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## South Carolina's Sexual Conduct Law after Lawrence v. Texas

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## **SOUTH CAROLINA'S SEXUAL CONDUCT LAWS AFTER *LAWRENCE V. TEXAS***

### **I. INTRODUCTION**

State laws proscribing consensual sexual conduct between adults are unconstitutional because they violate substantive due process. Moreover, such laws are “uncommonly silly”<sup>1</sup> as a practical matter because they purport to criminalize conduct that many individuals engage in, and they are rarely enforced.<sup>2</sup> However, South Carolina has several such laws,<sup>3</sup> and given the Supreme Court’s decision in *Lawrence v. Texas*,<sup>4</sup> which held that the understanding of liberty under the Due Process Clause gives consenting adults the right to engage in private sexual conduct without government intervention,<sup>5</sup> South Carolina has no legitimate interest in keeping its archaic antifornication laws on the books.

South Carolina has several criminal statutes proscribing consensual private sexual conduct between adults in its statutory code.<sup>6</sup> These provisions are part of Chapter 15 of Title 16 of the South Carolina Code, which delineates “Offenses Against Morality and Decency” and provides that any conduct constituting fornication, adultery, or buggery is punishable as a criminal offense.<sup>7</sup> The South Carolina Code defines fornication as “the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman, both being unmarried.”<sup>8</sup> The offense of adultery mirrors that of fornication, with the only significant difference being that one or both partners must be lawfully married to another person.<sup>9</sup> Both offenses carry the same punishment upon conviction—offenders “shall be severally punished by a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment for not less than six months nor more than one year or by both fine and imprisonment.”<sup>10</sup> While the statutory language describing the separate offense of buggery is facially ambiguous,<sup>11</sup> the word buggery is widely understood to encompass the criminal act of sodomy.<sup>12</sup> South Carolina’s criminal law punishes those found guilty of buggery more severely than those

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1. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

2. *See id.* (“As a practical matter, the law [forbidding the use of contraceptives] is obviously unenforceable . . .”).

3. *See* S.C. CODE ANN. § 16-15-60 (2003) (describing penalties for adultery and fornication offenses); *id.* § 16-15-70 (defining adultery); *id.* § 16-15-80 (defining fornication); *id.* § 16-15-120 (describing the penalty for buggery).

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

5. *Id.* at 578.

6. *See* §§ 16-15-60, -70, -80.

7. *See id.* §§ 16-15-60, -70, -80, -120.

8. *Id.* § 16-15-80.

9. *Compare id.* § 16-15-80 (defining fornication), with *id.* § 16-15-70 (defining adultery).

10. *Id.* § 16-15-60.

11. Section 16-15-120 provides that “the abominable crime of buggery” is a criminal offense in South Carolina, but it does not specify what conduct constitutes “buggery.”

12. *See* 70c AM. JUR. 2D *Sodomy* §§ 2, 3 (2010).

convicted of fornication or adultery—a convicted offender is “guilty of [a] felony and shall be imprisoned in the Penitentiary for five years or shall pay a fine of not less than five hundred dollars, or both.”<sup>13</sup> For all of these offenses regarding prohibited sexual activity, the imposition of punishment is within the discretion of the sentencing court.<sup>14</sup> In addition to the possibility of the punishments provided in Chapter 15, individuals convicted of fornication, adultery, or buggery may face a number of indirect consequences, particularly with respect to their ability to work with children in the future. Persons convicted of adultery or fornication under section 16-15-60 may be ineligible to work as teachers,<sup>15</sup> may not serve as guardians ad litem,<sup>16</sup> may not be foster parents,<sup>17</sup> may not work at a day-care or child-care facility,<sup>18</sup> and may not work as employees of the Department of Social Services in the child protective services or day care licensing divisions.<sup>19</sup> In addition to these consequences, individuals convicted of buggery are considered felons and may be subject to other serious repercussions, including mandatory HIV testing and compulsory registration as sex offenders.<sup>20</sup> Thus, as with any criminal conviction, these offenses carry with them the possibility not only of direct punishment but also of serious indirect social consequences and stigma that may last long after offenders serve their sentences.

Consistent with a federalist system of government, the United States Constitution provides that the powers not expressly granted to the federal government nor prohibited to the states are reserved to the individual states and the people.<sup>21</sup> Within their borders, states exercise their police powers to promote the welfare, security, health, and safety of their citizens.<sup>22</sup> Exercising their police powers, states use the criminal law to punish and deter conduct that the

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13. § 16-15-120.

14. *See id.* §§ 16-15-60, -120.

15. *See* S.C. CODE ANN. § 59-26-40(M) (2004).

16. *See* S.C. CODE ANN. § 63-11-520 (2010).

17. *See id.* § 63-7-2350(A)(2)(b).

18. *See id.* §§ 63-13-620 to -630, -820, -1010.

19. *See id.* § 63-13-190.

20. *See* S.C. CODE ANN. § 16-3-740 (2003); S.C. CODE ANN. § 23-3-430 (2007); *see also* S.C. CODE ANN. § 23-3-400 (2007) (“The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement’s efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency’s jurisdiction.”).

21. *See* U.S. CONST. amend. X.

22. *See* *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“There are . . . certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public.”), *overruled by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

legislature finds “most egregious to the public weal.”<sup>23</sup> The criminal law seeks to accomplish the general goal of deterrence through the complementary goal of punishment.<sup>24</sup> In theory, the State punishes individual offenders for their transgressions, and in doing so, both deters those particular individuals from future misconduct and generally deters society, which learns from the mistakes of others.<sup>25</sup> However, society, acting through its elected representatives, may not arbitrarily choose to criminalize whatever conduct it wishes, because the Constitution removes certain issues from the realm of political debate and places restrictions on the government’s power.<sup>26</sup> Because certain liberties are so fundamental, they are not subject to the whims of the majority.<sup>27</sup> While the text of the Constitution expressly protects some of these fundamental rights, the Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to include some rights not specifically mentioned in the text of the Constitution but nevertheless deemed to be fundamental under the doctrine of substantive due process.<sup>28</sup> In *Lawrence*, the Supreme Court found that a Texas law criminalizing consensual homosexual sodomy violated the right to privacy, which is a subset of substantive due process.<sup>29</sup> This Note will show how, in the wake of the *Lawrence* decision, South Carolina’s criminal laws proscribing private consensual adult sexual activity are unconstitutional because they intrude into a constitutionally protected zone of individual liberty.

Part II of this Note will discuss Supreme Court decisions establishing and expanding the idea of a constitutional right to privacy protected by the Fourteenth Amendment. Part III will explain the Court’s decision in *Lawrence* and its reliance upon the right to privacy when it overruled *Bowers v. Hardwick*,<sup>30</sup> concluding that “the petitioners were free as adults to engage in the

23. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 105 (2000).

24. *Id.*

25. *Id.*

26. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”); *see also* *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (striking down a Jacksonville vagrancy ordinance as impermissibly vague because it did not give fair notice of prohibited behavior and resulted in arbitrary arrests).

27. *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (“In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the ‘traditions and [collective] conscience of our people’ to determine whether a principle is ‘so rooted [there] . . . as to be ranked as fundamental.’ The inquiry is whether a right involved ‘is of such a character that it cannot be denied without violating those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions” . . . .’” (alterations in original) (citation omitted) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Powell v. Alabama*, 287 U.S. 45, 67 (1932))).

28. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–49 (1992) (describing how substantive due process protects liberties that are not enumerated in the Constitution).

29. *See* *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

30. 478 U.S. 186 (1986), *overruled by* *Lawrence*, 539 U.S. 558.

private conduct [homosexual sodomy] in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”<sup>31</sup> Part IV will address the State’s interests in criminalizing certain types of private sexual conduct. Part V will argue that, as a general matter, states should not impose a moral code onto society by legislating morality, and it will also focus on the practical problems related to laws proscribing noncommercial private consensual adult sexual conduct. Part VI will examine the experience of other states, where either the legislature has voluntarily repealed fornication and sodomy statutes or the highest court of the state has struck down the law as antithetical to the state constitution. In particular, Part VI will focus on *Martin v. Zihler*,<sup>32</sup> a Virginia Supreme Court case that relied on the *Lawrence* decision in overturning its own antifornication statute.<sup>33</sup> Finally, Part VII will address the concerns of the *Lawrence* dissenters and distinguish laws proscribing private consensual adult sexual conduct from other laws regulating sexual behavior. In particular, Part VII will argue that while antifornication laws and some applications of antisodomy laws cannot be sustained following the *Lawrence* decision, South Carolina may maintain other laws regulating sexual behavior, including adultery laws.

## II. THE CONSTITUTIONAL “RIGHT TO PRIVACY”

While some state constitutions explicitly grant citizens a right to privacy,<sup>34</sup> the federal constitution does not; nonetheless, the Supreme Court has found such a right to exist based on other constitutional provisions.<sup>35</sup> In particular, the right to privacy often appears in the context of Fourth Amendment search and seizure cases.<sup>36</sup> In *Olmstead v. United States*,<sup>37</sup> Justice Louis Brandeis’s dissenting opinion argued that the Fourth Amendment protects an individual’s right to privacy, into which the government had impermissibly intruded.<sup>38</sup> In *Katz v. United States*,<sup>39</sup> which overruled *Olmstead*, the Supreme Court agreed:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office,

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31. *Lawrence*, 539 U.S. at 564.

32. 607 S.E.2d 367 (Va. 2005).

33. *Id.* at 371 (citing *Lawrence*, 539 U.S. at 577).

34. *See Gryczan v. State*, 942 P.2d 112, 121 (Mont. 1997) (“[W]e have long held that Montana’s Constitution affords citizens broader protection of their right to privacy than does the federal constitution. Unlike the federal constitution, Montana’s Constitution explicitly grants to all Montana citizens the right to individual privacy.” (citation omitted)).

35. *See Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965).

36. *See Gryczan*, 924 P.2d at 121.

37. 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

38. *Id.* at 478–79 (Brandeis, J., dissenting).

39. 389 U.S. 347 (1967).

is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>40</sup>

Justice Harlan's concurring opinion in *Katz* also discussed the right to privacy and framed the test for determining whether law enforcement officials had violated the Fourth Amendment.<sup>41</sup> A search by law enforcement implicates an individual's Fourth Amendment rights where an individual had "an actual (subjective) expectation of privacy" and where the individual's expectation was "one that society is prepared to recognize as 'reasonable.'"<sup>42</sup>

In addition to being a part of the Supreme Court's Fourth Amendment jurisprudence, the right to privacy is a component of the Fourteenth Amendment doctrine of substantive due process.<sup>43</sup> The Due Process Clause of the Fourteenth Amendment provides that states shall not "deprive any person of life, liberty, or property, without due process of law."<sup>44</sup> While this language appears to place only procedural limitations on state power, during two key periods, the Supreme Court interpreted the Fourteenth Amendment to convey substantive rights as well.<sup>45</sup> During the late 1800s and early 1900s, the *Lochner* era,<sup>46</sup> the Supreme Court "interpreted the [Due Process Clause] as guaranteeing various laissez-faire economic freedoms, particularly the freedom of contract."<sup>47</sup> The Court also expanded the substantive due process doctrine beyond the context of economic freedoms during the second half of the twentieth century, when it recognized a constitutional right to privacy.<sup>48</sup> Tracing the evolution of the concept of the right to privacy in specific Supreme Court decisions is informative and helps illustrate how the Court's *Lawrence* decision in 2003 was a natural continuation of its right-to-privacy jurisprudence.

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40. *Id.* at 351–52 (citations omitted).

41. *See id.* at 361 (Harlan, J., concurring).

42. *Id.*

43. Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79, 81 (1988).

44. U.S. CONST. amend. XIV, § 1.

45. Schneider, *supra* note 43, at 81.

46. *Id.* at 81 n.5.

47. *Id.* at 81. In *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the Supreme Court first interpreted the Fourteenth Amendment's Due Process Clause to provide substantive protections to private contracts. *See id.* at 591–93. The *Lochner* decision extended this early case's reasoning and expressly held that the Fourteenth Amendment encompassed the right to make a business contract and the right to buy and sell labor. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (citing *Allgeyer*, 165 U.S. 578), *overruled by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

48. Schneider, *supra* note 43, at 81.

### A. *Protection of Marriage*

The right to privacy under the doctrine of substantive due process most often appears in cases involving freedom of choice in matters that involve reproduction, contraception, abortion, and marriage.<sup>49</sup> The Supreme Court first recognized that individuals have a constitutionally protected fundamental right to marry the person of their choice in *Loving v. Virginia*.<sup>50</sup> There, the Court struck down a state miscegenation statute that prohibited members of different races from marrying.<sup>51</sup> Additionally, in *Zablocki v. Redhail*,<sup>52</sup> the Supreme Court stated, “[T]he right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that ‘critical examination’ of the state interests advanced in support of the classification is required.”<sup>53</sup> The Court in *Zablocki* held that a state law that provided that individuals who were under an obligation to pay child support could not marry without court approval was an impermissible restriction on one’s right to marry.<sup>54</sup> These cases, along with others examining the right to marry,<sup>55</sup> indicate that “the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.”<sup>56</sup> Additionally, other cases have recognized that substantive due process encompasses a right to family unity.<sup>57</sup>

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49. See *Burton v. York County Sheriff’s Dep’t*, 358 S.C. 339, 353–54, 594 S.E.2d 888, 896 (Ct. App. 2004) (“[T]he ‘right to privacy’ has come to mean a right to engage in certain highly personal activities. More specifically, it currently relates to certain rights of freedom of choice in marital, sexual, and reproductive matters. Even this definition may be too broad . . . [because] the Justices have acknowledged the existence of a ‘right’ and defined it by very specific application to laws relating to reproduction, contraception, abortion, and marriage.” (quoting 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.26 (3d ed. 1999))); see also *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (“[T]he right has some extension to activities relating to marriage procreation; contraception; family relationships; and child rearing and education.” (citations omitted)).

50. 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

51. *Id.*

52. 434 U.S. 374 (1978).

53. *Id.* at 383 (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 314 (1976)).

54. *Id.* at 387–91.

55. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (describing marriage as “fundamental to the very existence and survival of the race”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing that the Due Process Clause protects the right “to marry, establish a home and bring up children”); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (characterizing marriage as “the foundation of the family and of society”).

56. *Zablocki*, 434 U.S. at 384.

57. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 495–96, 506 (1977) (holding that a city housing ordinance was an unconstitutional violation of due process where it criminalized a grandmother for living with her extended family); see also *id.* at 507 (Brennan, J., concurring) (“[T]he ordinance unconstitutionally abridges the ‘freedom of personal choice in matters of . . . family life [that] is one of the liberties protected by the Due Process Clause of the Fourteenth

*B. Protection of Reproductive Matters*

In *Griswold v. Connecticut*,<sup>58</sup> a case involving whether the State could restrict a married couple's access to contraceptives, the Supreme Court held that individual decisions by married people concerning their own intimate physical relationships are a facet of the right to privacy.<sup>59</sup> The Supreme Court extended *Griswold*'s holding in *Eisenstadt v. Baird*<sup>60</sup> and recognized the right of unmarried persons to have access to contraceptive devices.<sup>61</sup> While the Court reached its decision by reasoning that the statute in question violated the Equal Protection Clause of the Fourteenth Amendment because it provided dissimilar treatment for married and unmarried persons who were similarly situated,<sup>62</sup> the decision is significant for recognizing that rights pertaining to procreation extend beyond the marital unit. The Court explicitly stated the following:

[T]he 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 unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>63</sup>

This line of decisions thus establishes that while the right to privacy is not explicitly mentioned in the Constitution's text, it is a fundamental right worthy of protection in the context of such highly personal and intimate matters as marriage and family autonomy.<sup>64</sup>

*C. Protection of Abortion*

The Supreme Court further extended the right to privacy under substantive due process in *Roe v. Wade*,<sup>65</sup> where the Court held that the right "is broad enough to encompass a woman's decision whether or not to terminate her

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Amendment." (second alteration in original) (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974))).

58. 381 U.S. 479 (1965).

59. *Id.* at 484–86.

60. 405 U.S. 438 (1972).

61. *Id.* at 453.

62. *Id.* at 454–55.

63. *Id.* at 453.

64. The Court has also found a fundamental right to privacy in cases involving government intrusion into the home. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."). The right to privacy has also been described as "the right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

65. 410 U.S. 113 (1973).



pregnancy.”<sup>66</sup> The Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>67</sup> reaffirmed the central holding of *Roe*—that prior to fetal viability, a woman has the right to choose to have an abortion.<sup>68</sup> However, at the same time the Court also recognized that the State does have a legitimate interest in both the health of the mother and the potential life of the unborn fetus.<sup>69</sup> As to the right to privacy protected by the Fourteenth Amendment, the Court said, “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”<sup>70</sup> While recognizing a right to privacy under the doctrine of substantive due process has been criticized at times,<sup>71</sup> it is clear that within the spheres of marriage, reproductive matters, and abortion, the Supreme Court is willing to acknowledge and protect such a right.

### III. THE *LAWRENCE V. TEXAS* DECISION: OVERRULING *BOWERS V. HARDWICK*

The Supreme Court’s decision in *Lawrence* was a logical extension of the earlier line of cases finding a right to privacy implicit within the meaning of the Fourteenth Amendment. Justice Kennedy’s majority opinion struck down a Texas law proscribing private consensual homosexual sodomy between adults as an unconstitutional infringement on the right to privacy.<sup>72</sup> As discussed above, the Supreme Court had traditionally invoked the right to privacy in the context of family matters and reproductive autonomy,<sup>73</sup> which led some to criticize the *Lawrence* decision as a departure from stare decisis and precedent.<sup>74</sup> Because the

66. *Id.* at 153.

67. 505 U.S. 833 (1992).

68. *Id.* at 846.

69. *Id.*

70. *Id.* at 847.

71. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 605–06 (2003) (Thomas, J., dissenting) (“I ‘can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy.’” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting))); *id.* at 592 (Scalia, J., dissenting) (“[T]here is no right to ‘liberty’ under the Due Process Clause . . .”). *But see* *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (“It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.”).

72. *See Lawrence*, 539 U.S. at 578.

73. *See Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by Lawrence*, 539 U.S. 558.

74. *Lawrence*, 539 U.S. at 587–88 (Scalia, J., dissenting) (“[O]nly 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.” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted)). However, Justice Kennedy’s majority opinion persuasively addresses this criticism:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution

Court has protected privacy with regard to reproductive matters, which often involves some third party,<sup>75</sup> it would seem logical that the right to privacy would also encompass consensual sexual activity between adults when such activity occurs within the privacy of the home, which is an area clearly protected by the Constitution.<sup>76</sup>

In *Bowers*, the Supreme Court upheld a Georgia statute criminalizing sodomy, noting that “respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”<sup>77</sup> Justice White’s majority opinion, however, was met by sharp dissenting opinions. Quoting *Thornburgh v. American College of Obstetricians & Gynecologists*,<sup>78</sup> Justice Blackmun noted, “‘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.’”<sup>79</sup> For Justice Blackmun, this sphere of individual liberty encompassed precisely the kind of conduct that the State of Georgia had criminally proscribed.<sup>80</sup> Additionally, Justice Stevens argued in dissent that cases prior to *Bowers* established the proposition that “individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce

endures, persons in every generation can invoke its principles in their own search for greater freedom.

*Id.* at 578–79 (majority opinion).

75. With regard to both accessing contraceptive devices and obtaining abortions, a doctor or medical care provider is often involved.

76. See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that police use of thermal imaging to detect evidence of a defendant illegally growing marijuana in his home is a search for Fourth Amendment purposes and, as such, is presumptively unreasonable without a search warrant); see also *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting) (“The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. . . . Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there.”), *overruled by Lawrence*, 539 U.S. 558; *California v. Ciraolo*, 476 U.S. 207, 226 (1986) (Powell, J., dissenting) (“[T]he essence of a Fourth Amendment violation is ‘not the breaking of [a person’s] doors, and the rummaging of his drawers,’ but rather is ‘the invasion of his indefeasible right of personal security, personal liberty and private property.’” (second alteration in original) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))).

77. *Bowers*, 478 U.S. at 191. The Court also noted that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . . 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.” *Id.*

78. 476 U.S. 747 (1986), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

79. *Bowers*, 478 U.S. at 203 (Blackmun, J., dissenting) (quoting *Thornburgh*, 476 U.S. at 772).

80. See *id.* at 199–200 (citing *Herring v. State*, 46 S.E. 876, 882 (Ga. 1904)). Justice Blackmun also stated, “[T]he right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution’s protection of privacy.” *Id.* at 208.

offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.”<sup>81</sup> For him, the logical implications of the Court’s substantive due process jurisprudence in decisions such as *Griswold* and *Eisenstadt* dictated that the right of privacy also encompassed the conduct prohibited by Georgia’s statute.<sup>82</sup> In overruling the *Bowers* decision, Justice Kennedy’s *Lawrence* opinion expressly stated, “Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today.”<sup>83</sup>

#### IV. STATE INTERESTS IN REGULATING SEXUAL BEHAVIOR

States may not enact statutory classifications that are arbitrary or capricious; that is, there must at least be some reasonable justification or basis for rulemaking.<sup>84</sup> With regard to criminal law, a state’s justifications are particularly important because the Fourteenth Amendment prohibits states from depriving citizens of life, liberty, or property without due process of law,<sup>85</sup> and it is precisely when the State exacts punishment through criminal sanctions that the greatest individual deprivations occur—deprivation of property through fines, deprivation of liberty through imprisonment, and possible deprivation of life through capital punishment. In order to survive a due process challenge to one of its criminal laws, the State at a minimum must be able to assert a legitimate

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81. *Id.* at 216 (Stevens, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). Before his appointment to the Supreme Court, in *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716 (7th Cir. 1975), Justice Stevens observed the following with respect to cases dealing with claims similar to that in *Bowers*:

They deal . . . with the individual’s right to make certain unusually important decisions that will affect his own, or his family’s, destiny. The Court has referred to such decisions as implicating “basic values,” as being “fundamental,” and as being dignified by history and tradition. The character of the Court’s language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen’s right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases.

