, 1896 (2004)).

55. *See id.* at 1253.

56. Williams v. King (*Williams V*), 420 F. Supp. 2d 1224, 1253 (N.D. Ala. 2006) (quoting *Lawrence*, 539 U.S. at 578 (majority opinion)).

57. *See id.*

58. *Id.* at 1254.

59. *Id.*

60. Ernest H. Schopler, Annotation, *Supreme Court's Views as to the Federal Legal Aspects of the Right of Privacy*, 43 L. Ed. 2d 871, § 3 (2006).

in matters of procreation, contraception and other intimate family relationships.[61] With the *Lawrence* decision, the Court extended that recognition to private consensual homosexual relationships.

Griswold v. Connecticut[62] initiated the Court's review of the right to privacy as it relates to sexual conduct. Appellant Griswold challenged the constitutionality of a Connecticut law that prohibited the use of contraceptives.[63] The appellant, a licensed physician who operated a planned-parenthood center, gave information, instruction and medical advice to married couples regarding contraception.[64] He was charged and found guilty as an accessory under the Connecticut law.[65]

Griswold argued that the statute in question violated the constitutional rights of married persons. The Supreme Court indicated that the specific guarantees in the Bill of Rights have penumbras, or implied rights, that create zones of privacy into which the government should not intrude.[66] Citing *Boyd v. United States*, the Court identified that the Fourth and Fifth Amendments protect against all governmental invasions of "a man's home and the privacies of life."[67] Citing *Mapp v. Ohio*, the Court reiterated that the Fourth Amendment created a right to privacy "no less important than any other right carefully and particularly reserved to the people."[68] Such precedent, the Court reasoned, "bears witness that the right of privacy which presses for recognition here is a legitimate one."[69]

In reaching its decision, the Court focused on the nature of the relationship in question. They found that the case involved a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. Because the law concerned the forbidding of the use of contraceptives rather than regulation of their manufacture or distribution, it caused a "maximum destructive impact on that relationship."[70] In particular, the Court saw the provisions of the statute as impermissibly imposing on the marital relationship. Describing marriage as a right older than the Bill of Rights, the Court held that the Connecticut statute was unconstitutional.

In *Eisenstadt v. Baird*,[71] the Supreme Court considered sexual privacy beyond the context of the marital relationship. In *Eisenstadt*, ap-

61. *See id.* § 4.
62. Griswold v. Connecticut, 381 U.S. 479 (1965).
63. *Id.* at 481.
64. *Id.* at 480.
65. *Id.*
66. *Id.* at 484.
67. *Id.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).
68. *See id.* at 485 (quoting Mapp v. Ohio, 367 U.S. 643, 656 (1961)).
69. *See id.*
70. *Id.*
71. Eisenstadt v. Baird, 405 U.S. 438 (1972).

pellee William Baird was convicted under a Massachusetts law for giving a young woman a package of contraceptive foam during the course of delivering a lecture on contraception.[72] The recipient of the foam was an unmarried adult woman.[73] The statute prohibited distribution of contraceptives and distinguished between three classes of individuals, allowing married persons to legally obtain contraceptives but prohibiting single persons from doing so.[74]

While recognizing that the Fourteenth Amendment does not deny to the States the power to treat different classes of persons in different ways, the Court found that the Equal Protection Clause of that amendment does "deny to the States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the object of that statute."[75] The question, as the Court saw it under *Eisenstadt*, was "whether there [was] some ground of difference that rationally explain[ed] the different treatment accorded married and unmarried persons under the Massachusetts [statute]."[76]

The Court recognized that "if [they] were to conclude that the Massachusetts statute impinge[d] [on] the fundamental freedoms [identified] in *Griswold*, [any consideration of] the statutory classifications would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest."[77] The Court reviewed the possible state interests of deterring pre-marital sex, enforcing the state's criminal prohibition on fornication, and protecting the health needs of the community and concluded that the statute on its face did not serve to meet any of those state interests.[78]

The Court finally considered whether the statute could be upheld simply as a prohibition on contraception.[79] Analyzing a potential prohibition on contraception on the basis of the state's interest in preserving morality, the Court found that such a view of morality conflicted with "fundamental human rights."[80] However, the Court declined to extend its analysis of the case into this area.[81] Instead, the Court reasoned that regardless of whatever right an individual may have to ac-

