Penumbras, Privacy, and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law with the Inherent Right of Privacy in Islamic Jurisprudence

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Abstract

In an effort to separate the Islamic regulatory scheme with respect to the criminalization of consensual sexual conduct from the caricature espoused by many Western thinkers, this Note provides a comparative analysis of the criminalization of private consensual sexual conduct in Islamic law and U.S. constitutional jurisprudence on the right of privacy. Part I provides a brief background of Islamic and U.S. criminal regulations on consensual sex and outlines the evolution of constitutional privacy jurisprudence in the U.S. Supreme Court. Part II first examines the evidentiary and procedural requirements pertaining to the criminalization of consensual sexual intercourse in Islamic law, explores the consequences of transgressing these evidentiary requirements, and analyzes the theological and privacy-related constraints on initiating suits for engaging in such private conduct. Part II then applies these regulations to the recent case of Amina Lawal in northern Nigeria, and analyzes Islamic regulations governing sexual activity not amounting to intercourse. Finally, Part II examines an alternative reading of the U.S. Supreme Court’s current analysis of privacy as articulated in Lawrence v. Texas. Finally, Part III argues that Islamic evidence law and consequences of evidentiary transgression act as a de jure restriction to prosecuting individuals who engage in private consensual sex. Combined with theological and privacy-related regulations, which act as deterrents to such prosecutions, these evidentiary requirements create a zone of privacy that protects private consensual sex from State regulation. Part III then argues that the U.S. Supreme Court has subtly shifted away from recognizing privacy-related rights towards asserting a stance against all morals legislation, and concludes that it is the Court’s anti-morals legislation rhetoric, and not the constitutional right of privacy, that determines the holding in Lawrence. Moreover, Part III draws a distinction between the Islamic and American approaches to privacy jurisprudence by examining the significantly distinct consequences of the Islamic guarantee of privacy and the American criticism of morals-based legislation. Exploring the ramifications of the Court’s anti-morals legislation posture, Part III concludes that, despite the caricature embraced by the Western world, the real right of privacy resides in Islamic jurisprudence.
NOTE

PENUMBRAS, PRIVACY, AND THE DEATH OF MORALS-BASED LEGISLATION: COMPARING U.S. CONSTITUTIONAL LAW WITH THE INHERENT RIGHT OF PRIVACY IN ISLAMIC JURISPRUDENCE

Seema Saifee*

INTRODUCTION

Islamic jurisprudence designates adultery and fornication as crimes against God. Individuals who privately engage in such activity (unless they freely confess) answer only to God and not the State. Although the international community customarily

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1. See MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW 1 (1981) (observing that in Islamic law, application of punishment for fornication and adultery is considered right of God); Ahmad Abd al-Aziz al-Alfi, Punishment in Islamic Criminal Law, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM, supra note 1, at 227 (listing certain offenses as crimes against God); Ruud Peters, Zina, in 11 THE ENCYCLOPAEDIA OF ISLAM 509 (P.J. Bearman et al. eds., 2d ed. 2002) (noting that majority of Sunni schools of thought classify homosexual sodomy as crime against God, with exception of Hanafis). Whether homosexual anal intercourse constitutes adultery or fornication is a matter of controversy among Muslim jurists. Id. The majority of Sunni schools treat such conduct in the same manner as illicit heterosexual intercourse. Id. See 4 al-Dardir, AL-SHARH AL-SAGHIR 448 (Cairo: Dar al-Ma'arif n.d.) (describing juristic views on heterosexual sodomy). The majority of Sunni jurists regard heterosexual anal intercourse between a non-marital couple as a crime against God. Id. Such activity within marriage, although considered sinful by these jurists, is not a crime against God. Id. See 3 al-Mawwaq, AL-TAJ WA-L-IKLIL 405-06 (n.d.) (providing commentary on Mukhtasar of Khalil and noting that majority of Sunni jurists regard anal intercourse between married couple as sinful). See generally 5 THE ENCYCLOPAEDIA OF ISLAM 776-79 (C.E. Bosworth et al. eds., 1983) (discussing sodomy in Islam).

associates legal restrictions on consensual sexual behavior with non-Western traditions, such constraints extend to Western regions, including the United States.\(^3\) Historically, numerous jurisdictions in the United States have criminalized adultery, fornication, and sodomy between consenting adults acting in private.\(^4\) Despite the U.S. Supreme Court's construal of a constitutional right of privacy, many of these statutes have continued to survive.\(^5\) These laws have endured precisely because, until a 2003 challenge to a State regulation criminalizing homosexual sodomy,\(^6\) the Supreme Court had failed to establish a right for consenting adults to engage in private sexual activity.\(^7\) This Note seeks to demonstrate that it has taken over 200 years of Supreme Court jurisprudence to establish a right of privacy that has subsisted since the advent of Islamic law.\(^8\)


\(^6\) See Lawrence, 123 S. Ct. at 2475, 2484 (establishing fundamental right for consenting adults of same sex to engage in private acts of intimacy); TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) (repealed 2003) (criminalizing same-sex sodomy).


\(^8\) See Lawrence, 123 S. Ct. at 2481-82, 2484 (protecting individual autonomy in matters of private intimacy); 1 ENCYCLOPEDIA OF CRIME & JUSTICE 192 (Joshua Dressler ed.,
In an effort to separate the Islamic regulatory scheme with respect to the criminalization of consensual sexual conduct from the caricature espoused by many Western thinkers, this Note provides a comparative analysis of the criminalization of private consensual sexual conduct in Islamic law and U.S. constitutional jurisprudence on the right of privacy. Part I provides a brief background of Islamic and U.S. criminal regulations on consensual sex and outlines the evolution of constitutional privacy jurisprudence in the U.S. Supreme Court. Part II first examines the evidentiary and procedural requirements pertaining to the criminalization of consensual sexual intercourse in Islamic law, explores the consequences of transgressing these evidentiary requirements, and analyzes the theological and privacy-related constraints on initiating suits for engaging in such private conduct. Part II then applies these regulations to the recent case of Amina Lawal in northern Nigeria, and analyzes Islamic regulations governing sexual activity not amounting to intercourse. Finally, Part II examines an alternative reading of the U.S. Supreme Court’s current analysis of privacy as articulated in Lawrence v. Texas.

Finally, Part III argues that Islamic evidence law and consequences of evidentiary transgression act as a de jure restriction to prosecuting individuals who engage in private consensual sex. Combined with theological and privacy-related regulations, which act as deterrents to such prosecutions, these evidentiary requirements create a zone of privacy that protects private consensual sex from State regulation. Part III then argues that the U.S. Supreme Court has subtly shifted away from recognizing privacy-related rights towards asserting a stance against all morals legislation, and concludes that it is the Court’s anti-morals legislation rhetoric, and not the constitutional right of privacy, that determines the holding in Lawrence. Moreover, Part III draws a distinction between the Islamic and American approaches to privacy jurisprudence by examining the significantly distinct consequences of the Islamic guarantee of privacy and the American criticism of morals-based legislation. Exploring the ramifications of the Court’s anti-morals legislation posture, Part III concludes that, despite the caricature embraced by the

2d ed. 2002) (noting that Islamic law developed during first three and half centuries after death of Prophet Muhammad in 632 A.D.).
Western world, the real right of privacy resides in Islamic jurisprudence.

I. BACKGROUND

A. Islamic Law: The Regulation of Consensual Sex

Before defining the laws proscribing consensual sexual intercourse in Islam, a comprehensive analysis of the criminalization of such conduct requires familiarity with the sources of Islamic law.

1. Sources of Islamic Jurisprudence

Classical Islamic jurisprudence, or Shari'ah,9 speaks of four sources of law: the Qur'an,10 Sunnah,11 qiyas12 and ijma.13 Di-
vine in nature, the Qur'an and Sunnah form the primary sources of Islamic law.\textsuperscript{14} If the Qur'an and Sunnah were silent on a matter, jurists engaged in independent interpretation, or \textit{ijtihad},\textsuperscript{15}

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\textsuperscript{1} supra note 10, at 5 (noting that scholars have collected and compiled books of hadith recording Prophetic Sunnah); J. Robson, \textit{Hadith}, in \textit{3 The Encyclopedia of Islam} 23 (B. Lewis et al. eds., 1965) (defining hadith as "account of what the Prophet [Muhammad] said or did, or of his tacit approval of something said or done in his presence"); Abdal-Haqq, \textit{supra} note 9, at 46-47 (distinguishing between Sunnah and hadith). See generally Muhammad Mustafa Azami, \textit{Studies in Hadith Methodology and Literature} (1992) (discussing hadith literature and science of hadith methodology).

\textsuperscript{12} See \textit{Esposito}, \textit{supra} note 10, at 2 (defining qiyas as reasoning by analogy); Sanad, \textit{supra} note 11, at 39-40 (defining qiyas as judgment derived from legal analogy); Abdal-Haqq, \textit{supra} note 9, at 36, 56 (defining qiyas as analogical deduction).

\textsuperscript{13} See \textit{Esposito}, \textit{supra} note 10, at 2, 7 (defining \textit{ijma} as unanimous consensus of jurists of particular era on specific issue); Abdal-Haqq, \textit{supra} note 9, at 36 (defining \textit{ijma} as consensus of opinion among Prophet's companions or learned community); Sanad, \textit{supra} note 11, at 39 (asserting that \textit{ijma} does not require agreement of all Muslims, but rather, agreement of qualified and competent Muslim jurists).

\textsuperscript{14} See \textit{Sanad}, \textit{supra} note 11, at 39 (noting that Qur'an, Holy Book in Islam, is primary source of Islamic law); Azizah al-Hibri, \textit{Islam, Law, and Custom: Redefining Muslim Women's Rights}, 12 Am. U. Int'l L. & Pol'y 1, 6 (1997) (stating that Qur'an is foundation of Islamic law); Abdal-Haqq, \textit{supra} note 9, at 46, 51 (asserting that Qur'an is primary foundation for Islamic law); \textit{Esposito}, \textit{supra} note 10, at 1-2 (stating that Qur'an is not book of law or collection of directives providing legal system). See also Abdal-Haqq, \textit{supra} note 9, at 46 (noting that Qur'an includes legal injunctions but is not code of law). See \textit{Abdur Rahman I. Doi}, \textit{Shari'ah: The Islamic Law} 45 (1984) (describing Sunnah as one of primary sources of Shari'ah); Muhammad Sharif Chaudhry, \textit{Code of Islamic Laws} 1, 8 (1997) (noting that Qur'an and Sunnah are primary sources of Islamic law and describing Sunnah as most important source of Islamic law after Qur'an); Sanad, \textit{supra} note 11, at 39 (describing significant role of Sunnah in Islamic jurisprudence in complementing Qur'an or interpreting its texts); Abdal-Haqq, \textit{supra} note 9, at 33, 35 (2002) (noting that authority of Sunnah is revealed in Qur'anic command to obey Prophet). See also \textit{Esposito}, \textit{supra} note 10, at 5 (noting that significance of Sunnah is rooted in Qur'anic command to obey and follow example of Prophet Muhammad); Qur'an 4:59, 80 (directing Muslims to obey God and Prophet). The Qur'an states: "O ye who believe! Obey [God], and obey the [Prophet]... He who obeys the [Prophet], obeys [God]... ". \textit{Id.} The Qur'an describes the Prophet as an exemplary model for Muslims. \textit{See id.} at 33:21. "Ye have indeed in the Messenger of [God] a beautiful pattern (of conduct) ... ." \textit{Id.} The Qur'an also declares that the Prophet only speaks from divine inspiration. \textit{See id.} at 53:3, 4. "Your Companion is neither astray nor misled, Nor does he say (aught) of (his own) Desire. It is no less than inspiration sent down to him." \textit{Id.} See also Sanad, \textit{supra} note 11, at 38-39 (noting that Sunnah is divinely inspired); Doi, \textit{supra}, at 45 (describing divine nature of Prophet's behavior). "[The Prophet Muhammad] never spoke from his own imagination but told only what [God] had revealed unto him." \textit{Id.}

\textsuperscript{15} See \textit{Esposito}, \textit{supra} note 10, at 6 (defining \textit{ijtihad} as personal reasoning or interpretation); Sanad, \textit{supra} note 11, at 39 (defining \textit{ijtihad} as jurist's endeavor or self-exertion in formulating rule of law based on Qur'an and Sunnah); al-Hibri, \textit{supra} note 14, at 6 (defining \textit{ijtihad} as science of interpretation and rulemaking); Abdal-Haqq, \textit{supra} note 9, at 36 (citing hadith on and providing literal definition of \textit{ijtihad}).
based on these sources. One type of juristic interpretation was reasoning by analogy, or *qiyaṣ*, whereby a legal solution cited in the Qur’an or Sunnah for a particular case was applied to a similar case. The final source of law, one which derived its authority from a statement of the Prophet Muhammad, is the doctrine of *ijma*, or consensus of the scholars of a particular era on a specific issue. Matters unvoiced by the primary sources of Shari’ah were thus resolved by resort to *ijtihād*, *qiyaṣ*, and *ijma*.

As scholars from different societies, and those within the same society, engaged in independent reasoning, many disagreed in their *ijtihād*. As a result, numerous schools of thought emerged in the Islamic empire, five of which remain today: Hanafi, Shafi‘i, Maliki, Hanbali, and Ja‘fari.
2. Zina

Consensual sexual intercourse between a man and woman who are not married to one another [zina or “unlawful sexual relations”] forms one of the several offenses of hudood, singular hadd, a defined class of crimes whose punishments are fixed and made mandatory by the Qur’an and Sunnah. At least two categories of conduct are implicated in the crime of zina: (1) today include Hanafi, Shafi’i, Maliki, Hanbali, and Ja’fari); Esposito, supra note 10, at 2, 2 n.2 (noting that Hanafi, Shafi’i, Maliki, and Hanbali schools are four schools of thought in Sunni Islam (sect adhered to by approximately ninety percent of Muslims) which are named after mujtahids who founded them, and explaining that while there were originally many schools of law, only these four survived over time); Abdal-Haqq, supra note 9, at 39 (noting that Ja’fari school is predominant school of thought among Shi’i Muslims); al-Hibri, supra note 14, at 6-7 (noting that as result of juristic differences in interpretation, hundreds of schools of ijtihad evolved but only few major schools remain viable today). See also A.D. Ajjola, INTRODUCTION TO ISLAMIC LAW 30 (3d ed. 1989) (noting that as fundamental principles articulated by four Sunni schools are virtually identical, schools differ only in minor details); Abdal-Haqq, supra note 9, at 65 (emphasizing significant uniformity in fundamental methodologies employed by all five major schools and noting that while five schools reach different conclusions on variety of matters, their judgments differ only slightly). See generally Muhammad Abu Zahra, THE FOUR IMAMS: THEIR LIVES, WORKS, AND THEIR SCHOOLS OF THOUGHT (2001) (providing detailed history of founders of four Sunni schools of thought).

22. See Muhammad Salim al’Awwa, The Basis of Islamic Penal Legislation, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM, supra note 1, at 127 (noting that punishment in Islamic law is classified into two categories: fixed [hudood and quesas] and discretionary [1a’azir]); Muhammad Iqbal Siddiqi, THE PENAL LAW OF ISLAM 51-52 (1985) (noting that punishment in Islamic law is divided into three categories (hadd, quesas, and 1a’azir), where both hadd and quesas are fixed by law); El-Awa, supra note 1, at 1-2 (describing hudood as punishments prescribed by Qur’an or Sunnah, and classifying penalty for zina as hadd); Sanad, supra note 11, at 40-41 (describing hudood penalties as those prescribed by Qur’an and Sunnah); Qur’an 2:229 (affirming fixed nature of hadd). “These are the limits ordained by [God]; so do not transgress them.” Id. See also B. Carra de Vaux & Joseph Schacht, Hadd, in 3 THE ENCYCLOPAEDIA OF ISLAM, supra note 11, at 20 (listing five offenses as crimes of hudood: unlawful intercourse, false accusation of unlawful intercourse, drinking alcohol, theft, and highway robbery); El-Awa, supra note 1, at 1-2 (including apostasy as hadd crime and noting that majority of Islamic jurists recognize six offenses of hudood). For an argument limiting the hudood to four, see id. at 2-68 (arguing for exclusion of apostasy and alcohol drinking as crimes of hudood); Aly Aly Mansour, Hud[oo]d Crimes, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM, supra note 1, at 197 (including “transgression,” or rising against legitimate leader by use of force (which is equivalent to treason and armed rebellion), among offenses of hudood); al-Alfi, supra note 1, at 227 (noting that hudood crimes implicate fundamental public interest); al’Awwa, supra, at 127 (noting that hadd affords protection to public interests). See also Chaudhry, supra note 14, at 81-82 (noting immutability of hadd punishment and demonstrating that once guilt of zina is established beyond reasonable doubt, punishment can neither be pardoned nor negotiated); al’Awwa, supra, at 128 (noting that hadd penalties cannot be mitigated, augmented, or suspended); Ruud Peters, A SURVEY OF ISLAMIC LAW: THE LAW OF PERSONS, THE LAW OF MARRIAGE, THE LAW
sensual sexual intercourse between a man and woman who (a) are not married to each other and (b) are or have been lawfully married to a third person where the marriage was consummated ("adultery"); and (2) consensual sexual intercourse between an unmarried man and unmarried woman ("fornication"). The Qur'an first sets forth a general moral prohibition of zina and, in a subsequent verse, enforces its moral proscription by subjecting those who commit zina to criminal prosecution.

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23. See Peters, supra note 1, at 509 (defining zina as unlawful sexual intercourse between man and woman who are not married to one another); EL-Awa, supra note 1, at 14 (noting that zina applies to both adultery and fornication); Peters, supra note 1, at 509 (noting that only muhsan can be guilty of adultery and defining muhsan as one who is adult, free, Muslim (except in Shafi'i school of thought where dhimmi can also be muhsan), and has previously engaged in legitimate sexual intercourse in marital relationship regardless of whether marriage still exists); Cl. Cahen, Dhimma, in 2 THE ENCYCLOPAEDIA OF ISLAM 227 (B. Lewis et al. eds., 1965) (defining dhimmi as non-Muslim living under Islamic law); Chaudhry, supra note 14, at 82 (noting that to constitute adultery, offender must have been legally married and marriage must have been consummated); Peters, supra note 22, at 127 (asserting that offence of zina requires vaginal penetration). See also Syed Amin-U1-Hasan Rizvi, Adultery and Fornication in Islamic Criminal Law: A Debate, in CRIMINAL LAW IN ISLAM AND THE MUSLIM WORLD, A COMPARATIVE PERSPECTIVE 225-26 (Tahir Mahmood et al. eds., 1996) (noting that consent is element of zina); Quraishi, supra note 2, 314, 315-17 (discussing Islamic law on rape and emphasizing that rape is not subset of zina); Peters, supra note 22, at 92 (noting that individuals engaging in hadd crimes are excused from hadd penalty if activity falls under defense of mistake).

24. See Hideaki Homma, STRUCTURAL CHARACTERISTICS OF ISLAMIC PENAL LAW 30 (1986) (defining fornication as unlawful sexual intercourse between two unmarried persons); EL-Awa, supra note 1, at 14 (defining fornication as sexual relations between unmarried man and unmarried woman); Rizvi, supra note 23, at 223 (defining fornication as sexual relationship between male and female who are neither married to one another nor to third persons).

25. See QUR'AN 17:32 (denouncing zina as sinful act). The Qur'an states: "Nor come nigh to unlawful sex for it is a shameful (deed) and an evil, opening the road (to other evils)." Id. See also Doi, supra note 14, at 236 (quoting hadith where Prophet described zina as sin). The Prophet is reported to have said that "[t]here is no sin after associationism greater in the eyes of [God] than a drop of semen which a man places in the womb which is not lawful for him." Id. In another hadith, the Prophet described zina as the third greatest sin, after associationism and killing one's child for fear of poverty. See id. at 256-57 (quoting hadith on zina).

26. See QUR'AN 24:2 (criminalizing zina). This Qur'anic verse states the following: The woman and the man guilty of adultery or fornication — flog each of them with a hundred stripes: let not compassion move you in their case, in a matter prescribed by [God], if ye believe in [God] and the Last Day: and let a party of the Believers witness their punishment. Id. See also Quraishi, supra note 2, at 293-94 (describing Qur'an 24:2 as specifically setting forth legal prescriptions criminalizing unlawful sexual intercourse); EL-Awa,
Classified as a *hadd* offense, *zina* is considered a crime against God.\(^{27}\)

a. Heterosexual and Homosexual Sodomy

The majority of Sunni jurists regard heterosexual anal intercourse between a non-marital couple as *zina*.\(^ {28}\) Such activity within marriage, although considered sinful, is not a crime of *zina*.\(^ {29}\) Sunni schools of thought differ in their criminal classification of homosexual sodomy.\(^ {30}\) The Shafi'i, Hanbali, and Maliki schools regard homosexual intercourse as *zina* and thus liable to *hadd* punishment, while the Hanafis consider homosexual sodomy a crime of *ta'azir*, or discretionary punishment.\(^ {31}\)

B. Regulating Consensual Sex in the United States

To a large extent, laws regulating private sexual conduct between consenting adults have remained unenforced in the United States. Criminalization of such intimate activity, therefore, has been more apparent than real, and overtime, even less apparent.

\(^{27}\) See \textit{EL-Awa}, \textit{supra} note 1, at 1 (asserting that application of punishment for *zina* is considered right of God); \textit{al-Alfi}, \textit{supra} note 1, at 227 (listing certain offenses as crimes against God).

\(^{28}\) See \textit{4 al-Dardir}, \textit{supra} note 1, at 448 (describing position of Sunni schools on criminalization of heterosexual sodomy). \textit{See generally 5 THE ENCYCLOPAEDIA OF ISLAM, \textit{supra} note 1, at 776-79 (discussing sodomy, or *liwat*).}

\(^{29}\) See \textit{3 al-Mawwaq}, \textit{supra} note 1, at 405-06 (noting that according to majority of Sunni jurists, anal intercourse between married couple is sinful); \textit{4 al-Dardir}, \textit{supra} note 1, at 448 (explaining that majority of Sunni schools do not classify marital anal intercourse as *zina*).

\(^{30}\) See Peters, \textit{supra} note 1, at 509 (discussing positions of Muslim schools of thought on criminalization of homosexual sodomy). \textit{See generally 5 THE ENCYCLOPAEDIA OF ISLAM, \textit{supra} note 1, at 776-79 (discussing sodomy in Islam).}

\(^{31}\) See Peters, \textit{supra} note 1, at 509 (noting that Hanafis do not consider homosexual intercourse as *zina*). The Shi'i school classifies homosexual sodomy as a crime of *hadd*. \textit{ld.; E-mail from Mohammad Fadel, Associate, Sullivan & Cromwell LLP, to Seema Saifee (Dec. 9, 2003, 22:23:59 EST) (on file with author) (noting that majority position that homosexual sodomy is *zina* only applies to sodomy between two men); \textit{al-Alfi}, \textit{supra} note 1, at 227 (asserting that *ta'azir* includes all crimes whose penalties are not fixed by Qur'an or Sunnah); \textit{SANAD, supra} note 11, at 63 (noting that validity of *ta'azir* category derived from *ijma*); \textit{al-Alfi}, \textit{supra} note 1, at 227 (explaining that ruler or judge has discretion to determine, in accordance with public interest and changing mores, whether certain acts are punishable under *ta'azir*); \textit{SANAD, supra} note 11, at 41 (noting that judge must comply with general rules prescribed in Qur'an and Sunnah).
1. Fornication

Twelve States continue to criminalize premarital sex, sanctioning sexual activity solely within the marital relationship. Notwithstanding the proscription of fornication, selective enforcement remains the norm. For example, fornication legislation is often employed to punish rape and prostitution. In order to meet the statutory requirements for these latter crimes, State legislation requires additional conduct, such as force or commercial activity, to accompany sexual activity. As a result, sexual conduct is a necessary, but not sufficient element for prosecution. Selective enforcement of fornication legislation therefore entails penalization of a restricted group of offenders.


34. See, e.g., Doe v. Duling, 782 F.2d 1202, 1206 (4th Cir. 1986) (discussing selective application of Virginia's "fornication and cohabitation" statutes to prostitution and public conduct); State v. Saunders, 381 A.2d 333, 334, 335-36 (N.J. 1977) (noting that jury in lower court found suspected rapist guilty of fornication). See Note, Constitutional Barriers, supra note 4, at 1662 (noting that fornication laws are enforced primarily against suspected prostitutes and rapists); Juhi Mehta, Note, Prosecuting Teenage Parents Under Fornication Statutes: A Constitutionally Suspect Legal Solution to the Social Problem of Teen Pregnancy, 5 Cardozo Women's L.J. 121, 130 n.65 (1998) (citing Saunders as example of selective enforcement of fornication statutes against suspected rapists).

35. See, e.g., Duling, 782 F.2d at 1206 (demonstrating no record of arrest under Virginia's "fornication and cohabitation" statutes for non-prostitutional fornication conducted in private). See Note, Constitutional Barriers, supra note 4, at 1662 (demonstrating that fornication statutes are typically enforced against persons charged with engaging in commercial or non-consensual sexual conduct).

36. See, e.g., Summit Med. Assocs. v. James, 984 F. Supp. 1404, 1427 (M.D. Ala. 1998) (noting that arrests under Virginia's "fornication and cohabitation" statutes were confined to prostitutional or non-private activity). See Note, Constitutional Barriers, supra
specifically rapists and prostitutes, and criminalization of conduct where fornication is simply an element of the crime and not the crime itself. Fornication alone has largely evaded criminal prosecution in the United States.

2. Adultery

The common law considered extramarital sex a violation of the marital contract. Defining adultery in terms of the woman’s marital status, the common law focused on the risk that adulterous conduct posed to male spousal property rights. In this way, the common law examined adultery through a patriarchal lens. Although the common law regarded extramarital sex as a civil wrong, it introduced a foundation for modern legis-

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37. See Note, Constitutional Barriers, supra note 4, at 1662 (describing selective enforcement of State fornication statutes); Summit Med. Assocs., 984 F. Supp. at 1427 (demonstrating that selective enforcement of fornication legislation entails presence of elements beyond mere sexual activity); Duling, 782 F.2d at 1206 (discussing selective enforcement of Virginia’s “fornication and cohabitation” laws).