*Id.* at 719–20 (footnotes omitted).

82. *Bowers*, 478 U.S. at 218 (Stevens, J., dissenting).

83. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *see also id.* (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

84. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”).

85. U.S. CONST. amend. XIV, § 1.

interest in criminalizing the conduct.<sup>86</sup> A variety of states facing challenges to their antifornication statutes have asserted a number of interests in keeping such laws on the books, such as preserving morality, protecting the public health, and protecting the institution of marriage. These interests will be addressed in turn.

One common justification asserted by states in defense of antifornication laws is the state interest in preserving sexual morality.<sup>87</sup> Proponents of sexual conduct laws concede that these laws are rarely enforced but argue that this does not mean such laws should be repealed.<sup>88</sup> One commentator has analogized laws proscribing fornication and adultery to speeding laws:

Everybody breaks these laws, at least sometimes; but the laws are far from pointless. They affect the time, manner, and mode of speeding; the worst and most blatant offenders are caught and punished, while the “ordinary” speeder gets away with his offense. Speeding laws almost certainly cut down on the sheer *amount* of speeding; as a result, speeding probably stays within roughly acceptable limits. The speeding laws permit and foster a decent degree of control, while not interfering with the God-given right to speed a little, some of the time.<sup>89</sup>

Another commentator argues that the sporadic enforcement of sexual conduct laws is perhaps the “most effective strategy for deterring consensual conduct that violates a widely shared moral norm.”<sup>90</sup> However, in a culture where sex seems to be everywhere, it is questionable whether sexual morality is in fact a widely shared norm.<sup>91</sup> The crux of the argument seems to be that, as

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86. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (noting that criminalizing family living arrangements is an “intrusive regulation . . . [, and] the usual judicial deference to the legislature is inappropriate”). Additionally, the rational basis test, which is the most deferential test to government that the Supreme Court uses in evaluating laws allegedly violating the Due Process Clause, requires that the challenged classification be a rational means of achieving a legitimate government interest. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

87. See Benjamin J. Cooper, *Loose Not the Floodgates*, 10 CARDOZO WOMEN’S L.J. 311, 317 (2004) (“It is in the realm of moral guilt that sexual conduct laws do most good, as they protect one’s ability to choose one’s sexual encounters free of external pressure.”); see also *Hoke v. United States*, 227 U.S. 308, 321 (1913) (“There is unquestionably a control in the States over the morals of their citizens . . . .”); *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001) (“The State’s interest in public morality is a legitimate interest . . . . 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.”).

88. See Cooper, *supra* note 87, at 313–14.

89. Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1102 (2002).

90. Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 426 (2002).

91. Additionally, it is important to note that other commentators argue that sporadic enforcement of such laws is a problem in and of itself. See Leslie, *supra* note 23, at 104 (“[A] criminal law that is not enforced through prosecutions can still cause insidious social and legal

with speeders, the police cannot catch every possible fornicator, but antifornication laws serve the same purpose as the speed limits by reducing such behavior to an “acceptable” level.<sup>92</sup> However, this argument misses several important points. First, speeding is not a “God-given right.” States are given great latitude in regulating their public highways and thoroughfares, and there is no question that speed limits are constitutional.<sup>93</sup> Law enforcement officials may enforce the speed limits as vigorously as they want, which suggests that, rather than being a right, occasional speeding occurs because not all offenders get caught. The speeding scenario stands in sharp contrast to the enforcement of sexual conduct laws. Private sexual conduct usually occurs in the home, an area where the Supreme Court has been particularly vigilant in protecting individual liberty.<sup>94</sup> Additionally, as discussed above, intimate sexual conduct implicates the right to privacy recognized by the Court, and most sexual conduct laws are rarely enforced.<sup>95</sup> In contrast, law enforcement regularly enforces speeding laws. Thus, analogizing antifornication laws with speed limits is disingenuous, and the supposed deterrence accomplished by sexual conduct laws like South Carolina’s antifornication statute is speculative at most.<sup>96</sup> While states such as South Carolina justify their antifornication and other similar laws as an effort to preserve sexual morality, it is questionable whether these attempts actually accomplish anything.

Another objective asserted by states defending laws similar to South Carolina’s antifornication laws is the interest in public health.<sup>97</sup> The argument

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consequences. The primary impact is symbolic: nominally unenforced laws are used to classify groups and stigmatize common behavior.”).

92. See Friedman, *supra* note 89, at 1102; cf. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 13 (1965) (“There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.”).

93. See *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 663 (1981) (“[T]he Court normally accords ‘special deference’ to a state legislature’s judgment in enacting highway regulations.” (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978))).

94. See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (“[T]he Fourth Amendment draws a ‘firm line at the entrance to the house.’ That line, we think, must be not only firm but also bright . . .” (citation omitted) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980))).

95. See *supra* Part II.

96. See Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1667–68 (1991) (“Although [antifornication] laws have a long history, so does society’s toleration of premarital sex. Current legislative and social attitudes toward premarital intercourse also are relevant to a ‘historical protection’ analysis. The repeal of fornication laws by numerous states, the enactment of noncoercive measures designed to permit informed sexual choices, and the emerging consensus that premarital intercourse is a private and permissible activity, indicate that an ‘evolving standard of decency’ constitutionally safeguards fornication from governmental control.” (footnotes omitted) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989))).

97. See *State v. Saunders*, 381 A.2d 333, 341 (N.J. 1977).

has been made in the context of contraception cases,<sup>98</sup> and states have also cited the prevention of teenage pregnancy and venereal diseases in defending their antifornication statutes.<sup>99</sup> With respect to sodomy statutes in particular, some argue that the concern is reducing the spread of HIV.<sup>100</sup> It is well established that “efforts to protect public health and safety” are within a state or municipality’s police powers,<sup>101</sup> and if sexual conduct laws actually do promote this objective, one can make a strong argument that such laws are a proper exercise of states’ police powers. The Texas Physicians Resource Council, Christian Medical and Dental Associations, and Catholic Medical Association have noted the following:

The incidence and prevalence of sexually transmitted diseases have grown exponentially since the sexual revolution of the 1960’s and 1970’s. The Centers for Disease Control (“CDC”) estimates that “more than 65 million [Americans] are currently living with an incurable sexually transmitted disease (STD). An additional 15 million people become infected with one or more STDs each year, roughly half of whom contract lifelong infections.” As the CDC noted in its most recent STD surveillance report, “[a]ll Americans have an interest in STD prevention because all communities are impacted by STDs and all

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98. See *Eisenstadt v. Baird*, 405 U.S. 438, 465–66 (1972) (Burger, C.J., dissenting).

