A SUPREME COURT THAT IS "WILLING TO START DOWN THAT ROAD": THE SLIPPERY SLOPE OF *LAWRENCE V. TEXAS*

I. INTRODUCTION

Liberty. It is at the very heart of every American soul. Today's liberty, however, is very different than the liberty contemplated by our Founding Fathers. Today's Supreme Court has declared that the governing majority's view of morality is not a rational basis for laws. For hundreds of years, elected legislatures have made laws based on the morals of society. In 2003, however, in deciding *Lawrence v. Texas*,[1] the Court overruled *Bowers v. Hardwick*[2] and held that a Texas sodomy statute was unconstitutional because morality is not a rational basis for the law.[3] In his dissent, Justice Scalia expressed the implications of the majority's opinion:

> [O]verruling . . . *Roe* . . . would simply have restored the regime that existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State. . . .
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> [But overruling *Bowers* discards] [c]ountless judicial decisions and legislative enactments [that] have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation . . . . State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by [the *Lawrence*] decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.[4]

The majority in *Bowers* feared that if the right to homosexual sodomy was defined as "the voluntary sexual conduct between consenting adults, it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the

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[1] Lawrence v. Texas, 123 S. Ct. 2472 (2003).

[2] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by Lawrence,* 123 S. Ct. at 2483.

[3] *Lawrence*, 123 S. Ct. at 2483.

[4] *Id.* at 2490-91 (Scalia, J., dissenting) (citing Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001)).

home."[5] At that time, the Supreme Court was "unwilling to start down that road."[6]

Seventeen years later, the Court was not only willing to "start down that road," but it was also willing to disregard the principle of stare decisis to do so. In deciding *Lawrence,* the Court recognized that its decision was controlled by *Bowers*.[7] The principle of stare decisis requires that a court generally follow its own decisions, and that lower courts must follow the decisions of higher courts. But stare decisis is not an absolute command, so the Supreme Court can reconsider its decisions.[8] For example, if the Court finds that facts it relied on in a decision are untrue, it may overrule that decision.[9] The Court has stated that it will strictly adhere to its decision, however, when the recognized rights have been incorporated into the "very fabric of society," when there has been reasonable reliance by individuals on the rule's continued application, or if the rule has become part of the American culture.[10]

> In overturning *Bowers*, the Court asserted that the
> holding in *Bowers* . . . has not induced detrimental reliance compared to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.[11]

Contrary to the Court's assertion, however, there has been "overwhelming" societal reliance on *Bowers*.[12]

The majority in *Lawrence* based its justification for its circumvention of the principle of stare decisis on this supposed lack of reliance. This Note will demonstrate the overwhelming reliance that state and federal courts, as well as legislatures, have placed on *Bowers.* Part II will review the Court's due process analysis framework, including how that framework was applied in both *Bowers* and *Lawrence*. Part III will review the numerous decisions that relied on *Bowers,* demonstrating the overwhelming reliance of individuals and society. These cases will be analyzed further under the rationale the Court used in *Lawrence* to show the detrimental implications of overruling *Bowers*. The major categories of cases that relied on *Bowers* are examined: sodomy, adultery, rape,

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5 *Bowers*, 478 U.S. at 195-96.

6 *Id.*

7 *Lawrence*, 123 S. Ct. at 2490-91.

8 Helvering v. Hallock, 309 U.S. 106, 119 (1940).

9 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 855 (1992) (O'Connor, J., plurality).

10 *Id.* at 855-56.

11 *Lawrence*, 123 S. Ct. at 2483.

12 *Id.* at 2490 (Scalia, J., dissenting).

incest, prostitution, indecency statutes, gays in the military, same-sex marriage, gay adoption and custody cases, and Equal Protection Clause cases involving homosexuals. These and other cases specifically relied on the *Bowers* method of due process analysis and not its central holding as it related to homosexual sodomy. Finally, Part IV will conclude with a summary of the implications of *Lawrence*.

II. DUE PROCESS ANALYSIS

In determining substantive due process liberty and privacy rights under the Fourteenth Amendment, the Court has identified two primary factors. First, the Court requires a "careful description of the asserted fundamental liberty interest."[13] Second, the Court uses objective guideposts to help determine if the right is a fundamental liberty. These include freedoms that are "implicit in the concept of ordered liberty"[14] and those that are "deeply rooted in this Nation's history and tradition."[15] Thus, the Court must examine precedent and legal traditions as well as the Nation's history to determine if an asserted right is fundamental. The Court's review of the history and traditions of the asserted right includes reviewing laws at the time the nation was founded, and also those existing at the time the Fourteenth Amendment was ratified. Additionally, the Court reviews its Due Process Clause precedent to determine the extent of the rights protected. This analysis usually starts at the beginning of substantive due process with *Lochner v. New York*.[16]

Lochner v. New York introduced a period in which the Supreme Court began applying the doctrine of substantive due process to "increasingly controversial situations."[17] In this era, the Court protected economic liberty under substantive due process. This narrow view of liberty was expanded, however, when the Court decided *Meyer v. Nebraska*[18] and stated that liberty includes the right to marry, raise children, and worship God. Further, in *Pierce v. Society of Sisters*,[19] the Court struck down a state law that required all children to attend public school. At the time of these rulings, the First Amendment (freedom of speech, religion, press, and assembly) had not been applied to the states,

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[13] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[14] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

[15] *Id.* (quoting Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)).

[16] Lochner v. New York, 198 U.S. 45 (1905).

[17] Brett J. Williamson, *The Constitutional Privacy Doctrine after* Bowers v. Hardwick*: Rethinking the Second Death of Substantive Due Process*, 62 S. CAL. L. REV. 1297, 1307-08 (1989).

[18] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[19] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

so the rationales were at least partly based on substantive due process "liberty." Then, in the late 1930s, the Court rejected the interventionist substantive due process approach taken in *Meyer* and *Pierce* regarding personal liberties.[20] This was exemplified in the following decades in which the Court refused to recognize unenumerated liberty interests under substantive due process.

But a revival of personal liberties occurred in 1965 when the Court decided the landmark case, *Griswold v. Connecticut*.[21] In *Griswold*, the Court held that the right to privacy included the right of married couples to receive information about contraceptives. This right to privacy, though nowhere stated in the Constitution, was found by the Court in the First, Third, Fourth, and Fifth Amendments that "have penumbras, formed by emanations from those guarantees that help give them life and substance."[22] Seven years later, in an Equal Protection Clause case, *Eisenstadt v. Baird*,[23] the Court held that the right to privacy included the right of an individual, whether married or single, to have access to contraceptives. One year later, the Court decided *Roe v. Wade*[24] (later solidified in *Planned Parenthood v. Casey*[25]), which held that the right to privacy includes the right to decide whether to have an abortion. In *Roe*, the Court rejected the penumbra approach of *Griswold* and decided that the right to privacy falls under the Due Process Clause of the Fourteenth Amendment.[26] In the years following *Roe*, the Court further specified privacy rights to include the right of non-nuclear family members to live together (*Moore v. City of East Cleveland*[27]) and the right to marry (*Zablocki v. Redhail*[28]). In 1986, however, the Court decided *Bowers* and chose not to extend the broadening privacy rights any further by holding that there is no fundamental right to engage in homosexual sodomy.[29]

A. Due Process Analysis in Bowers

In *Bowers*, the Supreme Court held that the United States Constitution does not confer a fundamental right to engage in homosexual sodomy.[30] The *Bowers* Court relied on precedent during its

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20 *See* United States v. Carolene Prod. Co., 304 U.S. 144 (1938).

21 Griswold v. Connecticut, 381 U.S. 479 (1965).

22 *Id.* at 484.

23 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

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

25 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

26 *Roe*, 410 U.S. at 152-53.

27 Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

28 Zablocki v. Redhail, 434 U.S. 374 (1978).

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

30 *Id.* at 195-96.

due process analysis under the Fourteenth Amendment.[31] First, the Court defined the right at stake as the "right to engage in homosexual sodomy."[32] This specific delineation of the asserted right satisfied the first due process requirement, subsequently announced in *Glucksberg*: a "careful description of the asserted liberty interest."[33] Next, the Court used its own guideposts to analyze the liberty interest, which included: those rights "implicit in the concept of ordered liberty"[34] and "deeply rooted in this Nation's History and tradition."[35] Thus, as in other due process cases, the Court examined its own precedent as well as the history of the asserted right. The Court noted that, according to precedent, fundamental rights decided under the Due Process Clause include subjects relating to family, marriage, or procreation.[36] The Court found no connection between this precedent and homosexual sodomy.[37] It explained that due process precedent does not stand for the proposition that any kind of adult, private sexual conduct, such as sodomy, is protected from state proscription.[38] The Court then examined the legal history of sodomy in the United States and found that it was a criminal offense at common law, proscribed by all the original thirteen states when the Bill of Rights was ratified,[39] and proscribed by all but five of the thirty-seven states existing at the time the Fourteenth Amendment was ratified.[40] Thus, the Court concluded that there was no history or tradition of protecting the practice of homosexual sodomy.[41]

Next, the Court discussed the possibility of expanding the due process fundamental rights to include new rights in the Due Process Clause.[42] The Court said that it is "most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[43] Finding new privacy rights just because the acts occur in the privacy of the home would open up the door to protecting numerous

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31 *Id.* at 190.

32 *Id.* at 191.

33 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

34 *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

35 *Bowers*, 478 U.S. at 191-92 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)).