72. *Id.* at 440.
73. *Id.* at 440 n.1.
74. *Id.* at 442.
75. *Id.* at 446-47.
76. *Id.* at 447.
77. *Eisenstadt*, 405 U.S. at 447 n.7.
78. *Eisenstadt*, 405 U.S. 438.
79. *Id.* at 452.
80. *Id.* at 453.
81. *Id.*

cess contraceptives, those "rights must be the same for the unmarried and the married alike."[82]

The Court found that "if under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, [then] a ban on distribution to unmarried persons would be equally impermissible."[83] The Court reasoned that even though *Griswold* dealt with a right of privacy in the context of a marital relationship, such a right is ultimately "[that] of the individual, married or single, to be free from unwarranted governmental intrusion into [such personal] matters . . . [as] whether [or not] to bear . . . children."[84]

The Court held that if *Griswold* stood for the proposition that use of contraceptives may not be barred but distribution could, under the Equal Protection Clause, the state could not consistently "outlaw distribution to unmarried but not to married persons."[85] In particular, the Court cited *Railway Express Agency v. New York* wherein that court made the point that:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[86]

On this basis, the Supreme Court affirmed the judgment of the court of appeals in declaring the Massachusetts law unconstitutional.[87]

The decision in *Roe v. Wade*[88] demonstrated the Court's recognition that an individual's sexual privacy right is not absolute. Jane Roe, a single woman, instituted action against the District Attorney seeking a declaratory judgment that "Texas criminal abortion statutes were unconstitutional on their face."[89] Roe asserted "that the Texas statutes were unconstitutionally vague and abridged her right of personal privacy. . . ."[90] Roe cited *Griswold* as recognizing her right of personal

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 454.
86. *Id.* (quoting Railway Express Agency v. New York, 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring)).
87. *Eisenstadt*, 405 U.S. at 455-56.
88. Roe v. Wade, 410 U.S. 113 (1973).
89. *Id.* at 120.
90. *Id.*

and sexual privacy protected under the Bill of Rights or its penumbras.[91]

The Court reviewed three purported bases for the enactment of criminal abortion laws: a social concern to discourage illicit sexual conduct; a concern over the hazardous nature of abortion as a medical procedure; and a concern over the protection of prenatal life.[92] The Court found that prohibitions against abortion often do little to prevent illicit sex and modern medical techniques have made the procedure relatively safe.[93] In regard to the question of preserving prenatal life, the Court found that such contentions had been sharply disputed by the absence of legislative history bearing out that concern.[94]

The Court reiterated that although the Constitution does not explicitly mention any right of privacy, "the Court has recognized that a right of personal privacy or a guarantee of certain areas or zones of privacy does exist under the Constitution."[95] This right, the Court reasoned, was "broad enough to encompass a woman's decision of whether or not to terminate her pregnancy."[96] However, the Court held that the right is not absolute.[97] Some state regulation is appropriate.[98] "At some point in pregnancy, [the] respective interests [of the mother and those of the state in safeguarding health and protecting human life] become sufficiently compelling to sustain regulation of the . . . abortion decision."[99]

Accordingly, the Court reasoned that a "pregnant woman cannot be isolated in her privacy."[100] The Court considered the situation of abortion as "inherently different from [that of] martial intimacy . . . [and] procreation. . . ."[101] At some point, the state's interest in protecting the health of the mother and in protecting the potentiality of human life becomes compelling.[102] At that point, state regulation of abortion may be justified.[103] However, because the Texas "statute [made] no distinction between abortions performed early in pregnancy and those performed later," it was held unconstitutional.[104]

91. *Id.* at 129 (citing Griswold v, Connecticut, 381 U.S. 479 (1965)).
92. *Id.* at 147-50.
93. *Id.* at 148-50.
94. *Id.* at 151.
95. *Id.* at 152.
96. *Id.* at 153.
97. *Id.*
98. *Id.* at 154.
99. *Id.*
100. *Id.* at 159.
101. *Id.*
102. *Id.* at 162-63.
103. *Id.* at 163-64.
104. *Id.* at 164.

