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NO MORE MESSING AROUND: SUBSTANTIVE DUE PROCESS CHALLENGES TO STATE LAWS PROHIBITING FORNICATION

Traci Shallbetter Stratton

Abstract: Anglo-American law has historically prohibited fornication, and through the 1960s fornication remained illegal in all but ten states. Few questioned the validity of laws proscribing various forms of private, adult, consensual sexual behavior until the early 1970s. Aside from legislative repeal, substantive due process has been the primary weapon in the fight against state sex laws. Although the U.S. Supreme Court's substantive due process jurisprudence, particularly in the area of personal privacy, has brought the constitutionality of fornication statutes into question, it has not definitively resolved the matter. This Comment argues that laws prohibiting fornication do not violate substantive due process. It reasons that fornication laws need only withstand rational basis review because history does not support a right to fornicate, and the Supreme Court's privacy jurisprudence does not encompass such a right. This Comment contends, alternatively, that even if the Court were to find a fundamental right to engage in sex, fornication laws would withstand strict scrutiny. Finally, the Comment concludes that states should pass, but not necessarily enforce, fornication laws.

Laws prohibiting fornication¹ remain on the books in at least thirteen states and the District of Columbia.² Until the 1970s, few questioned the validity of laws prohibiting various forms of private, adult, consensual sexual behavior.³ Today, however, these laws, at the threshold of

1. Although statutory definitions vary slightly, fornication is the act of sexual intercourse between persons who are not married to each other. See Gerhard O.W. Mueller, *Legal Regulation of Sexual Conduct* 46 (1961).

2. D.C. Code Ann. § 22-1002 (1996); Ga. Code Ann. § 16-6-18 (1996); Idaho Code § 18-6603 (1997); 720 Ill. Comp. Stat. Ann. 5/11-8 (West 1993); Mass. Ann. Laws. ch. 272, § 18 (Law. Co-op. Supp. 1992); Minn. Stat. Ann. § 609.34 (West 1987); Miss. Code Ann. § 97-29-1 (1994); N.C. Gen. Stat. § 14-184 (1993); N.D. Cent. Code § 12.1-20.08 (1985); S.C. Code Ann. § 16-15-60 (Law Co-op. 1985); Utah Code Ann. § 76-7-104 (1995); Va. Code Ann. § 18.2-344 (Michie 1996); W. Va. Code § 61-8-3 (1997); Wis. Stat. Ann. § 944.15 (West 1996); see Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* 98-102 (1996) (listing enactment dates of state fornication statutes, ranging from as early as 1692 (Massachusetts) to as late as 1973 (North Dakota)).

Additionally, at least four states that do not expressly prohibit fornication have outlawed cohabitation. See Ariz. Rev. Stat. Ann. § 13-1409 (West 1989); Fla. Stat. Ann. § 798.02 (West 1992); Mich. Comp. Laws Ann. § 750.335 (West 1991); N.M. Stat. Ann. § 30-10-2 (Michie 1994). It is also a federal offense to knowingly transport or persuade an individual to travel in interstate or foreign commerce with the intent that such individual engage in criminal sexual activity. 18 U.S.C.A. §§ 2421-2422 (West Supp. 1998). See generally Posner & Silbaugh, *supra* (providing state-by-state review of fornication and cohabitation laws, including enactment dates).

3. Richard Green, *Fornication: Common Law Legacy and American Sexual Privacy*, 17 Anglo-Am. L. Rev. 226, 228 (1988).

attempts to regulate sexual conduct,⁴ are the subject of much dispute. Courts nationwide are divided over whether fornication is a fundamental right, and whether the right to privacy protects private, consensual sex between unmarried heterosexual adults.⁵ Some lower courts have upheld laws prohibiting fornication or deviant consensual sex between unmarried heterosexual adults as valid exercises of the police power;⁶ others have struck down these statutes as violations of the right to privacy.⁷ The U.S. Supreme Court has found that the right to personal privacy includes an individual's liberty to make choices regarding contraception and abortion,⁸ nevertheless, it has upheld statutes prohibiting sodomy as applied to consenting homosexual adults.⁹ The Court has emphasized that its substantive due process opinions, particularly in the area of privacy, have not decided the constitutionality of statutes prohibiting fornication.¹⁰

This Comment argues that fornication statutes do not violate an individual's Fourteenth Amendment substantive due process rights. Part I briefly traces the history of fornication laws in the United States. Part II presents the framework for evaluating a substantive due process challenge. Part III summarizes the Supreme Court's privacy jurisprudence¹¹ and notes that neither the U.S. Supreme Court nor lower courts have resolved whether fornication proscriptions are constitutional. Part IV argues that no fundamental right to fornicate exists; thus, fornication statutes are subject to rational basis review. It notes that fornication statutes do not violate substantive due process because states have numerous rational bases for proscribing fornication. Part V contends that, even if the Court were to find that statutes prohibiting fornication warrant strict scrutiny, the statutes would withstand it. Part

4. *Id.* at 237. If fornication laws withstand substantive due process challenges, legislation related to less conventional private consensual sexual conduct, such as adultery and homosexuality, has a strong chance of being upheld. *See id.* at 238.

5. *See, e.g.,* Schochet v. State, 580 A.2d 176, 181-82 (Md. 1990) (noting significant division among courts addressing constitutionality of punishing consensual sex between heterosexual adults).

6. *See infra* note 102.

7. *See infra* notes 99-100.

8. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

9. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986).

10. *See, e.g., Carey*, 431 U.S. at 688 n.5, 694 n.17.

11. The concept of constitutional privacy has embraced at least two different kinds of interests: the individual's interest in avoiding disclosure of personal matters, and the individual's interest in independence in making certain kinds of important decisions. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). This Comment focuses on the latter.

VI argues that unenforced fornication statutes are constitutional, avoid undesirable outcomes, and serve as valuable rhetorical devices. This Comment concludes that states have legitimate reasons to pass and publicize, but not necessarily enforce, fornication laws.

I. THE HISTORY OF FORNICATION LAWS IN THE UNITED STATES

Anglo-American tradition, grounded in Hebraic law and early English law, has long prohibited “deviant” and nonmarital sexual behavior.¹² In England, fornication was generally an offense only addressed in the ecclesiastical courts, but common-law courts occasionally exercised jurisdiction.¹³ The American colonies, which lacked ecclesiastical courts, consistently regulated fornication by statute.¹⁴ Intent on enforcing Puritan morality, the colonists enacted statutes making fornication an offense punishable by fine, marriage, or corporal punishment.¹⁵ Fornication laws were actively enforced throughout the colonial period.¹⁶ Historically, fornication was illegal in all jurisdictions of the United States.¹⁷ In the eighteenth century and thereafter, states less frequently prosecuted, and courts less frequently enforced, fornication laws.¹⁸

Attitudes toward sexuality underwent significant liberalization during the late nineteenth and twentieth centuries,¹⁹ and fornication laws gradually lapsed into desuetude.²⁰ Yet, as late as 1965 all but ten states

12. Ex. 20:14 (forbidding adultery); Lev. 18:6–29; 20:10–21 (describing unlawful sexual relations); Deut. 23: 18 (prohibiting prostitution); Mt. 15:19 (noting that sexual immorality makes a person unclean); 1 Cor. 6:13–18 (explaining that sexual sins are harmful to body); 1 Thess. 4:3 (warning community to avoid sexual immorality); 4 Sir William Blackstone, *Commentaries on the Law in England* 64–65 (William Draper Lewis, ed. 1898).

13. Morris Ploscowe, *Sex and the Law* 142 (1951).

14. *Id.* at 143–45.

15. *Id.* at 143. Legislation differed colony by colony concerning the way fornication was defined and punished. See *id.* at 143–45; John D’Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 22 (1988) (describing different punishments); Robert Veit Sherwin, *Sex and the Statutory Law* pt. 1, at 19 (1949) (noting different definitions).

16. Geoffrey May, *Social Control of Sex Expression* 192 (1930).

17. Donal E. J. MacNamara & Edward Sagarin, *Sex, Crime, and the Law* 186 (1977).

18. D’Emilio & Freedman, *supra* note 15, at 49.

19. See *id.* at 138–39, 188–201, 223, 233–35.

20. MacNamara & Sagarin, *supra* note 17, at 187. But see *Jarrett v. Jarrett*, 400 N.E.2d 421 (Ill. 1979) (using fornication statute to divest mother of child custody); *Commonwealth v. Sager*, 419 A.2d 1288 (Pa. Super. Ct. 1980) (reversing defendant’s fornication conviction because guilty plea was not made voluntarily, knowingly, and intelligently); *Quentin Hardy, Idaho County Tests a New*

prohibited fornication.²¹ Presently, thirteen states and the District of Columbia prohibit fornication, and at least four additional states outlaw cohabitation.²²

II. FEDERAL SUBSTANTIVE DUE PROCESS ANALYSIS

The Fourteenth Amendment declares that no State shall “deprive any person of life, liberty, or property, without due process of law.”²³ In adjudicating the constitutionality of statutes under this clause, a major distinction exists between legislation that burdens fundamental rights and legislation that does not.²⁴ If no fundamental right is involved, the Court evaluates a law challenged on substantive due process grounds under the rational basis test.²⁵ When legislation infringes upon a fundamental right, the Court applies strict scrutiny, requiring that the statute be narrowly tailored to serve a compelling state interest.²⁶

A. *When is a Right Fundamental?*

The U.S. Supreme Court has developed two approaches to discerning when a right not explicitly guaranteed by the Constitution is fundamental, and thus worthy of heightened scrutiny under the Fourteenth Amendment’s Due Process Clause. The first appeals to “our Nation’s history, legal traditions, and practices.”²⁷ Under this approach,

Way to Curb Teen Sex: Prosecute, Wall St. J., July 8, 1996, at A1 (discussing Emmet County’s prosecution of teen fornicators); see also Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 Harv. L. Rev. 1660, 1662 (1991) (asserting that fornication laws are most commonly enforced against suspected prostitutes, rapists, and other criminals).