36 *Id.* at 191.

37 *Id.* at 190-91.

38 *Id.*

39 *Id.* at 192.

40 *Id.* at 192-93.

41 *Id.*

42 *Id.* at 195.

43 *Id.* at 194.

crimes such as adultery, drug use, incest, and other sexual crimes.[44] The Court definitively stated that it was "unwilling to start down that road."[45] Finally, the Court analyzed the asserted right under rational basis review and found that laws based on notions of morality are valid.[46] The Court explained that the law is "constantly based on . . . morality" and the moral decisions of the electorate, and concluded that invalidating laws based on morality would cause the judiciary to "be very busy indeed."[47]

B. Due Process Analysis in Lawrence

Just seventeen years later, the Court overruled *Bowers* in *Lawrence*.[48] Both cases considered whether state laws proscribing homosexual sodomy violate the Due Process Clause.[49] As in every due process case, the Court must first define the right asserted. In *Lawrence*, the Court re-defined the right in question from the "'careful description' of the asserted"[50] right of homosexual sodomy to the broader right for "adults [to] choose to enter into . . . relationship[s] in the confines of their homes."[51] Then the Court, following due process analysis guideposts, examined the history of sodomy laws in the United States.[52] The Court emphasized that sodomy laws applied historically to same-sex and opposite-sex couples, and only recently have laws "target[ed]" same-sex couples.[53] Thus, the Court concluded that *Bowers*'s historical analysis was flawed.[54] The Court failed to recognize, however, that differentiation between same-sex and opposite-sex couples is irrelevant when examining history and tradition.[55] Homosexual sodomy was criminalized, and the fact that there was not a distinction between same-sex and opposite sex couples does not suddenly establish a tradition of protecting this practice as "deeply rooted in this Nation's history and tradition."[56] The Court's examination of history and tradition, as well as precedent, should have concluded the due process analysis.

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44 *Id.* at 195-96.

45 *Id.* at 196.

46 *Id.*

47 *Id.*

48 Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003).

49 *Id.* at 2477.

50 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

51 *Lawrence*, 123 S. Ct. at 2478.

52 *Id.*

53 *Id.*

54 *Id.* at 2480.

55 *Id.* at 2493-94 (Scalia, J., dissenting).

56 *Id.*

But the Court in *Lawrence* expanded its due process analysis after quoting *City of Sacramento v. Lewis*.[57] In his concurring opinion, Justice Kennedy stated, "history and tradition are the starting point but not in all cases the ending point of substantive due process inquiry."[58] The Court then announced two more considerations for due process analysis: (1) emerging recognition and trends, and (2) international court decisions.[59] First, the Court said that there is an "emerging recognition" of protection of adults' private sexual relationships.[60] The Court continued by asserting, "[w]e think that our laws and traditions in the past half century are . . . most [relevant] here."[61] The Court emphasized the recent trend of decriminalizing sodomy.[62] Second, the Court considered "[o]f even more importance" that an international court had decided a similar case and come to the opposite conclusion.[63] Thus, in addition to United States history and traditions, the Court also considers emerging trends and international court decisions in interpreting the United States Constitution.[64]

Finally, after finishing its "expanded" due process analysis, the Court considered the principle of stare decisis.[65] The Court considered whether the *Bowers* decision caused individual or societal reliance.[66] Without analyzing or examining case law, the Court declared that there was no individual or societal reliance that would prevent overruling the case.[67] The Court stated that there was no rational basis for the state statute barring homosexual sodomy and declared it unconstitutional.[68] The Court quoted Justice Stevens's dissent from *Bowers* in which he concluded "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[69] Thus, the majority in *Lawrence* concluded that this morals-based legislation proscribing homosexual sodomy was invalid.[70] More specifically, the Court declared that a state's governing majority's belief that certain sexual behavior is

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57 City of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).

58 *Id.*

59 *Lawrence*, 123 S. Ct. at 2480-82.

60 *Id.* at 2480.

61 *Id.*

62 *Id.*

63 *Id.* (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 52 (1981)).

64 *Id.* at 2481.

65 *Id.*

66 *Id.* at 2483.

67 *Id.*

68 *Id.*

69 *Id.* (quoting Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986)).

70 *Id.*

immoral is not a rational basis for regulation.[71] As a result of this analysis, the Court overruled *Bowers* and declared the sodomy statute unconstitutional.

C. Differences in the Due Process Analysis of Bowers *and* Lawrence

There are five major differences between the analysis in *Bowers* and *Lawrence*. First, the right asserted is defined in much broader terms in *Lawrence* (right for adults to enter into relationships in the confines of their homes) as compared with the carefully asserted right defined in *Bowers* (right to homosexual sodomy). Second, the history and tradition of protecting the asserted right were considered in a narrower context in *Lawrence* by only looking at homosexual sodomy rather than the criminalization of sodomy in general as in *Bowers*. Third, the Court in *Lawrence* considered recent trends and the last fifty years of history relevant to the analysis. Fourth, the Court in *Lawrence* considered international judicial decisions relevant to the analysis, at least as persuasive authority, as to whether the right is protected by the Constitution. Finally, the *Lawrence* Court declared that morality is not a valid basis under rational basis review for upholding the sodomy statute. Since many laws of our nation are based on morality, this creates uncertainty as to the validity of many existing laws. These differences in the Court's due process analysis and decision in *Bowers* and *Lawrence* could have a profound effect on the constitutionality of many state laws. Those effects will now be examined by reviewing the cases that relied on *Bowers* and then analyzing these cases under *Lawrence*.

III. CASES RELYING ON *BOWERS* AND IMPLICATIONS OF THE *LAWRENCE* DECISION

A. Sodomy Statutes

In a number of cases regarding state sodomy statutes, courts have directly relied on *Bowers* as binding authority when finding the statutes constitutional.[72] In upholding their state statutes under rational basis review, the courts held that the standard was satisfied by the fact that the laws reflect the morality of the majority of the electorate.[73] Based on

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[71] *Id.*

[72] Virginia v. Wolfe, 48 Va. Cir. 554, 555 (1999); Virginia v. Davidson, 48 Va. Cir. 542, 548 (1999); *see also* Missouri v. Walsh, 713 S.W.2d 508, 511-12 (Mo. 1986); Ohio v. Thompson, No. 99-A-0070, 2000 Ohio App. LEXIS 6090, at *20-21 (Ohio Ct. App. Dec. 22, 2000). *But see* Kentucky v. Wasson, 842 S.W.2d 487, 494 (Ky. 1992) (striking down a sodomy statute on state constitutional grounds).

[73] *Walsh*, 713 S.W.2d at 511-12; *Wolfe*, 48 Va. Cir. at 555; *Davidson*, 48 Va. Cir. at 548.

Bowers, the courts held that there is no fundamental right to homosexual sodomy, and that the statutes pass rational basis review.[74]

By applying the holding in *Lawrence* to these cases, the outcome would be different. The cases most directly affected by *Lawrence* are those in which a state statute is similar to the ones in *Bowers* and *Lawrence*; *Bowers*, which upheld a state statute criminalizing sodomy, was overruled by *Lawrence*. Based on the controlling precedent of *Lawrence*, the result of numerous cases[75] that upheld state sodomy laws would be the exact opposite: the laws would now be found unconstitutional. States will no longer be able to criminalize sodomy based on the morals of the majority.

B. Adultery Statutes

Adultery, like sodomy, is criminalized by states based on morals. There have been a number of challenges to adultery statutes on the basis that there is a right protected by the Constitution.[76] Courts have strongly relied on the *Bowers* holding and rationale in asserting that adultery is not a protected constitutional right and may be proscribed based on societal morals. These courts have used the Supreme Court's framework from *Bowers* in concluding that adultery is not a fundamental right that is protected by the United States Constitution.[77] For example, in *City of Sherman v. Henry*,[78] the Supreme Court of Texas stated, "[b]ecause homosexual conduct is not a fundamental right under the United States Constitution, adultery likewise cannot be a fundamental right." The courts have relied on two main propositions from *Bowers*: (1) its analysis of Supreme Court precedent and (2) its method of due process analysis.[79]

First, in examining the Court's precedent regarding the right to privacy, the *Bowers* Court stated there was no connection between the Court-identified rights of privacy, which concerned marriage, procreation, and family, and the alleged right of homosexual sodomy.[80] Relying on this, courts have also held that adultery, like homosexual

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[74] *Wolfe*, 48 Va. Cir. at 555; *Davidson*, 48 Va. Cir. at 548; *see also Walsh*, 713 S.W.2d at 511-12; *Thompson*, 2000 Ohio App. LEXIS 6090, at *20-21.

[75] *Id.*

[76] Marcum v. McWhorter, 308 F.3d 635 (6th Cir. 2002); Caruso v. City of Cocoa, 260 F. Supp. 2d 1191 (M.D. Fla. 2003); Mercure v. Van Buren Twp., 81 F. Supp. 2d 814 (E.D. Mich. 2000); Oliverson v. W. Valley City, 875 F. Supp. 1465 (D. Utah 1995); City of Sherman v. Henry, 928 S.W.2d 464 (Tex. 1996).

[77] *Marcum*, 308 F.3d at 635; *Caruso*, 260 F. Supp. 2d at 1191; *Mercure*, 81 F. Supp. 2d at 814; *Oliverson*, 875 F. Supp. at 1465; *City of Sherman*, 928 S.W.2d at 464.

[78] *City of Sherman*, 928 S.W.2d at 470-71.