99. See *Saunders*, 381 A.2d at 341. The Supreme Court has held that preventing teenage pregnancy is a legitimate government interest. See *Michael M. v. Superior Court*, 450 U.S. 464, 470 (1981). In upholding the constitutionality of California’s statutory rape law, the Court gave deference to the California Supreme Court’s opinion that the state legislature enacted the law in order “to prevent illegitimate teenage pregnancies.” *Id.*

100. See Brief in Support of Respondent on Behalf of Amici Curiae Texas Physicians Resource Council, et al., *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 367566, at \*2, \*16 (arguing that the Court should uphold Texas’s antisodomy law because the State has a “legitimate interest in regulating public health” and that “[w]ith the emergence of AIDS and identification of HIV, unprotected anal intercourse was reported to be the most efficient mode of sexual transmission of HIV infection” (internal quotation marks omitted)); CTR. FOR DISEASE CONTROL & PREVENTION, HIV AND AIDS AMONG GAY AND BISEXUAL MEN 1 (2010), available at <http://www.cdc.gov/nchhstp/Newsroom/docs/FastFacts-MSM-FINAL508COMP.pdf> (“MSM [men who have sex with men] account for nearly half of the more than one million people living with HIV in the U.S. . . . MSM account for more than half of all new HIV infections in the U.S. each year . . . [T]he rate of new HIV diagnoses among MSM in the U.S. is more than 44 times that of other men . . . MSM is the only risk group in the U.S. in which new HIV infections are increasing.”).

101. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 296 (2000) (plurality opinion); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (“The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.”).

individuals directly or indirectly pay for the costs of these diseases.  
*STDs are public health problems . . .*”<sup>102</sup>

While there have been numerous studies conducted showing the correlation between unprotected sexual activity and the spread of sexually transmitted diseases—a problem the government is legitimately concerned with curtailing—no empirical evidence showing a correlation between preventing the spread of STDs and antifornication or antisodomy laws was found during the research of this Note. Thus, while states clearly have a legitimate interest in public health, it is unclear and indeed debated whether criminalizing consensual sexual conduct actually serves that interest.

Defenders of sexual conduct laws also point to the need to protect the institution of marriage as a “compelling” justification.<sup>103</sup> The argument is that marriage traditionally has served to regulate sexual behavior and that “[r]eserving sex to married couples [has] served public functions.”<sup>104</sup> Supporters argue that antifornication and antiadultery laws protect children and that they promote trust within the marriage itself.<sup>105</sup> The fear is that removing restrictions on sexual conduct will threaten marriage because, “[t]o strike them . . . from the books, is to take away opprobrium and let people do as they will without guilt.”<sup>106</sup> Unfortunately, similar to the public health argument, there is little, if any, empirical data available showing a strong correlation between sexual conduct laws and protecting marriage as an institution. In general, these arguments seem to be based more on speculation and are grounded in neither factual data nor constitutional provisions.

## V. WHY CRIMINAL ANTIFORNICATION LAWS ARE PROBLEMATIC

As a general matter, imposing the majority’s view of morality onto society through the criminal law is problematic and inappropriate.<sup>107</sup> In his dissenting opinion in *Bowers*, Justice Blackmun noted the following:

That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends

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102. Brief in Support of Respondent, *supra* note 100, at \*7 (alterations in original) (footnotes omitted) (citations omitted).

103. Cooper, *supra* note 87, at 315.

104. Val D. Ricks, *Marriage and the Constitutional Right to Free Sex: The State Marriage Amendments as Response*, 7 FLA. COASTAL L. REV. 271, 272 (2005).

105. *Id.*; see also Cooper, *supra* note 87, at 315 (“The existence of stable coupling in America correlates to America’s prosperity and security, especially in the upbringing of intelligent, moral citizens.” (footnote omitted)).

106. Cooper, *supra* note 87, at 316.

107. This is especially true where it is unclear or debated as to how the majority views a particular moral issue.

instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.<sup>108</sup>

While proponents of morality laws argue that morality in and of itself is a legitimate basis for criminalizing conduct, Supreme Court cases prior to the *Lawrence* decision overturned legislative enactments that sought to impose a particular moral view onto society without some other legitimate justification.<sup>109</sup>

Furthermore, vigorous enforcement of statutes such as South Carolina's antifornication laws would involve constitutionally problematic methods. If South Carolina were to decide to start systematically enforcing its antifornication law, doing so would present several challenges. Because the sexual activity sought to be punished largely occurs in private dwellings, absent exceptional circumstances, police would need to obtain search warrants to enter homes in order to arrest "perpetrators" and to gather evidence. Therein lies the problem. The United States Constitution and the South Carolina Constitution both require that a neutral magistrate issue a search warrant based on probable cause before the government can enter a citizen's home.<sup>110</sup> In South Carolina, "[t]he General Assembly has imposed stricter requirements than federal law for issuing a search warrant. . . . [T]he South Carolina Code mandates that a search warrant 'shall be issued only upon affidavit sworn to before the magistrate.'" <sup>111</sup> How are police going to obtain the necessary evidence to support a finding of probable cause when the "crime" occurs within the parameters of the home? Law enforcement could perhaps rely on other evidence, such as evidence obtained from informants, but doing so would invite the problem of selective enforcement and discrimination.

Underenforced laws also raise problems by giving police too much discretion.<sup>112</sup> Where law enforcement officials have great discretion, the

108. *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). Justice Blackmun further elaborated, "A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. 'The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *Id.* at 211–12 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

109. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632–36 (1996) (striking down Colorado constitutional provision that allowed discrimination based on sexual orientation as violating equal protection).

110. *See* U.S. CONST. amend. IV; S.C. CONST. art. I, § 10; *State v. Bellamy*, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) ("A search warrant may issue only upon a finding of probable cause." (citing *State v. Owen*, 275 S.C. 586, 588, 274 S.E.2d 510, 511 (1981))).

111. *State v. Gentile*, 373 S.C. 506, 513, 646 S.E.2d 171, 174 (Ct. App. 2007) (citing S.C. CODE ANN. § 17-13-140 (1985)).

112. *See* Leslie, *supra* note 23, at 130 ("Although all laws vest police and prosecutors with some degree of discretion, the vagueness of sodomy and related laws increases this discretion, thereby allowing police to exercise their prejudices. Police have discretion over whom to target and how to target. . . . Judge Posner has explained that underenforced sodomy laws 'vest enforcement officials with enormous discretion, which invites discriminatory enforcement.'" (footnote omitted) (quoting RICHARD A. POSNER, *SEX AND REASON* 207 (1992))).



potential for selective enforcement becomes much greater.<sup>113</sup> While it has been estimated that more than 90% of ever-married men and 80% of ever-married women have had premarital sex by the age of nineteen,<sup>114</sup> enforcement of antifornication laws against most individuals is limited.<sup>115</sup> Nevertheless, “[g]iven the prevalence of premarital sex, these statutes permit discriminatory arrests and prosecutions. Fornication laws are used most often against suspected prostitutes, rapists, and other criminals. Such discriminatory enforcement only makes the continuing presence of fornication laws more indefensible.”<sup>116</sup> These laws also carry with them indirect consequences, which are troublesome given the potential for discriminatory enforcement.<sup>117</sup> Additionally, it is a misconception that underenforced and unenforced criminal laws, even those that carry minimal sentences, are without consequence. As Justice Kennedy noted in *Lawrence*, “[t]he stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged.”<sup>118</sup>

## VI. OVERTURNING ANTIFORNICATION STATUTES—THE EXPERIENCES OF OTHER STATES

While some state supreme courts have struck down antifornication laws, other state legislatures have chosen to repeal their antifornication statutes.<sup>119</sup> For example, Alabama chose to repeal its fornication prohibition based on its reasoning that “[c]riminal sanctions are practically inadequate and, therefore, inappropriate to regulate nondeviant sexual behavior between consenting unmarried adults.”<sup>120</sup> In Georgia, the state supreme court chose to deal with the right to privacy in the context of sexual activity through its opinion in *Powell v. State*.<sup>121</sup> There, five years prior to the *Lawrence* decision, the Georgia Supreme Court held that a Georgia sodomy statute violated the right of privacy as

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113. See Note, *supra* note 96, at 1661–62.