21. *Sexual Behavior and the Law* 10 (Ralph Slovenko ed., 1965).

22. See *supra* note 2.

23. U.S. Const. amend. XIV, § 1.

24. See, e.g., *Reno v. Flores*, 507 U.S. 292, 305, 311 (1993) (noting that because narrowly tailored requirement only applies when fundamental right is involved, state need only demonstrate “reasonable fit” between government purpose and means).

25. *Id.*

26. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

27. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2262 (1997). Criticism of the historical method abounds. See, e.g., Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 98–109 (1991) (discussing manipulability of tradition and its potential to curtail Court’s role in protecting individual liberties); William C. Heffernan, *Privacy Rights*, 29 Suffolk U. L. Rev. 737, 779–80 (1995) (suggesting traditions are often incompatible with principles embedded in liberal constitutionalism); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. Rev. 671, 735–36 (1973) (criticizing tradition as standard for judging fundamentality because it

due process protects those liberties so “deeply rooted in this Nation’s history and tradition,”²⁸ or “implicit in the concept of ordered liberty,”²⁹ that “neither liberty nor justice would exist if they were sacrificed.”³⁰

Under the Court’s second method, a right may be deemed fundamental even if it lacks an historical pedigree. The Court uses a common law process to define the scope of a general fundamental right, such as the right to privacy, which it has inferred from particular constitutional guarantees and principles.³¹ If a broad, inferred liberty encompasses the newly claimed right, the Court will subject statutes infringing on the right to strict scrutiny.³² The level of generality at which the Court defines the right at issue, and the fundamental rights it has previously protected, often determines whether precedent will encompass the newly claimed right, elevating it to the status of fundamental.³³

relies on traditional majority view without allowing for changing mores). *But see* Antonin Scalia, *Originalism: The Lesser Evil*, 57 Cinn. L. Rev. 849, 863–64 (1989) (acknowledging that danger of judges mistaking their own predilections for law plagues originalism, but asserting that it is to lesser extent than nonoriginalism).

28. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

29. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by* *Benton v. Maryland*, 395 U.S. 784 (1969).

30. *Id.* at 326; *see, e.g., Glucksberg*, 117 S. Ct. 2258, 2262–75; *Bowers v. Hardwick*, 478 U.S. 186, 191–94 (1986).

31. *Roe*, 410 U.S. at 153 (locating privacy right in Fourteenth Amendment Due Process liberty guarantee and construing it to protect woman’s right to choose abortion); *Griswold v. Connecticut*, 381 U.S. 479, 483–85 (1965) (locating right to privacy within penumbras of First, Third, Fourth, Fifth and Ninth Amendments and construing it to protect marital relations).

32. *See, e.g., Carey v. Population Servs. Int’l*, 431 U.S. 678, 686 (1977); *Roe*, 410 U.S. at 155; *Griswold*, 381 U.S. at 497–98 (Goldberg, J., concurring).

33. Tribe & Dorf, *supra* note 27, at 73–80; *see also* Laurence H. Tribe, *American Constitutional Law* 1427–28 (2d. ed. 1988) (arguing that *Bowers* Court defined liberty claim at wrong level of generality).

B. Infringements upon Non-fundamental Rights Receive Rational Basis Review

When no fundamental right is involved, the Court generally evaluates laws challenged on substantive due process grounds according to the rational basis test.³⁴ Under this standard, the Court defers heavily to legislative judgment.³⁵ Assuming no other specific constitutional limitation on government power is implicated, an offending statute will pass constitutional muster if the legislation has some minimally plausible, even if unproven and unlikely, relation to a permissible legislative purpose.³⁶ Most aspects of an individual's life are not "fundamental," and statutes regulating them bear a presumption of validity.³⁷

C. Statutory Infringements upon Fundamental Rights Receive Strict Scrutiny Review

Statutes limiting fundamental rights must be justified by a compelling state interest and narrowly drawn to further the interest.³⁸ The Court has

34. *Bowers*, 478 U.S. at 196. Occasionally, however, the Court uses a "continuum" approach in substantive due process cases. Rather than defer to the legislature when no fundamental right is involved, the Court evaluates the constitutionality of statutes by balancing the nature of the governmental interest in regulating the conduct against the burden on, and the importance of, the right. *See, e.g.,* *Washington v. Harper*, 499 U.S. 210 (1990) (holding that mentally ill prisoner has significant liberty interest in avoiding unwanted administration of antipsychotic drugs, but that state interest in prison safety was sufficient to override it); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (finding significant liberty interest in refusing unwanted medical treatment, but state's interest in preservation of human life and choice in matters of life and death justifies restrictions).

35. *See, e.g.,* *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955).

36. *Id.*

37. *Heller v. Doe*, 509 U.S. 312, 319 (1993).

38. *Roe v. Wade*, 410 U.S. 113, 155 (1973). The strength of the compelling interest required and the extent of the personal right may vary according to the nature of the right involved and the burden of government action on the claimant. *Compare Zablocki v. Redhail*, 434 U.S. 374 (1978) (observing that state may impose reasonable regulations that do not significantly interfere with decisions to marry), *with Planned Parenthood v. Casey*, 505 U.S. 883 (1992) (prohibiting government from unduly burdening woman's right to abortion, yet upholding mandatory waiting periods and informed consent), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (protecting choices of family living arrangements, but refusing to extend right to unrelated individuals and not questioning adoption of neutral land-use regulations limiting dwelling size), *and Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that state cannot prevent parents from educating their children

provided little guidance on what constitutes a “compelling interest,”³⁹ but it has indicated that a statute can satisfy the compelling interest test even when it infringes on a privacy right.⁴⁰ In some instances, the Court has suggested that nothing short of war is compelling;⁴¹ in others, it has implied that a uniform day of rest⁴² or limiting the actuality and appearance of corruption is sufficient.⁴³ The Court has also hinted that “extirpating the traffic in illegal drugs,” “preventing the community from being disrupted by violent disorders,” and “forestalling assassination attempts on the President” are compelling interests.⁴⁴

The Court has been equally imprecise in defining how “narrowly tailored” a statute must be to withstand strict scrutiny. Often the Court finds that a statute is not narrowly tailored when a less offensive alternative would serve the state’s purpose.⁴⁵ Yet, the Court does not always require the state to show that its chosen alternative is the least restrictive if a close fit exists between the state’s actual interest and the means by which it achieves that interest.⁴⁶

in private school, yet suggesting that state may dictate minimum requirements for education received).

39. Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment “Privacy” Law: An Essay on the Constitutionalization of Social Issues*, Law & Contemp. Probs., Winter 1988, at 79, 93–95.

40. The Court has occasionally permitted state interests to infringe upon a fundamental right of privacy. *See, e.g., Casey*, 505 U.S. 833 (finding that informed consent requirements, 24-hour waiting period, parental consent provision, and reporting and recordkeeping requirements do not impose undue burden on woman’s right to abortion); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) (upholding requirement of pathology report for each abortion performed and requirement of minor’s security of consent from parent or juvenile court); *Roe*, 410 U.S. 113 (finding compelling state interest in regulating abortion at end of first trimester for preservation of maternal health and compelling state interest in protecting fetal life after viability).

41. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding wartime racial classification against equal protection challenge). It is unclear whether “compelling” has the same meaning in the substantive due process context as it does in the equal protection context.

42. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

43. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

44. *Branzburg v. Hayes*, 408 U.S. 665, 700–01 (1972).

45. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 389 (1978) (finding that state has equally effective means for exacting compliance with child support obligations that do not impinge upon right to marry).

46. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 885–87 (1992) (upholding 24-hour waiting period between provision of information and performance of abortion as not constituting “undue burden” when, arguably, provision that merely required information about abortion and alternatives be given to woman would have been equally effective and less restrictive); *Buckley*, 424 U.S. at 60–84 (upholding disclosure requirement for campaign contributions against First

III. COURTS HAVE NOT RESOLVED WHETHER FORNICATION LAWS VIOLATE SUBSTANTIVE DUE PROCESS

A. *The U.S. Supreme Court Has Not Addressed Whether Fornication Laws Violate Substantive Due Process Guarantees*

1. *The Supreme Court Has Avoided Interfering with State Regulation of Fornication*

The U.S. Supreme Court has had numerous opportunities to attack the broad array of American laws that forbid private consensual sexual conduct, but it has consistently denied certiorari to these cases.⁴⁷ Although the Court has upheld laws prohibiting sodomy as applied to homosexuals, it has not considered their constitutionality as applied to consenting heterosexual adults.⁴⁸ Its opinions have ceded to state legislatures “a full measure of discretion in fashioning means to prevent fornication.”⁴⁹ The Court has extended the fundamental right to privacy to individuals’ decisions relating to marriage,⁵⁰ procreation,⁵¹ contraception,⁵² and child bearing,⁵³ but, it has insisted that its decisions in the privacy cases have “not definitively answered the difficult question

Amendment challenge when use of higher threshold for required disclosure would have been less onerous alternative for preventing corruption).