40. See Hickson, 22 M.J. at 147 (demonstrating that married woman and single man who engaged in sexual intercourse were considered adulterers but single woman and married man were considered fornicators); Haggard, supra note 4, at 471 (discussing implications of wife’s adulterous affair on husband’s property rights); Hickson, 22 M.J. at 147 (discussing common law concerns regarding illegitimate heirs to husband’s property); Hoye v. Hoye, 824 S.W.2d 422, 423 (Ky. 1992) (describing common law property-based arguments establishing husband’s exclusive right to wife’s services); Haggard, supra note 4, at 470-71 (asserting that contemporary criminalization of adultery originates from common law purposes to preserve inheritance and property rights of men).

41. See Hickson, 22 M.J. at 147 (discussing effects of adultery on male inheritance and property rights); Haggard, supra note 4, at 471 (describing common law regulations on adultery as rooted in historical women-as-chattel ideology where husband held exclusive right to wife’s services).
lation criminalizing adultery.  

Today, twenty-three States have enacted legislation penalizing adultery. With the introduction of the Married Women’s Property Acts, which granted wives independent ownership rights to property, and changing social mores regarding the rights of women, common law property-based rationales lost persuasive force. Adultery is now characterized as an act of deceit and betrayal. In their efforts to penalize adultery, modern stat-

42. See Hickson, 22 M.J. at 147 (discussing prohibition of adultery at common law); Haggard, supra note 4, at 470-71 (discussing common law ban on adultery). See also Prince, supra note 38, at 192 (noting that many States have repealed criminal adultery statutes).


44. See Cannon v. Miller, 322 S.E.2d 780, 791 (N.C. Ct. App. 1984) (noting that Married Women’s Property Acts, passed by most States in late nineteenth and early twentieth centuries in attempt to equalize legal status of wives, afforded wives equal property rights and right to sue in their individual names to recover damages for personal injuries); In re Bell-Breslin, 283 B.R. 834, 839 (Bankr. D. Md. 2002) (noting that Maryland Married Women’s Property Statute recognized married woman’s right to own property separate from husband); Haggard, supra note 4, at 471-72 (noting that Married Women’s Property Acts afforded women right to own property in their own name). See Hoye, 824 S.W.2d at 423 (discussing evolving perception of wife’s role in marriage and referring to wife-as-chattel ideology as antiquated); Haggard, supra note 4, at 471 (discussing legal and social implications of abolishing societal notion of women as husbands’ chattel); Erin L. Arcesi, Note, Conservatorships and Marriage: For Love or Money?, 16 Quinnipiac Prob. L.J. 298, 306 (2003) (describing Married Women’s Property statutes as attempt to reflect changing role of women in society and perception of marriage as equal partnership). Cf. Zainab Chaudhry, Comment, The Myth of Misogyny: A Reanalysis of Women’s Inheritance in Islamic Law, 61 Alb. L. Rev. 511, 513, 515 (1997) (discussing women’s inheritance rights in Islam and noting that introduction of Islam generated radical elevation in status of women and allowed Muslim women to own and manage their own property).

45. See Haggard, supra note 4, at 472 (revealing that much like jurisdictional ratio-
utes have adopted non-proprietary interests, including preserving marriage.\textsuperscript{46} In spite of statutory efforts to legitimize the penalization of adultery through the rationale of preserving morals, enforcement of adultery legislation (much like fornication statutes) remains minimal.\textsuperscript{47} While less than half the States continue to penalize adultery, most of these lingering statutes are enforced only in theory.\textsuperscript{48}

3. Heterosexual and Same-Sex Sodomy

Since colonial times, States have enacted legislation outlawing sodomy irrespective of the gender of the partners.\textsuperscript{49} The


\textsuperscript{47} See Haggard, supra note 4, at 473 (noting that although several jurisdictions continue to proscribe adultery and fornication, such statutes are rarely enforced).

\textsuperscript{48} Prince, supra note 38, at 192-93 (noting that while several States continue to criminalize adultery, such statutes are seldom enforced).

\textsuperscript{49} See Lawrence v. Texas, 123 S. Ct. 2472, 2478-79 (2003) (noting that in colonial times and nineteenth century, prohibitions against sodomy did not distinguish between
term homosexuality was coined in the nineteenth century and laws specifically directed at same-sex sodomy did not develop until the late twentieth century.\(^5\) As of June 2003, when the Supreme Court decided *Lawrence v. Texas*, thirteen States continue to criminalize sodomy while only four direct their anti-sodomy legislation solely to same-sex partners; even these States, however, have moved towards repealing such statutes.\(^5\) Much like adultery and fornication statutes, legislation outlawing sodomy (whether directed at all or only same-sex couples) remains highly unenforced.\(^5\)


\(^5\) See *Lawrence*, 123 S. Ct. at 2479 (asserting that U.S. laws targeting homosexual couples are not deeply rooted in history but developed in last third of twentieth century). But see Kevin F. Ryan, *A Flawed Performance*, 29 VT. B. J. 5, 9 (2003) (arguing that *Lawrence* Court provides lengthy but not very convincing discussion that laws specifically directed at same-sex sodomy are of relatively recent origin). See also Goldstein, *supra* note 49, at 1087-88 (noting that while homosexual intimacy existed in earlier eras, assumption that homosexual persons were fundamentally different from heterosexuals only developed in late nineteenth century); Eskridge, *supra* note 4 (manuscript at 3) (noting that first three-quarters of twentieth century marked period of increasing State snooping, especially into lives of sexual minorities, while in nineteenth century, State did not intrude into Nation's bedrooms).

\(^5\) See, e.g., ARK. STAT. ANN. § 5-14-122 (1987); KAN. STAT. ANN. § 21-3505 (1974); MO. ANN. STAT. § 566.090 (West 1982); TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) (repealed 2003). See *Lawrence*, 123 S. Ct. at 2480, 2481 (discussing decriminalization of sodomy statutes); Yao, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 524 (1986) (noting that few statutes expressly prohibit same-sex sodomy); *Lawrence*, 123 S. Ct. at 2481 (discussing statutory prohibitions of sodomy pre- and post-*Bowers* and noting that after *Bowers*, about one-fourth of States continued to criminalize sodomy irrespective of partner's gender); *Bowers*, 478 U.S. at 192-94 (noting that twenty-four States and District of Columbia continued to criminalize private consensual sodomy at time case was decided). See also *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2014 (2003) (noting that when *Bowers* was decided, twenty-four States and District of Columbia outlawed sodomy); Ryan, *supra* note 50, at 9 (noting that *Lawrence* Court reveals that States have been slowly repealing sodomy laws); Arthur S. Leonard, *A Magna Carta for Gay Americans*, GAY CITY NEWS, available at http://www.gaycitynews.com/gcn226/amagnacarta.html (arguing that logical result of *Lawrence* is invalidation of remaining sodomy statutes).

\(^5\) See *Lawrence*, 123 S. Ct. at 2481 (observing pattern of non-enforcement of State sodomy statues where conduct occurs between consenting adults acting in private, and asserting that Texas Attorney General stated that Texas had never prosecuted anyone under same-sex sodomy statute). The *Lawrence* Court found that "[t]he reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880-1995 are not always clear in the details, but a significant number involved conduct in a public place." *Id.* at 2479. See Ryan, *supra* note 50, at 9 (asserting
In their efforts to criminalize certain consensual sexual activity, States have adopted interests in preserving marriage, averting illegitimacy, preventing disease, and preserving morals. States have thus increasingly embraced morals-based legislation in their attempts to criminalize adultery, fornication, and sodomy. In spite of these morals-based laws, an inherent pattern of decriminalization and non-enforcement challenges
the viability of current legislation criminalizing private intimate acts between consenting adults. The privacy cases decided by the U.S. Supreme Court also illustrate this deep-seated pattern.

4. Constitutional Privacy Jurisprudence

A survey of the U.S. Supreme Court's original privacy jurisprudence, as expressed through the line of cases commencing with *Griswold v. Connecticut*, and an examination of the Court's current stance on privacy rights, as articulated by its recent decision in *Lawrence v. Texas*, illustrate the trajectory followed by the Court with respect to the constitutional protection of private intimate acts between consenting adults.

a. Pre-*Lawrence*

The Supreme Court first articulated a constitutional right of privacy in *Griswold v. Connecticut*. In *Griswold*, appellants challenged the constitutionality of a State statute criminalizing the use of any drug or article for the purpose of preventing conception.

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58. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (describing pattern of non-enforcement of State sodomy statutes where conduct occurs between consenting adults acting in private, and noting that Justice Powell, in his concurrence in *Bowers*, argued that history of non-enforcement of Georgia sodomy statute suggests waning character of laws criminalizing private consensual homosexual sodomy); Haggard, supra note 4, at 469-70, 472, 473 (discussing decriminalization of adultery and noting that remaining adultery statutes are seldom enforced); Prince, supra note 38, at 192 (noting that many States have repealed criminal fornication and adultery statutes); Law, *Homosexuality*, supra note 38, at 187 (noting that criminal penalties for fornication are rarely enforced).

59. *381 U.S. 479* (1965) (enunciating constitutional right of privacy); Anne C. Hydorn, Note, *Does the Constitutional Right to Privacy Protect Forced Disclosure of Sexual Orientation?*, 30 Hastings Const. L.Q. 237, 242 (2003) (discussing Court's privacy jurisprudence); Daniel O. Conkler, *The Second Death of Substantive Due Process*, 62 Ind. L.J. 215, 216 (1987) (identifying *Lochner v. N.Y.*, 198 U.S. 45 (1905), where Court invalidated statute limiting freedom to contract, as commencement of Court's first sustained use of substantive due process); Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence, 2003 U. Ill. L. Rev. 615, 629, 630 (2003) (noting that scholars and judges widely criticized *Lochner* and its progeny, and asserting that for critics who are skeptical of perceived judicial activism, *Lochner* represents reminder of judicial overreaching); Conkler, supra at 219 (asserting that Court abandoned Lochnering in 1930's and until *Griswold*, this departure was widely understood as renouncing substantive due process in general, and not merely application of doctrine to protection of economic rights); Norman Redlich et al., *Understanding Constitutional Law* 216 (2d ed. 1999) [hereinafter Redlich] (noting that many scholars understood *Griswold* as return to substantive due process analysis renounced by Court in *post-Lochner* period); Conkler, supra, at 219 (asserting that *Griswold* resurrected doctrine of substantive due process).
Finding that the Constitution creates "zones of privacy" through various guarantees in the Bill of Rights, the Supreme Court found that appellants had standing to challenge the statute criminalizing the use of contraception. The Court found that appellants had standing to argue that offense which he is charged with assisting cannot constitutionally be viewed as crime. See also Griswold, 381 U.S. at 481 (granting appellants standing to assert constitutional rights of married persons with whom they had professional relationship). See also David B. Cruz, "The Sexual Freedom Cases? Contraception, Abortion, Abstinence, and the Constitution," 35 HARV. C.R.-C.L. L. REv. 299, 341 (2000) (noting that Court granted appellants standing to argue that State's prohibition on use of contraceptives violated constitutional rights of married couples).

61. See Griswold, 381 U.S. at 484 (finding that although Constitution does not explicitly enumerate right of privacy, various amendments, including First, Third, Fourth, Fifth, and Ninth, have "penumbras" creating zones of privacy). See also Julia K. Sullens, Comment, Thus Far and No Further: The Supreme Court Draws the Outer Boundary of the Right to Privacy, 61 TUL. L. REV. 907, 908 (1987) (discussing Court's finding that penumbral rights, although not expressly granted by Constitution, are necessary for full enjoyment of rights protected by Bill of Rights). See Griswold, 381 U.S. at 483-84 (citing NAACP v. Alabama, 357 U.S. 449, 462 (1958), which held that Constitution protects freedom of association as peripheral First Amendment right, and demonstrating that right of association creates zone of privacy for constitutionally valid associations by protecting disclosure of membership). See also Martin H. Belsky, Privacy, The Rehnquist Court's Unmentionable "Right," 36 TULSA L.J. 43, Fall 2000, at 43 n.12 (noting that NAACP was cited in Griswold to support holding that there is penumbra of privacy rights surrounding rights protected by First Amendment). See Griswold, 381 U.S. at 482-83 (supporting penumbra-based construal of constitutional right of privacy by reference to prior decisions in Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923), and finding that although right to educate child in school of parents' choice and right to study any particular subject are not mentioned in Constitution, First Amendment has been construed to protect those rights). The Court noted that without certain peripheral rights, the specific rights of the Constitution would be less secure. Id. See also Conkle, supra note 59, at 220 (noting that Griswold explicitly reconfirmed validity of Meyer and Pierce); Richard F. Storrow, The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform, 66 Mo. L. Rev. 527, 551 (2001) (noting that Court described Meyer and Pierce as cases that recognized zones of privacy emanating from specific guarantees in Bill of Rights); Barbara Bennett Woodhouse, Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of Their Own," 11 CORNELL J.L. & PUB POL'Y 481, 484 (2002) (demonstrating that Meyer and Pierce provided foundation for modern substantive due process jurisprudence). See Griswold, 381 U.S. at 495-96 (Goldberg, J. concur-
Court declared the statute an unconstitutional62 intrusion upon the right of marital privacy.63 In subsequent years, the Court extended the right of privacy beyond the confines of the marital

ring) (noting that absence of specific constitutional provision expressly protecting marital privacy does not mean that government can disrupt traditional family relationship). In this way, although an explicit right of privacy is not enumerated in the Constitution, the right is nevertheless protected by implication. Id. But see Griswold, 381 U.S. at 510 (Black, J., dissenting) (arguing that State has right to invade privacy unless prohibited by specific constitutional provision); Griswold, 381 U.S. at 530 (Stewart, J., dissenting) (finding no general right of privacy in any constitutional provision or prior case decided by U.S. Supreme Court). See also Bradley R. Haywood, Note, The Right to Shelter as a Fundamental Interest Under the New York State Constitution, 34 COLUM. HUM. RTS. L. REV. 157, 182 (2002) (noting that Court provided content to right of privacy notwithstanding absence of express reference to right in Constitution); Conkle, supra note 59, at 219 (noting that constitutional right of privacy recognized by Griswold finds no mention in text of Constitution).

62. See Griswold, 381 U.S. at 486 (Goldberg, J., concurring) (noting that Court found that State's contraception statute was unconstitutional). The Court's argument for a constitutional right of privacy was based on penumbras emanating from specific guarantees in the Bill of Rights. Id. at 484. In finding the State statute unconstitutional, the Griswold Court expressly relied on the "zones of privacy" created by various guarantees in the Constitution, and not the substantive component of the Due Process Clause of the Fourteenth Amendment. Id. See also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 927 (2d ed. 1991) (finding that decision in Griswold was not based on substantive due process); REDLICH, supra note 59, at 216 (noting that in Griswold, Justice Douglas refused to rely expressly on substantive due process, stating that Court does not sit as "super-legislature" to review laws on social and economic affairs). But see STONE, supra, at 918 (citing Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The "Griswold" Case, 64 MICH. L. REV. 235, 252-53 (1965)) (noting that Court, "in extending the specifics to the periphery," essentially engaged in substantive due process analysis, providing it with different title); STONE, supra, at 926 (noting that although Griswold Court attempted to avoid relying on substantive due process as basis for holding, Griswold was in fact decided under doctrine of substantive due process because its decision can only be understood as holding that Connecticut statute substantively invaded liberty protected by Due Process Clause of Fourteenth Amendment); Conkle, supra note 59, at 219 (understanding decision in Griswold as application of substantive due process); Erwin Chemerinsky, The Rhetoric of Constitutional Law, 100 MICH. L. REV. 2008, 2015-16 (2002) (noting that Griswold Court mischaracterized Meyer and Pierce as First Amendment cases in attempt to reject substantive due process).

63. See Griswold, 381 U.S. at 486 (Goldberg, J., concurring) (noting that Court held that State's contraception statute unconstitutionally invades right of marital privacy). The Griswold Court limited the issue at hand to marital privacy and characterized the invasion of marital bedrooms as abhorrent. Griswold, 381 U.S. at 485-86. The Court reasoned as follows: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marital relationship." Id. See also Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (noting that Griswold invalidated Connecticut statute as unconstitutional encroachment on right of marital privacy); Michael J. Sandel, Moral Argument and Liberal Toleration: Abortion and Homosexuality, 77 CAL. L. REV. 521, 527 (1989) (emphasizing Griswold's objective as safeguarding privacy of marital relationship); Storrow, supra note 61, at 555 (arguing that Griswold asserts broad proposition
relationship.\textsuperscript{64}

In \textit{Eisenstadt v. Baird},\textsuperscript{65} the Court addressed the constitutionality of a Massachusetts statute placing disparate restrictions on the distribution of contraceptives to unmarried and married individuals.\textsuperscript{66} Declaring that the right of unmarried individuals to access contraception must be the same as that of married persons,\textsuperscript{67} the Court found the statute unconstitutional under the that State cannot regulate intimate activity of married couples in their bedrooms, regardless of whether activity is procreative).

\textsuperscript{64} See \textit{Eisenstadt}, 405 U.S. at 453 (extending right of privacy to unmarried persons such that contraception rights must be same for married and unmarried alike); \textit{Roe v. Wade}, 410 U.S. 113, 153 (1973) (extending right of privacy to protect woman’s decision whether to terminate her pregnancy); \textit{Carey v. Population Servs. Int’l}, 431 U.S. 678, 687 (1977) (confirming that right of privacy in matters of childbearing is not limited to married persons, and rejecting continued construal of \textit{Griswold} as protecting only married couple’s use of contraception); \textit{Planned Parenthood v. Casey}, 505 U.S. 833, 851 (1992) (establishing that Due Process Clause of Fourteenth Amendment protects intimate personal choices of individuals). See also Stan Karas, \textit{Privacy, Identity, Databases}, 52 Am. U. L. Rev. 393, 425 n. 186 (2002) (stating that \textit{Eisenstadt} extended right of privacy to all individuals); Conkle, \textit{supra} note 59, at 221 (arguing that \textit{Roe} provided constitutional protection to abortion decisions of both married and unmarried women); Rebecca L. Brown, \textit{Liberty, The New Equality}, 77 N.Y.U. L. Rev. 1491, 1503 (2002) (noting that \textit{Roe} extended right of privacy to abortion).

\textsuperscript{65} 405 U.S. 438 (1972).

\textsuperscript{66} See \textit{id.} at 440, 442, 443 (involving constitutional challenge by individual who was convicted under State statute for displaying contraceptives during lecture to group of students, and providing package of vaginal foam to young woman at end of lecture). The statutory provisions were summarized as follows: (1) married couples may obtain contraception to prevent pregnancy, but only from licensed physicians or licensed pharmacists on prescription; (2) unmarried persons may not obtain contraception from anyone to prevent pregnancy; and (3) married or unmarried persons may obtain contraception from anyone to prevent propagation of disease. \textit{id.} at 442. See also Mass. GEN. LAW ANN. ch. 272, § 21 (criminalizing distribution of contraception differently for married and single persons). See also John Nivala, \textit{Planned Parenthood v. Casey: The Death of Repose in Reproductive Decisionmaking}, 4 SETON HALL CONST. L.J. 47, 64 (1983) (noting that statute in \textit{Eisenstadt} regulated distribution of contraception to unmarried persons). See also \textit{Eisenstadt}, 403 U.S. at 462 (White, J. concurring) (noting that defendant, who was neither registered doctor nor registered pharmacist, was not charged for distributing contraception to unmarried person but rather for distributing contraception at all).

Quoting the Supreme Judicial Court of Massachusetts, Justice White noted that the constitutionality of Baird’s conviction rested on his lack of status as a distributor and not the marital status of the foam recipient. \textit{id.}

\textsuperscript{67} See \textit{Eisenstadt}, 405 U.S. at 453 (holding that right of privacy affords all individuals freedom from governmental intrusion into matters of childbearing). The Court held that

\ldots the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals \ldots If the right of privacy means anything, it is the right of the \textit{individual}, married or single, to be free
Identifying the protected right as the individual's "decision whether to bear or beget a child" rather than the privacy surrounding the wedded relationship, the Eisenstadt Court extended the right of privacy beyond the walls of the marital bedroom. 

from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. See also Storrow, supra note 61, at 551-52 (characterizing Eisenstadt as holding that where married persons have right to procure contraception, unmarried persons must also have that right); E. Lauren Arnault, Comment, Status, Conduct, and Forced Disclosure: What Does Bowers v. Hardwick Really Say?, 36 U.C. Davis L. Rev. 757, 764 n.54 (2003) (observing that Eisenstadt Court invalidated statute for discriminating against unmarried persons).

68. See Eisenstadt, 405 U.S. at 443, 454-55 (holding Massachusetts statute unconstitutional for providing dissimilar treatment to married and unmarried individuals who are similarly situated). See also Storrow, supra note 61, at 551-52 (noting that decision in Eisenstadt was matter of equal protection). But see Redlich, supra note 59, at 218 n.17 (asserting that Eisenstadt Court used combination of equal protection and substantive due process analysis and stating that although Court seemingly subjected State statute to rational basis test, Court's standard actually approached strict scrutiny); Stone, supra note 62, at 921 (asserting that Eisenstadt Court "purport[ed]" to apply rational basis review to Massachusetts statute). See also Redlich, supra note 59, at 922 (arguing that both Eisenstadt and Griswold involved sex discrimination because bans on use of contraception have disproportionate effects on women and, more importantly, such bans could not have been codified if relevant burdens were imposed on men, and in absence of stereotypes regarding maternal role of women). See Eisenstadt, 405 U.S. at 447-53 (finding no rational relationship between prohibiting distribution of contraceptives to unmarried persons, and Massachusetts' triple interests in deterring premarital sex, protecting health, and preserving morality). See also Stone, supra note 62, at 921 (stating that Eisenstadt Court held that under rational basis review, none of State's three interests raised in defense of statute was sufficient to support challenged classification).

69. See Carey, 431 U.S. at 687 (noting that Eisenstadt Court described protected right as "decision whether to bear or beget a child"). See also Storrow, supra note 61, at 553 (arguing that Eisenstadt only protected right to decide whether to have children). But see Bowers, 478 U.S. at 218 (Stevens, J. concurring) (noting that substantive due process protects right of married and unmarried persons to engage in non-procreative sex, including that which others may deem offensive or immoral); Conkle, supra note 59, at 232 (arguing that Eisenstadt and Roe necessarily protect right of unmarried heterosexual adults to engage in consensual non-reproductive sexual activity).

70. See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (restricting issue to marital privacy). See also Eisenstadt, 405 U.S. at 453 (noting that in Griswold, right of privacy at issue inhered in matrimonial relationship); Sandel, supra note 63, at 527 (emphasizing Griswold's objective as protecting privacy of married relationship).

71. See Eisenstadt, 405 U.S. at 453 (affording unmarried and married persons equal rights to access contraception). See also Sandel, supra note 63, at 524, 527-28 (noting that Eisenstadt effectuated shift in meaning of privacy from interest in preventing disclosure of personal affairs to freedom to engage in certain behavior without governmental restraint); Arnault, supra note 67, at 764 n.54 (asserting that Eisenstadt extended right of privacy beyond marital couple to individual). But see Storrow, supra note 61, at 555-56 (arguing that Eisenstadt recognized different privacy rights for married and unmarried
One year later, the Court construed the right of privacy to protect a woman's decision whether to terminate her pregnancy.\textsuperscript{72} In \textit{Roe v. Wade}, an unmarried pregnant woman brought a class action challenging the constitutionality of Texas legislation which made it a crime to obtain or attempt an abortion except to save the life of the mother.\textsuperscript{73} Discussing the scope of the liberty protected by modern substantive due process, the Court relied on the \textit{Palko v. Connecticut}\textsuperscript{74} framework of rights which are "fundamental" or "implicit in the concept of ordered liberty."\textsuperscript{75} Noting that its prior decisions have extended the right of privacy to certain spheres of personal "liberty,"\textsuperscript{76} the Court found that the right of privacy encompassed the abortion decision,\textsuperscript{77} and

\begin{itemize}
  \item \textsuperscript{72} See \textit{Roe v. Wade}, 410 U.S. 113, 153 (1973) (holding that right of privacy is broad enough to encompass woman's decision to procure abortion). See also Conkle, \textit{supra} note 59, at 221 (arguing that \textit{Roe} provided constitutional protection to married and single woman's decision to terminate pregnancy); \textit{Redlich}, \textit{supra} note 59, at 219 (stating that, according to Justice Blackmun, woman's right to terminate pregnancy was based on constitutional right of privacy which derived from concept of personal liberty in Due Process Clause).
  \item \textsuperscript{73} See \textit{Roe}, 410 U.S. at 113, 117-18 (summarizing statute as criminalizing procuring or attempting abortion except by medical advice for purpose of saving mother's life). See also Sarah Weddington, \textit{The Wind Beneath My Wings: One Woman's Journey to Effectuate Change as an Attorney}, 20 T.M. Cooley L. Rev. 1, 8 (2003) (noting that plaintiff in \textit{Roe} brought class action on behalf of all pregnant women or women who may become pregnant in future and would like option of abortion); Jeffrey Rosen, \textit{A Viable Solution: Why it Makes Sense to Permit Abortions and Punish Those Who Kill Fetuses}, LEG. AFF., Sept./Oct. 2003, at 20, 22 (discussing academic criticism of Texas statute challenged in \textit{Roe} which punished physicians, but not pregnant women, for performing abortions).
  \item \textsuperscript{74} 302 U.S. 319 (1937).
  \item \textsuperscript{76} See \textit{Roe}, 410 U.S. at 153 (noting that Court has recognized right of personal privacy which extends to activities relating to marriage, procreation, contraception, familial relationships, childrearing, and education). See also \textit{Redlich}, \textit{supra} note 59, at 219 (noting that scope of rights Court has deemed fundamental includes marriage, procreation, contraception, familial relationships, childrearing, and education); Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992) (confirming that substantive liberty safeguarded by Fourteenth Amendment protects personal decisions relating to marriage, procreation, contraception, familial relationships, childrearing, and education).
  \item \textsuperscript{77} See \textit{Roe}, 410 U.S. at 153 (holding that right of privacy includes woman's decision whether to procure abortion). See also \textit{Redlich}, \textit{supra} note 59, at 219 (stating that
concluded that Texas' abortion laws violated the substantive component of the Due Process Clause of the Fourteenth Amendment. 78

Shortly after its decision in Roe, the Court struck down another State statute pursuant to the constitutional right of privacy. In Carey v. Population Services International, 79 the Court addressed the constitutionality of New York legislation prohibiting the sale or distribution of contraception to persons under the age of sixteen, limiting the distribution of contraceptives to licensed pharmacists, and banning all advertisement or display of contraception. 80 Recognizing that access to contraception is essential to the exercise of the constitutionally protected freedom to decide "whether to bear or beget a child," 81 the Court invalidated the

Justice Blackmun premised right to terminate pregnancy on right of privacy which derived from concept of individual liberty in Due Process Clause); Sandel, supra note 63, at 528 (noting that, in context of contraception and abortion, right of privacy has evolved into freedom to make certain individual decisions without State interference); Conkle, supra note 59, at 221 (arguing that Roe provided constitutional protection to abortion decisions of both married and unmarried women). But see Roe, 410 U.S. at 154 (concluding that woman's right to decide whether to terminate pregnancy is not absolute, and emphasizing State's compelling interests in regulating abortion); Carey, 431 U.S. at 686 (highlighting Roe's discussion that certain State interests, including protecting health, upholding medical standards, and safeguarding potential life, may at some point become compelling enough to justify regulating abortion); David A. J. Richards, Constitutional Legitimacy and Constitutional Privacy, 61 N.Y.U. L. Rev. 800, 802 (1986) (characterizing Roe as holding that government cannot criminally proscribe woman's access to abortion services in certain stages of her pregnancy).