[79] *Marcum*, 308 F.3d at 641; *Caruso*, 260 F. Supp. 2d at 1207; *Mercure*, 81 F. Supp. 2d at 821-22; *Oliverson*, 875 F. Supp. at 1476-85; *City of Sherman*, 928 S.W.2d at 469.

[80] Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986).

sodomy, is unrelated to family, contraception, marriage, and procreation.[81] In fact, the Texas Supreme Court asserted that adultery is the "antithesis of marriage and family."[82] The Sixth Circuit took note of the *Bowers* Court's rejection of the proposition that "any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[83] Further, the court relied on the *Bowers* Court's rejection of an expanded view of new fundamental rights and acknowledged that the Court nears "illegitimacy" when creating constitutional law that has no recognizable roots in the language or structure of the Constitution.[84]

Second, in analyzing whether homosexual sodomy should be recognized as a substantive due process right, the *Bowers* Court stated that only rights "implicit in the concept of ordered liberty"[85] such that "neither liberty nor justice would exist if [they] were sacrificed,"[86] or those liberties that are "deeply rooted in this Nation's history and tradition"[87] receive constitutional protection under due process.[88] By reviewing the history of the legal treatment of homosexual sodomy in this nation and the fact that it was a criminal offense in all the original states and a majority of states at the time of ratification of the Fourteenth Amendment, the *Bowers* Court concluded that homosexual sodomy was not "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."[89] Again, relying on the *Bowers* reasoning and analysis, the courts have found that, like homosexual sodomy, adultery is not "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."[90] Like the *Bowers* Court, the various courts reviewed the history of the criminalization of adultery in the states at the time of Fourteenth

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[81] *Marcum*, 308 F.3d at 642; *Caruso*, 260 F. Supp. 2d at 1208; *Mercure*, 81 F. Supp. 2d at 825; *Oliverson*, 875 F. Supp. at 1479; *City of Sherman*, 928 S.W.2d at 469.

[82] *City of Sherman*, 928 S.W.2d at 470.

[83] *Marcum*, 308 F.3d at 641 (quoting *Bowers*, 478 U.S. at 191).

[84] *Id.*

[85] *Bowers*, 478 U.S. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

[86] *Id.*

[87] *Id.* (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)).

[88] City of Sherman v. Henry, 928 S.W.2d 464, 469 (Tex. 1996) (quoting *Bowers*, 478 U.S. at 191-92).

[89] *Bowers*, 478 U.S. at 191-92.

[90] Marcum v. McWhorter, 308 F.3d 635, 641 (6th Cir. 2002); Caruso v. City of Cocoa, 260 F. Supp. 2d 1191, 1207-08 (M.D. Fla. 2003); Mercure v. Van Buren Twp., 81 F. Supp. 2d 814, 821-24 (E.D. Mich. 2000); Oliverson v. W. Valley City, 875 F. Supp. 1465, 1478-83 (D. Utah 1995); *City of Sherman*, 928 S.W.2d at 470.

Amendment ratification and today.[91] As in *Bowers*, the courts found that adultery was considered a crime at the time the Fourteenth Amendment was ratified and by half of the states today.[92] One court noted that states' repealing laws criminalizing adultery and making adulterous conduct no longer illegal does not "cloak it with constitutional protection."[93] The courts have also cited the *Bowers* Court for being "unwilling to start down that road" of opening the door of constitutional protection to adultery, incest, and other sexual crimes.[94]

Based on *Lawrence*, adultery statutes that were justified under *Bowers* will likely not withstand rational basis review. First, to start the due process analysis for the right to adultery, courts must define the right asserted. Following *Bowers,* the right is defined narrowly and specifically (right to homosexual sodomy), and, thus, the courts defined the right to adultery as the right to engage in a consensual, sexual relationship with the spouse of another.[95] However, as in *Lawrence,* the asserted liberty interest could be re-defined in broader terms than *Bowers*. As a result, the right of adultery could be re-defined as the right to enter into relationships in the privacy of a home, not the right to have sexual intercourse outside of marriage. Under that description of the claimed right, the right would be practically identical to the right asserted in *Lawrence*. Since this broad right was protected under *Lawrence,* it is likely to be protected in these cases as well.

Second, after the right of adultery has been defined, the courts examine the due process precedent. Under *Bowers*, Due Process Clause precedent relates to marriage and family so homosexual sodomy is excluded. However, according to *Lawrence*, the precedent relates to the rights of an individual rather than the confines of marriage and family.[96] This view of the right to privacy opens the door to protection of adultery which is simply two individuals consenting to a sexual relationship in private.

Third, the courts deciding the adultery cases examined the history and traditions of our nation. The courts reviewed the history and tradition of adultery and compared it with the history and tradition of sodomy from *Bowers*. Like *Bowers*, the courts found that adultery was considered a crime at the time the Fourteenth Amendment was ratified

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91 *Marcum*, 308 F.3d at 641; *Caruso*, 260 F. Supp. 2d at 1207-08; *Mercure*, 81 F. Supp. 2d at 821-24; *Oliverson,* 875 F. Supp. at 1478-83; *City of Sherman*, 928 S.W.2d at 470.

92 *Id.*

93 *City of Sherman*, 928 S.W.2d at 470.

94 *Id.* at 470 (quoting *Bowers*, 478 U.S. at 191-92 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)).

95 *Oliverson*, 875 F. Supp. at 1477.

96 Lawrence v. Texas, 123 S. Ct. 2472 (2003).

and by half the states today.[97] Courts also stated that the recent repealing of these laws does not change history and suddenly add constitutional protection.[98] However, based on *Lawrence*, the court would have to not only consider the history but also the recent emerging trends of today's society.[99] In fact, the *Lawrence* Court seems to give *more* relevance to the laws of the last fifty years than the history and traditions of the nation.[100] This analysis would likely change the outcome of the adultery statute cases since the "emerging trend" is the repeal of the adultery statutes.[101]

Finally, the courts have relied on *Bowers* to justify adultery statutes on the basis of morality. After finding that adultery is not a fundamental right, the courts reviewed this right under rational basis review.[102] The courts held that the state's interest in supporting the family, including providing a base for intimacy and the morality of society, was valid.[103] But based on *Lawrence*'s holding that morality cannot provide a rational basis for state law, the "family interests" and the "morality of society" bases would be seriously questioned. Thus, if *Lawrence* were applied to these cases today, the courts would likely strike down the adultery statutes as unconstitutional.[104]

C. Rape

There are two types of rape cases that have relied on *Bowers*: (1) rape cases that rely on sexual perversion and sodomy statutes to charge the offender and (2) statutory rape cases. Prosecutors often charge sex offenders with state sodomy and sexual perversion crimes because they

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[97] *City of Sherman*, 928 S.W.2d at 470; *see also Marcum*, 308 F.3d at 641; *Caruso*, 260 F. Supp. 2d at 1207-08; *Mercure*, 81 F. Supp. 2d at 821-24; *Oliverson*, 875 F. Supp. at 1478-83.

[98] *See id.*

[99] *Lawrence*, 123 S. Ct. at 2484.

[100] *See id.*

[101] *City of Sherman*, 928 S.W.2d at 470.

[102] *Oliverson*, 875 F. Supp. at 1485; *see also Marcum*, 308 F.3d at 641-42; *Caruso*, 260 F. Supp. 2d at 1207-08; *Mercure*, 81 F. Supp. 2d at 821-24; *City of Sherman*, 928 S.W.2d at 470-72.

[103] *Oliverson*, 875 F. Supp. at 1485.

[104] *But see Lawrence*, 123 S. Ct. at 2484. In dicta, the Court stated that *Lawrence* did not "involve persons who might be injured or coerced." *Id.* It could be argued that in adultery there is a third party who is "injured." However, the Court also stated that the holding in *Lawrence* did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* In the first same-sex marriage case decided since *Bowers* was overruled, the Massachusetts Supreme Judicial Court cited *Lawrence* numerous times and held that the Massachusetts legislature had no rational basis for prohibiting people of the same sex from marrying each other. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

are easier to prove than non-consensual offenses since proof of the offense does not require absence of consent from the victim.

For example, in *Schochet v. Maryland,*[105] the Court of Appeals of Maryland relied on the *Bowers* holding in finding that the Maryland statute that charged the defendant with an "unnatural and perverted sexual practice" was constitutional.[106] Eight charges were filed against the defendant, six of which were for various non-consensual, sexual acts including rape.[107] The two charges that were appealed, anal intercourse and fellatio, did not require proof of force or absence of consent.[108] The defendant raised the issue of the constitutionality of the Maryland statute on the grounds that proscribing the consensual acts violates the right to privacy.[109] The Maryland Court of Appeals reviewed the right to privacy precedent from *Griswold* through *Bowers* and held that the right to privacy embraces sexual intimacy within marriage, parental decisions in child rearing, procreation, contraception, and abortion, but not sexual activity per se.[110] Thus, the sexual activity proscribed in the Maryland statute was not constitutionally protected.[111] Further, the court relied on the *Bowers* holding that legislative regulation of sexual behavior based on morality passed rational basis review to rule the statute constitutional.[112]

Similarly, in *Louisiana v. Smith,*[113] the Supreme Court of Louisiana relied on *Bowers* in finding a Louisiana statute prohibiting "crime[s] against nature" constitutional.[114] The defendant in the case was charged with one count of rape and one count of a "crime[s] against nature."[115] The defendant asserted that the Louisiana statute prohibiting unnatural carnal copulation, including anal and oral sex, was unconstitutional.[116] The Louisiana Supreme Court reviewed the history of statutes proscribing sodomy and directly relied on *Bowers*, noting that there was no federal constitutional right to engage in the acts proscribed by the statute.[117] The court agreed with the assertion in *Bowers* that, if a statute's constitutionality depended upon whether anyone besides the

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[105] Schochet v. Maryland, 541 A.2d 183 (Md. 1988).