Carey v. Population Services International[105] is as significant for what the Court did not hold as for what they did. Like *Roe*, *Carey* continued to define the limits of sexual privacy as a fundamental right. But, the Court declined to extend their analysis of sexual privacy beyond matters of procreation. *Carey* involved a New York statute that made it "a crime for (1) any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) anyone, including licensed pharmacists, to advertise or display contraceptives."[106]

Appellee Population Services International was a non-profit corporation which disseminated birth control information and services, including the mail-order retail sale of contraceptive devices.[107] In addition to Population Services International, the appellees in this case included Population Planning Associates, Inc. (PPA), and a New York resident who alleged that the statute inhibited his access to contraceptive devices and information.[108] The Court decided the constitutionality issue based on Population Planning Associates' standing. Quoting Craig v. Boren,[109] the Court found that "PPA is among the 'vendors and those in like positions [who] have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function.'"[110] The Court, citing *Roe v. Wade*, acknowledged that a right of personal privacy exists under the Constititution.[111] The Court went on to point out, however, that this "constitutionally protected right of privacy does not . . . automatically invalidate every state regulation" regarding contraceptive choice.[112] The court stated that "[t]he business of manufacturing and selling contraceptives may be regulated in ways that do not infringe protected individual choices."[113]

The Court cited the limiting language in *Roe v. Wade* in recognizing that "at some point [the state's interest] 'become[s] sufficiently compelling to sustain regulation.'"[114] However, the Court pointed out

105. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

106. *Id.* at 681.

107. *Id.* at 682.

108. *Id.*

109. Craig v. Boren, 429 U.S. 190 (1976).

110. Carey v. Population Servs. Int'l, 431 U.S. at 684 (quoting Craig v. Boren, 439 U.S. at 192-97).

111. *Id.* at 684.

112. *Id.* at 685-86.

113. *Id.* at 686.

114. *Id.* (quoting Roe v. Wade, 410 U.S. 113, 154-56 (1973) (discussing that a state's interest in governing the abortion decision must be "compelling" and "narrowly drawn to express only those interests.")).

that the right preserved in cases such as *Griswold* and *Eisenstadt* was not limited to the use of contraceptives alone.

> Read in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the [s]tate. Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception.[115]

Thus, when a statute limits access to the means affecting a decision on contraception it is subject to the same compelling state interest standard as is applied to statutes that prohibit the decision entirely.[116]

The Court concluded that the New York statute did not satisfy a compelling state interest in restricting access to contraception as a constitutionally protected right in decisions on matters of childbearing.[117] The Court stopped short of holding that a state regulation must meet a strict scrutiny standard whenever it implicates "sexual freedom" or "affects adult sexual relations."[118] Rather, the Court stated, such a standard is applied "only when it burdens an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means effectuating that decision."[119] The Court observed that they "ha[d] not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes from regulating private, consensual, sexual behavior among adults."[120]

The *Bowers v. Hardwick*[121] decision followed the limits of analysis the Court established in *Griswold*, *Eisenstadt*, *Roe* and *Carey*. Each of these cases had only analyzed an individual's sexual privacy rights in the context of a heterosexual relationship (i.e. one founded in procreation). So, too, did *Bowers*.

---

115. *Carey*, 431 U.S. at 687.

116. *Id.* at 688 (discussing the application of the compelling state interest test to statutes which burden an individual's right to either "prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision").

117. *See id.* at 690 (holding that the states' interests, that "young people not sell contraceptives", to prevent tampering with the product, and to facilitate "enforcement of the other provisions of the statute . . . hardly justify the statute's incursion into constitutionally protected rights, and in any event the statute is obviously not substantially related to any goal of preventing young people from selling contraceptives . . . [nor] as a quality control device.").

118. *See id.* at 689 n.5.