78. See Roe, 410 U.S. at 164 (holding that Texas statute, which criminalizes abortion except to save life of mother, without considering pregnancy stage or other interests involved, is unconstitutional under Due Process Clause of Fourteenth Amendment). See also Christopher J. Schmidt, Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process, 32 U. BALT. L. Rev. 169, 181 (2003) (noting that Roe protected woman's qualified right to terminate pregnancy under Fourteenth Amendment's substantive concept of personal liberty); G. Edward White, The Arrival of History in Constitutional Scholarship, 88 Va. L. Rev. 485, 550 n.160 (2002) (noting that Roe transformed right of privacy regarding intimate choices about sexuality into due process liberty to decide whether to have abortion).


81. See Carey, 431 U.S. at 687-88 (holding that because contraception constitutes means of effectuating individual decisions in matters of childbearing, restricting access to contraception burdens freedom to make such decisions). The Court noted that the
statute pursuant to the First Amendment and the substantive component of the Due Process Clause. Although the right of privacy enunciated in Griswold inhered in the marital association, Eisenstadt, Roe, and Carey confirm that the constitutional guarantee of individual privacy in matters of childbearing is not limited to married couples. Although the Griswold line of cases had not specifically an-

constitutively protected freedom to make decisions in matters of childbearing formed the basis of its prior holdings in Griswold, Eisenstadt, and Roe. See also Cass R. Sunstein, Public Deliberation, Affirmative Action, and the Supreme Court, 84 CAL. L. REV. 1179, 1184 n.22 (1996) (asserting that in Carey, Court granted constitutional protection to access contraception because such acquisition is essential to exercising fundamental right to procreate); Storrow, supra note 61, at 555 (arguing that Carey Court re-con- strued Griswold in order to emphasize basis of Griswold's holding as freedom to make decisions in matters of childbearing and not "sexual freedom"). 82. See Carey, 431 U.S. at 681-82 (affirming decision of lower court which struck down statute under First and Fourteenth Amendments insofar as it applied to nonpre-

cscription contraception and enjoined its enforcement as so applied). The Court also rejected the argument that banning contraception would deter sexual activity among minors, and quoted Eisenstadt for the proposition that it is unreasonable to presume that a State has prescribed pregnancy and birth of unwanted offspring, or dangers associated with abortion, as a penalty for fornication. Id. at 694-96. See also Redlich, supra note 59, at 218-19 (noting that Court in Carey invalidated requirement that registered pharmacist distribute contraception because it burdened individual's right to make decisions in matters of childbearing without furthering compelling State interest). Moreover, the Court struck down the ban on advertisements as violating the First Amendment protection of commercial speech without advancing any legitimate purpose. Id. at 218. Furthermore, the plurality invalidated the ban on distributing contraception to minors because this prohibition did not serve a significant State interest. Id. See Carey, 431 U.S. at 686-87 (criticizing appellants' argument that Court has not accorded "ac-

cess" to contraception fundamental rights status as overlooking premise of Griswold and Eisenstadt, and emphasizing principle of Griswold as protecting personal decisions in matters of childbearing).

83. See Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (protecting right of mari-

tal privacy). See also Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (noting that privacy right at issue in Griswold inhered in marital relationship); Sandel, supra note 63, at 527 (emphasizing Griswold's objective as protecting privacy of marital relationship).

84. Lawrence v. Texas, 123 S. Ct. 2472, 2477 (2003) (noting that Eisenstadt, Carey, and Roe all confirm that Griswold's reasoning was not limited to protecting rights of married adults). See Eisenstadt, 405 U.S. at 453 (holding that right of privacy affords all individuals freedom from State intrusion into matters of childbearing); Roe, 410 U.S. at 113 (affording right of privacy to unmarried pregnant woman); Carey, 431 U.S. at 687 (holding that Eisenstadt and subsequent cases clarified that constitutional protection of decisional autonomy in matters of childbearing does not depend on marital relationship); Storrow, supra note 61, at 551-52 (describing Eisenstadt as holding that where married persons have right to acquire contraception, unmarried persons must also have that right); Arnault, supra note 67, at 764 n.54 (declaring that Eisenstadt extended right of privacy from married couple to individual). But see Storrow, supra note 61, at 555-56 (arguing that Eisenstadt recognized distinct privacy rights for married and single persons).
nounced a right for consenting adults to engage in private acts of intimacy, legal scholars have argued that these cases create a constitutional right to intimate association. As the use of contraception and abortion necessarily entail sexual intercourse, academics have argued that the decisions in *Eisenstadt* and *Roe* protect the unmarried person's right to engage in consensual sexual activity. As a result, if the government cannot intrude into the personal decision to use contraception or procure an abortion, it necessarily cannot intrude into the intimate decision to engage in consensual sexual conduct. Even a Supreme Court Justice, along with eminent academics, has argued that the Court's privacy jurisprudence protects the married and unmarried person's right to engage in non-procreative consensual

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86. See Note, *Constitutional Barriers*, supra note 4, at 1664 (noting that right to use contraception would be meaningless without corresponding right to engage in sexual intercourse, and construing privacy right enunciated in *Griswold* and *Eisenstadt* more expansively than mere right to use contraception); Conkle, supra note 59, at 221-22 (arguing that right of privacy, which includes right to access and use contraception and right to procure abortion, at least incidentally protects underlying sexual conduct giving rise to protected activity). See *Eisenstadt*, 405 U.S. at 453 (providing married and single persons equal rights to access to contraception); *Carey*, 431 U.S. at 687 (confirming that right of privacy in matters of childbearing is not limited to married couples); *Lawrence*, 123 S. Ct. at 2477 (noting that *Eisenstadt*, *Carey*, and *Roe* confirm that Griswold's reasoning was not limited to protecting rights of married couples); Sandel, supra note 63, at 524, 527-28 (noting that *Eisenstadt* effectuated shift in meaning of privacy from interest in preventing disclosure of personal affairs to freedom to engage in certain activity without State constraint); Arnault, supra note 67, at 764 n.54 (observing that Eisenstadt extended right of privacy beyond marital couple to individual). But see Storrow, supra note 61, at 555-56 (arguing that Eisenstadt recognized distinct privacy rights for married (right of sexual privacy) and unmarried (right of procreative privacy, insofar as acquiring contraceptives)).

87. See Note, *Constitutional Barriers*, supra note 4, at 1664 (arguing that *Griswold* and *Eisenstadt* protect right to engage in sexual intercourse without State restraint); Conkle, supra note 59, at 221-22 (arguing that State cannot restrict sexual activity giving rise to contraception and abortion rights). But see Melissa M. Eckhause, Note, *A Chastity Belt for Lawyers: Proposed MRPC 1.8(K) and the Regulation of Attorney-Client Sexual Relationships*, 75 U. Det. Mercy L. Rev. 115, 129 (1997) (noting that U.S. Supreme Court has not recognized fundamental right to engage in sexual activity); Mischler, supra note 85, at 26 (noting that *Carey* Court has declared that right of privacy has never been found to protect private sexual conduct between consenting adults); Griswold, 381 U.S. at 498 (Goldberg, J. concurring) (declaring that Connecticut has constitutionally valid statutes prohibiting adultery and fornication).
sexual activity. Legal scholars have thus concluded that by protecting individual autonomy in matters relating to private consensual sexual conduct, the Court creates a zone of privacy for consenting adults to engage in private acts of intimacy. According to these interpretations of the Court's privacy jurisprudence, the rights enunciated in *Griswold* and its progeny create a "freedom of intimate association" between two opposite-sexed

88. See *Bowers*, 478 U.S. at 218 (Stevens, J. concurring) (noting that substantive due process protects right for unmarried and married persons to engage in non-procreative sex, including that which others may deem offensive or immoral). See also *REDLICH, supra* note 59, at 234 (noting that in his dissenting opinion in *Bowers*, Justice Stevens found that *Griswold, Eisenstadt,* and *Carey* protect right to engage in non-procreative sexual activity); *Conkle, supra* note 59, at 232 (arguing that *Eisenstadt* and *Roe* necessarily protect right of unmarried heterosexual adults to engage in consensual non-reproductive sexual activity); *Storrow, supra* note 61, at 551-52 (noting that *Eisenstadt* held that married and unmarried persons must have same rights to obtain contraception); *Arnault, supra* note 67, at 764 n.54 (noting that *Eisenstadt* struck down legislation for discriminating against unmarried individuals); Note, *Constitutional Barriers, supra* note 4, at 1664 (noting that right to use contraception would be meaningless without corresponding right to engage in sexual intercourse); *Conkle, supra* note 59, at 221-22 (arguing that right of privacy, which includes right to access and use contraception and right to procure abortion, at least incidentally protects underlying sexual conduct giving rise to protected activity).

89. See Arielle Goldhammer, *A Case Against Consensual Crimes: Why the Law Should Stay Out of Pocketbooks, Bedrooms, and Medicine Cabinets*, 41 *BRANDEIS L.J.* 237, 263 (2002) (discussing New York Family Court decision recognizing right to engage in non-reproductive recreational sex); *REDLICH, supra* note 59, at 230 (citing Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052 (1978), for proposition that Court has been reluctant to extend constitutional protection to extramarital relationships); *STONE, supra* note 62, at 955-56 (revealing that while Court's decisions in *Griswold* line of cases all construed right of privacy as protecting "the decision whether to bear or beget a child," post-*Roe* cases reveal that substantive due process is not so limited). See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (protecting marriage as fundamental right); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (extending right of privacy to family relationships). See also *REDLICH, supra* note 59, at 229, 230-33 (stating that Court has extended fundamental rights status to marriage and familial relationships and citing cases where Court has carefully examined State statutes that unjustifiably interfere with family relationships or individual rights exercised within family unit); *STONE, supra* note 62, at 955-56 (suggesting that modern substantive due process protection is not restricted to childbearing decision and noting that *Meyer* and *Pierce* involved matters beyond procreation, and *Moore, Zablocki,* and *Stanley v. Illinois*, 405 U.S. 645 (1972), addressed association between right of privacy and family relationship). Post-*Eisenstadt* cases, extending substantive due process protection to marriage and family relationships, therefore demonstrate that modern substantive due process provides protection to matters beyond childbearing. *Id.* But see *Storrow, supra* note 61, at 553 (arguing that *Eisenstadt* only protected narrow right to decide whether to have children, asserting that reasoning of *Eisenstadt* does not support right for unmarried persons to engage in non-procreative intimate activity, and contending that after *Eisenstadt*, States are free to enact criminal statutes proscribing sexual activity between unmarried persons).
individuals, married or single.\textsuperscript{90}

Although the Warren and Burger Courts had not specifically addressed whether the right of privacy extended to private sexual activity between consenting adults, State challenges to the constitutionality of legislation regulating such conduct escalated pursuant to the Court's construal of a constitutional right of privacy.\textsuperscript{91} The Court's landmark decision in \textit{Bowers v. Hardwick},\textsuperscript{92} however, limited the scope of these challenges and the potential scope of the privacy right enunciated in the \textit{Griswold} line of cases.\textsuperscript{93}

\textsuperscript{90} See Mischler, \textit{supra} note 85, at 26 (asserting that scholars have persuasively articulated existence of "freedom of intimate association"); Note, \textit{Constitutional Barriers, supra} note 4, at 1663-64, 1666 (arguing that \textit{Griswold} line of cases affords constitutional protection to intimate association).


\textsuperscript{92} 478 U.S. 186 (1986).

\textsuperscript{93} See Lawrence v. Texas, 128 S. Ct. 2472, 2490 (2003) (Scalia, J., dissenting) (citing cases relying on \textit{Bowers} to limit scope of privacy right). \textit{See}, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (citing \textit{Bowers} as support for upholding public indecency statute on grounds of protecting public order and morality); Milner v. Apfel, 148 F.3d 812, 814 (7th Cir. 1998) (citing \textit{Bowers} for proposition that morality constitutes legitimate State interest); Holmes v. California Army National Guard 124 F.3d 1126, 1136 (9th Cir. 1997) (relying on \textit{Bowers} to uphold regulations prohibiting those who engage in homosexual activity from military service); Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001) (relying on \textit{Bowers} in holding that statute prohibiting sale of sexually stimulating devices for purpose of preserving morality withstands rational basis review); Oliverson v. West Valley City, 875 F. Supp. 1465, 1482-83 (D. Utah 1994) (citing \textit{Bowers} to support holding that plaintiff had no fundamental right to commit adultery); Owens v. State, 724 A.2d 43, 53 (Md. 1999) (citing \textit{Bowers} for proposition that individuals have no constitutional right to engage in non-marital sexual intercourse); City of Sherman v. Henry, 928 S.W.2d 464, 469-71 (Tex. 1996) (holding that, under \textit{Bowers} test, there is no fundamental right to engage in adulterous conduct and citing \textit{Bowers} for
In Bowers, defendant Hardwick, an adult male, was charged with violating a Georgia statute by engaging in consensual homosexual sodomy in his bedroom.\textsuperscript{94} Defendant challenged the constitutionality of the statute insofar as it made private consensual sodomy a crime.\textsuperscript{95} In framing the issue, the majority asked whether the Constitution provides a fundamental right to engage in homosexual sodomy.\textsuperscript{96} In answering this query, the ma-

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\textsuperscript{94}See also Hydorn, supra note 59, at 247 (asserting that Bowers narrowed scope of right of privacy).

\textsuperscript{95}See Bowers, 478 U.S. at 187-88 (stating that defendant challenged constitutionality of Georgia statute insofar as it criminalized consensual sodomy); GA. CODE ANN. § 16-6-2 (1984) (criminalizing heterosexual and same-sex sodomy). The Official Code declares the following:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . . (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

\textit{Id.} See also Redlich, supra note 59, at 233 (noting that although prosecutor dropped charges against defendant, latter sued for declaratory judgment to invalidate statute as unconstitutional).

\textsuperscript{96}See Bowers, 478 U.S. at 188, 195-96 (identifying concerns regarding limitless nature of defendant's claim, such as potential protection that recognition of asserted freedom would grant to sexual crimes). See also Debra L. Weiss, \textit{The Sex Offender Registration and Community Notification Acts: Does Disclosure Violate an Offender's Right to Privacy?}, 20 HA\-\textsc{mline L. Rev.} 557, 564 (1996) (noting that defendants challenged constitutionality of statute on grounds that it infringed fundamental right of privacy to make autonomous decisions in matters of consensual intimate conduct).

\textsuperscript{96}See Bowers, 478 U.S. at 190 (characterizing issue as whether Constitution grants fundamental right to engage in homosexual sodomy). See also Schmidt, supra note 78, at 182-83 (arguing that Bowers Court did not address issue under broader rubric of privacy rights, but narrowly framed issue as whether Constitution confers right to engage in homosexual sodomy); Redlich, supra note 59, at 233 (noting that although Georgia statute's prohibition extended to heterosexual sodomy, including sodomy between married persons, Bowers majority limited its holding to homosexual sodomy); Stephanie M. Wildman, \textit{Interracial Intimacy and the Potential for Social Change}, 17 BERKELEY WOMEN'S L.J. 153, 161 n.28 (2002) (reviewing Rachel F. Moran, \textit{Interracial Intimacy: The Regulation of Race and Romance (2001)}) (asserting that Bowers Court viewed issue of homosexual sodomy as one of criminal activity and not one of privacy and fundamental rights); Henry F. Fradella et al., \textit{Sexual Orientation, Justice, and Higher Education: Student Attitudes Towards Gay Civil Rights and Hate Crimes}, 11 LAW & SEXUALITY 11, 19 (2002) (noting that majority's holding in Bowers has been criticized for framing issue too narrowly). See, e.g., Major Eugene E. Bahme, \textit{Private Consensual Sodomy Should be Constitutionally Protected in the Military by the Right to Privacy}, 171 MIL. L. REV. 91, 126 (2002) (arguing that Bowers focused too narrowly on right of individual to engage in homosexual sodomy); Francis J. Mootz III, \textit{Nietzschean Critique and Philosophical Hermeneutics}, 24 CARDOZO L. REV. 967, 1029 (2003) (arguing that framing issue as whether Constitution grants fundamental right to engage in homosexual sodomy enabled Bowers Court to distance itself from addressing question of whether anti-sodomy statutes are prudent or desirable); Timothy Zick, \textit{Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is,"} 59 WASH. & LEE L. REV. 839, 896 n.364 (2002) (noting
... defined fundamental rights as those rights without which neither liberty nor justice would exist, or those liberties that are deeply rooted in the history and tradition of this Nation. This history-related analysis requires discerning the relevant tradition, a concept that plays a central role in modern substantive due process jurisprudence, encompassing the particular practice at issue. Using tradition as the analytical tool for assessing the claimed fundamental rights status of homosexual sodomy, the Bowers majority presented the historical criminalization of sodomy as evidence that the proposed right did not satisfy either...
Finally, the majority criticized the defendant's claim, premised on the Court's prior decision in *Stanley v. Georgia,*\(^{100}\) that the Constitution affords protection to the intimate conduct at issue because it took place in the home.\(^{101}\) Finding that *Stanley* relied on the First Amendment, a provision inapplicable in the case at hand, the majority rejected the defendant's argument and revealed concern over the flood of sexual crimes that would

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99. *See Bowers,* 478 U.S. at 192-94 (noting that original thirteen States had all adopted criminal sodomy laws when they ratified Bill of Rights; in 1868, thirty-two of thirty-seven States in Union had criminal sodomy statutes; until 1961, all fifty States banned sodomy; and, at time of *Bowers,* twenty-four States and District of Columbia continued to criminalize private consensual sodomy). *But see* *Eskridge,* *supra* note 4 (manuscript at 3-5) (demonstrating that history of statutes criminalizing same-sex sodomy is complex). *See Bowers,* 478 U.S. at 192 (holding that neither *Palko* nor *Moore* formulation of fundamental liberties extends fundamental right to engage in consensual homosexual sodomy). *See also* *Redlich,* *supra* note 59, at 233 (observing that opinion in *Bowers* rejected argument that tradition provided fundamental right to engage in homosexual sodomy); *Mootz,* *supra* note 96, at 1029 (observing that because of Court's specific framing of issue, *Bowers* reached "obvious" conclusion that Constitution cannot be fairly read within this Nation's constitutional tradition as granting affirmative right to engage in homosexual sodomy); *Goldstein,* *supra* note 49, at 1075 (asserting that majority described recognition of fundamental right to engage in homosexual sodomy as exceeding Court's institutional limitations); *Mootz,* *supra* note 96, at 1029 (describing Court as reasoning that because sodomy laws have ancient roots in moral values, they are rational products of lawmaking acts and as such, do not contravene fundamental liberties that are deeply rooted in this Nation); *Hickey,* *supra* note 96, at 998 (noting that Court upheld sodomy statute insofar as it applied to homosexual sodomy because of absence of American tradition accepting such conduct). *But see* Aaron J. Rappaport, *Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy,* 2001 *Utah L. Rev.* 441, 488-89 (2001) (asserting that Court has never accepted position that tradition must be defined by specific conduct in question, discussing problems associated with interpreting tradition at this narrow level, including fact that such narrow analysis would produce outcomes inconsistent with Court's privacy jurisprudence, and noting that right to interracial marriage or abortion is not found in American tradition); *Wolf,* *supra* note 98, at 108 (noting that judges have employed several analytical formulations to evaluate claimed fundamental rights). *See, e.g.,* *Redlich,* *supra* note 59, at 234 (observing that majority and dissent in *Bowers* distinctly characterized relevant tradition).


101. *See Bowers,* 478 U.S. at 195 (finding that defendant's reliance on *Stanley* for proposition that homosexual sodomy is constitutionally protected when occurring in privacy of one's home lacks merit because *Stanley* rested firmly on First Amendment grounds while private homosexual sodomy finds no similar textual support in Constitution). *But see* *Bowers,* 478 U.S. at 207-08 (Blackmun, J., dissenting) (arguing that *Stanley*'s holding was rooted in Fourth Amendment protection of individual in home). *See also* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 *Columbia L. Rev.* 1642, 1695 (1998) (noting that Fourth Amendment played significant role in *Griswold*).
escape prosecution through acceptance of such a claim.\(^{102}\)

Discerning no fundamental right to engage in same-sex sodomy, the majority subsequently sought a legitimate State interest to determine whether Georgia's sodomy statute withstood rational basis review.\(^{103}\) Finding that majoritarian beliefs regarding the immorality of homosexual sodomy constituted a legitimate State interest, the majority upheld the Georgia statute criminalizing private consensual sodomy.\(^{104}\) In rejecting a right of privacy that exempts all private consensual sexual activity from State control, the *Bowers* majority squarely rested its holding on the presumed moral inclinations of Georgia's electorate.\(^{105}\)

102. See *Bowers*, 478 U.S. at 195-96 (identifying concerns regarding limitless nature of proposed freedom of intimate association, including potential protection that recognition of asserted freedom would grant to sexual crimes, and noting that victimless crimes (such as possession and use of illicit drugs) are not saved from prosecution when committed in private). *But see Bowers*, 478 U.S. at 208-09 (Blackmun, J., dissenting) (rejecting majority's comparison of private consensual sex with private possession of drugs, firearms, or stolen goods, arguing that latter crimes are inherently dangerous or involve robbed victim). See also Colb, supra note 101, at 1698 (noting that engaging in criminal activity behind closed doors forfeits right of privacy).

103. See *Bowers*, 478 U.S. at 196 (noting that even if conduct at issue is not fundamental right, statute must still have rational basis to withstand review). See also Goldstein, supra note 49, at 1075-76 (noting that *Bowers* Court applied rational basis review after finding that defendant had no fundamental right to engage in homosexual sodomy); Mootz, supra note 96, at 1031 (characterizing rational basis review as more relaxed standard than strict scrutiny).

104. See *Bowers*, 478 U.S. at 186, 196 (upholding constitutionality of State sodomy statute). See also Mootz, supra note 96, at 1034 (arguing that premise of *Bowers* was that morality constituted rational basis for State legislation); Sidney Buchanan, A Constitutional Cross-Road for Gay Rights, 38 Hous. L. Rev. 1269, 1270 (2001) (characterizing *Bowers* Court's decision as including three sub-holdings: (1) right of privacy recognized by Court's prior cases does not extend to homosexual sodomy; (2) Constitution does not grant fundamental right to engage in same-sex sodomy; and (3) criminalizing activity that offends majoritarian "notions of morality" is rationally related to legitimate goal of advancing moral objectives of majority). *But see Bowers*, 478 U.S. at 212-13 (Blackmun, J., dissenting) (distinguishing between laws banning public indecency and those enforcing private morality). Justice Blackmun argued that the same right of privacy that protects private consensual sex from unwarranted State intrusion justifies protecting the individual's right against having sexual conduct "imposed" on him or her in public. *Id.* at 213. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (concerning statute banning public indecency but not private aspects of such conduct).