[106] *Id.* at 184, 197-98.

[107] *Id.* at 184.

[108] *Id.*

[109] *Id.*

[110] *Id.* at 187-88, 195.

[111] *Id.*

[112] *See id.* at 197-98, 206.

[113] Louisiana v. Smith, 766 So. 2d 501 (La. 2000).

[114] *Id.* at 504.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 505-06.

consenting adults were harmed by the illegal act, then states would no longer be able to proscribe incest, fornication, drugs, and prostitution.[118] The court also stated that the laws passed rational basis review because "[t]here has never been any doubt that the legislature . . . has the authority to criminalize the commission of acts which . . . are considered immoral."[119]

Statutory rape cases also have relied on *Bowers*. In *Fleisher v. City of Signal Hill*,[120] the Ninth Circuit used *Bowers* in determining that the right of privacy does not extend to acts amounting to statutory rape.[121] The defendant was terminated from his job as a police cadet after admitting to engaging in consensual sexual activity that constituted statutory rape.[122] The court reasoned that, as in *Bowers*, the defendant was not married when engaging in sexual intercourse so none of the privacy cases grounded in the sanctity of marriage are applicable.[123] Thus, the right to privacy did not protect acts amounting to statutory rape.[124]

Also, in *Phagan v. Georgia*,[125] Justice Sears of the Supreme Court of Georgia cited *Bowers* when stating that child molestation and statutory rape statutes were not unconstitutional because the right of privacy does not preclude states from proscribing certain private sexual conduct between consenting adults.[126] Under an equal protection analysis, the Supreme Court of Georgia affirmed the trial court's holding that Georgia's statutory rape laws were constitutional because there was a rational basis for providing varied punishments based on the perpetrator's age.[127] The court also stated that, despite the right to privacy, the state has a compelling interest in protecting its children from immoral or indecent acts.[128] As a result, the court upheld the statutory rape laws.[129]

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[118] *Id.* at 509 (citing Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986).

[119] *Id.*

[120] Fleisher v. City of Signal Hill, 829 F.2d 1491 (9th Cir. 1987).

[121] *Id.* at 1498.

[122] *Id.* at 1493.

[123] *Id.* at 1497.

[124] *See id.*

[125] Phagan v. Georgia, 486 S.E.2d 876 (Ga. 1997).

[126] *Id.* at 886 (Carley, J., concurring).

[127] *Id.* at 880.

[128] *Id.* at 879; *see also* Flaskamp v. Dearborn Pub. Sch., 232 F. Supp. 2d 730, 741 (E.D. Mich. 2002) (holding that a teacher's relationship with a former student was not constitutionally protected, whether homosexual in nature or not, and citing *Bowers* as controlling precedent that a relationship between close friends, even if sexual, is not the type of relationship that receives constitutional protection).

[129] *Phagan*, 486 S.E.2d at 880.

Under *Lawrence*, the outcome of the first type of rape case would be different because they rely on sexual perversion and sodomy statutes to charge the offender. Since the Texas sodomy statute in *Lawrence* was held unconstitutional, any identical or similar statute, like the ones used in the rape cases, would also be unconstitutional. The result will be that accused rapists will no longer be charged under these statutes. For example, if the *Schochet* court had followed *Lawrence*, the outcome likely would have been different. The accused rapist challenged the "unnatural and perverted sexual practice" statute. The Maryland court relied heavily on *Bowers* to limit the privacy right to such categories as sexual intimacy within marriage, procreation, abortion, and not sexual activity per se.[130] Following *Lawrence*, the court could have defined the right more broadly to include the right of a consensual, sexual relationship within the privacy of the home. This definition would fit closely within the *Lawrence* precedent. Further, the Maryland court relied on *Bowers* for the proposition that legislative regulation of sexual behavior based on morals would pass rational basis review.[131] Under *Lawrence*, such morals-based legislation would not withstand rational basis scrutiny. Thus, if *Schochet* were decided under *Lawrence,* it is likely the statute would be declared unconstitutional.

In addition to seriously putting into question the validity of charging any accused rapist with these crimes, the *Lawrence* decision also jeopardizes statutory rape laws.[132] In *Fleisher v. City of Signal Hill*, a police cadet asserted that acts amounting to statutory rape are protected by the right of privacy.[133] The Ninth Circuit reviewed the Supreme Court precedent dealing with the right to privacy and specifically relied on *Bowers* for the proposition that not all sexual conduct is protected.[134] After *Lawrence*, the court may have defined the right of the cadet in a broader context—the right of two individuals to enter into a consensual relationship in private. Under a broader assertion of the right, the Ninth Circuit would be more likely to include this right under the right to privacy. In addition, since *Lawrence* further

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[130] Schochet v. Maryland, 541 A.2d 183, 195 (Md. 1988).

[131] *See id.* at 197-98, 206.

[132] *But see* Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003). The Court stated that the *Lawrence* decision does not involve minors. However, the Court also stated that the holding in *Lawrence* did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* Within months of the *Lawrence* decision, the Massachusetts Supreme Judicial Court cited *Lawrence* numerous times and held that the Massachusetts legislature had no rational basis for prohibiting homosexuals to marry. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). Thus, the Court's statement that the *Lawrence* holding does not involve minors will not necessarily prevent the decision's use as precedent in that context.

[133] Fleisher v. City of Signal Hill, 829 F.2d 1491, 1498 (9th Cir. 1987).

[134] *Id.*

separates the right to privacy from the sanctity of marriage and family, this attenuation could serve to support the claim that the right is protected, especially since the right was that of a boyfriend and girlfriend who had consensual sexual relations. Further, the primary basis for the statutory rape laws, such as the one in *Fleisher*, is morality.[135] Under *Lawrence*, the governing majority's belief that certain sexual behavior is immoral is not a rational basis for regulation. *Lawrence*, then, also puts statutory rape laws into question.

D. Incest

The Supreme Court's decision in *Lawrence* also calls incest laws into question. One such example is in *Wisconsin v. Allen.*[136] There, the Court of Appeals of Wisconsin followed the *Bowers* Court in holding that incest is not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.[137] The court stated that there is "no question that the state may legitimately say that no one can marry his or her sibling."[138] The court relied on the *Bowers* due process rationale that fundamental rights must be a "deeply rooted . . . tradition[]"[139] and that morality provides a legitimate reason for enacting laws.[140] Thus, the court of appeals concluded that incest is not a deeply rooted tradition, but state laws against it are.[141]

If *Lawrence* had been decided prior to the decision in *Allen*, the court of appeals may have declared the Wisconsin incest statute unconstitutional. The right to adult incest might have been asserted as the same broad right under *Lawrence*: the right for adults to choose to enter into relationships in the confines of their homes. Under the rational basis review of the *Lawrence* decision, the legislature may not use the power of the state to enforce its views of morality through criminal statutes.[142] Analyzing the right of incest in terms of *Lawrence*,

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[135] *But see* Phagan v. Georgia, 486 S.E.2d 876, 879 (Ga. 1997). Besides morality, the Georgia Supreme Court found a compelling interest in "safeguarding the physical and psychological well-being of a minor." *Id.* (quoting Aman v. Georgia, 409 S.E.2d 645 (Ga. 1991)).

[136] Wisconsin v. Allen, 571 N.W.2d 872 (Wis. Ct. App. 1997).

[137] *Id.* at 877.

[138] *Id.*

[139] *Id.* (quoting Zablocki v. Redhail, 434 U.S. 374, 399 (1978)).

[140] *Id.*

[141] *Id.*

[142] Lawrence v. Texas, 123 S. Ct. 2472, 2480 (2003). Morality is not the only rationale for incest statutes. The possibility of genetic disorders of a child born as a product of an incestuous relationship could also be a rationale for incest laws. *Allen*, 571 N.W.2d at 874. *But see* Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 267-81 (1984) (disputing the belief that consanguineous mating causes offspring with genetic disorders as "simply inaccurate").

it is probable that a court would declare a state incest statute unconstitutional.

E. Prostitution

Like incest laws, state laws proscribing prostitution are also called into question by *Lawrence*. The strong reliance on *Bowers* in upholding prostitution laws is exemplified in *Roe II v. Butterworth*.[143] In that case, the United States District Court for the Southern District of Florida followed *Bowers* when the constitutionality of a state statute prohibiting prostitution was challenged.[144] The district court said it was bound by *Bowers* until the opinion was overruled.[145] First, the court reviewed the specificity with which the right was asserted in *Bowers*.[146] Since the Court in *Bowers* defined the asserted right as that of homosexual sodomy, "it is clear that the Court does not inevitably limit its inquiry to general, overriding principles of privacy."[147]

Next, the court considered whether prostitution is "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [it] were sacrificed" or if it is "deeply rooted in this Nation[]'s history and tradition."[148] The district court acknowledged that there is a long history of prostitution, but, because society generally regards it as immoral and evil, it has also been proscribed throughout history.[149] There is a long history of laws prohibiting prostitution in the United States, and every state has some sort of prohibition against prostitution.[150] Thus, the practice of protecting prostitution is not implicit in liberty or deeply rooted in this nation's history.[151] Further, based on *Bowers*, the fact that the consenting sexual acts occurred in the privacy of one's home does not make prostitution a protected right under the Constitution.[152] Following the reasoning and analysis of the Court in *Bowers*, the district court found that there is no fundamental right to prostitution[153] and that the state's interest in protecting the morals of its citizens is legitimate.[154] The court stated that it was:

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143 Roe II v. Butterworth, 958 F. Supp. 1569 (S.D. Fla. 1997).