119. *Id.*

120. *Id.*

121. Bowers v. Hardwick, 478 U.S. 186 (1986).

In *Bowers*, respondent Hardwick was charged with violating a Georgia statute criminalizing sodomy.[122] Hardwick brought suit challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.[123] The Eleventh Circuit Court of Appeals reversed the district court's decision granting the defendant's motion to dismiss the case. Relying on *Griswold*, *Eisenstadt* and *Roe*, the court of appeals held that "the Georgia statute violated [Hardwick's] fundamental rights because his homosexual activity [wa]s a private and intimate association that was beyond the reach of state regulation."[124]

The Supreme Court granted certiorari to review whether the statute violated the fundamental rights of homosexuals.[125] The Court characterized the issue as "whether the Federal Constitution confer[red] a fundamental right upon homosexuals to engage in sodomy and hence invalidate[d] . . . [any state law making] such conduct illegal."[126] The Court distinguished the cases upon which the court of appeals relied in reaching its decision. The Court found that none of the rights announced in *Griswold*, *Eisenstadt* or *Roe* bore any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that was asserted in the present case.[127] In short, the Court found no connection between family, marriage, or procreation and homosexual activity.[128]

Contrary to Hardwick's argument, the Court found morality to be a sufficiently rational basis upon which to impose criminal restrictions on sodomy.[129] The Court was not persuaded that the majority sentiments about the morality of homosexuality was inadequate to invalidate existing sodomy laws.[130] Finding no violation of a fundamental right and the presence of a legitimate state interest in preserving morality, the Court reversed the judgment of the court of appeals and upheld the Georgia sodomy law.[131]

B. *An Examination: Lawrence v. Texas*

Lawrence v. Texas[132] broadened an individual's sexual privacy rights beyond those existing in heterosexual relationships only. In *Lawrence*, petitioner John Lawrence was arrested, charged and con-

122. GA. CODE ANN. § 16-6-2 (1984).
123. *Bowers*, 478 U.S. at 188.
124. *Id.* at 189.
125. *Id.*
126. *Id.* at 190.
127. *Id.* at 190-91.
128. *Id.* at 191.
129. *Id.* at 196.
130. *Id.*
131. *Id.*
132. Lawrence v. Texas, 539 U.S. 558 (2003).

victed of engaging in deviate sexual intercourse with another person of the same sex.[133] The applicable state law in Texas categorized deviate sexual intercourse to include sodomy.[134]

The Supreme Court granted certiorari to consider whether the Texas statute violated the Equal Protection Clause of the Fourteenth Amendment, whether the petitioner's criminal conviction violated his interest in liberty and privacy, and whether *Bowers v. Hardwick* should be overruled. The Court concluded that the *Bowers* decision failed to appreciate the extent of liberty at stake.[135] The Court concluded that "when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in the personal bond that is more enduring."[136] Basing its analysis on the decisions in *Griswold*, *Eisenstadt* and *Roe*, the Court expressed the sentiment that the liberty protected by the Constitution allows homosexual persons the right to make the choice of intimate conduct within the confines of their personal bond.[137] While recognizing that such a right is limited, the Court found that the holdings of these cases extended the right to make certain decisions regarding sexual conduct beyond the marital relationship.[138]

In limiting the scope of its inquiry, the Supreme Court found that the *Bowers* court relied on the long-standing tradition of condemning homosexual conduct as immoral as a rational basis for upholding the Georgia statute and that such basis was not sufficient.[139] Rather, the Court saw the *Lawrence* case as a question of "whether the majority may use the power of the [s]tate to enforce [their views of morality] on the whole society through operation of a criminal law."[140] The *Lawrence* court found that it could not.

The Court hastened to point out that its decision was not based on the argument of equal protection asserted by petitioners and some amici. Although the statute in *Lawrence* only prohibited same-sex sodomy, the Court chose to remove the question of how its decision would have been affected if the statute were drawn differently.[141] The

133. *Id.* at 563.

134. *Id.* TEX. PENAL CODE ANN. § 21.06(a) (2003) *invalidated* by Lawrence v. Texas, 539 U.S. 558 (2003) (providing that a person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex). "The statute define[d] 'deviate sexual intercourse' as follows: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." *Id.* at 563.

135. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

136. *Id.*

137. *Id.*

138. *Id.* at 565.

139. *Id.* at 571.

140. *Id.*

141. *Id.* at 575.