105. See *Bowers*, 478 U.S. at 191, 196 (holding that majority sentiments regarding morality of homosexual sodomy constitute adequate basis for law). See also Rebecca L. Brown, A Government For the People, 37 U.S.F. L. Rev. 5, 20 (2002) (asserting that *Bowers* Court explicitly approved legitimacy of using morals-based legislation). *But see Bowers*, 478 U.S. at 211 (Blackmun, J., dissenting) (arguing that religious values cannot provide adequate basis for secular legislation). In his dissent, Justice Stevens argued that the Court's prior cases demonstrate that traditional majoritarian beliefs regarding the mo-
In a dissenting opinion, Justice Harry Blackmun criticized the majority for misconstruing the disputed issue, and re-framed the issue in Bowers as "the right to be let alone." Discussing the Fourth Amendment's protection of personal security
within the home, Justice Blackmun demonstrated that the Constitution protects the right of the individual to engage in intimate association in the privacy of her home.¹⁰⁸

¹⁰⁸. See Bowers, 478 U.S. at 206-08 (Blackmun, J., dissenting) (quoting Court's prior decision which held that essence of Fourth Amendment violation is invasion of personal security). "[T]he essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefeasible right of personal security, personal liberty and private property.'” Id. (quoting California v. Ciraolo, 476 U.S. 207, 226 (1986) (Powell, J., dissenting)). Justice Blackmun supports his "privacy of the individual in her home" argument with specific reference to Stanley, and rejects the Bowers Court's interpretation of Stanley. Id. at 207-08. The Bowers Court found that the defendant's reliance on Stanley (for the proposition that homosexual sodomy is constitutionally protected when it occurs in the privacy of one's home) was misplaced because Stanley rested firmly on First Amendment grounds. Bowers, 478 U.S. at 195. Justice Blackmun, however, asserted that Stanley's holding was rooted in Fourth Amendment protection of the individual in her home. Bowers, 478 U.S. at 199, 207. "[Stanley was not about] "a fundamental right to watch obscene movies," but rather, "the right [of an individual] to read or observe what he pleases - the right to satisfy his intellectual and emotional needs in the privacy of his own home."" Id. (quoting Stanley, 394 U.S. at 565). Justice Blackmun argued that Stanley's reliance on the Fourth Amendment is made apparent by the importance Stanley gave to Justice Brandeis' dissent in Olmstead v. U.S., 277 U.S. 438 (1928), a case which raises no First Amendment claim. Id. at 207. He further noted that the Court in Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973), suggested that Fourth Amendment reliance was necessary to the Court's decision in Stanley. Id. at 207-08. See also Colb, supra note 101, at 1698-99 (arguing that defendant in Bowers asserted Fourth Amendment-related claim by asserting place-specific and not absolute right to engage in consensual homosexual sodomy); Radhika Rao, Property, Privacy, and The Human Body, 80 B.U. L. Rev. 359, 422 (2000) (noting that Justice Blackmun relied on ownership rights of home to provide sphere of privacy); Mark E. Papadopoulos, Inkblot Jurisprudence: Romer v. Evans as a Great Defeat for the Gay Rights Movement, 7 Cornell J.L. & Pub. Pol'y 165, 170 n.34 (1997) (noting that dissenting justices in Bowers criticized majority's reasoning for its failure to account for fact that activity occurred in privacy of home where Stanley provides special protection, and asserting that this argument actually represents challenge to majority's premise that it would decide case at lowest level of controversy possible rather than higher levels such as broad language with which statute was written or broad notions of privacy); Colb, supra, at 1695 (discussing centrality of Fourth Amendment in Court's privacy jurisprudence, namely in Griswold). See Bowers, 478 U.S. at 206 (Blackmun, J., dissenting) (arguing that protecting security of home means more than merely protecting specific activities occurring in home). "Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there." Id. Justice Blackmun argues that although the Court alleges that its decision in Bowers merely rejects recognition of a fundamental right for homosexuals to engage in consensual sodomy, the Court has actually refused to acknowledge the fundamental interest all individuals have in making personal decisions regarding their intimate associations. Id. at 205-06. He argues that the right of an individual to engage in intimate relationships in the privacy of her home is "at the heart of the Constitution's protection of privacy." Id. at 208. Justice Blackmun also notes that the Court's jurisprudence has long acknowledged that the Constitution protects a certain realm of individual liberty from govern-
The Court's decision in Bowers created an upheaval, infuriating critics who condemned the majority's narrow framing of the issue, and even distancing State courts, some of who declined to follow Bowers in interpreting certain provisions of their State Constitutions. The Supreme Court itself decided cases which questioned the continued viability of Bowers. First, in Planned Parenthood of Southeastern Pennsylvania v. Casey, the Court addressed the constitutionality of statutory provisions restricting a woman's right to procure an abortion. A few years
later, in Romer v. Evans, the Court addressed an amendment to the Colorado Constitution which disqualified a defined class of persons, namely homosexuals, lesbians, and bisexuals, from protection under the State’s antidiscrimination laws. Both cases, respectively illustrating that the scope of liberty protected by the Due Process Clause encompasses an individual’s most intimate personal decisions, and demonstrating that animus towards a solitary class of persons does not justify disfavored treatment in the law, exposed the unstable foundation underlying the Court’s holding in Bowers, and foreshadowed the death knell of the Court’s controversial stance on privacy.

b. Lawrence v. Texas

Seventeen years later, in Lawrence v. Texas, the Court lulled the agitation of academics and critics when it addressed the constitutionality of another statute banning same-sex sodomy. In Lawrence, State officers entered an apartment in response to a reported weapons disturbance and observed two men (“petitioners”) engaging in a sexual act. The petitioners were arrested
and convicted under the Texas Penal Code for engaging in "deviate sexual intercourse." In an opinion by Justice Anthony Kennedy, the majority criticizes the Bowers Court for its failure to recognize the scope of the liberty at stake in that case by framing the issue so "simply." Employing an alternative method of issue framing, Justice Kennedy sets out to determine whether the petitioners were free as adults to engage in consensual sexual conduct in the privacy of their home.

Criticizing the Bowers Court for its analysis of tradition, Justice Kennedy argues that the Bowers majority overstated historical premises and simplified a complex body of history. Tracing the ancient tradition of criminalizing sodomy, the Lawrence majority declares that early sodomy laws in the United States were not directed at homosexuals in particular, but rather, to all non-procreative sexual activity; moreover, such laws were rarely, if ever, enforced against consenting adults acting in private. Ac-

119. See Lawrence, 123 S. Ct. at 2476 (noting that, with respect to substantive due process claim, Court of Appeals considered Bowers as controlling); TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) (repealed 2003) (criminalizing same-sex sodomy). "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." Id. TEX. PENAL CODE ANN. § 21.01(1) (Vernon 2003) (defining "deviate sexual intercourse"). "'Deviate sexual intercourse' means (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." Id.

120. See Lawrence, 123 S. Ct. at 2478 (asserting that framing issue in Bowers as right to engage in homosexual sodomy deems defendant's claim just as it would deem married couple to describe marriage as simply about right to engage in sexual intercourse). "[The Bowers Court] misapprehended the claim of liberty . . . presented to it, and thus stat[ed] the claim to be whether there is a fundamental right to engage in consensual sodomy." Id. See Ryan, supra note 50, at 5 (noting that, according to Justice Kennedy, Bowers Court misstated essential issue and asserting that Justice Kennedy focused on dignity of free persons and not sexual activity).

121. See Lawrence, 123 S. Ct. at 2476, 2482 (noting that while case could be decided under Equal Protection Clause, Court must resolve case pursuant to substantive due process in order to determine continued validity of Bowers). See also Ryan, supra note 50, at 5 (noting that Lawrence Court declined to find statute unconstitutional under Equal Protection Clause).

122. See Lawrence, 123 S. Ct. at 2480 (noting that Bowers Court was making broader assertion regarding long-held beliefs denouncing homosexual sodomy as immoral); Eskridge, supra note 4 (manuscript at 2-5) (discussing complex history underlying prohibitions of all sodomy in general and same-sex sodomy in particular).

123. See Lawrence, 123 S. Ct. at 2478-79 (noting that in colonial times and nineteenth century, prohibitions against sodomy did not distinguish between heterosexuals and homosexuals); Bowers, 478 U.S. at 198 n.2 (Powell, J., concurring) (discussing pattern of non-enforcement of Georgia sodomy statute with respect to private consensual homosexual sodomy). See also Ryan, supra note 50, at 9 (asserting that Justice Kennedy
according to Justice Kennedy, States have only recently singled out homosexual sodomy for criminal prosecution, and only nine have done so.\textsuperscript{124} Noting that five of these States have since moved towards repealing these statutes, Justice Kennedy demonstrates an "emerging awareness" that liberty affords protection to adults in deciding how to conduct their intimate lives.\textsuperscript{125}

Justice Kennedy subsequently demonstrates the gradual erosion of \textit{Bowers} by invoking the two Supreme Court cases that challenged its continuing validity.\textsuperscript{126} First, the majority makes reference to the \textit{Casey} decision, arguing that the holding in \textit{Casey} affords all individuals, including homosexual persons, the right to decisional autonomy in making the most intimate choices in their personal lives.\textsuperscript{127} Next, the majority cites \textit{Romer}, where the Court invalidated class-based legislation aimed at homosexuals as violating the Equal Protection Clause.\textsuperscript{128}

demonstrates that sodomy statutes have rarely been enforced in U.S. except to ensure that alleged rapists who could not be convicted for lack of evidence could still be prosecuted for some offense; \textit{Eskridge}, supra note 4 (manuscript at 3) (citing nineteenth century case where court overturned conviction of men engaging in homosexual acts where witnesses observed three men entangled with one another but could not prove sexual penetration and noting that reported nineteenth century cases fall into three groups: (1) sex between adult men and animals; (2) sex between adult men and minors (boys and girls); and (3) sex between two adults, usually involving force or coercion based on status).

\textsuperscript{124} \textit{See Lawrence}, 123 S. Ct. at 2479 (asserting that U.S. laws targeting homosexual couples are not deeply rooted in history, but developed in last third of twentieth century). \textit{But see Ryan}, supra note 50, at 9 (arguing that Justice Kennedy provides lengthy but not very convincing discussion that laws specifically directed at same-sex sodomy are of relatively recent origin). \textit{See also Eskridge}, supra note 4 (manuscript at 3) (noting that first three-quarters of twentieth century marked period of increasing State snooping, especially into lives of sexual minorities, while in nineteenth century, State did not intrude into Nation's bedrooms).

\textsuperscript{125} \textit{See Lawrence}, 123 S. Ct. at 2480 (declaring that U.S. laws and traditions demonstrate this "emerging awareness"). \textit{See also Ryan}, supra note 50, at 9 (noting that Justice Kennedy reveals that States have been slowly repealing sodomy laws).

\textsuperscript{126} \textit{See Lawrence}, 123 S. Ct. at 2481-82 (discussing implications of \textit{Casey} and \textit{Romer} on gay rights). \textit{See also Winner}, supra note 110, at 1089, 1090 (suggesting that \textit{Casey} and \textit{Romer} foreshadowed demise of \textit{Bowers}); Leonard, supra note 51 (discussing Justice Kennedy's analysis of \textit{Casey} and \textit{Romer}).

\textsuperscript{127} \textit{See Lawrence}, 123 S. Ct. at 2481-82 (discussing impact of \textit{Casey} on continued existence of \textit{Bowers}). \textit{See also Winner}, supra note 110, at 1089 (suggesting that standards set forth in \textit{Casey} seem to foreshadow death of \textit{Bowers}); Leonard, supra note 51 (asserting that language employed in \textit{Casey} suggested broader concept of personal liberty than that implied in \textit{Bowers}).

\textsuperscript{128} \textit{See Lawrence}, 123 S. Ct. at 2482 (providing case summary of \textit{Romer}). Rejecting the legitimacy of morals-based legislation, \textit{Romer} foreshadows the \textit{Lawrence} Court's treatment of morals-based legislation. \textit{See id}. The \textit{Lawrence} Court observes that \textit{Romer} casts
Concluding that the precedents both before and after Bowers contradict the central holding of that case, the Lawrence majority overrules this controversial case which specifically held that the Constitution does not grant a right to engage in homosexual sodomy. Finding that Texas’ interest in promoting morality did not even constitute a legitimate State interest for criminalizing homosexual sodomy, the Court holds that the right of privacy protects the intimate decisions of persons in a homosexual relationship from State intrusion. Invalidating Texas’ same-sex sodomy legislation under the substantive component of the Due Process Clause of the Fourteenth Amendment, the majority grants a fundamental right to engage in private consensual sexual activity.

129. See Lawrence, 123 S. Ct. at 2481-82. See generally Romer v. Evans, 517 U.S. 620 (1996) (rejecting idea that law is constantly based on morality). Even Justice Scalia, dissenting in Romer, argued that the Romer Court’s rejection of the legitimacy of morals-based legislation contradicts Bowers. See Romer, 517 U.S. at 636, 644 (Scalia, J., dissenting). See also Leonard, supra note 51 (asserting that Romer was first major victory for gay rights in U.S. Supreme Court in long time); Winner, supra note 110, at 1089 (noting that Court in Romer directly contradicted its holding in Bowers).

130. Lawrence, 123 S. Ct. at 2476, 2484 (applying rational basis review to invalidate Texas statute). But see Lawrence, 123 S. Ct. at 2495 (Scalia, J., dissenting) (criticizing majority’s rejection of morality as legitimate State interest). See Lawrence, 123 S. Ct. at 2484 (asserting that liberty granted by Fourteenth Amendment’s Due Process Clause protects individual decisions in matters of private intimacy from unwarranted government intrusion). See also Leonard, supra note 51 (suggesting that Justice Kennedy was asserting that Texas’ statute failed even most lenient standard of review); Stephanie Francis Ward, Toys in the Appellate Court: Suit Challenging Alabama’s Ban on Sale of Sexual Devices Cites Lawrence Decision, 2 A.B.A.J. EREP., No. 40, at 3 (2003) (noting that Lawrence invalidates State sodomy law as unconstitutional violation of right of privacy); Elizabeth R. Baldwin, Note, Damage Control: Staking Claim to Employment Law Remedies for Undocumented Immigrant Workers After Hoffman Plastic Compounds, Inc. v. NLRB, 27 SEATTLE U. L. REV. 233, 263 n.265 (2003) (noting that Lawrence holds that all American sodomy laws are unconstitutional and unenforceable when applied to consenting adults acting in private).

131. See Lawrence, 123 S. Ct. at 2481-82, 2484 (protecting individual autonomy in matters of private intimacy). But see Lawrence, 123 S. Ct. at 2495 (Scalia, J., dissenting) (arguing that majority rests its holding on claim that law lacks rational basis). See also A. Scott Loveless, Children on the Front Lines of an Ideological War: The Differing Values of Differing Values, 22 ST. LOUIS U. PUB. L. REV. 371, 396 n. 77 (2003) (arguing that Lawrence elevates private consensual sodomy to fundamental rights status); Suzanne B.
c. Bowers and Lawrence: The Outcome-Determinative Aspect of Inquiry Framing

In its analysis of privacy rights, the Supreme Court has identified two privacy interests safeguarded by the Federal Constitution: the right to be free from governmental intrusion (or the right to be let alone) and the right to decisional autonomy.\(^\text{132}\) Consistent federal recognition of this dichotomy, as well as the Court's pivotal decisions in Bowers and Lawrence, reveal the compelling implications of this duality.\(^\text{133}\) These latter cases demonstrate that the "right to be let alone" aspect of privacy jurisprudence affords greater protection to private sexual activity between consenting adults than the right to decisional autonomy.\(^\text{134}\) Reaching diametrically-opposed holdings, these

Goldberg, On Making Anti-Essentialist and Social Constructionist Arguments in Court, 81 Or. L. Rev. 629, 631 n.7 (2002) (describing Lawrence as recognizing liberty interest of homosexual persons in making decisions regarding private consensual sexual activity); Michelle Mann, Will Canada Lead the Way in Same-Sex Marriages?: Winds of Change in the United States May Come From Up North, 2 A.B.A. J. eREP., No. 27, at 5 (2003) (asserting that Lawrence reflects principle articulated by former Canadian prime minister Pierre Trudeau who declared that State has no business in Nation's bedrooms); Eskridge, supra note 4 (manuscript at 1, 2) (arguing that Lawrence Court's reasoning forbids States from treating homosexuals as outlaws and requires States to treat gays with respect, and noting that after Lawrence, homosexuals have risen in status from public outlaws to public citizens); Leonard, supra note 51 (suggesting that as result of Lawrence, all remaining sodomy statutes in United States are unconstitutional).


133. See, e.g., City of Sherman, 928 S.W.2d at 468 (noting that lower federal courts have regularly recognized dichotomy of privacy right); Bellotti v. Baird, 443 U.S. 622, 655 (1979) (Stevens, J., concurring) (finding that abortion right protects both privacy interests); Woodland v. City of Houston, 940 F.2d 134, 138 (5th Cir. 1991) (asserting that Court's privacy jurisprudence implicates distinct privacy interests); Fleisher v. City of Signal Hill, 829 F.2d 1491, 1497 n.5 (9th Cir. 1988), cert. denied, 485 U.S. 961 (1988) (noting that liberty protected by Fourteenth Amendment's Due Process Clause includes two privacy interests); Thorne v. City of El Segundo, 796 F.2d 459, 468 (9th Cir. 1983), cert. denied, 469 U.S. 979 (1984) (finding that case implicated both privacy interests). See also Johnson v. San Jacinto Junior Coll., 498 F. Supp. 555, 574 (S.D. Tex 1980) (construing decisional autonomy aspect of right of privacy as encompassing three distinct interests).

134. See Bowers v. Hardwick, 478 U.S. 186, 190, 192-94, 195 (1986) (finding that Constitution does not confer and Nation's history and tradition do not support fundamental right for homosexual persons to engage in consensual sodomy); Lawrence, 123
cases suggest that in privacy jurisprudence, inquiry framing is outcome-determinative.135

Both Bowers and Lawrence address the constitutionality of sodomy statutes pursuant to the substantive component of the Due Process Clause of the Fourteenth Amendment.136 In Bowers, the Court specifically examined whether the defendant's individual conduct was constitutionally insulated, and thereby construed the case under the more specific individual autonomy aspect of privacy.137 Demonstrating that the right to engage in homosexual sodomy is not deeply rooted in the history and tradition of this Nation, Bowers concluded that the claimed right did not satisfy the Palko/Moore test.138

Deciding the level of generality at which to frame the rele-

S. Ct. at 2484 (holding that liberty protects private consensual homosexual intimacies from State intrusion). See also Francis J. Beckwith, Cloning and Reproductive Liberty, 3 Nev. L.J. 61, 83 n.109 (2002) (asserting that Justice Blackmun understood Court's privacy jurisprudence as premised on right to be let alone, and noting that this conception of privacy would render statutes criminalizing private consensual homosexual sodomy unconstitutional); Redlich, supra note 59, at 234 (noting that majority and dissent in Bowers distinctly described relevant tradition).

135. See Stone, supra note 62, at 964 (discussing outcome-determinative aspect of defining tradition in modern substantive due process jurisprudence); Rappaport, supra note 99, at 488-89 (stating that Court has never accepted position that tradition must be defined by specific conduct at issue and noting that narrow analysis would produce outcomes inconsistent with Court's privacy jurisprudence); Zick, supra note 96, at 896 n.364 (noting that Bowers Court's specific formulation of issue fixed its conclusion); Mootz, supra note 96, at 1029 (observing that Bowers Court came to "obvious" holding that within American constitutional tradition, Constitution cannot be read as conferring affirmative right to engage in homosexual sodomy).

136. See Bowers, 478 U.S. at 191-94 (assessing whether homosexual sodomy is fundamental right under Due Process Clause); Lawrence, 123 S. Ct. at 2476 (resolving case specifically under substantive due process component of Fourteenth Amendment). See also Daniel G. Bird, Note, Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty, 40 Am. Crim. L. Rev. 1329, 1359 (2003) (noting that Bowers Court held that, for purposes of substantive due process, there was no fundamental right to engage in homosexual sodomy); Ryan, supra note 50, at 5 (noting that Lawrence Court declines to strike down statute pursuant to Equal Protection Clause).

137. See Bowers, 478 U.S. at 190, 195 (finding no Constitutional text protecting right at issue); Jody Lynee Madeira, Comment, Law As a Reflection of Her/His-story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Interests in Legal Determinations of Sex, 5 U. Pa. J. Const. L. 128, 162 (2002) (asserting that Bowers cast shadow on individual autonomy-based claims for right of privacy to engage in any sexual activity). See also Leonard, supra note 51 (noting that Bowers narrowly framed issue as encompassing homosexual sodomy); Schmidt, supra note 78, at 182-83 (arguing that Bowers Court did not address issue under broader umbrella of privacy rights).

138. See Bowers, 478 U.S. at 192-94 (discussing history of sodomy criminalization to determine whether right to engage in homosexual sodomy is fundamental liberty). See also Redlich, supra note 59, at 232-34 (noting significance of defining appropriate tra-
vant inquiry is closely related to identifying the appropriate level of tradition that will define the content of the liberty protected by the Due Process Clause.\(^\text{139}\) This problem was illustrated in \textit{Michael H. v. Gerald D.},\(^\text{140}\) where a California statute, establishing that a child born to a married woman living with her husband is conclusively presumed to be the husband’s child, denied visitation rights to the child’s genetic father.\(^\text{141}\) Writing for a plurality, Justice Antonin Scalia upheld the statute, finding no specific tradition protecting the rights of an adulterous natural father.\(^\text{142}\) In a dissenting opinion, Justice William Brennan, Jr. espoused a more general framing of the relevant tradition, characterizing the appropriate tradition as the historical protection afforded to parenthood.\(^\text{143}\)

\(\text{See generally Michael H. v. Gerald D., 491 U.S. 110 (1989) (invoking justices' distinct formulations of tradition).}

\(\text{139. See Stone, supra note 62, at 975 (emphasizing problem associated with deciding level of generality at which to define tradition); Redlich, supra note 59, at 232 (noting that concept of tradition is central theme in the Court’s modern substantive due process analysis); Wolf, supra note 98, at 108 (asserting that tradition is generally accepted method for assessing proposed fundamental liberties).}

\(\text{140. 491 U.S. 110 (1989).}

\(\text{141. See id. at 111, 121, 127 (finding that substantive due process does not protect parental rights of adulterous natural father); Stone, supra note 62, at 965 (discussing statute in Michael H.); Redlich, supra note 59, at 232-33 (discussing split amongst justices in Michael H.). Cf. Sanusi Lamido Sanusi, The Hudood Punishments in Northern Nigeria: A Muslim Criticism, available at http://www.gamji.com/sanusi.htm (Oct. 1, 2002) [hereinafter Sanusi, A Muslim Criticism] (describing sleeping fetus doctrine in Maliki jurisprudence whereby child of pregnant unmarried divorcée is presumed to be child of former husband during recognized gestation period).}

\(\text{142. See Michael H., 491 U.S. at 126-27 (finding no tradition protecting parental rights of adulterous natural father). See also Redlich, supra note 59, at 233 (discussing diverse conceptions of tradition in Michael H.); Merry Jean Chan, Note, The Authorial Parent: An Intellectual Property Model of Parental Rights, 78 N.Y.U. L. Rev. 1186, 1193 (2003) (noting that in Michael H., plurality found that history and tradition did not protect liberty interest of adulterous natural father); Anthony Miller, Baseline, Bright-Line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage, 34 McGeorge L. Rev. 637, 640 n.15 (2003) (noting that in Michael H., Justice Scalia possibly had narrowest view of tradition among all justices); Michael H., 491 U.S. at 137 (Brennan, J., dissenting) (observing that by limiting concept of tradition, plurality limited concept of liberty).}

\(\text{143. See Michael H., 491 U.S. at 127 n.6 (asserting that Justice Brennan focused more generally on traditional protection afforded parenthood, and criticizing Justice Brennan’s broad definition of relevant tradition); Michael H., 491 U.S. at 139 (Brennan, J., dissenting) (asserting that if Court in prior cases had viewed tradition as narrowly as plurality does in Michael H., those cases would have reached different holdings). See also Stone, supra note 62, at 965 (discussing Michael H.); Laurence C. Nolan, “Unwed Children” and Their Parents Before the United States Supreme Court From Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence, 28 Cap. U. L. Rev. 1, 42 (1999) (assert-}
The Bowers majority, like Justice Scalia in Michael H., invoked the historical protection of the conduct at issue as the relevant tradition with which to evaluate the fundamental rights status of same-sex sodomy. The dissenting Justice Blackmun, however, did not adhere to the majority's narrow definition of the issue at stake, but framed the pertinent query in terms of a general right of privacy based on freedom from governmental intrusion. Consequently, Justice Blackmun found the defendant's conduct within the ambit of constitutional protection while the Bowers majority found the conduct well outside this protected sphere.

Opting for general framing, Justice Kennedy, like Justice Blackmun in his dissent in Bowers, presents the issue in Lawrence as implicating the more inclusive "right to be let alone" aspect of privacy. Recognizing the problematic nature of discerning whether the particular act of homosexual sodomy is deeply
rooted in this Nation's history and tradition (much like the arduous task of linking the private viewing of pornography to United States history and tradition), Justice Kennedy emphasizes the implications of narrow issue framing.\textsuperscript{147} Employing this broader query, the Court finds that the Constitution affords petitioners the right to engage in consensual sexual conduct free from governmental intervention.\textsuperscript{148} Concluding that the State cannot punish adults for engaging in private consensual sexual behavior, \textit{Lawrence} demonstrates that the current judicial position on private sexual conduct between two consenting individuals who are legally capable of consent is colored by the framing of the query.\textsuperscript{149}

\textsuperscript{147} See \textit{Lawrence}, 123 S. Ct. at 2478 (criticizing \textit{Bowers} for framing issue narrowly). See also \textit{Bowers}, 478 U.S. at 199 (Blackmun, J., dissenting) (revealing that if \textit{Stanley} Court examined whether viewing pornography in one's home was fundamental right protected by Constitution, Court would have faced challenging task gleaning this right through history and tradition); \textit{Ryan}, \textit{supra} note 50, at 7 (noting that it would be difficult to root fundamental right to engage in sodomy deeply in this Nation's history or tradition); \textit{Stone}, \textit{supra} note 62, at 975 (establishing that tradition can be defined at different levels of generality).

\textsuperscript{148} See \textit{Lawrence}, 123 S. Ct. at 2484 (holding that liberty affords petitioners right to engage in consensual intimate relations without State interference); \textit{Ryan}, \textit{supra} note 50, at 5 (noting that Justice Kennedy focuses on dignity of free persons rather than sexual activity); \textit{Leonard}, \textit{supra} note 51 (asserting that Justice Kennedy espouses broad ruling based on liberty protected by Fourteenth Amendment's Due Process Clause).