144 *Id.* at 1578-79.

145 *Id.* at 1578.

146 *Id.* at 1574.

147 *Id.*

148 *Id.* at 1577 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.* at 1578 (citing Bowers v. Hardwick, 478 U.S. 186, 193 (1986)).

153 *Id.* at 1578-79.

154 *Id.* at 1583.

> [not the c]ourt's place to tell . . . [the majority of the citizens of Florida] that they are wrong . . . [and, although] this moral judgment obviously will offend and aggravate a few, including Petitioner, it does not implicate the Fourteenth Amendment. The dictate of the Constitution is clear: "For protection against abuses by legislatures the people must resort to the polls, not to the courts."[155]

Roe II relied heavily on *Bowers* in declaring that prostitution is not a fundamental right. *Lawrence* would affect the outcome of this case in three ways. First, the court specifically relied on *Bowers* for defining the right narrowly.[156] Under *Lawrence*, the right might now be defined more broadly in terms of a right of consensual sexual intercourse within the privacy of a home. Framing the right so broadly allows prostitution to fall under this umbrella of private sexual relationships defined by *Lawrence*. The second way *Lawrence* affects this case relates to the privacy of one's home for sexual activity.[157] In *Roe II*, the court relied on *Bowers* in holding that state laws can reach into the privacy of one's home, even for "victimless crimes."[158] *Lawrence* rejected this proposition and found that the state cannot reach into the "most private human conduct, sexual behavior, and in the most private of places, the home."[159] Third, even if the right is not subjected to a higher level of scrutiny, it may not pass rational basis review. The court in *Roe II* acknowledged that society regards prostitution as immoral[160] and that the "collective decision of the citizens of Florida" may prohibit prostitution.[161] Under *Lawrence*, this morals-based legislation would not pass rational basis review. Thus, unless the Florida legislature has another reason for prohibiting prostitution, the statute would be declared unconstitutional.[162] States would not be able to make prostitution illegal.

F. Indecency Statutes

State statutes related to indecency are generally enacted because of the state's interest in morality. One example is in *Williams v. Pryor*.[163]

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[155] *Id.* at 1583 (quoting Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 487 (1955)).

[156] *Id.* at 1569, 1574.

[157] *See id.* at 1578.

[158] *Id.*

[159] Lawrence v. Texas, 123 S. Ct. 2472, 2478 (2003).

[160] *Roe II*, 958 F. Supp. at 1577.

[161] *Id.* at 1580.

[162] *But see Lawrence*, 123 S. Ct. at 2484. The Court stated that the case does not involve prostitution. However, just after that statement, the Court stated that the case "does involve two adults who, with full and mutual consent from each other, engaged in sexual practices." *Id.* One could argue that prostitution involves two adults who mutually consent to engage in sexual practices together.

[163] Williams v. Pryor, 229 F.3d 1331 (11th Cir. 2000), *withdrawn*, Jan. 1, 2001; *see also* Ohio v. Meadows, 503 N.E.2d 697, 712 (1986) (Wright, J., concurring) (citing *Bowers*

There, the Eleventh Circuit relied on *Bowers* in determining whether there is a fundamental right to use sexual devices (sex toys) which would invalidate an Alabama statute banning the distribution and possession of them.[164] The Eleventh Circuit stated that the *Bowers* Court did not construe the constitutional right to privacy broadly enough to include all forms of private, consensual, adult sexual activity.[165] Thus, the Alabama statute did not violate the Constitution because it was rationally related to the government's interest in morality.[166]

The Court's decision in *Lawrence* likely affected the constitutionality of indecency statutes. First, in *Williams*, the Eleventh Circuit specifically construed the constitutional right narrowly in light of *Bowers*.[167] Under *Lawrence*, a court could construe the right more broadly: the right to private consensual sexual activity. This broader version of the right more easily includes the uses of sexual devices between consenting adults because it is private consensual sexual activity. Once this right is included within the broad right that *Lawrence* asserted, the state's use of morality as the government interest would render the statute invalid. In *Williams*, the state statute was based on the elected legislature's view of morality.[168] Under *Bowers*, this was a valid basis for legislation, but under *Lawrence*, morality does not provide a rational basis for legislation and the indecency statute would likely be held unconstitutional.

G. Gays in the Military

The military discharges homosexuals from military service based on a policy that is often challenged; courts have relied on *Bowers* to justify the policy.[169] Generally, the plaintiffs' complaints state that the United States military violated their right to privacy when it discharged them from military service for homosexuality or bisexuality.[170] For example,

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for the proposition that any right to privacy in one's own home is not absolute when the defendant was convicted of illegally possessing child pornography); Barnes v. Glen Theatre, 501 U.S. 560, 575 (1991) (Scalia, J., concurring) (citing *Bowers* when considering if nude dancing may be prohibited by state statutes based on morality and a majority of the electorate). Obscenity and public indecency statutes further a substantial government interest in protecting morality, and, thus, laws may be based on morality. *Id.* at 569 (plurality opinion).

[164] *Williams,* 229 F.3d at 1333, 1340-41.

[165] *Id.* at 1341.

[166] *Id.* at 1343; *see also Barnes*, 501 U.S. at 569 (plurality opinion).

[167] *Williams*, 229 F.3d at 1341.

[168] *Id.* at 1343.

[169] Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Hrynda v. United States, 933 F. Supp. 1047 (M.D. Fla. 1996); Watson v. Perry, 918 F. Supp. 1403 (W.D. Wash. 1996).

[170] *Schowengerdt,* 944 F.2d at 490; *Woodward,* 871 F.2d at 1074; *Hrynda,* 933 F. Supp. at 1054-55; *Watson*, 918 F. Supp at 1417.

the policy of the United States Navy provides that "a propensity to engage in homosexual conduct . . . seriously impairs the accomplishment of the military mission [so] . . . [s]uch persons shall normally be separated from the naval service."[171] In their analysis, the courts have recognized that *Bowers* identified only certain fundamental rights that are subject to heightened scrutiny.[172] These include those "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed."[173] Further, the courts also took note of the *Bowers* Court's emphasis that the "right of privacy concerned matters of the family, marriage and/or procreation"[174] and that the privacy right "did not reach so far" as homosexuality.[175] Thus, based on *Bowers*, the courts have found that homosexuality is not a protected right under the Constitution, and it may be used as a criterion for referring a service member for review or discharge from active duty.[176]

There have been numerous challenges to the military's policy requiring the discharge of individuals who are homosexuals.[177] In upholding the policy, *Bowers* is frequently cited to show that statutes proscribing homosexual sodomy are not unconstitutional, and the right of homosexual sodomy is not protected under the right to privacy.[178] If *Lawrence* were followed in these cases, the validity of the military's discharge of homosexuals under the Department of Defense's policy would be in question. Relying on *Bowers*, the courts have denied numerous privacy rights claims related to the military's policy because homosexuality is not a protected right.[179] Under *Lawrence*, homosexual sodomy has not been raised to a fundamental right, but statutes prohibiting it are now unconstitutional.[180] This, at the very least, erodes part of the rationale that courts have used to uphold the military policy. The conduct for which these military members are discharged can no longer be criminalized. Further, since the *Lawrence* Court considered legal developments in other countries to be persuasive authority, courts

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[171] *Schowengerdt*, 944 F.2d at 490 n.7 (quoting Secretary of the Navy Instructions 1900.9D).

[172] *Woodward*, 871 F.2d at 1074; *see Schowengerdt*, 944 F.2d at 490; *Hrynda*, 933 F. Supp. at 1054-55; *Watson*, 918 F. Supp at 1417.

[173] *Woodward*, 871 F.2d at 1074 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

[174] *Id.*

[175] *Id.* at 1075 (quoting Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

[176] *Schowengerdt*, 944 F.2d at 490; *Woodward*, 871 F.2d at 1074; *Hrynda*, 933 F. Supp. at 1054-55; *Watson*, 918 F. Supp at 1417.

[177] *Schowengerdt*, 944 F.2d at 483; *Woodward*, 871 F.2d at 1068; *Hrynda*, 933 F. Supp. at 1047; *Watson*, 918 F. Supp. at 1403.