Court concluded that a continued reliance on the precedent of *Bowers* "demean[ed] the lives of homosexual persons" and should therefore be overruled.[142]

Finally, the Court agreed with Justice Stevens' analysis in *Bowers* wherein he stated that a state's traditional view of a practice as immoral "is not a sufficient reason to uphold a law prohibiting [the] practice" and that "individual decisions concerning the intimacies of their physical relationship . . . are a form of liberty protected by the Due Process Clause of the Fourteenth Amendment."[143] In sum, the Court concluded that the state cannot "demean [the] existence or control [the] destiny of [a private homosexual relationship] by making their private sexual conduct a crime."[144]

IV. ANALYSIS

Griswold was the first case to recognize an individual's sexual relationship with another as one lying within a zone of privacy created by fundamental constitutional guarantees.[145] *Griswold*, however, limited itself to the marital relationship. Through the progression of *Eisenstadt*, *Roe* and *Carey*, the United States Supreme Court broadened its recognition of privacy rights to include sexual relationships outside marriage. But, none of these cases ever ventured beyond conduct that had its foundations in procreation, and hence never sought to define sexual relationships as personal bonds, the conduct of which "can be but one element."[146] *Bowers* followed this line of cases and the Court was unwilling to recognize a fundamental right to engage in homosexual sodomy.[147]

The *Lawrence* decision explicitly overruled *Bowers*, but not because the Court recognized a fundamental privacy right in homosexual conduct. Rather, the Court recognized both a boundary and an intersection between the right of privacy and socially acceptable sexual conduct. In deciding *Lawrence*, the Court expanded the boundary of privacy to include consensual, private, adult homosexual relationships. However, the Court did not eliminate society's right to legislate on the basis of public morality where sexual conduct itself intersects with society's standards of acceptability.

In his dissent[148] of the *Lawrence* decision, Justice Scalia envisioned the *Lawrence* case creating a massive disruption of the current social

142. *Id.*
143. *Id.* at 577-78.
144. *Id.* at 578.
145. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
146. Lawrence v. Texas, 539 U.S. 558, 567 (2003).
147. Bowers v. Hardwick, 478 U.S. 186, 191 (1986).
148. *See supra* notes 3 and 4.

order by the breadth of its holding. In anticipation of a complete discarding of morality as a legitimate state interest, he ironically cited the Eleventh Circuit's first decision in *Williams II* as an example of how morality had been used in the past to uphold the "ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."[149] Justice Scalia feared that with *Lawrence*, state regulation of sexual conduct based on morality would be a thing of the past. Justice Scalia's fears did not materialize. In fact, the Eleventh Circuit Court of Appeals ultimately provided the direction to the district court in *Williams IV* that morality is not to be abandoned post-*Lawrence*.

Lawrence was decided based on the recognition that Texas law infringed upon a personal relationship.[150] The Court readily recognized that their decision did not involve "whether the government must give formal recognition to *any* relationship that homosexual persons seek to enter."[151] Moreover, the Court specifically eliminated from its holding any sexual conduct involving minors, those who might be injured or coerced, public conduct or prostitution.[152]

The plaintiffs in the *William v. King* cases argued that the Alabama statute violated their fundamental rights of privacy.[153] The court in *Williams I* found no evidentiary basis, under the *Glucksberg* standard, for holding that their case involved a fundamental right of privacy.[154] In completing their rational basis analysis, the court saw no difficulty in retaining public and social morality as a legitimate state interest. Instead, the court initially found the statute unconstitutional because it was deemed arbitrary and overly broad.[155] The district court in *Williams V* recognized that the constitutional boundaries for the plaintiffs' asserted privacy rights, even after *Lawrence* was not completely clear.[156] The district court characterized its understanding of the right to engage in private, consensual, sexual activity common to a homosexual lifestyle as "arguably" a fundamental right recognized by the Supreme Court.[157]

The court of appeals decision in *Williams IV*, after *Lawrence* had been decided, brought the significance of the *Williams* cases clearly into focus. In *Williams III*, the district court on remand, found that a broad-based fundamental right to sexual privacy existed under the