47. See, e.g., *Henry v. City of Sherman*, 117 S. Ct. 1098 (1997), *denying cert. to* 928 S.W.2d 464 (Tex. 1996) (discharge of police officer for adultery); *Oklahoma v. Post*, 479 U.S. 890, *denying cert. to* *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986) (right to select consensual adult sex partners and engage in abnormal sex acts, whether married or unmarried); *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052, *denying cert. to* 578 F.2d 1374 (3d Cir. 1978) (discharge of two public employees for adultery and cohabitation); see also Thomas C. Grey, *Eros, Civilization and the Burger Court*, *Law & Contemp. Probs.*, Summer 1980, at 86 (noting that Court has avoided number of chances to overturn American laws forbidding sexual expression).

48. *Bowers v. Hardwick*, 478 U.S. 186, 188 n.2 (1986).

49. *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972); see also *Bowers*, 478 U.S. at 191 (emphasizing that claim that privacy line of cases “stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable”); *Griswold v. Connecticut*, 381 U.S. 479, 498–99 (1965) (Goldberg, J., concurring) (stating that constitutionality of Connecticut’s laws against adultery and fornication is “beyond doubt” and that “Court’s holding today . . . in no way interferes with a State’s proper regulation of sexual promiscuity or misconduct”).

50. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

51. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541–42 (1942).

52. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977); *Eisenstadt*, 405 U.S. at 453–54.

53. *Carey*, 431 U.S. at 685; *Roe v. Wade*, 410 U.S. 113, 153 (1973).

whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults.”⁵⁴

2. *The Abortion and Contraception Cases Do Not Establish a Generalized Right to Engage in Sex*

Supreme Court opinions extending the right to privacy to individuals’ decisions about abortion and contraception may provide impetus for challenging fornication laws, but none of these opinions indicate that the right to privacy protects fornication. In *Griswold v. Connecticut*, the Supreme Court held that a law forbidding the use of contraceptives unconstitutionally intruded upon the right of marital privacy.⁵⁵ The majority inferred a general right to privacy from the “penumbras” of the First, Third, Fourth, Fifth, and Ninth Amendments.⁵⁶ Concurring Justices located the privacy right in the Ninth Amendment, finding it to emanate from the “traditions and [collective] consciences of our people”⁵⁷ and be “implicit in the concept of ordered liberty.”⁵⁸ The Court, at least temporarily, limited the reach of *Griswold* by firmly grounding the newly recognized privacy right in the sanctity of marriage.⁵⁹

Years later, in *Eisenstadt v. Baird*, the Court invalidated a Massachusetts statute criminalizing the dispensation of contraceptives to unmarried persons.⁶⁰ A plurality decided that the statute’s differential treatment of married and unmarried persons was arbitrary, and hence a violation of the Equal Protection Clause.⁶¹ The Court did not question the legitimacy of the state’s goal of preventing fornication;⁶² rather, it found that deterrence of nonmarital sexual intercourse could not reasonably be

54. *Carey*, 431 U.S. at 688–89 n.5.

55. 381 U.S. 479, 486 (1965).

56. *Id.* at 484–85.

57. *Id.* at 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

58. *Id.* at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

59. *Id.* at 486; see also *id.* at 495–99 (Goldberg, J., concurring), 502, 505–07 (White, J., concurring).

60. 405 U.S. 438, 440 (1972).

61. *Id.* at 454–55.

62. The *Eisenstadt* plurality conceded “that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as ‘[e]vils . . . of different dimensions and proportions, requiring different remedies.’” 405 U.S. at 448 (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955)).

regarded as the purpose of the Massachusetts law.⁶³ The Court offered the following expansive dictum, upon which some courts have relied to support the idea that *Griswold's* privacy right, to the extent that it protects sexual relations, is not limited to the marital relationship.⁶⁴

If the right to 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.⁶⁵

The Court, however, underscored that it was not deciding whether statutes forbidding the distribution of contraceptives to unmarried persons infringed upon the right to privacy.⁶⁶

Carey v. Population Services International clarified the relationship between sexual privacy and contraception.⁶⁷ The Court held unconstitutional a New York statute that forbid the sale of contraceptives to married or unmarried persons under age sixteen, and prohibited distribution to people over sixteen by anyone other than a licensed pharmacist.⁶⁸ *Carey* characterized the combined reasoning of *Griswold* and *Eisenstadt* as protecting “the right of the individual . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child.”⁶⁹ The Court did not recognize an independent fundamental right of access to contraceptives, but held such access essential to preserve the constitutional right to privacy that protects decisions concerning childbearing.⁷⁰ Hence, the Court subjected the regulation of contraception to strict scrutiny.⁷¹ Although some may use the *Carey* decision as a springboard for challenging fornication statutes, the *Carey* Court did not object to the state's policy of reducing the

63. *Eisenstadt*, 405 U.S. at 448–50.

64. See, e.g., *State v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976) (invalidating criminal sodomy statute as applied to consenting unmarried adults); *State v. Saunders*, 381 A.2d 333, 339–40 (N.J. 1977) (striking down fornication statute); *People v. Onofre*, 415 N.E.2d 936, 940–41 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981) (striking down law criminalizing consensual sodomy between unmarried adults).

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

66. *Id.* at 453–55.

67. 431 U.S. 678 (1977).

68. *Id.* at 681–82.

69. *Id.* at 687 (quoting *Eisenstadt*, 405 U.S. at 453).

70. *Id.* at 688.

71. *Id.* at 688–89.

incidence of premarital sex. It merely found no evidence that withholding the availability of contraceptives accomplished that goal.⁷²

In *Roe v. Wade*, the Court expanded the right to privacy by holding that the privacy right encompassed a woman's right to choose whether to have an abortion.⁷³ The Court articulated, however, that the right to privacy does not mean that "one has an unlimited right to do with one's body as one pleases."⁷⁴ The Court required that prior to the end of the first trimester, the abortion decision and its effectuation be left to the judgment of the woman and her physician.⁷⁵ It determined that the state had a compelling interest in limited regulation of abortion after the end of the first trimester, and a compelling interest in regulating or even proscribing abortion after fetal viability.⁷⁶

The joint opinion crafted by Justices Kennedy, Souter, and O'Connor in *Planned Parenthood v. Casey* spoke little of a right to privacy, but did contain seemingly limitless dicta embracing an individual's right to make decisions about intimate and personal matters.⁷⁷ The plurality reaffirmed the "central holding" of *Roe*, but abandoned its "rigid trimester framework" and adopted an "undue burden" test for evaluating abortion restrictions.⁷⁸ It upheld several of the Pennsylvania statute's restrictions on abortion under this standard,⁷⁹ suggesting that the privacy protection was not impenetrable.

3. *Additional Decisions Indicate the Court's Reluctance to Expand the Scope of Privacy*

Although the Court has linked privacy to intimate places such as the marital bedroom⁸⁰ and the home,⁸¹ it has expressed unwillingness to

72. *Id.* at 695.

73. 410 U.S. 113 (1973).

74. *Id.* at 154.

75. *Id.* at 164–65.

76. *Id.*

77. 505 U.S. 833, 851 (1992) (stating that "choices central to personal dignity and autonomy [and] right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life [are] central to the liberty protected by the Fourteenth Amendment").

78. *Id.* at 878–79.

79. *Id.* at 880, 887, 898–99, 901.

80. *See Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

81. *See Stanley v. Georgia*, 394 U.S. 557 (1969) (striking down Georgia anti-pornography statute to extent that it criminalized possession of pornography by adult in home).

expand the category of fundamental rights in any way that would necessitate the invalidation of statutes prohibiting sexual crimes committed in the home.⁸² In *Stanley v. Georgia*, a pornography case, the Court acknowledged the claimant's "right to satisfy his intellectual and emotional needs in the privacy of his own home."⁸³ However, it based its decision almost entirely upon the First Amendment freedom of speech and the press,⁸⁴ and emphasized that illegal conduct is not protected just because it occurs in the home.⁸⁵

The Court has also refused to deem conduct beyond state regulation merely because it involves consenting adults.⁸⁶ In *Bowers v. Hardwick*, the Court upheld a Georgia anti-sodomy statute as applied to consenting adult homosexuals in the privacy of the home.⁸⁷ Noting that proscriptions against homosexual sodomy have "ancient roots,"⁸⁸ the Court concluded that homosexual sodomy was not a fundamental liberty.⁸⁹ It also detected no relationship between homosexual activity and previously protected privacy rights concerning the family, marriage, and procreation.⁹⁰ The Court rejected the notion that "any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."⁹¹ Since *Bowers*, no court has specifically ruled on the constitutionality of fornication statutes as applied to adults;⁹² thus, the

82. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986).

83. 394 U.S. at 565.

84. *Id.*

85. *Id.* at 568 n.11.

86. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973) (upholding state prohibition of commercial exhibition of obscene films to consenting adults).

87. 478 U.S. 186.

88. *Id.* at 192.

89. *Id.* at 192-93.

90. *Id.* at 191.