114. See Centers for Disease Control and Prevention, Key Statistics from the National Survey of Family Growth, [http://www.cdc.gov/nchs/nsfg/abc\\_list\\_p.htm#premarital](http://www.cdc.gov/nchs/nsfg/abc_list_p.htm#premarital) (last visited May 14, 2010).

115. See Note, *supra* note 96, at 1661.

116. *Id.* at 1661–62 (footnotes omitted).

117. See *id.* at 1662–63 (“Even if fornication statutes were never enforced, their mere existence would have a detrimental legal effect. Because premarital sex is a crime, several states prohibit cohabitation between members of opposite genders, abridge the rights of individuals charged with other sex-related crimes, and permit the jobs and children of fornicators to be taken away. These ‘incidental’ consequences of fornication laws—often more burdensome than the statutes—are the moral and constitutional equivalent of laws that would prohibit welfare payments to unwed mothers as punishment for engaging in premarital sex.” (footnotes omitted)).

118. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

119. See Ricks, *supra* note 104, at 282–83.

120. ALA. CODE § 13A-13-2 cmt. (LexisNexis 2005).

121. 510 S.E.2d 18 (Ga. 1998).

guaranteed by the Due Process Clause of the Georgia Constitution.<sup>122</sup> Looking to a prior Georgia case, *Pavesich v. New England Life Ins. Co.*,<sup>123</sup> Georgia's highest court noted that the "'right of personal liberty' . . . embraces '[t]he right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law.'"<sup>124</sup> In a footnote, the court further noted that the right of people to be free from unreasonable searches and seizures under the Fourth Amendment implies "recognition of the existence of a right of privacy."<sup>125</sup>

Under the South Carolina Constitution, there is a provision similar to the text of the Fourth Amendment entitled "Searches and seizures; invasion of privacy."<sup>126</sup> Following the reasoning of the Georgia Supreme Court in *Powell*, it would seem that based on the "invasion of privacy" language in South Carolina's Constitution, a right to privacy could be implied under South Carolina law as well.<sup>127</sup> The experience of Georgia and other states where the courts overturned similar laws suggests that doing away with antifornication laws will not have disastrous effects.

In *Commonwealth v. Wasson*,<sup>128</sup> the Kentucky Supreme Court held that a state statute criminalizing consensual homosexual activity violated the Kentucky Constitution's equal protection and individual liberty guarantees.<sup>129</sup> While the court noted that the United States Supreme Court in *Bowers* held that the right of privacy under the federal Constitution did not encompass a right to engage in homosexual sodomy, it nonetheless held that the Kentucky Constitution more broadly protects individual liberty against government intrusion than the federal Constitution.<sup>130</sup> Applying its understanding of the right to privacy to the challenged statute, the Kentucky Supreme Court concluded that simply because

122. *Id.* at 26.

123. 50 S.E. 68 (Ga. 1905).

124. *Powell*, 510 S.E.2d at 22 (alteration in original) (quoting *Pavesich*, 50 S.E. at 70).

125. *Id.* n.2 (quoting *Pavesich*, 50 S.E. at 71–72) (internal quotation marks omitted).

126. Compare S.C. CONST. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained."), with U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

127. It is important to note, however, that the Georgia Supreme Court expressly indicated that the right of privacy under the federal Constitution was not an issue in the case, *Powell*, 510 S.E.2d at 21 n.1, and observed that "this Court [is] a pioneer in the realm of the right of privacy." *Id.* at 21 (citing *Bodrey v. Cape*, 172 S.E.2d 643 (Ga. Ct. App. 1969)).

128. 842 S.W.2d 487 (Ky. 1992).

129. *Id.* at 491–92.

130. *Id.* at 493–94. The Kentucky Supreme Court observed that "[t]he right of privacy has been recognized as an integral part of the guarantee of liberty in our 1891 Kentucky Constitution since its inception." *Id.* at 495.

a majority in the state “finds one type of extramarital intercourse more offensive than another, does not provide a rational basis for criminalizing the sexual preference of homosexuals.”<sup>131</sup>

Similarly, in *Campbell v. Sundquist*,<sup>132</sup> the Tennessee Court of Appeals considered a challenge to the state’s Homosexual Practices Act (HPA),<sup>133</sup> a statute similar to the statute overturned by the Kentucky Supreme Court in *Wasson*. Although the plaintiffs in *Campbell* were never prosecuted under the HPA, they sought a declaratory judgment that the HPA violated a right to privacy under the Tennessee Constitution.<sup>134</sup> Like the Commonwealth of Kentucky in *Wasson*, the State of Tennessee relied heavily on *Bowers* defending the HPA, but the Tennessee Court of Appeals, quoting that state’s supreme court, noted that “‘there is no reason to assume that there is a complete congruency’ between the federal and Tennessee rights to privacy.”<sup>135</sup> Although the court noted that the state constitution does not expressly mention a right to privacy, it recognized such a right based on the language and development of the Tennessee Constitution and described the right as one of personal autonomy or “‘the right to be let alone.’”<sup>136</sup> The court also discussed the state’s police power in the context of morals regulation and noted that “‘the police power should properly be exercised to protect each individual’s right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others.’”<sup>137</sup> Thus the court in *Campbell* concluded that a Tennessee citizen’s fundamental right to privacy includes the right to engage in private, consensual sexual activity because such conduct inherently involves private and intimate issues of personal concern.<sup>138</sup>

Another state case involving a criminal statute prohibiting same-gender sexual conduct was the decision in *Gryczan v. State*,<sup>139</sup> where the Montana Supreme Court held a deviate sexual conduct statute unconstitutional.<sup>140</sup> As in the Georgia, Kentucky, and Tennessee cases, Montana’s highest court recognized a state constitutional right of individual privacy upon which the challenged statute impermissibly infringed.<sup>141</sup> Additionally, while the State attempted to justify the statute on the basis of a public health interest, the Montana Supreme Court found that infringement onto fundamental privacy

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131. *Id.* at 502.

132. 926 S.W.2d 250 (Tenn. Ct. App. 1996), *abrogated by* Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 (Tenn. 2008).

133. *See id.* at 253 (citing TENN. CODE ANN. § 39-13-510 (1991)).

134. *Id.*

135. *Id.* at 259 (quoting *Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992)).

136. *Id.* at 260 (quoting *Davis*, 842 S.W.2d at 600).

137. *Id.* at 265 (quoting *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980)).

138. *Id.* at 266.