\textsuperscript{149} See \textit{Lawrence}, 123 S. Ct. at 2484 (finding that State cannot demean homosexual existence or control lives of homosexuals by criminalizing private consensual same-sex sodomy); \textit{Leonard}, \textit{supra} note 51 (asserting that Justice Kennedy demonstrates emerging awareness by courts that State should protect liberty of consenting adults to engage in private consensual intimacies). See also \textit{Fabio v. Civil Service Commission of City of Philadelphia}, 373 A.2d 751, 752, 754, 755 (Pa. Commw. Ct. 1977) (rejecting police officer's claim that basis for his dismissal infringed constitutional right of privacy where officer was dismissed for violating police department manual by engaging in adulterous conduct in his home while off-duty). Using \textit{Bowers} as its template, a lower federal court similarly rejected the application of the right to privacy to adulterous relationships. \textit{Oliverson v. West Valley City}, 875 F. Supp. 1465, 1482, 1485 (D. Utah 1994) (declaring that plaintiff has no fundamental right to engage in adultery). "[T]he right to commit adultery cannot be considered 'fundamental.'" \textit{Id.} at 1482. See also \textit{City of Sherman v. Henry}, 928 S.W.2d 464, 467, 468, 469 n.2 (Tex. 1996) (involving police officer's claim that basis for denial of promotion (engaging in private adulterous conduct with co-officer's spouse) violated constitutional right of privacy). In many pre-\textit{Lawrence} State cases addressing the applicability of the right to privacy to adulterous conduct, the judiciary was asked to recognize "a right to commit adultery." Most conservative and even moderate jurisdictions balked at such a request. A broader inquiry, such as the "right to be let alone," would likely have afforded protection to two adults engaging in private, consensual, adulterous conduct. See \textit{City of Sherman}, 928 S.W.2d at 474 (addressing whether adultery is fundamental right). The \textit{City of Sherman} Court held that, under the \textit{Bowers} test, the right to engage in adultery is neither "implicit in the
II. PRIVACY, MORALS, AND PUNISHMENT: EXAMINING THE CRIMINALIZATION OF CONSENSUAL INTIMACIES

A. Zina: Privacy Infringement or Public Indecency Crime?

After Lawrence, the Court has expanded the scope of privacy by affording protection to private intimacies between consenting adults of the same sex. While Islamic law criminalizes extramarital sexual intercourse, the standard of proof for establishing the crime, regulations addressing the consequences of transgressing these evidentiary requirements, and proprietary and personal se-
curity rights influence the viability of prosecuting individuals who engage in private consensual sex outside of marriage.

1. Quadruple Testimony Requirement

The majority view among Muslim schools of thought recognizes two forms of evidence in cases of hudood: witness testimony and confession by the party accused of committing the criminal act in question.\textsuperscript{150} We turn first to witness testimony.

After subjecting zina to criminal penalty, the Qur'an sets forth strict evidentiary requirements by calling on four witnesses to substantiate a claim of zina.\textsuperscript{151} Islamic jurisprudence has further construed the Qur'an's quadruple testimony standard for zina as requiring actual observance of sexual penetration.\textsuperscript{152} All

\textsuperscript{150} See Salama, \textit{supra} note 52, at 115, 119, 121 (noting that majority of scholars limit criminal evidence in hudood cases to witness testimony and confession); Sanad, \textit{supra} note 11, at 99 n.1, 104-05 (discussing majority and minority views on criminal evidence in Islam); Peters, \textit{supra} note 1, at 509 (noting that while majority of Muslim schools of thought do not admit circumstantial evidence as proof of zina, Maliki school accepts pregnancy of unmarried woman as evidence of fornication). See also Quraishi, \textit{supra} note 2, at 300, 301 (noting that majority view in classical Islamic jurisprudence is that pregnancy alone is insufficient as proof of zina, and arguing that notion of pregnancy as automatic proof of zina contravenes Qur'anic aversion for presumptions regarding woman's sexual activity without four witnesses).

\textsuperscript{151} See Qur'an 24:4 (describing evidentiary requirements for establishing proof of zina). "And those who launch a charge against chaste women and produce not four witnesses (to support their allegations) - flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors." Id. See Quraishi, \textit{supra} note 2, at 294 (discussing Qur'anic requirement of quadruple testimony in cases of zina). See also Salama, \textit{supra} note 52, at 116 (noting that four witnesses are required to prove zina); Qur'an 24:6-9 (placing different burden upon husband who accuses wife of adultery):

And for those who launch a charge against their spouses, and have (in support) no evidence but their own -

Their solitary evidence (can be received) if they bear witness four times (with an oath) by [God] that they are solemnly telling the truth;

And the fifth (oath) (should be) that they solemnly invoke the curse of [God] on themselves if they tell a lie.

But it would avert the punishment from the wife, if she bears witness four times (with an oath) by [God], that (her husband) is telling a lie;

And the fifth (oath) should be that she solemnly invokes the wrath of [God] on herself if (her accuser) is telling the truth.

Id. See Quraishi, \textit{supra} note 2, at 294 n.24 (noting that Qur'an provides lower evidentiary burden for husband who accuses wife of adultery); al-'Awwa, \textit{supra} note 22, at 137 (discussing process of li'an, or husband's allegation taken under oath that his wife committed adultery where he is sole witness); Sanusi, \textit{A Muslim Criticism, supra} note 141 (noting that if husband pursues this process, he rejects paternity).

\textsuperscript{152} See Quraishi, \textit{supra} note 2, at 295-96 (discussing requirement of actual obser-
witnesses must have seen the act like "a stick disappearing in a kohl container." In this way, four persons who witness two undressed individuals engaging in presumably intimate behavior underneath a blanket have not met the evidentiary requirements for proving zina. Given these strict evidentiary conditions, proof of zina is virtually impossible to establish through eyewitness testimony unless two individuals were having sex completely uncovered in a public space. In effect, scholars have argued

vance of sexual penetration); M. Cherif Bassiouni, Sources of Islamic Law, and The Protection of Human Rights in The Islamic Criminal Justice System, supra note 1, at 5 (emphasizing that proof of zina requires actual observance of sexual penetration); Muhammad 'Ata Al-Sidahm, The Hud[90]: The Hud[90]d are the Seven Specific Crimes in Islamic Criminal Law and their Mandatory Punishments 163 (1995) (noting that requirement of intercourse is evidenced by incident where Ma'iz b. Malik confessed to Prophet Muhammad that he committed zina and Prophet spoke with Ma'iz to confirm that act involved actual penetration). See Chaudhry, supra note 14, at 83 (noting that during time of Prophet Muhammad, woman who openly practiced prostitution was not punished because there was no proof of zina); Peters, supra note 22, at 127 (noting that importance of requiring penetration for hadd punishment was apparently public knowledge).

153. See Peters, supra note 1, at 510 (asserting that four male eyewitnesses must provide testimony for zina but noting distinction in Shi'i school regarding testimony of women); Salama, supra note 52, at 118 (stating that "[a]ll jurists" reject testimony of women as prosecution witnesses in cases of zina while testimony of women is accepted and sometimes required for defense, but asserting that minority of jurists accept testimony of women in cases of zina where there are two women for each man); Quraishi, supra note 2, at 305-10 (noting that Qur'anic verse setting forth evidentiary requirements for zina does not exclude testimony of women, criticizing restriction of testimony to men as example of cultural practice and biases, and arguing against excluding testimony of women). See generally Aftab Hussain, Status of Women in Islam 242-89 (1987) (discussing juristic variations on admissibility of women's testimony, and noting that theory that women are weak in memory is proved incorrect by Qur'an, which does not draw distinction between male and female testimony, and Sunnah, which proves that Prophet Muhammad decided disputes on solitary testimony of woman); Quraishi, supra note 2, at 305-06, nn.74-75 (discussing majority and minority views regarding all-male witness requirement). Islamic evidence law also limits criminal testimony to witnesses who are mature, sane, and of upstanding character. See id. at 295; Chaudhry, supra note 14, at 76-77 (citing report where Caliph 'Ali ibn 'Abi Talib prohibited punishment of insane persons); Salama, supra note 52, at 116-19 (discussing criteria for witness testimony, disqualified testimony, special conditions for testimony in adultery cases, and juristic variations); Sanad, supra note 11, at 100-02, 105-06 (discussing criteria for admissibility of criminal evidence and juristic variations); Salama, supra note 52, at 12 (noting that testimonies must be explicit and describe crime in all its details); Peters, supra note 22, at 84 (noting that testimony of fornication must use term fornication and not simply synonyms for sexual intercourse).

154. See Quraishi, supra note 2, at 296 (discussing practical consequences of zina's evidentiary requirements). See Bassiouni, supra note 152, at 5 (discussing requirement of observing actual penetration).

155. See Quraishi, supra note 2, at 296 (asserting that practical implications of evi-
that the crime of zina is one of public indecency rather than private sexual activity.156 Rather than infringing privacy rights, criminalization of the public display of two nude individuals engaging in sexual conduct serves to protect public health, order, and morality, interests that the U.S. Supreme Court has itself considered legitimate in upholding the validity of public indecency statutes.157

Besides Islamic evidence law, jurisprudential and theological regulations demonstrate that the criminalization of zina is seemingly more apparent than real. After setting forth the evidentiary requirements for establishing proof of zina, the Qur'an describes the repercussions for failure to meet this strict standard of evidence.158 If the accuser presents only three witnesses as proof of zina, he/she and the witnesses are all liable for slander, or qadhf, another offence of hudood.159 According to the
dentiary requirements render crime of zina liable to punishment only if two parties are committing zina in public in nude).

156. Quraishi, supra note 2, at 296 (noting that crime of zina is one of public indecency). See Salama, supra note 52, at 118 (noting that scholars have argued that strict evidentiary standards render criminal act of zina as crime of public indecency); Bassiouni, supra note 152, at 5-6 (arguing that standard of proof establishes that purpose of hadd penalty for zina is to deter public aspects of such activity).

157. See, e.g., In re Tennessee Pub. Indecency Statute v. Metro Gov't, Nos. 96-6512, 96-6573, 97-5924, 97-5938, 1999 U.S. App. Lexis 535 (6th Cir. 1999). In addition to morals-based statutes prohibiting public indecency, the Court has also justified public indecency statutes by ancillary non-moral effects. See Barnes, 501 U.S. at 582 (Souter, J., concurring) (arguing that State has sufficient interest in prohibiting secondary effects that nude barroom dancing may encourage, such as criminal activity and violence against women).

158. See QUR'AN 24:4 (describing consequences for failure to meet quadruple witness requirement). This Qur'anic verse states: "And those who launch a charge against chaste women and produce not four witnesses (to support their allegations) - flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors." Id. See Quraishi, supra note 2, at 296-99 (discussing Qur'anic verse punishing slander and arguing that subsequent verses honor privacy and dignity of women); EL-Awa, supra note 1, at 126 (discussing connection between slander rule and zina).

159. See SIDAHMAD, supra note 152, at 69 (noting that qadhf is crime of hadd); Quraishi, supra note 2, at 297-98, 311 (defining qadhf as slander); EL-Awa, supra note 1, at 1-2 (defining qadhf as slanderous accusation of unchastity); Salama, supra note 52, at 112 (defining qadhf as defamation and citing case where Caliph Umar imposed hadd penalty for qadhf on three witnesses who testified against person accused of zina where testimony of fourth witness failed to corroborate theirs); EL-Awa, supra note 1, at 20-23 (discussing crime of qadhf). See also D.A. SPELLBERG, POLITICS, GENDER, AND THE ISLAMIC PAST: THE LEGACY OF 'AISHA BINT ABI BAKR 66-74 (1994) (discussing context in which Qur'anic verse on qadhf was revealed). This is a primarily Sunni account of the background of these verses. Many Shi'i scholars take a different position. Id. at 81-82. See also Quraishi, supra note 2, at 296-99 (discussing qadhf verse and ensuing verses that
prevailing view, the accused must be acquitted unless all four witnesses testify together at the same hearing. In the absence of this concurrent testimony, the accuser and four witnesses are all guilty of qadhāf, even if the defamatory accusation is true. Some scholars further require the presence of all witnesses at the commencement of each witness' testimony. Finally, according to all schools except the Hanafi, qadhāf also applies to evidentiary transgressions associated with proving an accusation of homosex-

condemn public speculation of women's sexual activities (see Qur'an 24:11-17), and arguing that these verses demonstrate Qur'anic protection of woman's honor and dignity; al-'Awwa, supra note 22, at 137 (noting that qadhāf does not apply in cases of li'an, pointing out that penalty is mitigated if slanderer is husband, and discussing purpose of li'an).

160. See Salama, supra note 52, at 118-19 (noting that while Imams Malik, Abu Hanifa, and Ahmad ibn Hanbal espouse this view, Imam al-Shafi'i accepts presentation of testimony at separate sessions); El-Awa, supra note 1, at 126 (noting that, except in Shafi'i school, testimonies in zina cases must be presented to court in one sitting). Cf. U.S. Const. amend. VI (discussing rights of accused in criminal trial). "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Id. See Maryland v. Craig, 497 U.S. 836 (1990) (discussing Confrontation Clause of Sixth Amendment); Radha Natarajan, Note, Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications, 78 N.Y.U. L. Rev. 1821, 1831 n.54 (2003) (citing Davis v. Alaska, 415 U.S. 308 (1974), for holding that defendant has constitutional right to confront witnesses, including right to cross-examine key prosecution witness); Alan C. Michaels, Trial Rights at Sentencing, 81 N.C. L. Rev. 1771, 1836 (2003) (noting that Confrontation Clause protects defendant's interest in having witnesses physically present at trial). But see Craig, 497 U.S. at 837 (holding that physical face-to-face confrontation is not vital to satisfy rights guaranteed by Confrontation Clause, but noting that right to confront opposing witnesses may be satisfied without face-to-face confrontation at trial only where deprivation of such confrontation is essential to serve important public policy).

161. See Salama, supra note 52, at 118-19 (noting that Shafi'i school does not adhere to this rule); El-Awa, supra note 1, at 126 (noting that this rule does not apply in Shafi'i school of thought); Peters, supra note 22, at 85 (asserting that withdrawal of testimony of at least one witness, even post-trial, precludes infliction of punishment); Quraishi, supra note 2, at 299 (revealing that truth of accusation is irrelevant where person has committed slander in violation of evidentiary requirements). Cf. Diane Heckman, Comment, Educational Athletics and Freedom of Speech, 177 Ed. Law. Rep. 15, 20 (2003) (noting that no matter how offensive, speech is not defamatory if true). See, e.g., James v. DeGrandis, 138 F. Supp. 2d 402, 416 (W.D.N.Y. 2001) (quoting 43A N.Y. Jur. 2d, Defamation and Privacy, § 98 for rule that truth is absolute defense to action for slander). This Section states that: "Proof of the truth of defamatory words constitutes a complete and absolute defense to an action for libel or slander, regardless of the harm done by the statement and regardless of the malicious or evil motives that may have prompted its publication." Id.

162. See Salama, supra note 52, at 119 (noting that Imams Malik and Abu Hanifa espouse this view); Peters, supra note 22, at 132 (asserting that if testimonies do not satisfy legal conditions, witnesses are liable to penalty for qadhāf).
Apart from these evidentiary requirements and procedural repercussions, the Islamic concern for personal security in one's home and reputation also affects the initiation of zina prosecutions. First, the Islamic interest in the security of the home and the persons dwelling within affects the initiation of zina accusations. Qur'anic provisions, describing the privacy rights of a proprietor, prohibit entry into a dwelling without consent of the owner. This proscription includes entry into a home occupied by the owner as well as entry onto the owner's property in the absence of the owner. The Sunnah echoes this proprietary privacy by safeguarding homes, correspondence, and conversations from unlawful intrusion. If government agents choose to disregard these injunctions and unlawfully search, enter, or even spy into one's home (contravening the Qur'an's injunction against spying), most scholars agree that the evi-

163. See Peters, supra note 1, at 509 (noting that three major Sunni schools classify homosexual sodomy as zina); Interview with Sanusi Lamido Sanusi, Head of Risk Management, United Bank for Africa, in New York, New York (Oct. 31, 2003) [hereinafter Interview with Sanusi] (asserting that sodomy between two women does not constitute zina because of penetration requirement).

164. See Qur'an 24:27-28 (protecting privacy of home). This verse reads: Enter not houses other than your own, until ye have asked permission and saluted those in them: that is best for you .... If ye find no one in the house, enter not until permission is given to you: if ye are asked to go back, go back: that makes for greater purity for yourselves: and God knows well all that ye do.

Id. See Osman Abd-el-Malek al-Saleh, The Right of the Individual to Personal Security in Islam, in The Islamic Criminal Justice System, supra note 1, at 68 (discussing Qur'anic verses and hadith protecting privacy of home); Siddiqi, supra note 22, at 20 (noting that requirement of seeking permission before entering home extends to homes of family members).

165. See al-Saleh, supra note 164, at 68 (discussing proprietary and personal privacy in Islam); Sanusi, Between the Shari'ah and "Barbarism," supra note 2 (discussing individual liberty in Islam).

166. See al-Saleh, supra note 164, at 68-69 (citing hadiths where Prophet disallowed persons from looking inside home without permission and prohibited reading personal correspondence without permission of owner); Awad M. Awad, The Rights of the Accused Under Islamic Criminal Procedure, in The Islamic Criminal Justice System, supra note 1, at 104 (noting hadith where Prophet prohibited eavesdropping on another's conversations); al-Saleh, supra note 164, at 68 (asserting that reasonable expectations of privacy extend to individuals, protecting persons from unreasonable searches and seizures); Sanad, supra note 11, at 76-77 (discussing guarantees against warrantless searches and seizures, legal bases for obtaining search warrant, and methods of conducting lawful search). See also al-Saleh, supra note 164, at 69-70 (discussing confidentiality of correspondence and freedom of expression in Islam).

167. See Qur'an 49:12 (prohibiting spying). "[A]nd spy not on each other ...." Id. See al-Saleh, supra note 164, at 68 (citing hadith prohibiting individuals from looking
dence obtained through this violation is inadmissible as proof of criminal wrongdoing.\textsuperscript{168}

Second, the Islamic interest in personal reputation implicates the initiation of \textit{zina} accusations. Qur'anic verses prohibiting the propagation of scandal and Islamic prescriptions encouraging the preservation of another's moral character, deterring Muslims from disseminating gossip and encouraging Muslims to refrain from disclosing the immoral acts of others, strongly discourage public discussion of another's sexual indiscretions.\textsuperscript{169}

Given the strict standard of proof attached to \textit{zina} prosecutions, the consequences of evidentiary transgression, namely the offense of slander, and proprietary and personal security protections, eyewitness testimony is virtually unattainable in cases of inside another's home without permission); Siddeeq, \textit{supra} note 22, at 19-20 (noting that \textit{hadith} prohibit peeking into another's home); al-Saleh, \textit{supra} note 164, at 70 (citing incident where Caliph Umar ibn al-Khattab and companion chanced upon private gathering where, behind locked doors, alcohol was being consumed; realizing they had unlawfully spied upon individuals in privacy of their home, they disregarded party and left):

\begin{quote}
Once at night I accompanied [Umar] on one of his wanderings at Medina. As we traveled we saw the light of a lamp. We went toward it. When we approached it, we found a locked door concealing some people noisily reveling. [Umar] took my hand and said, "Do you know whose home this is?" I said I did not. He said "It is the home of Rabiaa ibn Omaya ibn Khalef. They are drinking. What is to be done?" I said, "I see that we did what God prohibited. God forbids us to spy." [Umar] returned and disregarded them.\textit{Id.}\end{quote}

\textit{Id.} See also Qurashi, \textit{supra} note 2, at 295 n.30 (noting requirement of knocking before entering dwelling, even of family).  \textsuperscript{168} al-Saleh, \textit{supra} note 164, at 69 (noting that evidence obtained from spying (i.e., eavesdropping or poking holes through a door) is inadmissible). \textit{But see} Qurashi, \textit{supra} note 2, at 295 n.30 (noting that some scholars admit evidence unlawfully obtained). \textit{Cf.} Fed. R. Evid. 402 (describing rules of admissibility for evidence).

\textsuperscript{169} See Qur'an 24:19 (prohibiting spread of scandal). This verse reads in part: "Those who love (to see) scandal published broadcast among the Believers, will have a grievous Penalty in this life and in the Hereafter: [God] knows, and ye know not." \textit{Id.} See also \textit{id.} at 49:12 (prohibiting gossip). The Qur'an states: "Avoid suspicion as much (as possible): for suspicion in some cases is a sin . . . nor speak ill of each other behind their backs." \textit{Id.} See Sidahamad, \textit{supra} note 152, at 359 n.720 (quoting \textit{hadith} encouraging upholding character of fellow Muslim). The Prophet Muhammad is reported to have said: "Whoever protects the reputation of his brother (by veiling his wrongful act), God will do the same to him in this world and the world to come." \textit{Id.} See \textit{id.} (quoting \textit{hadith} discouraging disclosure of indiscretions of fellow Muslim). "Whoever veils his Muslim brother's 'uwrah (discreditable act), God will veil his 'uwrah in the hereafter. And whoever unveils his Muslim brother's 'uwrah, God will unveil his 'uwrah until He scandalizes him with it [even if he commits it] in the innermost part of his own home." \textit{Id.} See Qurashi, \textit{supra} note 2, at 296-99 (discussing Qur'anic ban on speculating about sexual improprieties of women).
Consequently, prosecutions are initiated almost uniquely through confession, the second form of hudood evidence accepted in Islamic jurisprudence.\textsuperscript{171}

2. Jurisprudential Alternatives to Four Witness Standard

a. Confession

As with witness testimony, guidelines for admitting confessions are exacting. First, the accused must offer confession with free will.\textsuperscript{172} Torture, coercive tactics, or deception by the judge nullify confession.\textsuperscript{173} The judge must also inform the accused that she is free to retract her confession, and actually suggest that the confessor abandon her confession.\textsuperscript{174} Next, the confession must be clear and unambiguous.\textsuperscript{175} The accused must describe the criminal act in detail, leaving no room for doubt.\textsuperscript{176}

\textsuperscript{170} See Quraishi, supra note 2, at 296, 299 (demonstrating that evidentiary requirements render prosecution of zina virtually impossible, revealing that slander penalty discourages accusations of zina, and asserting that Qur'an prohibits speculation about sexual activity of women); El-Awa, supra note 1, at 126 (noting that throughout Islamic history, zina has never been established through witness testimony).

\textsuperscript{171} See Salama, supra note 52, at 119, 121 (discussing juristic variations regarding admitting evidentiary presumptions in cases of hudood); Peters, supra note 22, at 83-87 (discussing evidence in hudood crimes).

\textsuperscript{172} See Salama, supra note 52, at 119 (discussing conditions for admitting confessions in Islamic criminal jurisprudence); Sidahmadi, supra note 152, at 160 (noting that confession must be completely voluntary and offered when the confessor is completely free).

\textsuperscript{173} See Salama, supra note 52, at 119 (providing examples of involuntary confessions); Sanad, supra note 11, at 80 n.14, 102 (noting that official who engages in inhumane treatment or coercion, and judge who accepts confession without verifying whether it was rendered with free will are both subject to punishment). Jurists disagree, however, on the admissibility of confessions obtained through inhumane treatment, and whether the coercer must be punished. Id.

\textsuperscript{174} See Peters, supra note 22, at 84 (discussing conditions for testimony and confession); al-Saleh, supra note 164, at 73 (discussing requirements for valid confession); Sidahmadi, supra note 152, at 162-63 (noting that in case where Ma'iz confessed to Prophet Muhammad that he committed zina, it is reported that Prophet offered Ma'iz opportunity to retract his confession; and when Ma'iz confessed for fourth time, Prophet attempted to dissuade Ma'iz from confessing). The Prophet is reported to have asked Ma'iz: "Perhaps you kissed, poked, or looked?" Id.; al-Saleh, supra note 164, at 73 (discussing Ma'iz's confession of adultery). See Joseph Schacht, An Introduction to Islamic Law 177 (1982) (noting that in all crimes of hudood except for qadhf, it is even recommended that judge suggest retraction to confessor).

\textsuperscript{175} See Salama, supra note 52, at 119 (noting that confessor must describe act in such detail so as to preclude doubt); El-Awa, supra note 1, at 128 (noting that confession must be clear and specific, and discussing rationale for requiring detailed confession).

\textsuperscript{176} See Salama, supra note 52, at 119 (noting that Sunnah disallows doubtful con-
Some jurists hold that the Qur'an requires repetition of the zina confession four times, corresponding to the quadruple witness requirement. Additionally, if criminal penalty is based solely on confession of the accused, withdrawal of confession at any time before or after sentencing, or during execution of the sentence, prevents hadd punishment, except in the case of qadhf, where confession cannot be retracted.

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177. See Salama, supra note 52, at 119-20 (noting that the Hanafi school adopts this view); Sidahmad, supra note 152, at 161, 163-64 (noting that this rule derived from incident where Ma'iz confessed to Prophet Muhammad that he committed zina and Prophet sent Ma'iz away, telling him to turn to God for repentance). Ma'iz went away and returned to the Prophet to ask for his punishment and the Prophet repeated his previous statement. Id. at 161. This dialogue continued until Ma'iz's fourth confession. Id. Only then did the Prophet begin to consider Ma'iz's case, asking Ma'iz specific questions to ensure actual penetration. Id. at 161, 163-64. Chaudhry, supra note 14, at 73-74 (citing hadith where Ma'iz approached Prophet Muhammad to confess commission of zina); El-Awa supra note 1, at 127 (noting that Hanbali school also requires quadruple testimony in confessions of zina but Maliki and Shafi'i schools regard one confession as sufficient); Peters, supra note 22, at 130 (noting that Hanafi and Hanbali schools require quadruple confession in cases of zina).