91. *Id.*

92. In 1988, the Maryland appellate court upheld a statute prohibiting certain sexual acts between consenting, unmarried, heterosexual adults. *Schochet v. State*, 541 A.2d 183 (Md. Ct. Spec. App. 1988). However, the Maryland Supreme Court held that the statute criminalizing certain sexual acts did not encompass consensual, noncommercial, heterosexual activity between adults in the privacy of the home, and thus did not decide the issue. *Schochet v. State*, 580 A.2d 176 (Md. 1990). Courts have relied on the *Bowers* Court's reasoning in declaring that other illicit adult sexual relationships are not protected by the right to privacy. See, e.g., *Roe II v. Butterworth*, 958 F. Supp. 1569, 1574, 1577-83 (S.D. Fla.), *aff'd*, 129 F.3d 1221 (11th Cir. 1997) (prostitution); *Oliverson v. West Valley City*, 875 F. Supp. 1465, 1482-83 (D. Utah 1995) (adultery); *City of Sherman v. Henry*, 928 S.W.2d 464, 469-72 (Tex. 1996), *cert. denied*, 117 S. Ct. 1098 (1997) (adultery).

extent to which *Bowers* signifies the Court's approval of State regulation of nonmarital sexual conduct has yet to be determined.

Recently, in *Washington v. Glucksberg*, the Supreme Court held that a right to assisted suicide is neither rooted in the nation's history or traditions⁹³ nor analogous to the specific freedoms protected in the Bill of Rights or the Due Process Clause.⁹⁴ The Court expressed its reluctance to expand the concept of substantive due process⁹⁵ and explained that *Casey* did not mean that the Due Process Clause protects any and all important, intimate, and personal decisions.⁹⁶ The Court's reasoning in *Glucksberg* casts doubt upon the recognition of a fundamental right to fornicate.

B. Lower Courts Disagree on Whether Fornication Laws Violate the Right to Privacy

Lower courts are divided over the constitutionality of laws prohibiting fornication and "deviant" heterosexual acts between unmarried consenting adults.⁹⁷ Most lower courts that have invalidated such statutes have done so on the ground that they violate the individual's right to privacy.⁹⁸ Some courts have also given special consideration to the right of spatial privacy⁹⁹ or held that statutes prohibiting certain heterosexual conduct between unmarried persons violate constitutional guarantees of equal protection.¹⁰⁰

Conversely, numerous lower courts have upheld statutes prohibiting fornication and deviant sexual acts between consenting heterosexual

93. 117 S. Ct. 2258, 2271 (1997).

94. *Id.* at 2267–71.

95. *Id.* at 2267–68.

96. *Id.* at 2271.

97. *Schochet v. State*, 580 A.2d 176, 181–82 (Md. 1990) (noting significant division among courts addressing constitutionality of punishing consensual sex between heterosexual adults); *see also infra* notes 99–102.

98. *See, e.g.*, *State v. Pilcher*, 242 N.W.2d 348, 359 (Iowa 1976); *State v. Saunders*, 381 A.2d 333, 340–41 (N.J. 1977); *People v. Onofre*, 415 N.E.2d 936, 940 (N.Y. 1980); *Post v. State*, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986).

99. *See, e.g.*, *Post*, 715 P.2d at 1109 (construing *Stanley v. Georgia*, 394 U.S. 555 (1969), to extend right to privacy to matters of sexual gratification occurring in home).

100. *See, e.g.*, *Purvis v. State*, 377 So. 2d 674, 676–77 (Fla. 1979); *Commonwealth v. Bonadio*, 415 A.2d 47, 51 (Pa. 1980). Potential equal protection challenges are beyond the scope of this Comment.

adults in private.¹⁰¹ In these cases, courts have found that none of the U.S. Supreme Court's holdings imply that the right to privacy protects private sexual activity between unmarried consenting adults.¹⁰² They have reasoned that imposing sanctions on behavior deemed harmful or offensive by the state represents a valid exercise of the police power.¹⁰³

IV. FORNICATION STATUTES RECEIVE AND WITHSTAND RATIONAL BASIS REVIEW

Commentators have argued that the Supreme Court's jurisprudence places the constitutionality of fornication statutes in serious doubt.¹⁰⁴ Yet, neither the Court's historical nor common law approach supports the existence of a fundamental right to fornicate. Consequently, the Court must review fornication statutes under the rational basis test. Fornication statutes are rationally related to state interests; thus, they do not violate substantive due process.

A. *History and Tradition Do Not Support a Fundamental Right to Engage in Consensual, Nonmarital, Heterosexual Sex*

Fornication was a punishable offense in the United States at the time of colonization,¹⁰⁵ and remained illegal in forty states¹⁰⁶ until the early 1970s.¹⁰⁷ Such consistent prohibition of consensual heterosexual conduct among unmarried adults¹⁰⁸ indicates that a right to fornicate is not one of

101. See, e.g., *State v. Bateman*, 547 P.2d 6 (Ariz. 1976); *State v. Elliott*, 551 P.2d 1352 (N.M. 1976); *State v. Poe*, 252 S.E.2d 843 (N.C. Ct. App. 1979); *State v. Santos*, 413 A.2d 58 (R.I. 1980). Three cases, now overruled by *State v. Saunders*, 381 A.2d 333 (N.J. 1977), provide additional analysis of why fornication statutes do not violate the Fourteenth Amendment. *State v. Clark*, 275 A.2d 137 (N.J. 1971); *State v. Lutz*, 272 A.2d 753 (N.J. 1971); *State v. Barr*, 265 A.2d 817, 819 (N.J. Super. Ct. App. Div. 1970).

102. See, e.g., *Bateman*, 547 P.2d at 9–10; *Elliott*, 551 P.2d at 1353; *Poe*, 252 S.E.2d at 844–45; *Santos*, 413 A.2d at 66–68.

103. See, e.g., *Bateman*, 547 P.2d at 10; *Poe*, 252 S.E.2d at 845; see also *Barr*, 265 A.2d at 819, overruled by *Saunders*, 381 A.2d 333.

104. See Note, *Constitutional Barriers*, *supra* note 20, at 1663; Note, *Fornication, Cohabitation, and the Constitution*, 77 Mich. L. Rev. 252, 257 (1978).

105. *May*, *supra* note 16, at 205; see also *supra* Part I; Model Penal Code § 213.6, note on adultery and fornication, at 430 (1980) (discussing historical prohibition of fornication).

106. *Sexual Behavior and the Law*, *supra* note 21, at 10.

107. *Green*, *supra* note 3, at 228.

108. See *supra* Part I.

those rights so “implicit in the concept of ordered liberty”¹⁰⁹ that “neither liberty nor justice would exist if [it] were sacrificed.”¹¹⁰

Lack of enforcement¹¹¹ and widespread disobedience of the law¹¹² do not alter this conclusion. Nonenforcement and violation of the law may suggest states’ tacit acceptance of the difficulty in enforcing and obeying fornication laws, but such relaxed attitudes do not elevate non-marital sex to constitutionally protected status.¹¹³ Even if legislative decriminalization were to occur nationwide,¹¹⁴ nonmarital sex would only be a permitted activity, not a protected one.¹¹⁵ The Constitution does not protect as fundamental what, until recently, virtually all states have prohibited since the founding of the Republic.¹¹⁶ Fornication is hardly “so rooted in the traditions and conscience of our people as to be ranked fundamental.”¹¹⁷

B. The Fundamental Right to Privacy Does Not Encompass a Right to Fornicate

1. A Fundamental Right to Make Personal Decisions Does Not Imply a Fundamental Right to Engage in Fornication

If there is a constitutional right to make decisions relating to contraception and abortion, must there be a constitutional right to use

109. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by* *Benton v. Maryland*, 395 U.S. 784 (1969).

110. *Id.* at 326.

111. See Note, *Post-Kinsey: Voluntary Sex Relations as Criminal Offenses*, 17 U. Chi. L. Rev. 162, 170–73 (1949–50); see also Model Penal Code, *supra* note 106, at 434. Cf. Hillary Greene, Note, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 Yale L. & Pol’y Rev. 169 (1997) (noting that fornication laws are rarely directly enforced and arguing that secondary application of disused laws is unjust). *But see, e.g., State v. Spanbauer*, 322 N.W.2d 511 (Wis. 1982) (upholding conviction of fornication); Hardy, *supra* note 20, at A1 (discussing Emmet County’s prosecution of teen fornicators under Idaho’s 1920 fornication law).

112. See *MacNamara & Sagarin*, *supra* note 17, at 187 (observing that fornication laws have withered away under impact of mass open defiance); Note, *supra* note 112, at 163, 167 (giving percentage of white males whose acts would subject them to prosecution under sex statutes).

113. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 567 (1983).

114. See Model Penal Code, *supra* note 106, at 436–39 (advocating decriminalization).

115. Hafen, *supra* note 114, at 567.

116. See *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986).

117. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

contraceptives while engaging in sexual intercourse, whether married or single?¹¹⁸ Some scholars have asserted that the abortion and contraception cases do not concern the right of access to contraception or abortion, but rather “the right to liberate sex from conception—to engage in and perhaps even enjoy sex for its own sake.”¹¹⁹ However, a generalized right to sexual gratification, whether marital or non-marital, does not logically flow from the premises of the contraception and abortion cases.

a. The Court’s Opinions Protect Childbearing, Not Sex

In its abortion and contraception cases, the Court protected the freedom to decide whether to have children, not the freedom to engage in nonmarital sex.¹²⁰ The right to prevent or terminate a pregnancy stems, at least in part, from the Court’s unwillingness to force the creation of an unwanted parent-child relationship.¹²¹ As the Court explained:

‘It would be plainly unreasonable to assume that [the state] has prescribed pregnancy and the birth of an unwanted child [or the physical and psychological dangers of an abortion] as punishment for fornication.’ We remain reluctant to attribute any such ‘scheme of values’ to the state.¹²²

This suggests that the Constitution protects a woman’s rights to contraception and abortion not because it sanctions sexual intercourse in all contexts, but because restrictions on such rights intrude unfairly upon

118. See, e.g., *Doe v. Duling*, 603 F. Supp. 960, 966 (E.D. Va. 1985) (remarking, “[n]ecessarily implicit in the right to make decisions regarding childbearing is the right to engage in sexual intercourse”), *rev’d on other grounds*, 782 F.2d 1202 (4th Cir. 1986).

119. Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 J. Fam. L. 45, at 84 (1991/1992) (referring to analysis of Laurence H. Tribe, *American Constitutional Law*, *supra* note 33, at 1423); see also *California v. LaRue*, 409 U.S. 109, 132 n.10 (1972) (Marshall, J., dissenting) (citing *Griswold* for “serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults”); Note, *supra* note 27, at 733.

120. James Rizzo, Comment, *The Constitutionality of Sodomy Statutes*, 45 Fordham L. Rev 553, 575–76 (1976).

121. Hafen, *supra* note 114, at 542. Cf. Grey, *supra* note 48, at 88 (suggesting that such decisions were based on concerns that undesired pregnancies, single-parent families, irresponsible youthful parents, and abandoned or neglected children threaten social and family stability).

122. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 695 (1977) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972)).

a woman by increasing the likelihood that she will have to bear and raise a child.¹²³

The Court's opinions in the abortion and contraception cases evince its preoccupation with the "unique" liberty involved in the decision of whether to bear a child:¹²⁴ the right to contraception or abortion cannot be proscribed because to do so would impose anxiety, suffering, and mental, physical, and financial constraints on a woman.¹²⁵ Limiting one's choice to engage in sexual relations by requiring an individual to enjoy sex only within a marital relationship does not burden the individual in a comparable manner. The physical, emotional, and financial burdens of laws restricting contraception and abortion are of a much greater magnitude than those associated with prohibiting fornication. It does not follow, therefore, that the Court's disapproval of fornication requires its disapproval of abortion and contraception.¹²⁶

In its abortion and contraception decisions, the Court did not doubt the legitimacy of a state's use of the criminal law to directly prohibit immoral sexual activity; rather, it disapproved of the government's effort to stop sexual activity through regulation of procreation. The Court has continually distinguished the right to access contraceptives and abortion from the right to sexual freedom.¹²⁷ Had *Griswold*, *Eisenstadt*, *Carey*, *Roe*, and *Casey* merely concerned sex, the Court could not have brushed them aside so easily in *Bowers*.¹²⁸ Childbearing and sexual relations are simply two different matters.¹²⁹

123. Note, *Fornication*, *supra* note 105, at 295–96.

124. *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

125. *Id.*

126. Note, *Fornication*, *supra* note 105, at 296; *see also* Grey, *supra* note 48, at 88 (asserting that contraception and abortion cases are simply family planning cases based on practical considerations).

127. *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986); *Carey*, 431 U.S. at 688 n.5; *see also* Grey, *supra* note 48, at 88 n.31.

128. Richard Posner, *Sex and Reason* 342 (1992).

129. Hafen, *supra* note 114, at 531.

b. *The Court's Privacy Jurisprudence Has Limited the Scope of Protected Personal Decisions*

The U.S. Supreme Court has severely restricted the scope of personal decisions protected by the right to privacy.¹³⁰ None of the Court's privacy cases indicate that protecting an individual's right to make personal decisions relating to "marriage, procreation, [and] contraception" necessitates protecting decisions concerning private consensual adult sexual relations.¹³¹ In fact, in *Carey* and *Roe*, the Court carefully noted that it has not extended protection to the decision to fornicate.¹³²

The *Casey* decision described the Fourteenth Amendment's liberty provision as protecting personal decisions involving intimate choices "central to personal dignity and autonomy"¹³³ that "originate within the zone of conscience and belief."¹³⁴ The Court has subsequently severely disabled the seemingly limitless scope of this language,¹³⁵ explicitly stating in *Glucksberg* that reference to decisional autonomy in earlier privacy opinions¹³⁶ in no way expanded the Court's privacy jurisprudence.¹³⁷ The right to privacy does not encompass decisions related to how and when to have sexual intercourse just because such decisions involve intimate, personal choices and may be central to personal dignity and autonomy.¹³⁸ As the Court noted:

That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal

130. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997). *But see* Tribe, *American Constitutional Law*, *supra* note 33, at 1423.

131. *Carey*, 431 U.S. at 684–85 (citations omitted), 688 n.5, 694 n.17. *But see supra* note 99 (listing pre-*Bowers* opinions concluding that consenting adults possessed fundamental right to make decision to engage in nonmarital sex).

132. *See, e.g., Carey*, 431 U.S. at 688 n.5, 694 n.17 (noting that Court has not decided whether Constitution prohibits state statutes regulating private consensual sexual adult conduct); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (rejecting broad right of individual autonomy allowing one to "do with one's body as one pleases").

133. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

134. *Id.* at 852.

135. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997).

136. *See, e.g., Casey*, 505 U.S. at 851.

137. *Glucksberg*, 117 S. Ct. at 2271.

138. *Id.*

decisions are so protected . . . and *Casey* did not suggest otherwise.¹³⁹

The decision to have sex outside of marriage is important and personal;¹⁴⁰ however, decisions to engage in homosexual conduct and to commit assisted suicide are equally essential to individual autonomy, yet the Court has refused to protect them.¹⁴¹

The Court has declined to create an inherently limitless and implausible right of individual autonomy in personal decisionmaking.¹⁴² Bestowing fundamental status on decisions related to intimate aspects of an individual's life could potentially enable an individual to label any decision an intimate one, thereby hindering the state's ability to regulate his or her conduct. Even advocates of an expanded right to privacy that would encompass nonmarital sexual activity recognize the necessity of limiting its application,¹⁴³ acknowledging that "[a] concept in danger of embracing everything is a concept in danger of conveying nothing."¹⁴⁴

c. *Logic Denies That a Fundamental Right to Contraception and Abortion Necessitates a Fundamental Right to Engage in Nonmarital Sex*

Finally, as a matter of logic, the privacy right's protection of personal decisions relating to procreation, contraception, and childbearing¹⁴⁵ does not require protection of nonmarital heterosexual intercourse. For example, it may be unlawful for a car dealer to deny people without drivers' licenses the right to purchase a car; yet, it does not logically follow that these people must have a right to drive a car without a license. Criminals possess constitutional rights even though they commit crimes. An individual can have a right to wear a safety helmet *when* he rides a bicycle, without having a right to ride a bicycle.¹⁴⁶ Homosexuals

139. *Id.*

140. See, e.g., David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *Hastings L.J.* 957, 1003–09 (1979) (discussing importance of sex to humans).

141. See *Glucksberg*, 117 S. Ct. at 2270 (assisted suicide); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (homosexual sodomy).

142. See, e.g., *Glucksberg*, 117 S. Ct. at 2267; *Bowers*, 478 U.S. at 194–95.

143. Note, *supra* note 27, at 673; Tribe, *American Constitutional Law*, *supra* note 33, at 1304.

144. Tribe, *American Constitutional Law*, *supra* note 33, at 1304.

145. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

146. Grey, *supra* note 48, at 88 n.31.

have a fundamental right to contraception,¹⁴⁷ though they do not necessarily have the right to use it in homosexual intercourse.¹⁴⁸ Hence, fundamental rights of access to contraception and abortion do not necessitate a fundamental right to sexual liberty.¹⁴⁹

2. *Sexual Conduct Falls Within the Right to Privacy, if at All, Only When the Consenting Adults Are Married to Each Other*

The Court's decisions in the line of privacy cases indicate that if a fundamental right to sexual privacy exists, it exists only within the marriage.¹⁵⁰ In *Griswold*, Justice Douglas spoke of "the notions to privacy surrounding the marriage relationship"¹⁵¹ and marriage as "intimate to the degree of being sacred."¹⁵² *Eisenstadt* merely held that unmarried individuals must have equal access to contraceptives (unless the legislature has a rational basis for concluding otherwise), and not that the right to privacy protects nonmarital, consensual, sexual intimacy.¹⁵³ Although the Court in *Carey* reaffirmed the right of access to contraception for unmarried individuals, it deliberately emphasized that it was not extending the right to privacy to nonmarital sex.¹⁵⁴

147. See *Carey*, 431 U.S. 678; *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

149. See, e.g., *Grey*, *supra* note 48, at 86.

150. *But see* *Lovisi v. Slayton*, 363 F. Supp 620, 625 (E.D. Va. 1973) (finding that private, consensual, adult sexual behavior is fundamental right based on intensely personal and intimate nature of sexuality itself); Tribe, *American Constitutional Law*, *supra* note 33, at 1423 (opining that decisions in privacy cases could not have revolved around marriage or family); Richards, *supra* note 141, at 981 n.107 (citing *Roe v. Wade*, 401 U.S. 113 (1973); *Eisenstadt*, 405 U.S. 438; and *Stanley v. Georgia*, 394 U.S. 557 (1969) as evidence that right to privacy applies to nonmarital contexts).