149. *Lawrence*, 539 U.S. at 589.
150. *Id.* at 567 (emphasis added).
151. *Id.* at 578.
152. *Id.*
153. Williams v. King (*Williams V*), 420 F. Supp. 2d 1224, 1225 (N.D. Ala. 2006).
154. *Id.* at 1234.
155. *Id.* at 1235.
156. *Id.* at 1226.
157. *Id.* at 1228-29.

federal Constitution. However, the court of appeals (in *Williams IV*) reversed the district court and reasoned that the *Lawrence* court had not in fact recognized such a fundamental right. On remand again, in *William V*, the district court articulated the distinction in the *Lawrence* decision when they identified the explicit limitations the *Lawrence* court placed on its holding but also recognized that within those confines "the moral views of a governing majority may not be used to define the meaning *of the relationship* or to set its boundaries."[158]

Some, like Justice Scalia, have argued that *Lawrence* stands for the idea that morality is no longer a legitimate state interest in matters of sexual conduct.[159] The district court in *Williams V* recognized, however, that morality, as a legitimate state interest, is limited only where the conduct in question is but one element of the private, consensual adult relationship (homosexual or heterosexual), the privacy of which *Lawrence* sought to protect. In so doing, the *Williams V* court reveals the underlying weaknesses of both Justice Stevens' argument in *Bowers* and Justice Scalia's argument in *Lawrence*. Neither argument holds true. As the *Williams V* court stated, laws are often based on moral standards.[160] Moral standards have not and will not be abandoned in the law. On the other hand, the recognition of a sexual privacy right in the context of a consensual relationship negates morality as a rational basis for state legislation involving *conduct* which is intimately connected to *that* relationship.[161] *Lawrence* extended the reach of privacy beyond marriage and contraception – that is, to include the homosexual relationship. However, the *Williams V* decision demonstrates that a constitutional right of privacy has not been extended to *every* form of private sexual conduct or *every* private sexual relationship to the extent that morality is no longer a valid state interest.

In the end, the district court in *Williams V* found it easy to distinguish *Lawrence* because their case was not encapsulated within the private sexual relationship that *Lawrence* sought to recognize and whose privacy the Supreme Court sought to protect.[162] In reaching its conclusions, the *Williams V* court demonstrated that, outside the limited relationship boundaries established by the *Lawrence* court, morality remains a valid rational basis for state regulation of sexual conduct.

158. *Id.* at 1246-47 (emphasis added).

159. *See generally* Lawrence v. Texas, 539 U.S. 558, 589 (2003).

160. Williams v. King (*Williams V*), 420 F. Supp. 2d 1224, 1248 (N.D. Ala. 2006).

161. *Id.* at 1250 (emphasis added).

162. *Id.* at 1253-54.

V. CONCLUSION

Lawrence v. Texas established that private, consensual, adult homosexual relationships may not be intruded upon by government regulation that criminalizes their conduct. As a result, *Lawrence* moved the Court beyond the traditional procreative basis recognized in *Griswold*, *Eisenstadt*, and *Roe* as the foundation for analyzing an individual's constitutional right to sexual privacy.

Lawrence stands for the idea that prohibitions on sexual conduct, even morally unacceptable conduct, are not a permissible means for the state to infringe on the privacy of an individual's intimate relationship with another person. However, the right to sexual privacy, heterosexual or homosexual, does not extend to every state regulation. In other words, sexual conduct in many contexts may not be constitutionally protected merely by an appeal to one's privacy rights. Outside of the intimate relationship recognized by *Lawrence*, states continue to be free to regulate the boundaries of sexual conduct to the extent that the legislation rationally serves to protect the state's legitimate interests.

One of those interests is the preservation of social or public morality. State legislatures need not abandon their moral compass in the wake of the *Lawrence* decision. *Lawrence* explicitly excludes its application in situations of sexual conduct involving minors, coercion, public conduct or prostitution. The significance of *William v. King* (*Williams V*) is that it recognizes that this explicit list of limitations is not exhaustive. Sexual conduct outside that which is intimately reflective of, and an integral component of, a private, consensual adult relationship, including a homosexual one, continues to be subject to the state's interest in public morality under rational basis review.