178. See Salama, supra note 52, at 112, 120 (describing majority view that retraction halts execution of hudood and minority view that it does not); Sanad, supra note 11, at 80 (asserting that in crimes of hudood, jurists hold that silence of accused should not be held against him). Cf. U.S. Const. amend. V. (safeguarding individual's right to remain silent in face of police questioning). "No person shall be compelled in any criminal case to be a witness against himself . . . ." Id. See Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (creating procedural safeguards, or "Miranda warnings," to protect individual's Fifth Amendment rights, and holding that officer must inform suspect who is taken into custody and subjected to questioning that he has right to remain silent); Doyle v. Ohio, 426 U.S. 610, 610 (1976) (holding that defendant's silence after receiving Miranda warnings cannot be used against him at trial). See also El-Awa, supra note 1, at 128 (noting that hadd penalty cannot be applied where accused has retracted confession because withdrawal of confession introduces doubt). But see Salama, supra note 52, at 120 (noting that some jurists reject view that retraction of confession nullifies infliction of hadd). See also Peters, supra note 22, at 86 (stating that escape of prisoner who has confessed to hadd offense is considered withdrawal of confession); Sidahmad, supra note 152, at 143-44, 293 n.593 (noting that after feeling pain of stoning, Ma'iz attempted to run away but was caught and executed, and quoting hadith where Prophet Muhammad, upon learning of Ma'iz's attempt to escape, addressed executors of hadd punishment and said: "You could have let him go"). The concept that escape amounts to withdrawal of confession is supported by this incident. Id. See al-Saleh, supra note 164, at 73 (discussing Ma'iz's escape from execution). See also Peters, supra note 22, at 85 n.67 (noting that qadhf involves rights of persons and not just rights of God); Sanusi, A Muslim Criticism, supra note 141 (asserting that qadhf involves rights of God and rights of persons); El-Awa, supra note 1, at 122-23 (discussing juristic variations in classifying penalty for qadhf as right of God [haqq Allah] or right of persons [haqq adami].
Finally, consistent with the Islamic principle of individual responsibility, self-incrimination applies only to the confessor and not to any co-conspirators. In this way, where a confessor identifies her partner in zina, the partner incurs no penalty unless he also confesses. Unilateral confessions, however, pose a distinct problem in cases of zina where the crime necessarily entails commission by both parties involved. Islamic jurists disagree as to whether one party’s denial invalidates the other’s confession. The Shafi‘i and Hanbali schools hold that regardless of the alleged co-conspirator’s denial, the confessor should be punished. However, Imam Abu Hanifa argues that neither party can be punished if the alleged co-conspirator denies com-

179. See al-Saleh, supra note 164, at 56-58 (discussing principle of individual responsibility in Islamic criminal law); Sanad, supra note 11, at 89-98 (discussing grounds for withholding criminal responsibility and reasons for permissibility in Islamic law). See generally Ahmad Fathi Bahnassi, Criminal Responsibility in Islamic Law, in The Islamic Criminal Justice System, supra note 1, at 173-93 (discussing individual responsibility and justifications for withholding responsibility in Islamic jurisprudence).

180. See El-Awa, supra note 1, at 128 (noting that in all cases, confession applies only to confessor); Sidahmad, supra note 152, at 164 (noting that where individual confesses to committing zina, alleged co-conspirator does not incur punishment unless he or she also confesses); Salama, supra note 52, at 120 (asserting that concept that confession only implicates confessor derives from principle of individual responsibility).

181. See Sidahmad, supra note 152, at 164 (discussing hadith where confessor incurred hadd penalty for zina but co-conspirator was not punished because she did not confess, and noting that there is no report that Prophet Muhammad summoned or questioned woman with whom Ma‘iz committed zina); Chaudhry, supra note 14, at 82 (noting that in situation where confessor names partner in zina and partner denies guilt, confessor may also be subjected to penalty for qadhrij); Sidahmad, supra note 152, at 165 (discussing hadith where confessor identified partner in zina and partner denied culpability; confessor received hadd penalty for zina and when asked to furnish evidence regarding alleged partner’s guilt, confessor was unable to do so and incurred punishment for qadhrij); Peters, supra note 22, at 130 (noting that the absence of one party’s confession constitutes shubha, or doubt, under Hanafi jurisprudence); Salama, supra note 52, at 120 (defining shubha as doubt); Peters, supra note 22, at 92 (defining shubha as mistake).

182. See El-Awa, supra note 1, at 128 (discussing requirements for admitting confessions); Salama, supra note 52, at 120 (noting that confession only implicates confessor).

183. See El-Awa, supra note 1, at 128-29 (discussing juristic variations regarding implications of unilateral confessions); Salama, supra note 52, at 120 (suggesting that co-conspirator’s lack of confession introduces doubt and invalidates hadd penalty); Sidahmad, supra note 152, at 209 (citing hadith on shubha); Peters, supra note 22, at 92 (quoting hadith on shubha). The Prophet Muhammad is reported to have said: “Ward off the hadd punishments from the Muslims on the strength of shubha as much as you can.” Id.

184. See El-Awa, supra note 1, at 128-29 (discussing juristic views on unilateral confessions); al‘Awwa, supra note 22, at 144 (noting that doctrine of nullifying hudood in
mission of the crime. Imam Abu Hanifa asserts that in criminal acts which by definition can only be carried out by all parties involved, if the conduct of one is not proven, then the conduct of the other has not been definitively established. As a result, he argues that punishing one or both parties in this circumstance would be unjust.

An overarching principle, governing Islamic criminal law in general and the crime of zina in particular, is the doctrine that doubt invalidates application of the hudood. This jurisprudential principle acts as a recurring theme in the context of zina confessions, as evidenced from the juristic determinations that (1) zina must be described in detail, leaving no room for doubt; (2) one co-conspirator’s denial of zina casts doubt on the truth of the other party’s confession; and (3) withdrawal of zina confession at any time nullifies the hadd punishment. Similar in form to the “beyond a reasonable doubt” standard employed in U.S. jurisprudence, this principle, along with the stringent requirements placed on the admission of confessions, demonstrates an overriding objective in limiting and discouraging confessions in Islamic jurisprudence.

cases of doubt is closely connected to Shari’ah principles of presumption of innocence and proving guilt beyond reasonable doubt).

185. See El-Awa, supra note 1, at 129 (arguing that doctrine of nullifying hudood in cases of doubt supports Hanafi view); al-'Awwa, supra note 22, at 143 (noting that practice of avoiding hadd in cases of doubt is based on rule prohibiting judge from imposing hadd penalty where he experiences doubt or uncertainty regarding whether accused committed crime).

186. See El-Awa, supra note 1, at 129 (providing support for Hanafi view on unilateral confessions); Salama, supra note 52, at 112-13 (noting that conflicting evidence prevents imposition of hadd penalty).

187. See El-Awa, supra note 1, at 129 (arguing that exacting conditions of and broad ability to retract confessions in Islamic jurisprudence support idea that self-incrimination has limited role as form of evidence in criminal cases); al-'Awwa, supra note 22, at 144 (asserting that principle of presumption of innocence is necessary to protect individual liberty from threat of injustice).

188. See Salama, supra note 52, at 112 (noting that in crimes of hudood, evidence must be conclusive); SIDAHMAD, supra note 152, at 209 (discussing legal principle that benefit of doubt must go to accused and asserting that Prophet Muhammad particularly emphasized doubt principle with respect to crimes of hudood); Interview with Sanusi, supra note 163 (stating that jurists adhered to concept that individual cannot be convicted for zina unless there is absolutely no doubt of commission).

189. See In re Winship, 397 U.S. 358, 361, 362 (1970) (holding that in criminal cases, prosecution must prove guilt beyond reasonable doubt and describing this standard as constitutionally required); Salama, supra note 52, at 119 (explaining that purpose of strict requirements for admissibility of self-incriminations is to limit confessions); SIDAHMAD, supra note 152, at 143 (citing hadith where, before approaching
b. Pregnancy of Unmarried Woman

While the majority view among Muslim schools of thought limits *hudood* evidence to witness testimony and confession, the *Maliki* school admits pregnancy of an unmarried woman as sufficient proof of *zina*.190 Although only one school of thought admits this circumstantial form of proof, the application of this evidentiary rule in Muslim countries has been widely broadcast, causing the international community to condemn the seemingly gender-biased criminalization of consensual sexual conduct.191

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190. See Peters, *supra* note 1, at 509 (noting that majority of Muslim schools of thought do not admit circumstantial evidence of *zina* except Maliki school, which accepts pregnancy of unmarried woman as evidence of fornication); Salama, *supra* note 52, at 121 (noting that Maliki conclusion is based on statements by Caliphs Umar ibn al-Khattab, 'Uthman ibn Affan, and 'Ali ibn 'Abi Talib): "Adultery is public when pregnancy appears or confession is made." *Id.* See *Sidahmed*, *supra* note 152, at 117 (quoting *hadith* where Prophet, in addressing community after Ma'iz was stoned for *zina*, encouraged private repentance over public disclosure of sins): "Avoid these impurities which God has prohibited. Whoever commits any should conceal his act with the shelter of God and repent to Him. Verily, if he divulges his act to us, the law of God will, certainly, be applied to him." *Id.*

191. See Peters, *supra* note 1, at 509 (noting that Maliki school admits pregnancy of unmarried woman as circumstantial evidence of fornication); Nigeria: Amina Lawal's
One such condemnation occurred on March 22, 2002, when an Upper Area Court in Katsina State in northern Nigeria ("lower court") convicted Amina Lawal ("defendant") of adultery and sentenced her to capital punishment by stoning.\(^1\) In the lower court, the judge specifically asked the defendant whether she conceived a child out-of-wedlock.\(^2\) The defendant replied affirmatively.\(^3\) The judge then asked the defendant if she knew this conduct constituted zina.\(^4\) The defendant again replied affirmatively.\(^5\) According to the Shari'ah legislation in place in several northern Nigerian States since 1999, the defendant's illegitimate child represented sufficient proof that the defendant engaged in non-marital sexual intercourse.\(^6\) Adultery death sentence quashed at last but questions remain about discriminatory legislation, at http://web.amnesty.org/library/index/eng afr440322003 [hereinafter Amina Lawal's death sentence quashed] (discussing application of Shari'ah punishments in Nigeria).


193. Interview with Sanusi, supra note 163 (discussing Amina Lawal case); E-mail from Sanusi Lamido Sanusi, Head of Risk Management, United Bank for Africa, to Seema Saifee (Nov. 7, 2003, 23:08:24 PST) (on file with author) [hereinafter E-MAIL FROM SANUSI] (discussing conversation between defendant and judge in lower court).

194. Interview with Sanusi, supra note 163 (noting that judge in lower court asked defendant leading questions); E-MAIL FROM SANUSI, supra note 193 (discussing judge's questioning of defendant).

195. Interview with Sanusi, supra note 163 (discussing procedural errors in Lawal case); E-MAIL FROM SANUSI, supra note 193 (noting that judge's actions violated Islamic criminal procedure).

196. Interview with Sanusi, supra note 163 (discussing errors committed by judge in lower court). The judge in the lower court led the defendant to incriminate herself by asking her leading questions. Id. E-MAIL FROM SANUSI, supra note 193 (discussing proceedings in lower court).

197. See Amina Lawal's death sentence quashed, supra note 191 (discussing Amina Lawal Case); Barbara Mikkelson & David P. Mikkelson, Urban Legends Reference Pages: Inboxer Rebellion (Amina Lawal), at http://www.snopes.com/inboxer/petition/amina. asp [hereinafter Mikkelson & Mikkelson] (asserting that since 1999, twelve of Nigeria's nineteen northern Islamic States have espoused this Shari'ah code); Nigeria: Amina Lawal Freed, supra note 192 (noting that defendant offered confession without aid of counsel at first trial and asserting that some northern Nigerian states applying Shari'ah law consider pregnancy outside of marital relationship as sufficient evidence for convic-
charges, were, however, dropped against Yahay Mohammed, the man named as the father of the defendant’s daughter, after Mohammed denied engaging in sexual intercourse with the defendant and as there was no other proof against him.8

After procuring an attorney, the defendant appealed to the Upper Shari’ah Court in Funtua (“regional appeals court”), arguing that the judge in the lower court used leading queries in questioning the defendant, failed to define zina for the defendant, and neglected to explain to the defendant the implications of confessing to that crime.9 In August 2002, the regional appeals court rejected the defendant’s appeal and affirmed the lower court’s death sentence which was based on the defendant’s confession and pregnancy.10 The regional appeals court disallowed retraction of the defendant’s confession and suspended execution of the sentence until January 2004 or afterwards to allow the defendant to wean her child for two years.201
A Nigerian women's rights organization ("BAOBAB") appealed the regional appeals court's decision to the Katsina State Shari'ah Court of Appeal ("Katsina Court of Appeal"). On September 25, 2003, after several adjournments, the Katsina Court of Appeal quashed the defendant's death sentence, holding that the defendant's withdrawal of confession was valid and finding that investigation into the ex-husband's paternity should have taken place pursuant to the Maliki doctrine of the sleeping fetus. The Katsina Court of Appeal's reversal was also based on numerous procedural errors of the lower court including the judge's failure to define the offense of zina to the defendant in order to ensure that she understood the crime with which she was charged; the judge's neglect in explaining the implications of confession to the defendant; and the judge's procedural transgression of the Shari'ah laws of Katsina State which require at least three judges to entertain a hadd case.

At the outset, it is imperative to note that the Lawal case raised several cries from Western as well as Muslim critics. While both groups condemned the stoning sentence, their criticisms were grounded in distinct rationales. Digressing a mo-

202. See Imam & Medar-Gould, supra note 192 (discussing Lawal case); Nigeria: Amina Lawal Freed, supra note 192 (discussing procedural history of Lawal case)

203. See Nigeria: Amina Lawal Freed, supra note 192 (discussing adjournments in Lawal case); Audio tape: Democracy NOW! "Miss World 2002 Will Be the Most Lavish and Spectacular Production That We've Ever Undertaken": Now There are 220 People Dead, 1000 Injured, and 8000 Homeless From the Miss World Riots in Nigeria (Nov. 27, 2002), available at http://archive.webactive.com/pacifica/demnow/dn20021127.html [hereinafter Democracy NOW!] (discussing protests against holding Miss World Pageant in Nigeria due to Lawal case).


205. See Sanusi, A Muslim Criticism, supra note 141 (distinguishing between non-Muslim and Muslim discourses criticizing implementation of hudood penalties); Bob Abernethy, Nigerian Islamic Appeals Court overturns stoning sentence of Amina Lawal, RELIGION & ETHICS NEWSWEEKLY, Sept. 29, 2003 (noting that Lawal case drew international criticism from human rights organizations); Democracy NOW!, supra note 203 (presenting Muslim critique on Lawal conviction). But see Court Spare Nigerian Mom From Stoning, NEWS DAY, Sept. 26, 2003, at A6 (presenting Muslim and non-Muslim views on Lawal conviction).

206. See Sanusi, A Muslim Criticism, supra note 141 (criticizing timing and method of implementing Islamic criminal law in northern Nigeria); Democracy NOW!, supra
ment from the particulars of this case, consider the divergent sources of condemnation for sentences declared upon women like Amina Lawal.207

The widely-publicized application of *hudood* penalties for engaging in consensual sexual conduct has led human rights organizations to link Islamic criminal law with "cruel, inhuman or degrading punishments;"208 the international community to characterize the penalty as an example of the "barbaric laws of [Islam];"209 and the United States Congress to issue a resolution condemning the practice as a gross human rights violation.210 Muslim scholars have also rejected the imposition of these punishments, but for dramatically different reasons.211 Muslim critics have argued that application of the *hudood* punishments must be limited to societies which have provided for the welfare of all its inhabitants, Muslim and non-Muslim, where each individual

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207. See Sanusi, *A Muslim Criticism*, supra note 141 (presenting arguments against implementing Islamic law in regions lacking strong welfare base); Democracy NOW!, supra note 203 (featuring debate on Lawal case).

208. See Amnesty International, at http://web.amnesty.org/library/Index/ENG AFR540012002?open&of=ENG-2AF (discussing penalties inflicted upon persons in Muslim States); Sanusi, *A Muslim Criticism*, supra note 141 (discussing non-Muslim rationales for criticizing implementation of *hudood* punishments); John F. Burns, *Stoning of Afghan Adulterers: Some Go to Take Part, Others Just to Watch*, N.Y. TIMES, Nov. 3, 1996, at 18, at http://www.pulitzer.org/year/1997/international-reporting/works/8/index.html (discussing application of stoning penalty to woman who was convicted of adultery); *Afghan Death By Stoning*, N.Y. TIMES, May 2, 2000, at A4 (discussing application of stoning as method of capital punishment). Anecdotes depicting images of religious rulers Stoning women to death for engaging in consensual promiscuous behavior have repeatedly flooded the pages of widely-read publications, inculcating vivid impressions of this severe form of capital punishment into the memories of the international community. See id.

209. Shari'Ja[h] Law: *What do you Think?*, supra note 3 (presenting various international criticisms and assumptions regarding Islamic criminalization of intimate activity); Sanusi, *A Muslim Criticism*, supra note 141 (discussing non-Muslim characterization of *hudood* penalties).


211. See Sanusi, *A Muslim Criticism*, supra note 141 (presenting Muslim criticisms regarding enforcement of *hudood*); Democracy NOW!, supra note 203 (featuring Muslim and non-Muslim critiques of Lawal case).
enjoys economic, social and political protection, an argument that is consistent with actions taken by the Caliph Umar ibn al-Khattab, who suspended punishment for theft during a time of famine.\textsuperscript{212} In spite of this necessary backdrop, \textit{hudood} penalties have burgeoned in many unjust societies, causing a number of unfortunate and avoidable rulings and effectively exposing Islam to unwarranted ridicule and misunderstanding.\textsuperscript{213}

One such avoidable ruling occurred in the case of Amina Lawal. The lower court convicted the defendant on the basis of her confession to \textit{zina} and pregnancy/out-of-wedlock childbirth.\textsuperscript{214} With respect to the defendant's confession, the Shari'ah clearly holds that withdrawal of confession at any time, even during execution of the sentence, nullifies the \textit{hadd} penalty.\textsuperscript{215} Furthermore, jurisprudential rules require the judge to inform the accused that she is free to retract her confession and even recommend that the judge suggest retraction to a defendant who incriminates herself.\textsuperscript{216} Lawal's confession therefore

\begin{itemize}
\item \textsuperscript{212} See Sanusi, \textit{A Muslim Criticism}, supra note 141 (recognizing existence of debate in Islam regarding interpretation of Qur'anic verses and application of these verses in particular historical contexts); Ruud Peters, \textit{Islamic Law in Nigeria}, 12 NYU: \textit{THE LAW SCHOOL MAGAZINE}, Autumn 2002, at 85 (suggesting argument that Shari'ah penalties may not be applied until just Islamic society has been set up); Sanusi, \textit{A Muslim Criticism}, supra note 141 (providing example of Muslim country that implemented \textit{hudood} penalties without considering social and economic conditions of majority and ramifications of such implementation).
\item \textsuperscript{213} See Sanusi, \textit{A Muslim Criticism}, supra note 141 (discussing implementation of \textit{hudood} penalties in Sudan); Peters, supra note 212, at 85 (discussing practical problems associated with re-introduction of Shari'ah in northern Nigerian States, including use of incorrect definitions, ignorance of Islamic law among judiciary and attorneys, and growth of Islamic vigilante factions).
\item \textsuperscript{214} See Nigeria: Amina Lawal Freed, supra note 192 (asserting that in lower court, defendant confessed to bearing child outside of marriage); McGinty, supra note 192, at 11 (discussing Lawal case); Sanusi, \textit{A Muslim Criticism}, supra note 141 (discussing misapplication of legal principles in Lawal case).
\item \textsuperscript{215} See Salama, supra note 52, at 112, 120 (discussing implications of retracting confession and describing minority view). See \textit{Sanad}, supra note 11, at 80 (asserting that in crimes of \textit{hudood}, jurists hold that silence of accused should not be held against him); \textit{El-Awa}, supra note 1, at 128 (noting that \textit{hadd} penalty cannot be applied where accused has retracted confession because withdrawal of confession introduces doubt). But see Salama, supra note 52, at 120 (noting that some jurists reject view that retraction of confession nullifies infliction of \textit{hadd} punishment).
\item \textsuperscript{216} See Peters, supra note 22, at 84 (discussing conditions for admitting testimony and confession in Islamic law); al-Saleh, supra note 164, at 73 (discussing requirements for valid confession); \textit{Siddahmad}, supra note 152, at 162-63 (noting that in case where Ma'iz confessed to Prophet Muhammad that he committed \textit{zina}, it is reported that Prophet Muhammad offered Ma'iz opportunity to retract his confession). It is reported that the Prophet even attempted to dissuade Ma'iz from confessing. \textit{Id.} at 163. See al-
became invalid when it was retracted on appeal.\textsuperscript{217}

With respect to the defendant's pregnancy and resulting childbirth, northern Nigeria is a Maliki jurisdiction and therefore adheres to the minority view that pregnancy of an unmarried woman constitutes circumstantial evidence of zina.\textsuperscript{218} Under Maliki jurisprudence, however, it is virtually impossible to convict a pregnant unmarried divorcée, like Amina Lawal, of zina based on her pregnancy alone.\textsuperscript{219} Rather, like the majority view, conviction will inevitably require confession or four eyewitnesses because of the Maliki doctrine of the sleeping fetus.\textsuperscript{220}

Maliki law recognizes a theory, known as the doctrine of the sleeping fetus, whereby the child of an unmarried pregnant divorcée is automatically presumed to belong to the ex- or deceased husband as long as the child was born within the recog-

\textsuperscript{217} See Sanusi, \textit{A Muslim Criticism}, supra note 141 (criticizing application of Shari'ah law in Lawal case); E-MAIL FROM IMAM, supra note 199 (noting that Lawal was not represented by counsel in lower court); Interview with Sanusi, supra note 163 (noting that in absence of counsel, Lawal confessed to committing adultery); E-mail from Asifa Quraishi, S.J.D. Candidate, Harvard Law School, to Seema Saifee (Oct. 5, 2003, 22:59:14 PST) (on file with author) [hereinafter OCTOBER E-MAIL FROM QURAISHI] (noting that one reason Katsina Court of Appeal overturned Lawal's conviction was because Lawal's confession was made without presence of counsel, and describing this ground as interesting application of contemporary requirements of fully informed voluntary confession). Salama, supra note 52, at 119 (discussing conditions for admitting confessions in Islamic criminal jurisprudence, including requirement that confession be voluntary and freely given); SIDAHMAD, supra note 152, at 160 (noting that confession must be completely voluntary and offered when confessor is completely free); Interview with Sanusi, supra note 163 (discussing procedural bases for Katsina Court of Appeal's reversal of Lawal's conviction, and noting that Court's use of leading questions and procedural errors invalidated defendant's confession).

\textsuperscript{218} See Peters, supra note 1, at 509 (noting that circumstantial evidence is not admitted as proof of zina, with one exception: Maliki jurisprudence accepts pregnancy of unmarried woman as evidence of fornication); Quraishi, supra note 2, at 300 (noting that majority view in classical Islamic jurisprudence is that pregnancy alone is insufficient as proof of zina); Democracy NOW!, supra note 203 (presenting statement by Azizah al-Hibri, Professor of Law at University of Richmond Law School, that northern Nigeria adheres to Maliki law).

\textsuperscript{219} See Sanusi, \textit{A Muslim Criticism}, supra note 141 (discussing application of Maliki law to Lawal case); Peters, supra note 22, at 86-87 (explaining that Maliki school protects women by recognizing protracted periods of gestation based on sleeping fetus doctrine).

\textsuperscript{220} See Sanusi, \textit{A Muslim Criticism}, supra note 141 (discussing Maliki law in northern Nigeria); Salama, supra note 52, at 115, 119, 121 (noting that majority of scholars limit criminal evidence in hudood cases to witness testimony and confession).
nized gestation period of pregnancy. As the maximum gestation period has not been fixed by the Qur'an or Sunnah, as Imam Malik himself placed a ceiling at four different intervals, and as jurists have disagreed in determining a limitation for the gestation period, the element of uncertainty in gestation length raises doubt in convicting a divorced or widowed woman of zina. As jurists are reluctant to convict a pregnant unmarried divorcee for zina in the face of any doubt (remember, doubt nullifies hudood), the doctrine of the sleeping fetus affords substantial protection to widows and divorcées.

Next, in the case of a pregnant woman who has never been married, Maliki jurisprudence is not as protective. Here, preg-

221. See Sanusi, A Muslim Criticism, supra note 141 (discussing sleeping fetus doctrine); Peters, supra note 212, at 85 (asserting that sleeping fetus doctrine is well recognized tenet in Islamic jurisprudence); Peters, supra note 22, at 86-87 (observing that Maliki sleeping fetus doctrine affords substantial protection to previously married women). But see Sanusi, A Muslim Criticism, supra note 141 (noting that child born within recognized gestation period is presumed to belong to former husband unless former husband refuses to accept paternity through process of li'an). See al-'Awwa, supra note 22, at 137 (discussing process of li'an); Sanusi, A Muslim Criticism, supra note 141 (asserting that if husband wishes to pursue li'an, he places himself at risk for punishment if woman refutes accusation).

222. See Sanusi, A Muslim Criticism, supra note 141 (asserting that jurists disagree as to maximum gestation period, and quoting jurist who described Imam Malik's conflicting rulings on maximum gestation as indicative of doubt which prevents hadd penalty); al-'Awwa, supra note 22, at 143-47 (discussing principle of nullifying hudood penalties in case of doubt); Interview with Sanusi, supra note 163 (discussing juristic adherence to concept that individual cannot be convicted for zina unless there is absolutely no doubt of commission). See also Sanusi Lamido Sanusi, Amina Lawal: Sex, Pregnancy and Muslim Law, (Aug. 22, 2002), available at http://www.gamji.com/sanusi.htm [hereinafter Sanusi, Amina Lawal: Sex, Pregnancy and Muslim Law] (discussing variations among Muslim schools of thought regarding maximum gestation period).

223. See Sanusi, A Muslim Criticism, supra note 141 (noting that Maliki jurisprudence provides widows and divorced women greater protection than other Islamic schools of thought).

The difficulty of convicting a previously married woman of zina based on her pregnancy arises because quite apart from the very long gestation period for pregnancy in Maliki Law of Personal Status, the contradictions among jurists in fixing it are considered by leading jurists of the Maliki School sufficient reason to prevent the hadd in criminal law.