The theory that locates the right to privacy in personal autonomy represents an additional "mainstream" method of establishing a fundamental right to fornication, but is beyond the scope of this Comment. See Richards, *supra* note 141; see also David A.J. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 *Fordham L. Rev.* 1281 (1977). Cf. *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 *U. Miami L. Rev.* 521, 564-93 (1986) [hereinafter *Survey*] (comparing autonomy theory, as applied to sexual privacy, with family-based right to privacy).

151. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

152. *Id.*

153. Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 *B.U. L. Rev.* 765, 772-74 (1973).

154. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 n.5, 694 n.17 (1977); see also *id.* at 705 (Powell, J., concurring in part and concurring in judgment) (stating that "[n]either our precedents nor sound principles of constitutional analysis require state legislation to meet the exacting 'compelling state interest' standard whenever it implicates sexual freedom").

Justice Douglas's insertion of the adjective "marital" when referring to "the sacred precincts of marital bedrooms"¹⁵⁵ in *Griswold* was not inadvertent. Indeed, it was also a bedroom occupied by consenting unmarried adults to which the *Bowers* Court refused to extend the right to privacy.¹⁵⁶ A lower court observed, "[t]he critical difference between the bedroom protected in *Griswold* and the bedroom not protected in *Bowers v. Hardwick* is that the former was a marital bedroom and the latter was not."¹⁵⁷

Nonmarital sex, whether between heterosexuals or homosexuals, does not "spring from the same deep well of cultural values" or produce the same effects as do decisions about marriage, procreation, or child rearing.¹⁵⁸ It is likely, then, that the right to privacy did not protect the plaintiffs in *Bowers* because their sexual conduct lacked the imprimatur of marriage, not solely because their sexual conduct lacked the quality of heterosexuality.¹⁵⁹ The Court has determined that valuable reasons exist for the "sacred" status of the marital relationship;¹⁶⁰ thus, it has maintained the distinction throughout its decisions.¹⁶¹

3. *The Right to Spatial Privacy Does Not Encompass Matters of Sexual Gratification that Occur in the Home*

Stanley was grounded primarily in the First Amendment, not the Fourteenth, and hence has limited relevance in an action for a violation of one's federal privacy right.¹⁶² Moreover, whatever right to privacy in the home exists is unlikely to qualify as fundamental.¹⁶³ The Court has emphasized that illegal conduct is not immune merely because it occurs

155. *Griswold*, 381 U.S. at 485.

156. *Schochet v. State*, 541 A.2d 183, 188 (Md. Ct. App. 1988), *rev'd*, 580 A.2d 176 (Md. 1990).

157. *Id.* (citing *Griswold*, 381 U.S. at 485).

158. *Heymann & Barzelay*, *supra* note 154, at 774.

159. *Schochet*, 541 A.2d at 188.

160. *Griswold*, 381 U.S. at 485–86 (noting that marriage "promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects" and is "an association for as noble a purpose as any involved in [the Court's] prior decisions").

161. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986) (finding no relationship between homosexuality and privacy right protecting marriage); *Griswold*, 381 U.S. 479, 486 (upholding right of married people to use contraception).

162. *Stanley v. Georgia*, 394 U.S. 557, 559 (1969); *see also Bowers*, 478 U.S. at 195 (noting that *Stanley* was "firmly grounded in the First Amendment").

163. Note, *Fornication*, *supra* note 105, at 276–78.

in the home.¹⁶⁴ The *Stanley* Court also implied that demonstration of external harm would eliminate the protection extended to the petitioner.¹⁶⁵ Given the evident harms of fornication,¹⁶⁶ the concept of spatial privacy cannot protect such conduct.¹⁶⁷

C. *Fornication Laws are Rationally Related to a Legitimate State End*

As previously demonstrated, a fundamental right to fornicate has not historically been protected and may not be inferred from the various lines of reasoning about the right to privacy. Consequently, the Court will uphold the statute as long as a state can show some rational relationship between its means and ends that may legitimately be served by exercising its police power.¹⁶⁸ Because the state has several rational bases for prohibiting fornication—preventing disease and birth out of wedlock,¹⁶⁹ promoting a certain baseline morality,¹⁷⁰ and protecting

164. See *Stanley*, 394 U.S. at 568 n.11. Activity protected by virtue of being in one's home has centered on the beliefs, thoughts, and emotions of individuals, not on their actions. *Id.* at 565–66.

165. See Note, *Fornication*, *supra* note 105, at 277 (discussing demonstration of external harm as limit on right to privacy within home); see also *Stanley*, 394 U.S. at 566–67 (distinguishing *Stanley* from *Roth v. United States*, 354 U.S. 476 (1957), in which Court held that obscenity was not within area of constitutionally protected speech or press, on grounds that dangers of obscene material falling into hands of children or intruding upon sensibilities or privacy of general public are not present in *Stanley* where issue is *private* possession of obscene material).

166. See *infra* Part VI (discussing tendency to promote disease and extramarital birth, discredit public morals, and discourage marriage).

167. *But see* *Post v. State*, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986) (interpreting *Stanley* to extend right to privacy to matters of sexual gratification that occur in home).

168. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–17, 40, 51 (1973); see also *supra* Part II.B.

169. See *infra* Part V.A.; see also *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding presumption that child born to married woman cohabiting with husband is child of marriage rather than of natural father); *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) (upholding mandatory vaccination).

170. See *infra* Part V.B. The police power of a state embraces “regulations to promote the health, peace, morals, education, and good order of the people.” *Barbier v. Connolly*, 113 U.S. 27, 31 (1885). The Supreme Court has upheld the right of states to regulate morality and sexual promiscuity. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66–69 (1973); *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting).

marriage¹⁷¹—fornication statutes pass the lenient traditional rational basis test and do not violate substantive due process.¹⁷²

V. FORNICATION STATUTES SURVIVE STRICT SCRUTINY

Even if the Court were to find a fundamental right to engage in sex, fornication statutes would survive strict scrutiny. States have compelling reasons to restrict the exercise of the right to marriage. Fornication statutes are narrowly tailored to accomplish these goals.

A. Preventing Disease and Extramarital Birth

The state's interests in preventing extramarital birth and sexually transmitted diseases (STDs) are compelling.¹⁷³ The more difficult question is whether fornication statutes are narrowly tailored to achieve these goals.¹⁷⁴

Abstinence is a more effective means of achieving the state's goals of preventing births out of wedlock and STDs than either contraception or sex education programs.¹⁷⁵ Sex education has little effect on teenagers' decisions to engage in or postpone sex and does not significantly reduce teen pregnancy.¹⁷⁶ Contraceptives, even when used properly, tend to be

171. See discussion *infra* Part V.C.; see also *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (upholding denial of franchise to those engaged in polygamous marriage and noting legitimacy of legislation designed to promote traditional notions of marriage).

172. See, e.g., *Duke Power Co. v. Carolina Environ. Study Group* 438 U.S. 59, 83–84 (1978) (noting that statutes not infringing on fundamental rights bear presumption of constitutionality, and burden is on party complaining of due process violation to establish that “‘legislature has acted in an arbitrary and irrational way’”) (citation omitted).

173. Siegel, *supra* note 120, at 87; *Survey*, *supra* note 151, at 623–24; Note, *supra* note 20, at 1668–70; Note, *Fornication*, *supra* note 105, at 298–301; see also *Michael H.*, 491 U.S. 110 (upholding presumption that child born to married woman cohabiting with husband is child of marriage rather than of natural father); *Jacobsen*, 197 U.S. 11 (upholding mandatory vaccination).

174. Siegel, *supra* note 120, at 87–88; *Survey*, *supra* note 151, at 623–35; Note, *supra* note 20, at 1669–70; Note, *Fornication*, *supra* note 105, at 298–99, 302–04.

175. Given the lack of enforcement of fornication laws, it is difficult to prove that they are a better deterrent; yet, even if such laws were enforced, empirical evidence on the effectiveness of such laws would be difficult to gather. See *infra* notes 177–78.

176. Barbara Dafoe Whitehead, *The Failure of Sex Education*, *Atlantic Monthly*, Oct. 1994, at 55, 68; see also Note, *Fornication*, *supra* note 105, at 302–03 (observing that education may be ineffective in preventing disease and extramarital births); Douglas Kirby et al., “School-based Programs to Reduce Sexual Risk Behaviors: A Review of Effectiveness,” *Public Health Reports*, May/June 1994, at 339, 345, 352–53, 359 (concluding that relationship between sex education

used irregularly and therefore are unreliable.¹⁷⁷ Hence, fornication laws are necessary to curb disease and extramarital births.¹⁷⁸

Fornication laws may be attacked as overinclusive¹⁷⁹ and underinclusive;¹⁸⁰ but, neither challenge is fatal. States can cure overinclusiveness problems by redrafting fornication statutes to exclude monogamous, healthy individuals who are infertile or sterile. With regard to underinclusiveness, the Supreme Court has recognized that piecemeal legislation is a pragmatic means of effecting needed reforms where a demand for comprehensiveness is not feasible at the current time.¹⁸¹ Finally, states can avoid underinclusiveness problems by requiring each applicant for a marriage license to submit to a blood test or sign an affidavit showing that the applicant does not have an STD or that the condition is known to both applicants.¹⁸²

programs and initiation of intercourse, use of contraceptives, and pregnancy rates remains unclear, and that sex education does not represent total solution to problems).