[178] *Id.*

[179] *Id.*

[180] Lawrence v. Texas, 123 S. Ct. 2472, 2478 (2003).

now may take note that foreign nations, through their laws and policies, are increasingly allowing homosexuals in the military.[181] This trend of foreign countries, along with the decriminalization of sodomy, does weaken the various courts' rationales for the policy. The reason for the policy is not morality-based, however, so it may be more likely to withstand rational basis review than morality-based laws.[182]

H. Same-Sex Marriage

Same-sex marriage is another issue in which *Bowers* has been cited and relied upon.[183] In *Dean v. District of Columbia*,[184] the Court of Appeals for the District of Columbia refered to *Bowers* in determining whether same-sex marriage is a fundamental right under the Constitution. The court of appeals examined the Supreme Court precedent concerning fundamental rights and determined that the fundamental right to marry is linked to procreation, and same-sex marriage is not deeply rooted in the history or traditions of this country.[185] The court held that there is no fundamental right to same-sex marriage.[186]

In *Shahar v. Bowers*,[187] the Eleventh Circuit concluded that a woman's federal constitutional rights were not violated when her job offer was revoked because she married another woman. The woman was employed by the state's chief criminal prosecutor.[188] Since the job included enforcing the law against homosexual sodomy, which was upheld in *Bowers,* the court of appeals ruled that hiring the employee could cause confusion and credibility issues.[189] The court reasoned that

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[181] U.S. GEN. ACCOUNTING OFFICE REP. TO THE HONORABLE JOHN W. WARNER, U.S. SENATE, HOMOSEXUALS IN THE MILITARY – POLICIES AND PRACTICES OF FOREIGN COUNTRIES (June 1993), *at* http://dont.stanford.edu/regulations/GAO.pdf [hereinafter ACCOUNTING OFFICE REP.]. Out of twenty-five countries reviewed, eleven have policies and laws that allow homosexuals in the military, eleven have policies that do not, and three do not address the issue. *Id.* at 3.

[182] The policy requiring discharge of those who engage in homosexual conduct serves the legitimate state interest of maintenance of morale, order, discipline, national security, and mutual trust among members. *Woodward*, 871 F.2d at 1076-77.

[183] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997); Dean v. Dist. of Columbia, 653 A.2d 307 (D.C. App. 1995) (plurality opinion); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). *But see* Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (upholding same-sex unions on state constitutional grounds).

[184] *Dean*, 653 A.2d at 332.

[185] *Id.* at 332-33.

[186] *Id.* at 333.

[187] *Shahar,* 114 F.3d at 1097.

[188] *Id.* at 1100.

[189] *Id.*

one who is in a homosexual marriage could reasonably be perceived as violating the state's sodomy law.[190]

In 2002, the superior court of Massachusetts decided whether there was a fundamental right for same-sex couples to marry.[191] In its substantive due process analysis, the court relied on *Bowers* in deciding whether the claimed right was "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[192] Citing *Bowers*, the court noted how important it is to analyze carefully the history and tradition of the asserted right.[193] In applying this careful analysis, the court found that there was no history or tradition of same-sex marriage, and, thus, no fundamental right.[194]

The impact of *Lawrence* on the claimed right to same-sex marriage does not need to be predicted; such a case has already been decided. Just months after *Lawrence* was decided, the Supreme Judicial Court of Massachusetts heard the appeal of *Goodridge v. Department of Public Health.*[195] The Court vacated the 2002 judgment and remanded to the trial court for entry of judgment, which was stayed for 180 days to allow the legislature to take such action as it deemed appropriate. In the first same-sex marriage case decided since *Bowers* was overruled, the Massachusetts Supreme Judicial Court held that the Massachusetts legislature had no rational basis for prohibiting same-sex couples from marrying.[196] The Commonwealth presented three reasons for reserving marriage for heterosexual couples: (1) providing "a favorable setting for procreation," (2) ensuring the optimal setting for child rearing, which is a two parent heterosexual couple, and (3) preserving limited state financial resources.[197] The Supreme Judicial Court rejected all three reasons. Not surprisingly, *Lawrence* was cited numerous times in the opinion. The Massachusetts Supreme Judicial Court quoted *Lawrence* for the proposition that it is not the government's job to legislate morality.[198] The Court also followed the *Lawrence* Court's holding that "the core concept of common human dignity protected by the Fourteenth Amendment of the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner" and that

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[190] *Id.* at 1105 n.17.

[191] Goodridge v. Dep't of Pub. Health, 14 Mass. L. Rep. 591 (Mass. Super. Ct. 2002), *overruled by* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[192] *Id.* at 596 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[193] *Id.*

[194] *Id.* at 597.

[195] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[196] *Id.* at 948.

[197] *Id.* at 961.

[198] *Id.* at 948.

"decisions whether to marry or have children bear in shaping one's identity."[199] The Court then stated that the Massachusetts Constitution is even more protective of individual liberty and equality than the U.S. Constitution. As a result, prohibition of same-sex marriage arbitrarily deprives a person who enters into an intimate, exclusive union with another of the same-sex of one of the most "rewarding and cherished institutions."[200]

Shortly after the ruling, the Massachusetts Supreme Judicial Court issued an opinion to the Massachusetts Senate which reviewed the constitutionality of a bill that prohibited same-sex couples from entering into marriage, but allowed them to form civil unions with all the benefits, protections, and rights of marriage.[201] The Court held that the bill violated the equal protection and due process requirements of the state's constitution.[202] The Court stated that the elected majority, under the "guise" of protecting traditional values, may not prohibit same-sex marriages based on its values and morals.[203] The Court said that, for the bill to be constitutional, same-sex couples must be allowed to enter into a "marriage," not just a "civil union," even though the benefits, rights, and protections are the same. It is evident that *Lawrence* had a persuasive, if not compelling, effect on the Massachusetts Supreme Judicial Court. Both *Lawrence*'s broad definition of privacy and its refusal to accept morality as a justification for prohibition under rational basis review certainly influenced the Massachusetts court to define the right broadly and find that the state's objectives did not survive rational basis review. As a result, on May 17, 2004, same-sex marriages were legalized in Massachusetts, and a number of other state courts have already considered cases that seek invalidation of similar marriage laws.[204]

I. Adoption and Custody Cases

Courts have also cited *Bowers* in family law cases when considering an individual's sexual orientation as a factor in deciding whether to allow a parent to adopt or have custody of a child.[205] In *Appeal in Pima*

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[199] *Id.* (citing Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003)).

[200] *Id.*

[201] Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

[202] *Id.* at 572.

[203] *Id.* at 570.

[204] *See generally* Cheryl Wetzstein, *Courts Set to Hear Arguments on Same-sex "Marriage"; Missouri Vote, Massachusetts Authority at Issue*, WASH. TIMES, June 1, 2004, at A3; Ashbel S. Green, *Marriage Case Moves Closer to High Court*, OREGONIAN, July 16, 2004, at C1; Lornet Turnbull & Sanjay Bhatt, *Gay-Marriage Fight Heats up After Ruling*, SEATTLE TIMES, Aug. 8, 2004, at A1.

[205] *In re* Appeal in Pima County Juvenile Action B-10489, 727 P.2d 830 (Ariz. Ct. App. 1986); S.B. v. L.W., 793 So. 2d 656 (Miss. Ct. App. 2001).

County,[206] the Court of Appeals of Arizona held that the trial court did not err when it considered the bisexuality of an applicant for adoption because the court must consider the child's best interests. The Court stated that, while bisexuality alone does not make someone an unfit parent, it is a relevant factor because bisexual conduct violates state law and proscribing this conduct is constitutional as announced in *Bowers*.[207] It would be contradictory to proscribe homosexual conduct yet give parenting rights to those who practice that unlawful behavior.[208] Similarly, in *S.B. v. L.W.*,[209] an appellate court held that the chancellor could consider the mother's bisexual lifestyle as a factor in a decision regarding custody.

By applying *Lawrence*, it is likely that the homosexuality or bisexuality of an applicant for adoption or custody would no longer be a permissible consideration. Since the rationale for considering bisexuality or homosexuality as a factor in adoption or custody was that sodomy was against the law, this rationale is no longer valid under *Lawrence*. Thus, under *Lawrence*, the bisexuality or homosexuality of an applicant for adoption or custody could no longer be considered.

J. Equal Protection Clause Cases

Courts have relied on *Bowers* in a large number of Equal Protection Clause cases.[210] The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[211] The Equal Protection Clause, as interpreted by the United States Supreme Court, prohibits the government from arbitrarily or invidiously discriminating against classes of people.[212] In order to determine if the government's discrimination is so arbitrary that it is unconstitutional, the Supreme Court analyzes Equal Protection Clause cases according to a three-tiered model that consists of three levels of review: strict, intermediate, and rational basis. Courts considering Equal Protection Clause challenges have relied on *Bowers* to conclude that

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[206] *Pima County*, 727 P.2d at 835.

[207] *Id.*

[208] *Id.*

[209] *S.B.*, 793 So. 2d at 656.

[210] *See* High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); Hrynda v. United States, 933 F. Supp. 1047 (M.D. Fla. 1996); Watson v. Perry, 918 F. Supp. 1403 (W.D. Wash. 1996); Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991); Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990); Missouri v. Walsh, 713 S.W.2d 508 (Mo. 1986); Ohio v. Thompson, No. 99-A-0070, 2000 Ohio App. LEXIS 6090 (Ohio Ct. App. Dec. 22, 2000); Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

[211] U.S. CONST. amend. XIV, § 1.

[212] ALLAN IDES & CHRISTOPHER MAY, CONSTITUTIONAL LAW INDIVIDUAL RIGHTS 184 (2d ed. 2001).

homosexuality is not a suspect class and is analyzed under rational basis review.[213] Although *Bowers* is a Due Process Clause case, the doctrines supporting both the Equal Protection Clause analysis and Due Process Clause analysis are similar.[214]

> When conduct, either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, then analysis under the substantive due process clause proceeds in much the same way as analysis under the lowest tier of equal protection scrutiny. A rational relation to a legitimate government interest will normally suffice to uphold the regulation. At the other extreme, where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis.[215]

Since the Supreme Court held that there is no fundamental right to engage in homosexual sodomy, then under both Equal Protection Clause analysis and Due Process Clause analysis a statute or policy "must be upheld if there is a rational relationship between the policy and a legitimate governmental purpose."[216] The Equal Protection Clause challenges involve such subjects as gays in the military,[217] sexual misconduct statutes,[218] the Department of Defense policy of expanded background checks,[219] Federal Bureau of Investigation (FBI) hiring policies,[220] and same-sex marriage.[221] Courts deciding these cases relied on *Bowers* for justification in their rational basis scrutiny.