139. 942 P.2d 112 (Mont. 1997).

140. *Id.* at 126.

141. *Id.*

rights could be warranted only where the State has a compelling interest, and in this case, the State's goal did not constitute such a compelling interest.<sup>142</sup> Moreover, the State could not sustain its statute on the grounds that it had an interest in protecting sexual morality.<sup>143</sup>

The Arkansas Supreme Court's decision in *Jegley v. Picado*<sup>144</sup> is also illustrative of states recognizing a right to privacy in the context of sexual activities prior to the Supreme Court's decision in *Lawrence*.<sup>145</sup> Unlike the Montana Constitution, the Arkansas Constitution does not expressly recognize a fundamental right to privacy,<sup>146</sup> but the Arkansas Supreme Court nevertheless held such a right to be implicit.<sup>147</sup> Because the court could conceive of instances in which the challenged sodomy statute might constitutionally punish certain conduct, such as the prohibition against sexual conduct involving animals, the court held the statute to be facially constitutional.<sup>148</sup> However, the court held that the statute violated a citizen's right to privacy on the basis of an "as applied" challenge.<sup>149</sup> While the court agreed that "the State has a clear and proper role to protect the public from offensive displays of sexual behavior, to protect people from forcible sexual contact, and to protect minors from sexual abuse by adults,"

142. *See id.* at 123 ("The State's assertion that the statute protects public health by containing the spread of AIDS relies on faulty logic and invalid assumptions about the disease. . . . Despite the two-plus decades that the statute has been in effect, HIV infection is currently a significant cause of illness and death in this State . . .").

143. *See id.* at 125–26 ("The right of consenting adults, regardless of gender, to engage in private, non-commercial sexual conduct strikes at the very core of Montana's constitutional right of individual privacy; and, absent an interest more compelling than a legislative distaste of what is perceived to be offensive and immoral sexual practices on the part of homosexuals, state regulation, much less criminalization, of this most intimate social relationship will not withstand constitutional scrutiny.").

144. 80 S.W.3d 332 (Ark. 2002).

145. *See id.* at 334.

146. *Compare* MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."), *with Jegley*, 80 S.W.3d at 346 ("No right to privacy is specifically enumerated in the Arkansas Constitution.").

147. *Jegley*, 80 S.W.2d at 346–350. After a comprehensive review of Arkansas law, the court stated, "In considering our constitution together with the statutes, rules, and case law mentioned above, it is clear to this court that Arkansas has a rich and compelling tradition of protecting individual privacy and that a fundamental right to privacy is implicit in the Arkansas Constitution." *Id.* at 349–50. Thus, the Arkansas Supreme Court held "that the fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults." *Id.* at 350.

148. *Id.* at 344.

149. *Id.* at 344, 350. The Arkansas Supreme Court noted that, at the time of its decision, nine states had invalidated sodomy laws by judicial decision, including Georgia, Kentucky, Maryland, Massachusetts, Minnesota, Montana, New York, Pennsylvania, and Tennessee. *Id.* at 345 n.4. On the other hand, the court noted that as of 2002, nine states and Puerto Rico continued to maintain statutes prohibiting sodomy among same-sex and opposite-sex individuals, including Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, Puerto Rico, South Carolina, Utah, and Virginia. *Id.*

laws proscribing private, consensual sexual conduct between adults are unrelated to the State's interest in these issues.<sup>150</sup>

Finally, in 2005, in *Martin v. Zihlerl*, the Virginia Supreme Court considered a constitutional challenge to a statute criminalizing sexual intercourse between two unmarried persons and determined that the law unconstitutionally infringed upon the rights of adults to engage in private conduct in exercising their liberty under the Due Process Clause of the Fourteenth Amendment.<sup>151</sup> The court found no principled distinction between the facts it faced and the facts the United States Supreme Court confronted in *Lawrence*, and reasoned that “but for the nature of the sexual act, the provisions of [Virginia] Code § 18.2-344 are identical to those of the Texas statute.”<sup>152</sup> Both statutes were attempts by the state legislatures to control liberty interests that individuals exercise in making decisions about their personal relationships.<sup>153</sup> Thus, the Virginia Supreme Court held that because the Court in *Lawrence* indicated that the federal “[C]onstitution protects the liberty interests of persons to maintain a personal relationship ‘in the confines of their homes and their own private lives’ and that an element of that relationship is its ‘overt expression in intimate conduct,’” the Virginia statute could not withstand constitutional attack.<sup>154</sup> While the decision in *Martin* obviously does not control in South Carolina, it is interesting to note that the Virginia Supreme Court expressly pointed out that *Lawrence*’s observation—that the challenged Texas statute furthered no legitimate state interest justifying its intrusion into an individual’s personal and private life—extends beyond the interests Texas argued to support its statute; indeed, this observation implicated “all manner of states’ interests.”<sup>155</sup>

## VII. CONCLUSION

Because South Carolina Code Section 16-15-60 impermissibly intrudes into a realm of individual privacy recognized and protected by the Supreme Court,<sup>156</sup> it is facially unconstitutional and should be repealed. Additionally, the South

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150. *Id.* at 353. Thus, the court noted the following:

In conclusion, appellant has not offered sufficient reasoning to show that notions of a public morality justify the prohibition of consensual, private intimate behavior between persons of the same sex in the name of the public interest. There is no contention that same-sex sodomy implicates the public health or welfare, the efficient administration of government, the economy, the citizenry, or the promotion of the family unit. We have consistently held that legislation must bear a real or substantial relationship to the protection of public health, safety and welfare, in order that personal rights and property rights not be subjected to arbitrary or oppressive, rather than reasonable, invasion.

*Id.*

151. See *Martin v. Zihlerl*, 607 S.E.2d 367, 369, 371 (Va. 2005).

152. *Id.* at 370 & n.\*.

153. See *id.* at 370–71.

154. *Id.* at 369, 371 (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

155. *Id.* at 370.

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

Carolina Constitution, though not expressly recognizing a right to privacy, contains a due process provision nearly identical to the Fourteenth Amendment, from which such a right can be inferred.<sup>157</sup> Recognizing that the right to privacy encompasses private consensual adult sexual activity does not necessarily mean that all morality-based legislation would be subject to constitutional challenge, which is what Justice Scalia's dissent in *Lawrence* predicts.<sup>158</sup> Rather, there are meaningful differences between laws prohibiting fornication and laws prohibiting other conduct such as child pornography, obscenity, and prostitution.<sup>159</sup> Even though Justice Kennedy's opinion in *Lawrence* suggests that moral disapproval is not a legitimate basis for legislation (and thus may fail even rational basis review),<sup>160</sup> other laws grounded in society's moral choices could withstand attack on other grounds.<sup>161</sup> With respect to South Carolina's statutes, although the law proscribing fornication cannot be sustained, the law proscribing buggery does not appear to be facially unconstitutional, because an individual could face a conviction under that statute for committing sexual acts with an animal.<sup>162</sup> However, when the statute is applied to consensual private adult sexual conduct, it clearly runs afoul of the Supreme Court's decision in *Lawrence*.

In *Martin*, in declaring a Virginia law criminalizing fornication to be unconstitutional, the Virginia Supreme Court took care to point out "that this case does not involve minors, non-consensual activity, prostitution, or public activity," distinguishing the antifornication law on the basis that it was unconstitutional because it impermissibly sought to regulate private sexual

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157. S.C. CONST. art. I, § 3 ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.").