177. Whitehead, *supra* note 177, at 68. About 95% of U.S. women aged 15–44 who are at risk of unintended pregnancy use a contraceptive method. Alan Guttmacher Institute, *Facts in Brief: Contraceptive Use* (1998). Nonetheless, more than three million unintended pregnancies occur annually in the United States. *Id.* Thirty percent of all births now occur outside of marriage. June Carbone, Symposium, *Morality, Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 Santa Clara L. Rev. 267, 268 (1996).

Twelve million Americans contract an STD every year. Medical Inst. for Sexual Health, “*Condom Sense: Is it Enough?*” (n.d.). Even when condoms are used in every sexual encounter, which is rare, studies suggest that the risk of transmitting HIV cannot be entirely eliminated. *Id.*; see also John E. Anderson et al., *Condom Use for Disease Prevention Among Unmarried U.S. Women*, *Family Planning Perspectives*, vol. 28, no. 1, Jan/Feb. 1996 (documenting frequency of condom use).

178. Fornication laws may be insufficient to curb disease and extramarital births resulting from nonmarital sex, but they are a necessary supplement to education and contraception. See Whitehead, *supra* note 177, at 69 (noting that sex education works best when it combines clear messages about behavior with strong moral and logistical support for behavior sought).

179. Fornication statutes fail to distinguish between healthy and infected persons, and between sexually promiscuous individuals and monogamous unmarried couples; therefore, they may be an overinclusive way to prevent disease. Since numerous individuals have been sterilized or are infertile, fornication statutes may be an overinclusive method of preventing births out of wedlock. See *supra* note 175.

180. Fornication statutes may be an underinclusive means of preventing disease since they do not prohibit repeated marriages and thereby allow transmission of sexual infections between spouses. See *supra* note 175.

181. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 487–89 (1955).

182. See, e.g., D.C. Code § 30-117 (Supp. 1997) (requiring blood test for syphilis); Wash. Rev. Code § 26.04.210 (1996) (requiring marriage applicants to sign affidavit).

B. *Prohibiting Immoral Conduct*

Caselaw suggests that the state's interest in proscribing conduct in order to uphold traditional and deeply rooted moral values may be compelling.¹⁸³ A danger arguably exists that deeming morality a compelling interest will allow states to justify limitless infringements on fundamental rights by making "unprovable assumptions about what is good for the people."¹⁸⁴ But, the Court precludes such Orwellian scenarios by demanding that the moral purpose be embedded in the Nation's history, legal traditions, and practices to be compelling, and by requiring lawmakers to abide by the laws they pass.¹⁸⁵ Moral goals are only compelling, for purposes of constitutional analysis, when they are "deeply rooted in this nation's history and tradition."¹⁸⁶ Values like chastity and sexual abstinence outside of marriage are so basic to the traditions and institutions of our society¹⁸⁷ and so tightly defined, that they are compelling. The Equal Protection Clause also requires the democratic majority to abide by the laws they impose on the public,¹⁸⁸ further minimizing the potential that the state's "moral power" will lead to tyranny.

Fornication laws are a dramatic symbol of moral disapprobation and essential to achieving the state's goal of promoting morality. An alternative such as a statewide campaign promoting premarital abstinence may be a less restrictive means of promoting sexual morality; however, its effectiveness would be limited if the discouraged conduct were legal.¹⁸⁹ Fornication laws prohibit only that act that the state

183. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (stating that law is "constantly based on notions of morality" and upholding morality as rational basis for legislation). The Supreme Court has found no difficulty in upholding state laws legislating morality under the police power. *See, e.g.*, *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991) (holding that public indecency statute furthers substantial government interest in protecting morality); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62 (1973) (recognizing state's right to make "unprovable assumptions about what is good for the people").

184. *Paris Adult Theatre*, 413 U.S. at 62.

185. Concededly, tradition-based tests have inherent difficulties. *See supra* note 27.

186. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

187. *See supra* Part I.

188. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

189. The national "Just Say No (to Drugs)" campaign had the backing of legal prohibitions (and even so its effectiveness is unclear). *See also infra* Part VI.

considers to be the substantive problem.¹⁹⁰ These laws also have the unique ability to signal appropriate behavior and help reconstruct norms.¹⁹¹ Consequently, fornication statutes are narrowly tailored to promote the state's compelling interest in promoting moral sexual conduct.

C. *Encouraging and Maintaining the Integrity of Marriage*

One of the most threatening aspects of fornication is its potential to become an alternative to marriage, monogamy, and the family relationship, thereby undermining the valued institution of marriage.¹⁹² As nonmarital sex becomes more socially acceptable, individuals wait longer to get married or do not marry at all.¹⁹³ The state has a compelling interest in ensuring that the continuing allegiance to marriage and traditional family commitments does not decline.¹⁹⁴

Marriage is the basis of stable expectations in personal relationships, and carries with it a commitment to permanence.¹⁹⁵ The Court has long described marriage as "the most important relation in life"¹⁹⁶ and the "foundation of the family and of society, without which there would be neither civilization nor progress."¹⁹⁷ Justice Harlan wrote in *Poe v. Ullman*:

190. *Survey*, *supra* note 151, at 622–23.

191. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2032–33 (1996) (discussing ability of law to reconstruct norms).

192. The Court has recognized marriage as a fundamental right. *Zablocki v. Redhail*, 434 U.S. 374 (1978). Cf. J. Harvie Wilkinson & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 Cornell L. Rev. 563, 595 (1977) (referring to danger of homosexuality becoming alternative to heterosexuality and institutions associated with it).

193. The number of unmarried adults has doubled since 1970, and the proportion of unmarried adults has risen from 28% to 39%. Arlene F. Saluter, *Marital Status and Living Arrangements*, Mar. 1994, at vi–vii (Bureau of the Census, U.S. Dep't of Commerce). The estimated median age at first marriage in 1994 was 26.7 for men and 24.5 for women. *Id.* In 1956, the median age reached a low of 22.5 for men and 20.1 for women. Most of the increase occurring since 1956 has occurred since 1975. *Id.*

194. Distinguished sociologist Alice Rossie agrees that "the machine cultures of the West have [no] social institutions capable of providing individual loyalty and social integration to replace the bonds of the family." Karl Zinsmeister, *Marriage as the Male Antidote*, *Am. Enter.*, May/June 1996, at 46, 46 (quoting Alice Rossie); see also *id.* (quoting George Gilder).

195. Hafén, *supra* note 114, at 486.

196. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

197. *Id.* at 211.

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.¹⁹⁸

Men, women, and society benefit from marriage.¹⁹⁹ Nonmarital relationships perform some intimate and associational functions, but lack marriage's effectiveness in promoting a political structure that "limits government, stabilizes social patterns, and protects pluralistic liberty through the power of its own relational permanency."²⁰⁰ Even cohabitants in lengthy "marriage-like" relationships fare significantly worse than married couples.²⁰¹

Requiring people to postpone sexual gratification until they are married is not an excessively burdensome means of promoting marriage, particularly in light of the additional goals fornication statutes achieve. Laws extensively regulate other, equally significant aspects of family life.²⁰² Statutes mandating that individuals defer enjoyment of sex until marriage are no different from regulations on abortion and marriage.

198. *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

199. Married couples show lower levels of alcohol and cigarette consumption, higher earnings, and longer life spans. Lee A. Lillard & Linda J. Waite, *'Til Death Do Us Part: Marital Disruption and Mortality*, *Am. J. Soc.*, Mar. 1995, at 1131, 1131. Marriage also gives a sense of obligation to others, discouraging high-risk behaviors and encouraging financial earnings and savings. William R. Mattox, Jr., *Marital Bliss*, *Am. Enter.*, May/June 1996, at 45, 45; *see also* Zinsmeister, *supra* note 195, at 46. Children tend to suffer when they are born and raised out of wedlock or by a single parent. Barbara Dafeo Whitehead, *Dan Quayle Was Right*, *Atlantic Monthly*, Apr. 1993, at 47, 47; *see also* Baehr v. Miike, 1996 WL 694235, at *18 (Haw. Cir. Ct. Dec. 3, 1996). Crime and unemployment rates are much higher among unmarried men. Zinsmeister, *supra* note 195, at 46.

200. Hafen, *supra* note 114, at 482.

201. Mattox, *supra* note 200, at 45 (describing higher rates of depression and domestic violence among cohabiting women); *see also* William R. Mattox, Jr., *Be My POSSLQ? Is Living Together as Good as Marriage?*, *Ideas & Energy*, at 2, 2 (Family Research Council, 1998) (noting higher divorce rates for people who cohabit before marriage).