Id. Peters, supra note 22, at 86-87 (explaining that Maliki school, by generously fixing maximum duration of pregnancy, protects women by recognizing protracted periods of gestation based on sleeping fetus doctrine); Sanusi, Amina Lawal: Sex, Pregnancy and Muslim Law, supra note 222 (revealing that of all schools, Malikis provide greatest benefit of doubt in setting high maximum gestation period).

224. See Sanusi, A Muslim Criticism, supra note 141 (discussing application of Maliki law on zina to pregnant woman who has never been married). Interview with Sanusi, supra note 163 (discussing Maliki pregnancy rule).
nancy constitutes sufficient evidence of *zina* and the woman is liable to *hadd*.\(^{225}\) Besides the fact that the majority of jurists limit proof of *zina* to confession or four eyewitnesses, Islamic scholars have criticized the use of pregnancy as proof of *zina*, and have argued that even the conduct of Caliph Umar ibn al-Khattab, whose statement forms the basis of the *Maliki* pregnancy rule, casts doubt on his assertion regarding the evidentiary quality of pregnancy.\(^{226}\)

Finally, Muslim rulers and courts in Islamic countries have often penalized pregnant and non-pregnant women who have claimed rape with the punishment for *zina*, classifying the non-consensual violent crime as a subset of *zina*, considering a woman's claim of rape as confession to *zina*, and allowing the rapist to escape unscathed in the absence of four witnesses to the violent act.\(^{227}\) The classification of rape as a subcategory of *zina*, however, disregards various aspects of Islamic teachings and legal thought.\(^{228}\)

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\(^{226}\) See E-mail from Asifa Quraishi, S.J.D. Candidate, Harvard Law School, to Seema Saifee (Nov. 5, 2003, 11:44:29 PST) (on file with author) [hereinafter NOVEMBER E-MAIL FROM QURAISHI] (arguing that Maliki rule of pregnancy as prima facie proof of *zina* seems inconsistent with Qur'anic verses which emphasize protection of women against random *zina* prosecution by requiring four witnesses). At least one scholar has argued that the Maliki rule results in randomly punishing those women whose intercourse has happened to result in pregnancy. Id. See Interview with Sanusi, supra note 163 (discussing incident where man brought report that unmarried woman was pregnant and Caliph Umar did not act on report, declaring that man was bearer of bad news).

\(^{227}\) See Quraishi, supra note 2, at 290-92, 302, 312 (discussing rape cases in Pakistan); Sanusi, *A Muslim Criticism*, supra note 141 (discussing risk of convicting rape victims of *zina*).

\(^{228}\) See Quraishi, supra note 2, at 302, 314 (noting that Pakistan's *Zina Ordinance* classifies *zina*-*bil-jabr*, or *zina* by force, as subcategory of crime of *zina*); Rizvi, supra note 23, at 225-26 (discussing cases in early Islam where rapist, but not victim, was punished).
i. Pregnancy as Result of Rape: Islamic Law on Nonconsensual Sex

First, Islamic jurisprudence specifies duress as a negation of intent for zina.\(^2\) As the act of zina requires an element of free will, an individual who has been raped cannot be punished with the hadd penalty for zina.\(^2\) Furthermore, early Islamic teachings and rulings prohibited punishing a rape victim for zina.\(^2\) Second, zina is a crime of public indecency where the private aspects of the activity remain between the individual and God.\(^2\)

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229. Quraishi, supra note 2, at 314 (noting that Islamic scholars have affirmed that one who engages in zina under duress escapes liability); Peters, supra note 22, at 94 (discussing legal defense of duress and noting that one who is forced to commit crime of hadd is free of liability).

230. See Peters, supra note 1, at 509 (describing free will as element of zina); Chaudhry, supra note 14, at 75, 80, 81, 82 (noting that to constitute zina, sexual intercourse must be voluntary, discussing that in cases of rape, only assailant, and not victim, incurs punishment, and citing hadiths where women who were forced to commit zina incurred no penalty while their assailants were prosecuted); Quraishi, supra note 2, at 314 (citing two cases: one where Caliph Umar prosecuted rapist of slave girl and did not prosecute girl, and another where Caliph Umar released woman who declared rape); Rizvi, supra note 23, at 225-26 (noting that consent is element of zina and discussing cases where Prophet Muhammad and Caliph Umar punished only rapist and not victim); Sanad, supra note 11, at 51, 92-93 (noting that consent is element of zina and discussing nullification of hadd penalty in cases of coercion or duress); Peters, supra note 22, at 94 (discussing legal defense of duress, noting that one who is forced to commit a hadd crime is not guilty); Sanad, supra note 11, at 88 (noting that lack of intent negates criminal responsibility in crimes of hudood); Peters, supra note 22, at 92-94 (discussing legal defense of mistake where excusable ignorance, such as mistake based on putative marriage, constitutes unassailable defense). See generally Sanad, supra note 11, at 89-95 (discussing legal defenses for criminal conduct). See Quraishi, supra note 2, at 302-05, 313-20 (citing Pakistani cases where alleged rape victims were charged with zina, but rejecting application of zina (consensual sex) to rape (nonconsensual sex or sex under duress), and discussing Islamic law of rape). Quraishi also cites to a source that resolves cases where only one party claims the sexual encounter was consensual. Id. at 314. But see Doi, supra note 14, at 236 (noting that in cases of zina, consent of parties is immaterial); Kara, Mustafa Abdulmegid, The Philosophy of Punishment in Islamic Law 137 (1977) (unpublished Ph.D thesis, Claremont Graduate School) (noting that consent is not required for zina). Note, however, that Doi and Kara do not cite any Islamic texts supporting their claims that consent is irrelevant in zina cases. Id.; Doi, supra note 14, at 236.

231. See Quraishi, supra note 2, at 314 n.105 (citing case where Caliph Umar prosecuted rapist but not victim); Rizvi, supra note 23, at 225-26 (discussing rape cases in early Islam); Chaudhry, supra note 14, at 75, 80, 81, 82 (noting that in cases of rape, only assailant incurs punishment, and citing hadiths where women who were forced to commit zina incurred no penalty while their assailants were prosecuted).

232. See Quraishi, supra note 2, at 313 (distinguishing rape from zina); Sanusi, Between the Shari'ah and "Barbarism," supra note 2 (drawing distinction between State's power to regulate private and public morals); Bassiouni, supra note 152, at 5-6 (noting that purpose of hadd penalty for zina is to deter public aspects of such conduct).
Rape, however, is a crime of violence where public indecency is not the essential criminal element of the act.\textsuperscript{233}

Scholars have classified rape under the separate \textit{hadd} category of \textit{hiraba}, a crime of forcible assault, under which four eyewitnesses to the act of penetration is not required to establish proof.\textsuperscript{234} In this way, committed in private or public, rape is considered a violent assault, and not a consensual public act of sex.\textsuperscript{235} Under all Sunni schools of thought, a woman who claims rape is free and not held liable for \textit{zina}; however, the \textit{Maliki} school requires physical evidence of nonconsensual sex, a rule that scholars have characterized as demonstrating insensitivity to the fact that many rape survivors decline to struggle in order to save their lives, while still not consenting to the act, and a rule that is consequently inconsistent with the Islamic duty to defend one's life.\textsuperscript{236}

3. Applicability of \textit{Ta'azir} to Private Consensual Sexual Activity

While the majority view among Muslim schools of thought limits criminal evidence to witness testimony and confession, this restriction applies only to crimes of \textit{hudood}, a defined class of crimes whose punishments are prescribed by the Qur'an and

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\textsuperscript{233} See Quraishi, \textit{supra} note 2, at 313 (revealing that public display is key to crime of \textit{zina} but not rape); \textit{SANAD}, \textit{supra} note 11, at 51, 92-93 (discussing nullification of \textit{hadd} penalty in cases of coercion or duress).

\textsuperscript{234} See Quraishi, \textit{supra} note 2, at 314, 315-17 (discussing Islamic law of rape); Salama, \textit{supra} note 52, at 118 (noting that scholars have argued that crime of \textit{zina} is one of public indecency).

\textsuperscript{235} See Quraishi, \textit{supra} note 2, at 313-19 (noting that in addition to criminal prosecution, Islamic law creates path for civil redress for rape survivors); \textit{SANAD}, \textit{supra} note 11, at 51, 92-93 (describing consent as element of \textit{zina} and noting that \textit{hadd} penalty is nullified in cases of coercion or duress); Quraishi, \textit{supra} note 2, at 296 (noting that crime of \textit{zina} is one of public sex).

\textsuperscript{236} Sanusi, \textit{Amina Lawal: Sex, Pregnancy and Muslim Law}, \textit{supra} note 222 (noting that pregnant unmarried woman who claims rape is free in all Sunni schools except Maliki which requires corroborating evidence of rape, and providing examples of such evidence); \textsc{November E-mail from Quraishi, \textit{supra} note 226} (noting that in case of pregnant unmarried woman who claims rape, under Maliki law burden of proof is on woman because prima facie case has already been made against her from fact of pregnancy); Sanusi, \textit{A Muslim Criticism}, \textit{supra} note 141 (discussing implications of claiming rape in Maliki law where pregnant woman has never been married). \textit{But see November E-mail from Quraishi, \textit{supra} note 226} (noting that requiring physical evidence to prove that intercourse was nonconsensual indicates insensitivity to fact that many rape survivors may have protected their lives by not physically resisting attack, yet still not consenting to it). \textit{See also SANAD, \textit{supra} note 11, at 95} (discussing duty to defend one's life in Islam).
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Sunnah.\textsuperscript{237} Classified as a \textit{hadd} crime, \textit{zina} represents a specific and limited type of intimate conduct, namely consensual non-marital intercourse.\textsuperscript{238} The category of \textit{hudood} crimes therefore does not apply to all consensual intimate activity performed outside of marriage.\textsuperscript{239} This non-zina intimate behavior, however, may be liable to prosecution under a less restrictive category of criminal conduct, known as \textit{ta'azir}, or discretionary punishment.\textsuperscript{240}

\textit{Ta'azir} includes all crimes whose penalties are not fixed by the Qur'an or Sunnah.\textsuperscript{241} A few characteristics distinguish \textit{ta'azir}

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\item \textsuperscript{237} See Salama, \textit{supra} note 52, at 115, 119, 121 (noting that majority of scholars limit criminal evidence in \textit{hudood} cases to witness testimony and confession); \textit{Sanad}, \textit{supra} note 11, at 99 n.1, 104-05 (discussing majority and minority views on criminal evidence in Islam); \textit{El-Awa}, \textit{supra} note 1, at 2 (describing \textit{hudood} as punishments prescribed by Qur'an or Sunnah); \textit{Sanad}, \textit{supra} note 11, at 40-41 (describing \textit{hudood} penalties as those prescribed by Qur'an and Sunnah); \textit{Chaudhry}, \textit{supra} note 14, at 81-82 (noting immutability of \textit{hadd} punishment and demonstrating that once guilt of \textit{zina} is established beyond reasonable doubt, punishment can neither be pardoned nor negotiated); \textit{al-'Awwa}, \textit{supra} note 22, at 128 (noting that \textit{hudood} penalties cannot be mitigated, augmented, or suspended); \textit{Peters}, \textit{supra} note 22, at 106 (noting \textit{hadith} where Prophet Muhammad disallowed substituting ransom in place of \textit{hadd}).
\item \textsuperscript{238} See \textit{Peters}, \textit{supra} note 1, at 509 (defining \textit{zina}); \textit{El-Awa}, \textit{supra} note 1, at 1 (noting that \textit{zina} is \textit{hadd} crime); \textit{Chaudhry}, \textit{supra} note 14, at 82 (describing elements of \textit{zina}); \textit{Peters}, \textit{supra} note 1, at 509 (discussing juristic variations regarding classification of homosexual sodomy as \textit{zina}); \textit{Quraishi}, \textit{supra} note 2, at 295-95 (discussing \textit{zina}'s requirement of penetration); Interview with Sanusi, \textit{supra} note 163 (asserting that sodomy between women does not constitute \textit{zina} because of penetration requirement); \textit{Peters}, \textit{supra} note 22, at 127, 135 (noting that \textit{zina} involves vaginal intercourse). \textit{But see} 4 \textit{al-Dardir}, \textit{supra} note 1, at 448 (noting that majority of Sunni jurists regard heterosexual anal intercourse between non-marital couple as \textit{zina}). \textit{See also} 3 \textit{al-Mawwaq}, \textit{supra} note 1, at 405-06 (noting that majority of Sunni jurists regard anal intercourse within marriage as sinful).
\item \textsuperscript{239} See \textit{Peters}, \textit{supra} note 22, at 135 (observing that sexual acts not amounting to intercourse are not liable to \textit{hadd} penalty); \textit{Sidadmad}, \textit{supra} note 152, at 163 (demonstrating that acts of kissing, touching, or other acts of foreplay do not constitute \textit{zina}); \textit{Peters}, \textit{supra} note 1, at 509 (noting that Hanafi school does not classify homosexual sodomy as \textit{hadd} crime).
\item \textsuperscript{240} See \textit{Peters}, \textit{supra} note 22, at 135 (asserting that \textit{ta'azir} provides basis for punishment of persons who have committed acts resembling but not satisfying definition of \textit{hudood}); \textit{Peters}, \textit{supra} note 1, at 509 (stating that Hanafi jurisprudence classifies homosexual sodomy as crime of \textit{ta'azir}); \textit{Peters}, \textit{supra} note 22 (describing illicit sexual activity that does not amount to intercourse as example of crime punishable under \textit{ta'azir}).
\item \textsuperscript{241} See \textit{al-Alfi}, \textit{supra} note 1, at 227 (defining \textit{ta'azir}); Ghaouti Benmelha, \textit{Ta'azir Crimes}, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM, \textit{supra} note 1, at 212 (providing overview of criminal categories in Islamic law); \textit{El-Awa}, \textit{supra} note 1, at 97 (arguing that while term \textit{ta'azir} is not used in Qur'an or Sunnah in same sense as in Islamic legal texts, it is alluded to in these former sources); \textit{Sanad}, \textit{supra} note 11, at 63 (noting that validity of \textit{ta'azir} category derived from \textit{ijma}); \textit{al-Alfi}, \textit{supra} note 1, at 227 (explaining that ruler or judge has discretion to determine, in accordance with public interest and
from *hadd* in the context of private consensual sexual conduct.\(^2\)\(^4\)\(^2\) First, as mentioned above, while Islamic jurisprudence mandates punishment for a specific and confined category of sexual conduct, the *ta'azir* penalty permits prosecution for private consensual sexual activity that does not rise to the level of *zina*.\(^2\)\(^4\)\(^3\)

Second, the category of *ta'azir* implicates private consensual intimacies by permitting conviction of persons who have committed *hadd* crimes but escaped penalty due to lack of evidence.\(^2\)\(^4\)\(^4\) Some Muslim countries and scholars have applied this residual catch-all category of *ta'azir* to the crime of *zina* in cases where the strict evidentiary requirements of *zina* were not satisfied.\(^2\)\(^4\)\(^5\) There is a wrinkle, however, in applying the *ta'azir* pen-

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242. See Peters, *supra* note 22, at 135 (distinguishing between *hudoood* and *ta'azir* crimes); Quraishi, *supra* note 2, at 311 (differentiating between weight of evidentiary burden in *ta'azir* and *hudoood* crimes); Sanad, *supra* note 11, at 65-66 (comparing *hudoood* and *ta'azir* crimes generally).

243. See Peters, *supra* note 22, at 135 (noting that illicit sexual activity not amounting to sexual intercourse may be liable to *ta'azir*); Sanad, *supra* note 11, at 64 (listing examples of intimate acts liable to *ta'azir* penalty and including rape as crime of *ta'azir*). Contra Quraishi, *supra* note 2, at 314, 315-17 (classifying rape as *hadd* crime). See also El-Awa, *supra* note 1, at 128 (noting that withdrawal of confession rule does not apply to *ta'azir* crimes).

244. Peters, *supra* note 22, at 135 (discussing applicability of *ta'azir* to persons who committed *hadd* crimes but could not be sentenced for lack of evidence); Quraishi, *supra* note 2, at 311 (discussing use of *ta'azir* where evidentiary requirements are not satisfied).

245. See Quraishi, *supra* note 2, at 311 (revealing that Pakistan has extended appli-
alty to zina because of the specific penalty for slander that attaches to individuals who initiate zina prosecutions in the absence of four witnesses. Although an individual may logically be convicted for zina as ta'azir, the prosecutor and testifying witnesses should be punished for slander because of the special considerations attached only to accusations of zina.

While the hadd penalty prohibits prosecution in the absence of eyewitness testimony or a willing confession, the burden of proof is relaxed in crimes of ta'azir. The judge has discretion, therefore, to permit a lenient, but suitable, standard of proof. As all jurists admit circumstantial evidence in crimes of ta'azir, there is a lower evidentiary standard for convicting individuals who engage in non-hadd crimes. For example, consider the applicability of ta'azir to an individual who enters a brothel. In this circumstance, the quadruple testimony requirement, risk of slander prosecution, and proprietary and personal security restrictions specified in Part II.A.1 protect the individual from in-
curring the hadd penalty for zina.252 Whether the individual can escape criminal conviction for another sexual offence, however, is blurred by the doctrine of ta'azir.253 Another example of the use of ta'azir emerges in Hanafi law, where homosexual sodomy is not considered a crime of zina.254 In both the brothel hypothetical and the case of homosexual sodomy under Hanafi law, theological prescriptions and regulations protecting proprietary and reputational security continue to protect such intimate conduct from State restraint.255

B. Defining the Scope of Privacy: An Alternative Reading of Lawrence

While Islamic hudood laws serve to protect public morality,256 academic scholars in the United States and U.S. Supreme Court Justices have argued that the State's interest in morality does not justify the criminalization of private sexual conduct between consenting adults.257 Despite its ostensible privacy ratio-

252. See Quraishi, supra note 2, at 296-99, 313 (discussing implications of quadruple evidentiary standard and crime of slander); al-Saleh, supra note 164, at 68-70 (describing personal security in Islam).

253. See Peters, supra note 22, at 90 (noting that man who enters home with woman of bad reputation and remains inside cannot be punished with hadd but may be punished on strength of ta'azir); Sanad, supra note 11, at 64 (listing certain sexual acts as possible crimes of ta'azir).

254. See Peters, supra note 1, at 509 (discussing positions of Muslim schools of thought on homosexual intercourse). See generally 5 THE ENCYCLOPAEDIA OF ISLAM, supra note 1, at 776-79 (discussing sodomy, or liwat).

255. See al-Saleh, supra note 164, at 68-70 (describing protections afforded to property and personal security in Islam); Quraishi, supra note 2, at 296-99, 313 (demonstrating that zina evidentiary requirements and crime of slander afford individuals protection from State intrusion).

256. See al-'Awwa, supra note 22, at 132-33 (discussing interplay between law and morality in Islam). Sanad, supra note 11, at 45-46 (discussing inherent link between religion and morality in Islam); Sanusi, Between the Shari'ah and "Barbarism," supra note 2 (asserting that Muslim State can control public but not private morality, noting that Shari'ah does not afford State unlimited power to infringe personal liberty but does provide State with right to restrict personal liberty to private sphere, and arguing that Shari'ah does not enforce "religion" but rather creates atmosphere conducive to its development). But see El-Awa, supra note 1, at 118 (asserting that Islamic law does not draw distinction between private and public morality but acknowledging that strict standard of proof renders crime of zina as offense of public indecency). The private act of zina, however, is still considered a sin in Islam). Id.

257. See Griswold v. Connecticut, 381 U.S. 479, 530-531 (1965) (Stewart, J., dissenting) (stating that it is not function of Court to decide cases based on community standards or enforce Justices' personal views); Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (emphasizing that articulating rights not easily identifiable from constitutional provi-
nale, evidence suggests the U.S. Supreme Court finally adopted this argument in its recent holding in *Lawrence*.258

1. Regulating Private Morality: Early Hints of Unrest

The dissenting Justices in *Bowers*, arguing that morality lacks rational basis in the law, drafted opinions foreshadowing the Court's recent decision in *Lawrence*. Invoking distinct themes of privacy precedent,259 Justices Harry Blackmun and John Paul Stevens criticized the use of morals-based legislation to infringe an individual's right of privacy in matters of intimate association.260 Arguing that the moral sentiments held by a majority cannot justify deprivation of individual liberty, Justice Blackmun challenged the *Bowers* Court's treatment of morality as a legitimate State interest.261 Rejecting the majority's conclusion that

...
long-held uniform condemnation of homosexuality adequately justifies State regulation of same-sex sodomy, Justice Blackmun argued that religious- or moral-based rationales are not sufficiently legitimate to support secular State legislation.262

Justice Blackmun concluded by drawing a distinction between laws that prohibit public indecency and statutes that regulate private morality.263 Asserting that the right of privacy that protects private consensual sexual conduct from State regulation also justifies protecting the individual right against having sexual activity "imposed" upon him/her in public, Justice Blackmun averred that the mere knowledge that certain individuals are en-

Bowers, 478 U.S. at 216 (Stevens, J., dissenting) (arguing that Court's prior cases demonstrate that traditional majoritarian beliefs regarding morality of particular conduct are insufficient to support statutory prohibition of conduct). But see Bowers, 478 U.S. at 191, 196 (holding that majority sentiments regarding morality of homosexual sodomy constitute adequate basis for law). See also Brown, supra note 105, at 20 (asserting that Bowers Court explicitly approved legitimacy of using morals-based legislation); Mootz, supra note 96, at 1034 (arguing that premise of Bowers was that morality formed rational basis for state legislation).

262. See Bowers, 478 U.S. at 210, 211 (Blackmun, J., dissenting) (rejecting majority's holding that morality is legitimate State interest). See also Goldstein, supra note 49, at 1077 (averring that Justice Blackmun rejected claim that long-espoused beliefs that sodomy is immoral protects sodomy laws from judicial review). See Bowers, 478 U.S. at 216 (Stevens, J., dissenting) (arguing that Court's precedent demonstrates that traditional majoritarian beliefs regarding morality of certain conduct are insufficient to support statutory ban of that conduct). But see Bowers 478 U.S. at 191, 196 (holding that majority attitudes that homosexual sodomy is immoral constitute adequate basis for law); Brown, supra note 105, at 20 (stating that Bowers Court explicitly endorsed legitimacy of using morals-based legislation); Mootz, supra note 96, at 1034 (asserting that Bower's premise was that morality constituted rational basis for State laws); Grossman, supra note 118 (observing that in Bowers, majority held that State's belief that homosexual sodomy was immoral constituted rational basis for legislation banning sodomy).

gaging in subjectively immoral private sexual activity is not an invasion of the right against viewing sexual conduct on the street, a park, or any public place. 264

In another dissenting opinion, Justice Stevens asserted that the Court’s prior cases have established that morality lacks rational basis in the law. 265 Justice Stevens made a twofold argument for invalidating Georgia’s sodomy statute. 266 First, asserting that the liberty protected by the *Griswold* line of cases embraces the right for married and unmarried heterosexual adults to engage in non-procreative intimate activity that others may deem offensive or immoral, Justice Stevens concluded that Georgia may not entirely prohibit sodomy without exception. 267 In making this determination, Justice Stevens cited the Court’s


266. See *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting) (asking whether State may entirely prohibit private homosexual sodomy between consenting adults by enacting neutral legislation without exception to all constituents or, if not, whether State may selectively enforce law against homosexuals); Katz, supra note 265, at 428 (discussing Justice Stevens’ dissent in *Bowers*).

267. See *Bowers* at 216, 218 (Stevens, J., dissenting) (noting that liberty protected by Fourteenth Amendment’s Due Process Clause encompasses individual decisions by unmarried and married persons to engage in non-reproductive sexual activity). See also Goldstein, supra note 49, at 1077 (noting that Justice Stevens concluded that Georgia could neither enact neutral statute outlawing sodomy by all persons nor selectively enforce sodomy statute against homosexuals); Buchanan, supra note 104, at 1270 (asserting that *Bowers* Court limited its holding to determining constitutionality of statute as applied to homosexual sodomy). See *Bowers*, 478 U.S. at 216, 218 (Stevens, J., dissenting) (citing *Griswold*, *Eisenstadt*, and *Carey* for proposition that intimate choices of married and unmarried persons concerning decision to engage in non-procreative sexual activity are form of liberty protected by Fourteenth Amendment’s Due Process Clause). See also Goldstein, supra note 49, at 1077 (noting that Justice Stevens concluded that liberty protected by Court’s privacy jurisprudence encompassed right of married and single heterosexual persons to engage in non-procreative sexual activity, and every citizen has same interest in such liberty).
prior decision in Loving v. Virginia, a case which invalidated legislation outlawing certain interracial marriages, to criticize the majority's attachment to the American history and tradition of banning sodomy. Analogizing the prohibition of sodomy to the statutory prohibition in Loving, Justice Stevens argued that the history and tradition of criminalizing miscegenation could not save such legislation from constitutional challenge.

Next, asserting that the selective application of Georgia's generally applicable statute to homosexuals must be supported by a neutral and legitimate purpose, Justice Stevens concluded that the State must identify an interest more significant than aversion for or ignorance about homosexuals. Justice Stevens concluded that the Court cannot rely on Georgia's sodomy statute, which does not single out homosexuals for disfavored treatment, to support its holding unless it is prepared to conclude that an entire ban on sodomy is constitutional. Justice Stevens' analysis, namely his rejection of morality as a legitimate State interest, forms the central point of the Court's holding seventeen years later in Lawrence.
2. The Court's New Rule: Extending the Right of Privacy or Ending All Morals-Based Legislation?

On its face, the Lawrence Court seems to extend the right of privacy to protect private consensual sodomy between homosexual adults. From the outset, the Lawrence Court specifically chooses to analyze the case under the substantive dimension of the Due Process Clause of the Fourteenth Amendment, the constitutional provision consistently employed by the Court to assess whether the right of privacy protects an asserted liberty. Under the substantive component of this constitutional provision, States cannot infringe fundamental liberty interests unless the infringement is narrowly tailored to advance a compelling state interest. In a dissenting opinion, Justice Antonin Scalia

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vans' analysis in Bowers); Ryan, supra note 50, at 7 (discussing Lawrence's reliance on Justice Stevens' dissent in Bowers).