One example of how courts have relied on *Bowers* in Equal Protection Clause cases involving gays in the military is *Woodward v.*

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[213] Equal. Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289, 292-93 (6th Cir. 1997); *High Tech Gays*, 895 F.2d at 563, 573; Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989); *Woodward,* 871 F.2d at 1068, 1075; *Padula,* 822 F.2d at 102-03; *see also* Opinion of the Justices, 530 A.2d 21, 24 (N.H. 1987) (stating that for equal protection analysis, homosexuals are not a suspect class nor is there a fundamental right to homosexual sodomy according to *Bowers*). *But see* Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

[214] *Watson*, 918 F. Supp. at 1416.

[215] *Id.* at 1416 (quoting Beller v. Middendorf, 632 F.2d 788, 808 (9th Cir. 1980)).

[216] *Id.*

[217] *Woodward,* 871 F.2d at 1068; Hrynda v. United States, 933 F. Supp. 1047 (M.D. Fla. 1996); *Watson,* 918 F. Supp. at 1403; Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991).

[218] Missouri v. Walsh, 713 S.W.2d 508 (Mo. 1986); Ohio v. Thompson, No. 99-A-0070, 2000 Ohio App. LEXIS 6090 (Ohio Ct. App. Dec. 22, 2000).

[219] High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

[220] Padula v. Webster, 822 F.2d 97, 97 (D.C. Cir. 1987).

[221] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997); Dean v. Dist. of Columbia, 653 A.2d 307 (D.C. Cir. 1995) (plurality opinion); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

United States.[222] There, the Federal Circuit stated that, although *Bowers* was a due process case, it was "equally persuasive, if not dispositive" of the Equal Protection Clause argument that a Navy service member asserted.[223] The Federal Circuit relied on *Bowers* and reasoned that, since the Court held that there is no fundamental right to homosexual sodomy, there is no need to consider if this Equal Protection Clause claim would be analyzed under suspect class (strict level) scrutiny.[224] The Federal Circuit also cited *Bowers* when it declined to elevate homosexuality to a quasi-suspect (intermediate level) class.[225] Thus, the court held that the Navy policy regarding homosexuals only had to be rationally related to a permissible government interest.[226] The Navy's interests included, among other things, morale, mutual trust, recruitment issues, security breach issues, and maintenance of discipline.[227] The court found that these specific considerations of the armed forces passed the rational basis test.[228]

Besides cases relating to the Department of Defense's policy discharging gays, the Department's national security policy also has come under attack under the Equal Protection Clause.[229] In *High Tech Gays v. Defense Industrial Security Clearance Office*,[230] the Ninth Circuit rejected an Equal Protection Clause claim brought by homosexual applicants for employment with the Department of Defense. The plaintiffs alleged that the top security clearance policy of the Department of Defense, which subjected homosexual applicants for top security clearance to expanded investigations, violated the Equal Protection Clause.[231] In its analysis, the Ninth Circuit relied on *Bowers*[232] to determine the appropriate level of scrutiny under the Equal Protection Clause.[233] The court reasoned that, if there is no fundamental right to homosexual sodomy under the Due Process Clause, then the Equal Protection Clause cannot include homosexual conduct as a

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[222] *Woodward*, 871 F.2d at 1068; *see also Hrynda*, 933 F. Supp. at 1047; *Watson*, 918 F. Supp. at 1403; *Steffan*, 780 F. Supp. at 1.

[223] *Woodward*, 871 F.2d at 1075.

[224] *Id.*

[225] *Id.* at 1076.

[226] *Id.*

[227] *Id.* at 1076-77.

[228] *Id.* at 1077.

[229] High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

[230] *Id.*

[231] *Id.* at 569.

[232] *Id.* at 571. The Ninth Circuit also cited *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), and *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). *Id.*

[233] *Id.*

fundamental right either.[234] The court concluded that, based on the *Bowers* holding, since the Constitution "confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes."[235] Under rational basis review, the Ninth Circuit concluded that the government's statement that hostile intelligence groups target homosexuals is a legitimate, if not compelling, justification for the Department of Defense's expanded investigations for top security clearance.[236]

In a similar case, *Padula v. Webster*,[237] the D.C. Circuit held that the FBI's hiring policy did not violate the Equal Protection Clause. The plaintiff claimed that the FBI did not hire her as a special agent because the routine background check revealed she was homosexual.[238] The FBI's hiring policy treated homosexuality as a factor in hiring decisions,[239] but the FBI explained that the reason for the policy was that agents perform duties that involve top secret matters related to national security and, further, to employ agents who engage in the criminalized conduct of homosexuality would undermine the FBI's law enforcement purpose.[240] In deciding whether homosexuals compromised a class deserving heightened scrutiny, the D.C. Circuit concluded that the Court's reasoning in *Bowers*[241] was controlling and rejected such a classification.[242] The court stated that it would be contradictory "to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause."[243] Further, the D.C. Circuit explained that, if the Supreme Court did not object to state laws criminalizing behavior that defines the class, then certainly a lower court does not have the power to declare that the class needs protection.[244] Thus, the D.C. Circuit examined the Equal

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[234] *Id.*

[235] *Id.*

[236] *Id.* at 578.

[237] *Padula,* 822 F.2d at 104; *see also* City of Walls v. Petersburg, 895 F.2d 188, 193 (4th Cir. 1990) (holding that *Bowers* is controlling when considering whether homosexual conduct may be questioned on an employment background questionnaire).

[238] *Padula*, 822 F.2d at 98.

[239] *Id.* at 98-99.

[240] *Id.* at 104.

[241] The court also relied on Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), which was an equal protection case decided two years before *Bowers*. The *Dronenburg* court based its rational basis analysis on the fact that the constitutional right to privacy did not protect homosexual conduct.

[242] *Padula*, 822 F.2d at 103.

[243] *Id.*

[244] *Id.*

Protection Clause argument under rational basis review.[245] The court concluded that the FBI's specialized counterintelligence duties related to national security rationally justified its consideration of homosexual conduct that could compromise the agency's functions.[246]

A number of Equal Protection Clause cases relied on *Bowers* as justification for applying rational basis review.[247] The courts relied on two general propositions from *Bowers* that justify rational basis scrutiny: (1) homosexual sodomy is not a protected fundamental right, and (2) statutes that criminalize homosexual sodomy are constitutional. The courts reasoned that, if there is no right to homosexual sodomy under the Due Process Clause, then the Equal Protection Clause cannot elevate homosexuals to a quasi-suspect or suspect class.[248] The courts also concluded that, since states can criminalize homosexual sodomy, homosexual conduct cannot constitute a quasi-suspect or suspect class.[249]

Under *Lawrence*, homosexual sodomy has not been deemed a fundamental right, but statutes proscribing homosexual sodomy have been declared unconstitutional. Thus, the rationale that courts used for their Equal Protection Clause rational basis scrutiny has eroded.[250] Further, since courts considered the Due Process Clause case of *Bowers* when assigning the level of Equal Protection Clause scrutiny, it is logical to assume that courts will now consider *Lawrence* and its "expanded" due process analysis with respect to Equal Protection Clause claims. The *Lawrence* Court deemed current trends and foreign nations' laws and judicial opinions as relevant in interpreting the Constitution; it is logical that courts will consider these factors in Equal Protection Clause cases as well. One example is the ban on gays in the military. In applying *Lawrence* to an Equal Protection Clause case, a court could conceivably examine current trends and international laws and policies when making its decision. In fact, more countries are allowing gays in the military with most of the provisions being changed in just the last

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[245] *Id.*

[246] *Id.* at 104.

[247] High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); *Padula*, 822 F.2d at 97; Hrynda v. United States, 933 F. Supp. 1047 (M.D. Fla. 1996); Watson v. Perry, 918 F. Supp. 1403 (W.D. Wash. 1996); Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991); Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990); Missouri v. Walsh, 713 S.W.2d 508 (Mo. 1986); Ohio v. Thompson, No. 99-A-0070, 2000 Ohio App. LEXIS 6090 (Ohio Ct. App. Dec. 22, 2000).

[248] *High Tech Gays*, 895 F.2d at 571.

[249] *Id.* at 571; *Padula*, 822 F.2d at 103-04.

[250] *But see* Romer v. Evans, 517 U.S. 620 (1996). In striking down a Colorado constitutional amendment that prohibited all legislative, judicial, or executive action designed to protect homosexual persons from discrimination, the Court never cited *Bowers* to support the rational basis review.

twenty years.[251] Since the Court in *Lawrence* found the history of the last fifty years relevant in examining an asserted constitutional right, this international trend could certainly impact a court deciding an Equal Protection Clause case.

In sum, the courts deciding Equal Protection Clause cases have used *Bowers* to justify rational basis review for homosexuals. In light of *Lawrence*, the justification for rational basis review has eroded because homosexual sodomy statutes are now unconstitutional. The courts may also consider other factors such as recent trends and international laws in making their decisions.