202. *See, e.g.*, Wash. Rev. Code § 9A.88.030 (1996) (making prostitution misdemeanor); Wash. Rev. Code § 26.04.020 (1996) (outlawing bigamy and marriages between kin); Wash. Rev. Code § 26.04.210 (1996) (imposing minimum age requirements for marriage); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding informed consent requirements, 24-hour waiting period and parental consent provisions even though such requirements may make it virtually impossible for some women to obtain abortions); *Id.* at 937 (Blackmun, J., concurring in part, and dissenting in part); *Moe v. Dinkins*, 669 F.2d 67 (2d Cir. 1982) (upholding age restrictions on fundamental right

The possibility that some individuals may spend their entire lives without a spouse, never enjoying their "fundamental right" to have sex, does not diminish the validity of fornication statutes. Government has not denied individuals the right to engage in sex any more than it has denied the right of marriage to individuals who find a desired mate at age fifteen, but find nobody after they reach eighteen, or denied the right to abort to a woman who cannot wait twenty-four hours to have an abortion after receiving information about alternatives.²⁰³ The state has merely imposed reasonable regulations on the exercise of the right in order to further a compelling state interest. Nothing suggests the right to engage in sex is somehow more fundamental than the rights to marry²⁰⁴ and pursue one's calling;²⁰⁵ yet, numerous statutes limit individuals in achieving these goals.²⁰⁶ The Court has failed to find anything disconcerting about denying individuals the right to engage in sexual activity unless they adhere to certain conditions.²⁰⁷

Although community and family dissuasion and moral teaching may be a less coercive means of encouraging marriage, the state lacks a method of ensuring that such attitudes are perpetuated. Staging massive public awareness campaigns or sponsoring events to assist singles in meeting lifetime spouses would be less restrictive means of promoting marriage, but also less effective. Tax incentives may promote marriage without burdening sexual intimacy; however, sex, for most, is a bigger "carrot" and more easily perceived as a benefit of marriage than a tax incentive.²⁰⁸ Furthermore, the Supreme Court does not usually require the

to marry); *Roe II v. Butterworth*, 958 F. Supp. 1569 (S.D. Fla.) (upholding constitutionality of statutes prohibiting prostitution), *aff'd*, 129 F.3d 1221 (11th Cir. 1997); H.B. 1130, 55th Leg., 1998 Reg. Sess. (Wash. 1998) (defining marriage as union of man and woman).

203. Age restrictions on marriage and waiting periods for abortion delay, rather than forbid, exercise of a right. However, such delays can have the same effect as an outright prohibition. See *Casey*, 505 U.S. 833, 937 (Blackmun, J., concurring in part and dissenting in part).

204. See *Zablocki v. Redhail*, 434 U.S. 384 (1978).

205. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that Fourteenth Amendment "liberty" includes right to engage in any occupation).

206. See *supra* note 203; see also Wash. Rev. Code § 2.48.060 (1996) (requirements for becoming attorney); Wash. Rev. Code §§ 28A.410.020--025 (1996) (requirements for becoming schoolteacher).

207. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986) (upholding statutes prohibiting sodomy between homosexuals and thereby potentially withholding any opportunity homosexuals may have to engage in sex); see also *Roe II*, 958 F. Supp. 1569 (upholding constitutionality of prohibiting prostitution).

208. Some people are outside the tax system and would not benefit from a tax incentive for marriage. Additionally, states may not have sufficient financial means to permit tax incentives.

state to show that its alternative is the least restrictive when the state's asserted interest closely fits the means the state uses to achieve that interest.²⁰⁹

Fornication statutes further the state's compelling interests in preventing disease and extramarital birth, and promoting the institution of marriage. The statutes are narrowly tailored to achieve these interests. They do not deprive an individual of a right to engage in sex, but merely channel its exercise into the marital relationship. Consequently, fornication statutes should withstand strict scrutiny.

VI. UNENFORCED FORNICATION STATUTES ARE CONSTITUTIONAL AND SERVE A VALUABLE PURPOSE

The threat of prosecution is not sufficient to present a case or controversy;²¹⁰ hence, as long as fornication statutes are not enforced, they cannot be challenged. Nonenforcement of fornication statutes may be desirable, even if the laws are constitutional, because enforcement has potentially undesirable ramifications.²¹¹

What good is a statute prohibiting fornication if it is not enforced? Fornication laws need not control behavior directly to serve the important functions of reinforcing social norms and publicly condemning immorality.²¹² Unenforced laws regularly, and often profoundly, affect societal notions regarding morally acceptable activity.²¹³

209. *Roe v. Wade*, 410 U.S. 113, 155 (1973); see *supra* notes 46–47 and accompanying text.

210. *Poe v. Ullman*, 367 U.S. 497 (1961) (holding that plaintiff had no justiciable controversy given lack of showing that statutes prohibiting distribution of contraceptives would be enforced against them); see also *Doe v. Duling*, 782 F.2d 1202 (4th Cir. 1986) (holding theoretical threat of prosecution under state fornication statute insufficient to present case or controversy).

211. For example, extramarital births would constitute *prima facie* evidence of fornication, creating an incentive for abortions, particularly black-market abortions, and causing unmarried women to avoid prenatal care and treatment of sexually transmitted disease. Even minor penalties, like parenting classes or small fines, carry such potential. Fornication statutes also permit discriminatory arrests and prosecutions. See, e.g., Model Penal Code, *supra* note 112, at 435; Posner, *supra* note 129, at 207.

212. Sunstein, *supra* note 192, at 2024–25; see also *id.* at 2032 (citing laws forbidding littering and requiring people to clean up after their dogs as examples). State prohibitions on polygamy and sodomy, while not avidly enforced, have also influenced social norms, driving such conduct underground, even if the conduct still occurs.

213. *Id.* at 2032–33, 2051. Cf. *Jarrett v. Jarrett*, 400 N.E.2d 421, 423 (Ill. 1979) (divesting mother of custody by deeming her unfit role model to her children because she violated fornication statute); *Cooper v. French*, 460 N.W.2d 2, 11 (Minn. 1990) (refusing to punish landlord under marital status discrimination statute for not renting to unmarried couple because couple intended to violate criminal fornication statute).

Decriminalization of fornication means, literally, the removal of disapproval; the state's posture becomes one of neutrality, if not approval.²¹⁴ This could make fornication appear more acceptable, particularly to young people with unformed morals.²¹⁵ In short, fornication laws, even if unenforced, are intrinsically valuable for their educative and rhetorical effect, and can potentially serve as a strong barrier to action.²¹⁶

Not everything one can describe as a 'wrong' should come within the reach of the law.²¹⁷ However, the state has few reasons not to interfere, and several compelling reasons to interfere, with an individual's engagement in the immoral act of fornication. Unenforced fornication laws neither prevent the individual from fulfilling essential obligations nor put the individual at risk of serious harm. Such laws are unlikely to damage the common good in any way, jeopardize important liberties, or encourage undue conformism and mindless obedience to authority.²¹⁸ If fornication laws are widely flouted and considered illegitimate by many, disrespect for the law prohibiting fornication may breed disrespect for the law in general. This need not be the case. The law against perjury, for example, is difficult to enforce and frequently violated; yet, rarely do people brag about having committed perjury. Similarly, fornication laws, particularly if publicized,²¹⁹ may help minimize the reputational benefits

214. Wilkonson & White, *supra* note 193, at 595.

215. *Id.*

216. Mueller, *supra* note 1, at 18 (observing that even disrespected and disregarded sex laws may impact behavior, but conceding that extent to which they impact behavior is difficult to verify); see also *Poe v. Ullman*, 367 U.S. 497, 529-39 (1961) (Harlan, J., dissenting) (contending that threat of prosecution, however slight, deters appellants from engaging in conduct in which they assert right to engage).

217. See Robert P. George, *Making Men Moral* 118 (1993). Given the existence of disagreement and the potential to impose on individuals burdens they simply should not bear, toleration of immoral conduct may at times be the better public policy. This is not to say that there is a moral right to perform immoral actions, but rather that "[o]pportunities for immoral choice inhere in the human condition." *Id.* at 128; see also Hadley Arkes, *Beyond the Constitution* 38 (1990) (observing that prudence may cause one to hesitate before bringing every "wrong" within reach of law). Thus, legislators should always identify various prudential considerations for not outlawing certain forms of immorality, such as fornication. See George, *supra*, at 117 (discussing need to evaluate prudential considerations when contemplating enactment of moral laws in general).

218. See George, *supra* note 218, at 117 (listing prudential reasons why one might not interfere with performance of immoral act).

219. The effect of current fornication statutes has been significantly diminished by the fact that many people do not even know such laws exist. Note, *Fornication*, *supra* note 105, at 305; see also Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72

of engaging in nonmarital sexual activity and ultimately discourage the behavior.

VII. CONCLUSION

Neither history and tradition nor the various forms of reasoning in the Court's privacy jurisprudence support a fundamental right to engage in fornication; thus, the state need only assert a rational basis for its fornication statute to withstand a substantive due process challenge. Courts should uphold fornication statutes because states have many plausible reasons for prohibiting fornication.

Even if the Court were to find a fundamental right to engage in extramarital sexual activity, fornication statutes withstand strict scrutiny. The state's interests in preventing disease and extramarital births, protecting the institution of marriage, and promoting morality are compelling, and fornication statutes are narrowly tailored to achieve these goals.

Although fornication laws do not violate substantive due process, states should publicize, but not enforce them. By doing so, states benefit from the law's rhetorical effect, but avoid the dangers that may result from enforcement. Keeping fornication statutes on the books and informing the public of their existence might not prevent fornication, but it will send a much needed message of social disapproval, driving this immoral conduct underground.

Laws alone, no matter how wise or how moral, cannot make people moral and are not sufficient to establish and maintain a healthy moral society.²²⁰ People only become moral by choosing to do the morally right thing for the morally right reasons.²²¹ Therefore, law cannot and should not usurp the function of the valuable mediating institutions that are essential to maintain a decent moral atmosphere. Laws, however, like those prohibiting fornication, can powerfully reinforce, if not shape, the teachings of parents, families, teachers, religious communities and other persons and institutions who have the primary role in forming moral individuals.²²²

N.Y.U. L. Rev. 967, 980–81 (1997) (noting that laws are unlikely to change culture without public awareness).

220. George, *supra* note 218, at 1.

221. *Id.*

222. *Id.* at 46.