158. *See Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

159. *Cf. Bowers v. Hardwick*, 478 U.S. 186, 212–13 (1986) (Blackmun, J., dissenting) ("This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest . . ."), *overruled by Lawrence*, 539 U.S. 558.

160. *See Lawrence*, 539 U.S. at 571 (finding that the majority may not use the State's power to enforce its moral "views on the whole society through operation of the criminal law"); *cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code.").

161. *Cf. Jegley v. Picado*, 80 S.W.3d 332, 353 (Ark. 2002) ("[T]he police power may not be used to enforce a majority morality on persons whose conduct does not harm others."). Although the court in *Jegley* held that the law as applied was an unconstitutional infringement of the individual right to privacy, the court did not strike down the challenged statute as facially unconstitutional because the statute also prohibited sexual conduct involving humans and animals, a permissible use of the state's police power. *Id.* at 344, 350.

162. *See* S.C. CODE ANN. § 16-15-120 (2003). In 2009, a South Carolina man was charged with buggery for having sex with a horse in Horry County. *See* Kurt Knappek, *Sex with Horse? S.C. Man Charged 2nd Time*, CHARLOTTE OBSERVER, July 29, 2009, <http://www.charlotteobserver.com/2009/07/29/858947/sex-with-horse-sc-man-charged.html>.

activity between consenting adults.<sup>163</sup> Indeed, in *Singson v. Commonwealth*,<sup>164</sup> the Virginia Court of Appeals declined to extend *Martin* in the context of a challenge to the state's antisodomy statute where the law "prohibits individuals from engaging in *public* acts of sodomy."<sup>165</sup> The court noted that the challenges in *Bowers* and *Lawrence* involved as-applied challenges rather than facial challenges, and thus there could be some permissible applications of antisodomy laws.<sup>166</sup> If the South Carolina Supreme Court were to hear a challenge to its antibuggery statute, it could take a similar direction to that taken by the Virginia Court of Appeals in *Singson* and the North Carolina Court of Appeals in *State v. Whiteley*<sup>167</sup> and determine whether the statute was unconstitutional as applied under the circumstances.<sup>168</sup> In *Whiteley*, the court found that a North Carolina statute creating the offense of a crime against nature was unconstitutional as applied to the facts of the case and vacated the defendant's sentence.<sup>169</sup> With regard to criminal offenses punishing pedophilia, child pornography, and the like, an additional (and more compelling) justification is the State's desire to protect minors from predatory adults. The Supreme Court has on many occasions recognized the government's interest in protecting children as a compelling interest.<sup>170</sup> As to obscenity, prostitution, and public indecency offenses, these laws can be distinguished from antifornication laws because the former laws involve conduct that is inherently public and may offend other members of

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163. *Martin v. Zihler*, 607 S.E.2d 367, 371 (Va. 2005).

164. 621 S.E.2d 682 (Va. Ct. App. 2005).

165. *Id.* at 688.

166. *See State v. Whiteley*, 616 S.E.2d 576, 580 (N.C. Ct. App. 2005) ("[O]ur state's regulation of sexual conduct falling outside the narrow liberty interest recognized in *Lawrence* remains constitutional."); *Singson*, 621 S.E.2d at 688 ("[B]ecause Singson's proposed conduct occurred in a public location, application of Code § 18.2-361 . . . does not implicate Singson's constitutionally-protected right to engage in private, consensual acts of sodomy.").

167. 616 S.E.2d 576 (N.C. Ct. App. 2005).

168. *See Whiteley*, 616 S.E.2d at 580; *Singson*, 621 S.E.2d at 688.

169. *Whiteley*, 616 S.E.2d at 581–83. In that case, the "[d]efendant was charged with first degree rape, first degree sexual offense, and a crime against nature." *Id.* at 578. A jury found the defendant not guilty of rape or sexual offense but returned a guilty verdict as to the crime against nature. *Id.* The court noted that the state statute remained constitutional following the Supreme Court's decision in *Lawrence* because "state regulation of sexual conduct involving minors, non-consensual or coercive conduct, public conduct, and prostitution falls outside the boundaries of the liberty interest protecting personal relations." *Id.* at 580. However, the court vacated the defendant's conviction because the court found the statute under which he was convicted unconstitutional "when used to criminalize acts within private relations protected by the Fourteenth Amendment liberty interest." *Id.* at 581. Because the trial judge charged the jury that the defendant was guilty if he "committed an unnatural sexual act" but did not instruct the jury as to the victim's consent, the North Carolina Court of Appeals found the statute unconstitutional as applied. *Id.*

170. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 869–70 (1997) (recognizing a compelling state interest in protecting minors). Although the Court in *Reno* found the federal law unconstitutional, the Court nevertheless recognized that protecting minor children is a compelling state interest. *Id.* at 849, 869–70.

society, thereby intruding on their rights.<sup>171</sup> Private sexual activity that is truly consensual and that occurs between adults, however, does not interfere with the rights of others, and various courts upholding laws regulating sexual activity have made this distinction.<sup>172</sup> While “[a] legitimate state interest clearly exists in regulating conduct involving minors, non-consensual or coercive conduct, public conduct, and prostitution,”<sup>173</sup> the decision in *Lawrence* indicates that regulation of particular sexual acts is impermissible when the regulation intrudes upon personal and intimate relations with no legitimate state interest.<sup>174</sup> Society as a whole may have an interest in sexual morality, but it is difficult to see how that interest should override the liberty interests of individual adults who are engaging in what they have decided is acceptable private conduct. The Supreme Court has held far more publicly disruptive activities to be constitutionally protected.<sup>175</sup>

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171. Note, however, that the Supreme Court has protected the right of individuals to possess obscene materials within the privacy of the home. See *Stanley v. Georgia*, 394 U.S. 557, 566–68 (1969) (overturning the defendant’s criminal conviction for possession of obscene materials and holding that the government “cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts”).

172. See, e.g., *Anderson v. Morrow*, 371 F.3d 1027, 1032–33 (9th Cir. 2004) (holding that where consent is in doubt, the State has a legitimate interest to interpose, which is unaffected by *Lawrence*’s recognition of a right of “individuals to engage in fully and mutually consensual private sexual conduct”); *People v. Williams*, 811 N.E.2d 1197, 1199 (Ill. App. Ct. 2004) (noting that the *Lawrence* decision expressly excludes prostitution from its holding); *State v. Thomas*, 891 So. 2d 1233, 1238 (La. 2005) (declining to declare a Louisiana law criminalizing solicitation to engage in a crime against nature for compensation as unconstitutional even after *Lawrence*).

173. *Whiteley*, 616 S.E.2d at 580–81.

174. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

175. See, e.g., *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion) (“The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech.”); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (overturning the defendant’s criminal conviction for burning the American flag during a protest rally because the First Amendment protects such expressive content and finding that the State’s asserted interests in preventing a breach of the peace and preserving the American flag as a symbol of unity and nationhood were insufficient to justify criminally prosecuting the defendant); *Gooding v. Wilson*, 405 U.S. 518, 519, 528 (1972) (holding that a Georgia law, which provided that “[a]ny person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor” was on its face unconstitutionally vague and overbroad where the Georgia courts had not narrowly interpreted the statute).



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