K. Cases Relying on Bowers*'s Method of Due Process Analysis*

Finally, there are numerous cases that cited *Bowers*, not for its holding that the Constitution does not prohibit states from proscribing homosexual sodomy or similar acts, but for its method of determining a fundamental right.[252] In *Mullins v. Oregon*,[253] grandparents claimed that their substantive due process rights were violated because they, as grandparents, had a fundamental interest in adopting their grandchildren after the natural parents lost parental rights. The Ninth Circuit considered whether the biological connection alone would give a grandparent a substantive due process right to adopt a grandchild.[254] In making its decision, the court reviewed the Supreme Court's Fourteenth Amendment Due Process Clause analysis.[255] The court relied on *Bowers* when it limited the substantive due process rights to those that "we as a society traditionally have protected."[256] Further, the court cautioned against expanding substantive due process based on opinions of the judiciary rather than traditional societal rights.[257] Thus, the court rejected the invitation to find a new fundamental right of grandparents to adopt their grandchildren.[258]

Similarly, in *Doe v. Wigginton*,[259] a prisoner claimed a fundamental right to on-demand HIV testing.[260] Relying on *Bowers*'s analysis of

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[251] ACCOUNTING OFFICE REP., *supra* note 181.

[252] Mullins v. Oregon, 57 F.3d 789 (9th Cir. 1995); Doe v. Wigginton, 21 F.3d 733 (6th Cir. 1994); Flores v. Meese, 934 F.2d 991 (9th Cir. 1990); Charles v. Baesler, 910 F.2d 1349 (6th Cir. 1990); Henne v. Wright, 904 F.2d 1208 (8th Cir. 1990); Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988).

[253] *Mullins*, 57 F.3d at 793-94.

[254] *Id.* at 791.

[255] *Id.* at 793.

[256] *Id.*

[257] *Id.*

[258] *Id.* at 794-95. In *Troxel v. Granville*, 530 U.S. 57 (2000), the Supreme Court came to a similar conclusion but did not cite *Bowers* in rejecting a right of grandparents to visit their grandchildren.

[259] Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994).

"history and traditions," the Sixth Circuit held that on-demand HIV testing is not a fundamental right because it is not protected in this nation's history and traditions.[261] The Sixth Circuit also relied on *Bowers*'s rationale in *Charles v. Baesler*[262] in rejecting a fire department captain's asserted fundamental right to promotion. To determine if a contractual right to promotion was a protected fundamental right under the Due Process Clause, the court relied on *Bowers* for its analysis of the deeply rooted history and traditions that define fundamental rights.[263] Just as the *Bowers* Court found that protection of homosexual sodomy was not deeply rooted in history, the Sixth Circuit found that any claim to a right of promotion is not deeply rooted in history or tradition.[264]

In another case, *Henne v. Wright*,[265] the Eighth Circuit relied on *Bowers* in rejecting a claim that Nebraska's restrictions on the choice of surnames that can be given to a child at birth violated a fundamental right under the Due Process Clause. Specifically, the court examined if the parental right to train and educate recognized by *Meyer v. Nebraska*[266] and *Pierce v. Society of Sisters*[267] should be extended to include the parental right to choose a non-parental surname.[268] Relying on *Bowers*'s fundamental rights analysis, the Eighth Circuit found no such tradition in the history of the nation.[269]

In *Flores v. Meese,*[270] the Ninth Circuit relied on *Bowers* in rejecting a claim that a fundamental right was violated by an Immigration and Naturalization Services (INS) policy which stated that no detained alien minor may be released except to a parent or lawful guardian. The court considered whether to define the alleged right broadly (right of physical liberty), which is more likely to be a fundamental right, or narrowly (right to be released to an unrelated adult), which is less likely to be a fundamental right.[271] In its analysis, the court contrasted the *Bowers* majority's method of construing the right at stake narrowly (fundamental right to engage in homosexual sodomy) with the dissenting opinion's method of construing the right at stake broadly (right to be let

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[260] *Id.* at 739-40.

[261] *Id.* at 740 (citing Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

[262] Charles v. Baesler, 910 F.2d 1349, 1353 (6th Cir. 1990).

[263] *Id.*

[264] *Id.* at 1353.

[265] Henne v. Wright, 904 F.2d 1208, 1215 (8th Cir. 1990).

[266] Meyer v. Nebraska, 262 U.S. 390 (1923).

[267] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[268] *Henne,* 904 F.2d at 1214.

[269] *Id.* at 1214-15.

[270] Flores v. Meese, 934 F.2d 991, 1007-08 (9th Cir. 1990).

[271] *Id.* at 1007 n.3.

alone).[272] The Ninth Circuit concluded that the majority in *Bowers* "properly rejected this broad characterization of the right in favor of the narrower formulation."[273] The court stated that *Bowers* provided "solid support for our decision to characterize the substantive due process right narrowly."[274] Based on the narrow definition of the right at issue, the Ninth Circuit found that no fundamental right was implicated.[275] Under rational basis review, the court held that the state's regulation was rationally related to a legitimate state interest.[276]

Finally, in *Cruzan v. Harmon*,[277] the Supreme Court of Missouri considered whether the right of privacy under the Due Process Clause extends to the decision of a patient or his guardian to direct the withdrawal of food and water. The court relied on *Bowers* in asserting that the privacy right should not be expanded beyond its "common theme of procreation and relationships within the bonds of marriage."[278] Thus, based on *Bowers* and the right to privacy decisions of the Supreme Court, the Missouri Supreme Court held that the state's interest in the preservation of life outweighed any rights invoked on the patient's behalf to have food and water withdrawn.[279] Two years later, the United States Supreme Court affirmed this decision.[280]

The *Lawrence* decision could have far reaching effects on many cases not even related to sexual privacy rights, as cases unrelated to sexual relationships or homosexuality relied on *Bowers*'s method of due process analysis.[281] The two main propositions that *Bowers* stood for with respect to these cases were (1) the history and tradition analysis and (2) the defining of the right asserted narrowly rather than broadly. Under *Lawrence*, the analysis and outcomes of many of these cases would be different. After *Lawrence*, the analysis of an asserted right would still consist of an examination of "deeply rooted history and traditions," but the courts may also consider emerging trends in the United States, international court precedent, and whether the rationale for a statute was based on morality. The broad definition of the right asserted in

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[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *Id.* at 1009.

[276] *Id.* at 1010.

[277] Cruzan v. Harmon, 760 S.W.2d 408, 412 (Mo. 1988), *aff'd,* 497 U.S. 261 (1990).

[278] *Id.* at 418.

[279] *Id.* at 418-19.

[280] Cruzan v. Harmon, 497 U.S. 261 (1990).

[281] Mullins v. Oregon, 57 F.3d 789 (9th Cir. 1995); Doe v. Wigginton, 21 F.3d 733 (6th Cir. 1994); Flores v. Meese, 934 F.2d 991 (9th Cir. 1990); Charles v. Baesler, 910 F.2d 1349 (6th Cir. 1990); Henne v. Wright, 904 F.2d 1208 (8th Cir. 1990); *Cruzan*, 760 S.W.2d at 408.

Lawrence could influence outcomes as well. For example, in *Cruzan*, the court relied on *Bowers* for the proposition that the privacy right should not be expanded beyond procreation and marriage rights.[282] Based on *Lawrence*, however, the right has been significantly broadened to protect private adult relationships and the dignity of the individual. Certainly, the right to die case of *Cruzan* could be affected by defining the right so broadly.[283] *Flores* is another example; the court relied on *Bowers* in defining the right narrowly, but under *Lawrence*, the right that the plaintiff claimed would now be viewed broadly. Thus, *Lawrence* has implications for all due process cases, not just those related to sexual privacy.

IV. CONCLUSION

Based on the principle of stare decisis, the Supreme Court must strictly adhere to its decisions when there has been reasonable reliance by individuals and society on its continued application. When the Court overruled *Bowers* and did not follow the principle of stare decisis, it declared that the *Bowers* holding had not induced such reliance. But, to the contrary, the reliance on *Bowers* has been "overwhelming."[284] Numerous judicial decisions and legislative enactments have relied on the holding, rationale, and principles set forth in *Bowers*, especially the proposition that laws based on notions of morality are valid. Numerous state laws which prohibit adultery, prostitution, adult incest, statutory rape, indecency, and same-sex marriage, as well as the Department of Defense's and FBI's security policies regarding homosexuals, are called into question. Further, numerous decisions not even related to sexual behavior have relied on *Bowers* for its method of due process analysis. Decisions dealing with the asserted fundamental rights of adoption, HIV testing, employment promotions, and the right to die have all relied on *Bowers*. In deciding *Lawrence,* the Court overruled *Bowers* and called into question every one of these decisions. The Court has opened the door and started down the road that it was so unwilling to start down seventeen years earlier. The descent down the slippery slope has begun.

Sarah Catherine Mowchan

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[282] *See supra* note 278 and accompanying text.

[283] *But see* Washington v. Glucksberg, 521 U.S. 702, 721-23 (1997). In substantive due process cases, the Supreme Court requires a "careful description" of the asserted fundamental liberty interest. *Id.* In defining the right so broadly in *Lawrence*, which was decided after *Glucksberg,* the "'careful description' of the asserted" right requirement may be eroding in favor of a broader view of substantive due process rights. *See id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[284] Lawrence v. Texas, 123 S. Ct. 2472, 2490 (2003) (Scalia, J., dissenting).