274. See Lawrence, 123 S. Ct. at 2484 (holding that homosexual persons have fundamental right to engage in consensual sodomy without governmental restraint). See also Goldberg, supra note 131, at 631 n.7 (describing Lawrence as recognizing liberty interest of homosexual persons in making decisions regarding private consensual sexual activity); Ward, supra note 130 (noting that Lawrence invalidates State sodomy law as unconstitutional violation of right of privacy). But see Leonard, supra note 51 (arguing that in recent years, majority of Court has "backed away" from theory of constitutional privacy). Leonard argues that the current trend in the Court is to seek a more direct "textual" basis for claimed constitutional rights, e.g., by employing the term "liberty." Id. See Lawrence, 123 S. Ct. at 2484 (protecting petitioners' conduct as exercise of liberty protected by Due Process Clause of Fourteenth Amendment, rather than pursuant to constitutional right of privacy); Leonard, supra note 51 (observing developing fashion among Justices in seeking more direct textual basis for claimed constitutional rights). See generally Lawrence, 123 S. Ct. 2472 (employing term "liberty" twenty times and "privacy" three times throughout entire majority opinion, not including direct quotations from prior cases).

275. See Lawrence, 123 S. Ct. at 2482 (declining to address constitutional challenge on equal protection grounds). See also Goldberg, supra note 131, at 631 n.7 (describing Lawrence as recognizing liberty interest of homosexual persons in making decisions regarding private consensual sexual activity); Ryan, supra note 50, at 7 (including Lawrence as part of Court's substantive due process jurisprudence).

276. See Reno v. Flores, 507 U.S. 292, 301-02 (1993) (describing elements of substantive due process analysis); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J. concurring) (noting that States cannot infringe fundamental personal liberties without showing compelling interest); Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) (holding that where decision as fundamental as deciding whether to bear or beget child is concerned, regulations burdening that right must be narrowly tailored to advancing compelling State interest); Roe v. Wade, 410 U.S. 113, 155 (1973) (finding that where certain fundamental liberties are involved, Court has held that laws restricting those rights may only be justified by compelling State interests and must be narrowly tailored to serving those interests). See also Ryan, supra note 50, at 7 (discussing elements of Court's substantive due process jurisprudence); Robert Chesney, Old
criticizes the Lawrence majority for its incomplete substantive due process analysis.277

Justice Scalia first criticizes the majority's substantive due process analysis for its failure to characterize homosexual sodomy as a fundamental right.278 As an initial matter, the substantive due process inquiry requires the Court to determine whether the pertinent legislation infringes a fundamental right.279 In order to make this determination, the Court must ascertain whether the right at issue is deeply rooted in the history of this Nation.280 While the Lawrence majority focuses on evidence that early sodomy laws were not directed at homosexual conduct "as a distinct matter,"281 Justice Scalia argues that the fact that homosexual sodomy was criminalized as part of a

277. See Lawrence, 123 S. Ct. at 2488 (Scalia, J., dissenting) (criticizing majority's application of substantive due process). See also Leonard, supra note 51 (asserting that Justice Kennedy's methodology was "calculated" to enrage Justice Scalia); Grossman, supra note 118 (describing Justice Scalia's dissent as "angry").

278. See Lawrence, 123 S. Ct. at 2488, 2492 (Scalia, J., dissenting) (noting that majority never once describes homosexual sodomy as fundamental right). See also Grossman, supra note 118 (noting that "oddly," Lawrence Court does not explicitly characterize homosexual sodomy as fundamental right); Leonard, supra note 51 (noting that Justice Kennedy does not employ term "fundamental right"). But see Loveless, supra note 131, at 396 n. 77 (arguing that Lawrence elevates private consensual sodomy to fundamental rights status).


280. See Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (noting that fundamental rights analysis protects those liberties that are deeply rooted in history and tradition of this Nation). See also Russell, supra note 97, at 1512 n.245 (revealing that in order to ascertain whether legislation infringes fundamental right, Court must determine whether claimed liberty satisfies Palko, Moore or similar test of fundamental rights).

281. See Lawrence, 123 S. Ct. at 2478-79 (discussing history of sodomy laws and noting that in colonial times and nineteenth century, prohibitions against sodomy did not distinguish between heterosexuals and homosexuals); Goldstein, supra note 49, at 1087-88 (noting that while homosexual intimacy existed in earlier eras, assumption that homosexual persons were fundamentally different from heterosexuals only developed in late nineteenth century); Lawrence, 123 S. Ct. at 2479 (asserting that U.S. laws targeting homosexual couples are not deeply rooted in history, but developed in last third of twentieth century); Ryan, supra note 50, at 9 (arguing that Justice Kennedy provides lengthy but not very convincing discussion that laws specifically directed at same-sex sodomy are of relatively recent origin).
general prohibition of non-reproductive sexual conduct and not singled out as a specific offense does not render such conduct deeply rooted in the history of this Nation.282 Justice Scalia then criticizes the majority for its "emerging awareness" rhetoric (the contention that legal scholarship has recognized that liberty affords protection to private sexual activity between consenting adults), and asserts that such a claim does not establish a fundamental right and furthermore, is factually inaccurate.283

Second, Justice Scalia argues that the majority fails to subject Texas' sodomy statute to the appropriate standard of review for fundamental rights.284 In order to survive constitutional challenge, legislation implicating a fundamental liberty interest must withstand strict scrutiny, a heightened form of analysis which requires applicable legislation to further a compelling state interest and be narrowly tailored to achieving that interest.285 Justice Scalia finds, however, that the Lawrence majority applies rational basis review to the State legislation, invalidating the Texas statute for lacking a legitimate State interest that would justify its interference with an individual's consensual intimate decisions.286 Arguing that the majority neither declares ho-

282. See Lawrence, 123 S. Ct. at 2493 (Scalia, J., dissenting) (arguing that Justice Kennedy's argument that sodomy laws were not distinctly directed at homosexuals does not erode historical premise upon which Bowers relied); Grossman, supra note 118 (asserting that Lawrence Court never explicitly identifies homosexual sodomy as fundamental liberty interest). But see Loveless, supra note 131, at 396 n. 77 (arguing that Lawrence affords fundamental rights status to private consensual sodomy).

283. See Lawrence, 123 S. Ct. at 2494 (Scalia, J., dissenting) (demonstrating that majority circumvents requisite fundamental liberties test); Ryan, supra note 50, at 7 (declaring that Lawrence Court chooses not to find fundamental right to engage in sodomy); Leonard, supra note 51 (asserting that Justice Kennedy never employs term "fundamental right" to describe right claimed by petitioners).

284. See Lawrence, 123 S. Ct. at 2488, 2495 (criticizing majority for asserting that morality lacks rational basis in law); Grossman, supra note 118 (asserting that Lawrence Court's language resembles rational basis review and not strict scrutiny). But see Leonard, supra note 51 (suggesting that Justice Kennedy was declaring that Texas' statute failed even most lenient standard of review).

285. See Lawrence, 123 S. Ct. at 2491-92 (noting that only fundamental rights qualify for strict scrutiny); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J. concurring) (noting that States cannot infringe fundamental personal liberties without showing compelling interest). See also Haywood, supra note 61, at 183 (noting that post-Griswold and Eisenstadt, Court applied strict scrutiny standard in cases implicating right of privacy).

286. See Lawrence, 123 S. Ct. at 2488 (Scalia, J. dissenting) (describing majority's scrutiny standard as "unheard-of form of rational-basis review"); Lawrence, 123 S. Ct. at 2484 (invalidating State statute for furthering no legitimate State interest). The Lawrence majority states that "[t]he Texas statute furthers no legitimate [S]tate interest
mososexual sodomy a fundamental right nor subjects Texas' sodomy statute to the appropriate standard of review for fundamental rights, Justice Scalia criticizes the majority for overruling Bowers while leaving its central holding "untouched." Lastly, finding that Texas' interest in morality constitutes a legitimate State interest, Justice Scalia criticizes the majority's holding as announcing an end to all morals-based legislation.

III. THE WESTERN SCHOLAR'S PARADOX: FINDING THE REAL RIGHT OF PRIVACY IN ISLAMIC JURISPRUDENCE

For more than ten centuries, Islamic jurisprudence has maintained a thick wall through which the State cannot penetrate when prosecuting individuals for engaging in consensual sex. Forbidding the State from unlawfully entering one's private dwelling, Islamic law has rendered prosecutions for private consensual sex virtually impossible. Until 2003, however, American
States could, and in fact did, initiate such prosecutions.289 Lawrence reveals that the American impetus for prohibiting these prosecutions is significantly distinct from that of the Islamic State.

By arguing that morality is an inadequate justification for State regulation of private consensual sex between adults, the U.S. Supreme Court has subtly shifted away from recognizing privacy-related rights towards taking a stance against morals-based legislation. Notwithstanding the fact that the greater part of the opinion discusses the right of privacy, the Lawrence Court's anti-morals legislation rhetoric determines the holding of the case.

Islamic evidence law and the consequences of evidentiary transgression, on the other hand, act as a de jure restriction to initiating zina prosecutions. Combined with theological and privacy-related regulations, which act as deterrents to such prosecutions, these evidentiary requirements create a zone of privacy that protects private consensual sex from State regulation. Exploring the ramifications of the Court's anti-morals legislation posture reveals that there is a significant difference between characterizing conduct as a privacy-right and identifying legislation as lacking rational basis. This distinction also reveals that despite the caricature embraced by many Western thinkers, the real right of privacy resides in Islamic jurisprudence.

A. Islamic Law: Finding Consistency in Privacy and Morals-Based Legislation

1. Regulating Zina: Restricting State Control and Encouraging Private Repentance over Public Confession

While Islam classifies acts of non-marital sex as crimes against God, it does not subject private consensual sexual activity to unwarranted intrusion by the State.290 Islamic jurisprudence has interpreted the Qur'an's quadruple testimony standard for


290. See supra notes 1-2, 255-56 and accompanying text (drawing distinction between Islamic State's power to prosecute individual for private acts of sex and duty of individual to God).
zina as requiring actual observance of sexual penetration. Given these strict evidentiary requirements, the crime of zina is one of public indecency rather than private sexual activity. Criminalization of the public display of two nude individuals engaging in sexual conduct does not implicate any aspect of the privacy right as construed by the U.S. Supreme Court. Rather, such criminalization is necessary for preserving public health, order, and morality, and protecting against non-ancillary moral effects, rationales that the U.S. Supreme Court itself has affirmed in upholding the validity of public indecency statutes. Consider the application of zina to the Supreme Court sodomy cases. With Islamic regulations protecting reasonable expectations of privacy in the home and the strict quadruple testimony standard for proving intercourse, prosecutions against the defendants in Bowers and Lawrence, at least under the majority of Sunni schools which consider homosexual intercourse as zina, would have likely failed at the trial level for lack of evidentiary support, while the prosecutor and any testifying witnesses would have been guilty of slander.

Furthermore, Islamic jurisprudence strongly discourages and resists accepting confessions even if prosecutorial evidence is weak. Rather, Islam emphasizes the importance of hiding the faults of Muslims and encourages private repentance over public confession and public discussion of sins.

2. Legal and Theological Deterrents to Initiating Zina Prosecutions

The classification of zina as a public indecency crime creates

291. See supra notes 152-54 and accompanying text (discussing evidentiary requirements for zina and implications of these requirements).
292. See supra notes 155-56 and accompanying text (noting that zina is actually crime of public indecency).
293. See supra note 157 and accompanying text (discussing public indecency statutes in United States).
294. See supra notes 157, 264 and accompanying text (discussing public indecency laws in United States).
295. See supra notes 152-53, 158-68 and accompanying text (discussing personal security in Islam, crime of defamation, and strict standard of proof attached to zina prosecutions).
296. See supra notes 172-89 and accompanying text (discussing confession in Islamic jurisprudence).
297. See supra notes 169, 189 and accompanying text (discussing preference for private repentance and concealing sins in Islam).
a two-pronged right of privacy. First, the strict evidentiary requirements implicated in zina prosecutions reflect a desire not to authorize the State to punish private sexual conduct, but to preserve public morality by preventing public acts of indecency.\textsuperscript{298} As such, these requirements create a zone of privacy that protects private consensual sex as against government authority. Second, legislation prescribing mandatory punishment for accusations of zina in the absence of four competent witnesses, and prohibitions against the dissemination of scandal, both reflecting the Shari'ah's interest in minding one's own business and concealing the consensual sexual indiscretions of others, combine to create a zone of privacy that protects private consensual sex as against the community.\textsuperscript{299} By discouraging accusations of zina and restricting zina prosecutions, Islamic regulations criminalizing slander and the Islamic ban against circulating hearsay regarding another's alleged indiscretions further emphasize the public nature of the crime of zina.\textsuperscript{300}

This zone of privacy, however, is not a mere inevitability of Islamic regulations. Rather, granting the freedom from governmental intrusion, the Shari'ah expresses an affirmative right of privacy that protects private consensual sex from State interference.\textsuperscript{301} By espousing a self-conscious perception of privacy, the Shari'ah affords individuals reasonable expectations of privacy from unwarranted government intrusion.\textsuperscript{302} As State agents cannot unlawfully enter or search one's home, let alone peek into another's residence, where consensual sex would typically occur, Islamic jurisprudence prevents the prosecution of individuals

\textsuperscript{298} See supra notes 2, 232, 255-57 and accompanying text (drawing distinction between State's regulation of public and private morality).

\textsuperscript{299} See supra notes 158-63, 169 and accompanying text (discussing crime of slander and prohibition of spreading gossip and propagating scandal).

\textsuperscript{300} See supra notes 156, 158-63, 169 and accompanying text (demonstrating difficulty of initiating zina prosecution unless offenders are engaging in public act of sex, and revealing preference for abstaining from gossiping about sexual indiscretions of others).

\textsuperscript{301} See supra notes 164-66 and accompanying text (discussing proprietary and personal security rights in Islam).

\textsuperscript{302} See supra notes 164-68 and accompanying text (revealing that Qur'anic requirement of knocking before entering and injunction against spying further support concept that Islamic law provides individuals with reasonable expectations of privacy within home).
who engage in consensual sex in the privacy of their homes.\textsuperscript{303} Furthermore, if State agents disregard privacy-related injunctions and unlawfully search, enter, or spy into one's home, most scholars agree that the evidence obtained through this violation of privacy is inadmissible as proof of criminal misconduct.\textsuperscript{304} Accordingly, Islamic jurisprudential rules on privacy, affording individuals "the right to be let alone," act as a de jure restriction to \textit{zina} prosecutions.\textsuperscript{305}

3. \textit{Ta'azir}: Circumscribing Right of Privacy?

One of three classes of punishment in Islamic jurisprudence, the \textit{hadd} comprises only one criminal category associated with the regulation of sexuality and morality.\textsuperscript{306} The distinctions between the \textit{ta'azir} and \textit{hadd} penalties enumerated in Part II arguably reject an absolute right of privacy from State restraint with respect to private consensual sexual activity not amounting to \textit{zina}.\textsuperscript{307} That is, if the State can shut down a brothel without the strict evidentiary requirements implicated in the crime of \textit{zina}, the right of privacy may be less than absolute.\textsuperscript{308} The same logic could apply to \textit{zina} cases that are liable to \textit{ta'azir} for lack of evidence.\textsuperscript{309}

However, privacy rights are still protected in both circumstances. As for the brothel hypothetical, rather than circumscribing the right of privacy, the doctrine of \textit{ta'azir} can be justifiably applied in this context as a form of secular welfare legislation.\textsuperscript{310} As for the application of \textit{ta'azir} to cases of \textit{zina}, the fact that no other \textit{hadd} crime has such specific evidentiary require-

\textsuperscript{303.} See supra notes 166-67, 255-56 and accompanying text (discussing protections against unlawful State intrusion in Islam).
\textsuperscript{304.} See supra notes 167-68 and accompanying text (discussing consequences of State intrusion into privacy).
\textsuperscript{305.} See supra notes 164-68 and accompanying text (discussing consequences of State intrusion into privacy).
\textsuperscript{306.} See supra notes 164-68 and accompanying text (discussing respect to property, personal security, and correspondence in Islam).
\textsuperscript{307.} See supra notes 238-40 and accompanying text (discussing applicability of \textit{ta'azir} to private intimate and consensual acts).
\textsuperscript{308.} See supra notes 242-45, 248-50 and accompanying text (discussing lower standard of proof and residual character of \textit{ta'azir}).
\textsuperscript{309.} See supra notes 251-53 and accompanying text (discussing applicability of \textit{ta'azir} to private intimate conduct).
\textsuperscript{310.} See supra notes 244-45 and accompanying text (discussing relevance of \textit{ta'azir} to persons who escaped \textit{hadd} penalty for lack of evidence).
ments (four witnesses) and the fact that no other hadd punishment carries slander punishments for failure to bring those evidence requirements, reveal that zina has special privacy considerations that other crimes do not.\textsuperscript{311}

B. U.S. Constitutional Jurisprudence: Sweeping Privacy Aside and Signaling the Demise of Morals-Based Legislation

While the U.S. Supreme Court had been expanding the right of privacy since the early days of Griswold, the scope of this right was restricted by Bowers v. Hardwick. In 2003, however, the Court resurrected its expansive reading of privacy when it decided Lawrence v. Texas. Although the Court claims that the issue in Lawrence implicates the substantive component of the Due Process Clause, the opinion fails to follow any semblance of the fundamental rights analysis that the Court has consistently required in sustaining a claim of substantive due process.\textsuperscript{312}

While the Lawrence Court provides evidence to support the notion that consensual homosexual sodomy is a fundamental right, it fails to prove this essential element of substantive due process.\textsuperscript{313} Rather, the majority circumvents this essential analysis by focusing on evidence that early sodomy laws were not directed at homosexual conduct "as a distinct matter" and subsequently cloaks the requisite tradition analysis underneath its "emerging awareness" rhetoric.\textsuperscript{314} As the fundamental rights query focuses on whether the right at issue is deeply rooted in history and tradition, the majority's argument is inapposite.\textsuperscript{315}

Even if the Court's rhetoric impliedly establishes that Texas' statute infringed a fundamental liberty interest, the Court still fails to subject the statute to the more rigorous standard of strict scrutiny, the second requirement of substantive due process.

\textsuperscript{311} See supra notes 151, 158-59, 169, 246-47 and accompanying text (discussing ban on publicly discussing sexual indiscretions of others).

\textsuperscript{312} See supra notes 277-87 and accompanying text (discussing Justice Scalia's criticism of majority's application of substantive due process in Lawrence).

\textsuperscript{313} See supra notes 123-25, 281-83 and accompanying text (discussing Lawrence Court's fundamental rights analysis and application of tradition).

\textsuperscript{314} See id. (describing Lawrence Court's application of history-and-tradition test).

\textsuperscript{315} See supra notes 97-98, 280 and accompanying text (discussing requirements for evaluating fundamental nature of claimed right in substantive due process jurisprudence).
analysis.³¹⁶ Where pertinent legislation infringes a fundamental right, such as the right of privacy, the Court has repeatedly affirmed that such legislation must survive strict scrutiny.³¹⁷ The Lawrence Court cannot conceivably apply the more relaxed rational-basis review to legislation involving infringement of a fundamental liberty interest.³¹⁸

Paradoxically, Justice Scalia was correct when he exposes the deficiencies of the majority's opinion and accuses the majority for conducting an incomplete analysis in assessing the fundamental rights status of homosexual sodomy.³¹⁹

The Court's failure to adhere to this standard raises a larger flaw in its constitutional privacy analysis: had the desire to articulate a right of privacy for private homosexual sodomy between consenting adults steered the Court's opinion, as it should have, the opinion would have closely, or at least somewhat, followed the above chain of analysis.³²⁰

The Court's incomplete analysis in Lawrence raises a compelling query: if the right of privacy does not guide Lawrence's holding, then how does the Court strike down Texas' sodomy statute as well as seventeen years of precedent circumscribing the scope of privacy? The operative section of the opinion begins and ends in the third to last paragraph, where the Court declares that the statute fails to advance any legitimate State interest.³²¹ Immediately before it strikes down Texas' sodomy statute, the majority invokes Justice Stevens' dissent in Bowers rejecting the legitimacy of morals-based legislation.³²² In fact, the majority's assertion that morality is not a legitimate State interest and its ensuing application of rational-basis review reveal that the Court's current privacy jurisprudence is more influenced by the desire to

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³¹⁶. See supra notes 130, 284-87 and accompanying text (discussing appropriate standard of review in substantive due process analysis)

³¹⁷. See supra notes 276, 285 and accompanying text (discussing conditions, including heightened form of analysis, for substantive due process jurisprudence).

³¹⁸. See supra notes 276, 286 and accompanying text (discussing requirement that fundamental rights withstand strict scrutiny or be invalidated as unconstitutional).

³¹⁹. See supra notes 277-87 and accompanying text (discussing Justice Scalia's dissent in Lawrence).

³²⁰. See supra notes 278-87 and accompanying text (discussing requirements for substantive due process analysis).

³²¹. See supra note 286 and accompanying text (describing Lawrence Court's holding that State statute does not further legitimate State interest).

³²². See supra note 273 and accompanying text (noting that Lawrence Court adopted Justice Stevens' analysis in Bowers).
eradicate morals-based legislation than the interest in championing the constitutionally-derived right of privacy.\textsuperscript{323}

In this way, it is the Court's anti-morals legislation rhetoric, and not its privacy rights language, that determines the holding in \textit{Lawrence}. Although consuming more than ninety percent of the Court's opinion, \textit{Lawrence}'s rhetoric on privacy paradoxically represents mere dicta.\textsuperscript{324} In fact, the majority's language – voicing the term "privacy" only three times and the term "liberty" twenty times – reveals that the Court is "backing away" from protecting conduct pursuant to the right of privacy.\textsuperscript{325}

The Court's persistence in eradicating morals legislation effectively protects consensual homosexual sodomy between adults acting in private.\textsuperscript{326} The \textit{Lawrence} Court's conclusion that morality lacks rational basis implicates the viability of statutes proscribing public indecency.\textsuperscript{327} If morals-based legislation fails the more relaxed standard of rational basis review, on what basis then is public indecency prohibited? The \textit{Lawrence} Court fails to specify whether its holding implicates all morals or simply morals in the private sphere.\textsuperscript{328} At least three potential resolutions emerge from the Court's ambiguity. First, if the Court intended to define "morals" as morals in the private sphere, the Court's resolution follows the jurisprudential trajectory of Islam.\textsuperscript{329} Language in the \textit{Lawrence} opinion supports this interpretation. The Court mentions that historically, a large number of prosecutions for adult consensual homosexual sodomy involved conduct in a

\textsuperscript{323} See supra notes 130, 288 and accompanying text (discussing \textit{Lawrence} Court's use of rational basis review in striking down morals-based law).

\textsuperscript{324} See supra note 286 (suggesting that because \textit{Lawrence} was resolved pursuant to rational basis review, its holding rested on concept that statute lacked any legitimate State interest).

\textsuperscript{325} See supra note 274 (suggesting that \textit{Lawrence} Court is not protecting conduct at issue pursuant to constitutional right of privacy).

\textsuperscript{326} See supra notes 259-62, 265, 288 and accompanying text (revealing that Supreme Court's anti-morals legislation rhetoric protects private sexual activity between consenting adults).

\textsuperscript{327} See supra notes 157, 263-64 (discussing public indecency statutes in United States).

\textsuperscript{328} See supra notes 130, 286 and accompanying text (revealing that \textit{Lawrence} Court merely discusses morality in general sense of term).

\textsuperscript{329} See supra notes 93, 156-67, 232, 256 and accompanying text (discussing public indecency laws in United States and drawing distinction between State's power to regulate private and public morality in Islam).
public space.\textsuperscript{330} Tolerating criminalization of consensual sex committed in public, the Court's reference to this Nation's public indecency prosecutions demonstrates that such prosecutions are valid.\textsuperscript{331} This fact would suggest that the better rule would be a \textit{zina} evidentiary rule where the crime would only be punished if conducted in public.

Second, the Court may sustain the validity of public indecency statutes through the approach espoused by Justice Blackmun in his dissent in \textit{Bowers} whereby the right of privacy protects an individual against having sexual activity "imposed" on her in public.\textsuperscript{332} However, a fair reading of the Court's dicta illustrates that public morals do not necessarily constitute a legitimate State interest worthy of regulation, and thus the Court may have included its discussion of public displays of sexual behavior as an example of sexual conduct prosecutable for non-moral reasons.\textsuperscript{333} Construed as such, the Court's rejection of morals as an inadequate state interest arguably applies to morals in both the private and public spheres, and if the Court anticipated an all-encompassing rejection of morals-based legislation, the prohibition of public indecency is then justified not by morals, but by ancillary non-moral effects.\textsuperscript{334} As a result, the Court's understanding of public indecency laws might be grounded in the theory of public interest and protection, rather than public morality.

CONCLUSION

While the U.S. Supreme Court's recent decision in \textit{Lawrence v. Texas} was actually decided on anti-morals legislation and not privacy grounds, Islam places privacy interests at the heart of every prosecution for consensual sex crimes. These privacy rights, although inherent to Islamic jurisprudence, are too often buried underneath patriarchal biases and traditions which are

\textsuperscript{330} See supra notes 34, 52 (discussing selective enforcement of laws regulating consensual sexual activity).

\textsuperscript{331} See supra note 52 (discussing history of selectively prosecuting only public acts of sodomy).

\textsuperscript{332} See supra notes 263-64 and accompanying text (discussing Justice Blackmun's argument for drawing distinction between laws banning public indecency and those restricting private sexual conduct).

\textsuperscript{333} See supra note 157 (discussing non-moral justifications for public indecency statutes).

\textsuperscript{334} See id. (discussing secondary non-moral effects of public indecency).
responsible for the corrupt implementation of a criminal system that engenders criticism and condemnation from the international community. Islamic jurists, local human rights groups, scholars, and especially women, must work together to bring the Islamic ideal to their legal systems, for only when the Muslim world amends its misconstructions of the Islamic legal system can the international world be better suited to amend theirs.