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Private Affairs: Public Employees and the Right to Sexual Privacy

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PRIVATE AFFAIRS: PUBLIC EMPLOYEES AND THE RIGHT TO SEXUAL PRIVACY

SUSAN A. JACOBSEN*

ABSTRACT

Currently, the federal circuit courts split on whether public employers can discipline their employees for legal, off-duty sexual activity. The Fifth and Tenth Circuits permit discipline in these scenarios; the Ninth Circuit does not. At issue is whether certain public employees, like police officers, should be held to a higher standard because of their duty to the public or whether the Constitution entitles them to privacy rights that shield them from discipline. This Note concludes the latter and argues against punishing the legal, off-duty sexual conduct of all public employees. Because the right to sexual privacy already exists within the penumbras of the Constitution, public employees should be protected in their legal sexual conduct. While several states still criminalize adultery and thereby make certain off-duty sexual activity illegal, this Note also argues that anti-adultery statutes are unconstitutional in the same way the Supreme Court found anti-sodomy statutes unconstitutional in *Lawrence v. Texas*. Ultimately, the United States Supreme Court should extend its logic from *Lawrence* and find that public employees cannot be disciplined for their legal, off-duty sexual activity.

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I. INTRODUCTION

The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their person or station, from having matters which they may properly prefer to keep private, made public against their will.¹

When does the community have a “legitimate concern” into the private affairs of its citizens? What if those citizens are public employees? In the United States, most public employers recognize that an employee's criminal activity on the job is cause for termination.² However, when the public employee's actions are “neither criminal nor on the job, but rather . . . viewed as ‘immoral’ or ‘deviant,’ the salience of termination is far more tenuous.”³ Nevertheless, “[m]any public employees have been dismissed for some alleged form of harm to the public resulting from purely legal actions away from work.”⁴ This Note focuses specifically on public employees, who have greater protections than private-sector employees and thus a greater expectation of privacy.⁵

¹ Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 214–15 (1890).

² See Nonnie L. Shivers, *Firing “Immoral” Public Employees: If Article 8 of the European Convention on Human Rights Protects Employee Privacy Rights, Then Why Can't We?*, 21 ARIZ. J. INT'L & COMP. LAW 621, 622 (2004).

³ *Id.* at 622, 624 (Comparing the laws in the United States to those of the European Union and ultimately positing that “it is unlikely the United States will impart additional privacy protections to public employees.”).

⁴ *Id.* at 622. Examples of public employees fired for otherwise legal actions occurring while the employees were off-the-clock include “an elementary school teacher [who] was fired for being unmarried and pregnant . . . A librarian employed at a municipal library [who] was also terminated for becoming pregnant out of wedlock . . . A male police officer who provided a ride home to an underage girl [who] was summarily dismissed due to the appearance of impropriety . . . [and] Female and male police officers who engaged in extramarital affairs or merely lived with another person out of wedlock [who] have also been dismissed from their roles as public servants.” *Id.*

⁵ See Paul F. Gerhart, *Employee Privacy Rights in the United States*, 17 COMP. LAB. L.J. 175, 176 (1995) (“[P]ublic sector employees enjoy greater explicit protection of their privacy rights than private sector employees do.”). Because the actions a government agency takes against its

Private and public employment law operate in distinct legal spheres; while private employers have significant discretion over the terms and conditions of employment, public employers are government actors constrained by the Constitution in their employment decisions.⁶ In the United States, the default rule for private employment is employment at-will.⁷ Except under limited, specific exceptions, either party in an at-will employment relationship may terminate employment for any reason or no reason at all.⁸

Public employees, however, receive certain constitutional protections.⁹ One example is the Supreme Court's holding that "The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens."¹⁰ Furthermore, since the 1950s, the Supreme Court has applied procedural due process protections to public employment and benefits.¹¹ These due process protections create additional procedural requirements public employers must follow when they seek to dismiss or discipline public employees.¹²

employees are considered "state action," public-sector employees are able to invoke constitutional rights in ways that private-sector employees are not. *See* Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 828 (1998).

⁶ *See* Pauline Kim, *Market Norms and Constitutional Values in the Government Workplace*, 94 N.C. L. REV. 601, 610 (2016) ("Although accommodations are made for the government's interests as employer, constitutional rights provide the relevant background against which individual disputes are decided.").

⁷ *See* William Homer, *Just Cause for Trust: Honoring the Expectation of Loyalty in the At Will Employment Relationship*, 45 FLA. ST. U. L. REV. 833, 836 (2018).

⁸ *Id.* ("The common articulation of the doctrine is that an at-will employee can be terminated 'for good cause, bad cause, or no cause at all.'").

⁹ *See* James F. Allmendinger et al., *The First, Fourth and Fifth Amendment Constitutional Rights of Public Employees—Free Speech, Due Process and Other Issues*, AM. BAR ASS'N 1 (2009) ("The First Amendment protects the right to free speech and free association. The Fourth Amendment protects against unreasonable searches and seizures. The Fifth Amendment provides protections against compelled self-incrimination, and against denials of due process in connection with discipline and discharge. As is well-settled, such protections are enforceable against state and local governments by operation of the Fourteenth Amendment.").

¹⁰ *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

¹¹ *See* Corinne D. Kruft, *McDaniels v. Flick: Terminating the Employment of Tenured Professors – What Process is Due?*, 41 VILL. L. REV. 607, 611–12 (1996) ("The Constitution affords due process protection of property through the Fifth and Fourteenth Amendments. Historically, property rights did not include the right to public employment. In the 1950s, however, the Supreme Court began to actively apply procedural due process protections to public employment and benefits. The Supreme Court's first substantial development in this area came in the twin cases of *Board of Regents v. Roth* and *Perry v. Sindermann*.").

¹² *See* Tommy Tobin, *Far From a "Dead Letter": The Contract Clause and North Carolina Association of Educators v. State*, 96 N.C. L. REV. 1681, 1711 (2018) ("The creation of the property interest in continued public employment triggers constitutional due process

However, there are limits to these constitutional protections.¹³ Public employees' protections are not unfettered and must remain within the confines of the constitutional framework. For example, in *Doggrell v. City of Anniston*, an Alabama city terminated Josh Doggrell, a police officer, after he spoke at a League of the South national conference.¹⁴ The Court ultimately upheld Doggrell's termination, finding that it did not violate his First Amendment interest because his "interest in speaking out was outweighed by the [A]PD's interests in maintaining order, loyalty, morale, and harmony [within the APD and throughout the community]."¹⁵ In this case, the police officer publicly espoused inflammatory opinions and remarks that endangered the safety of the community in which he was employed. What about cases in which police officers *privately* engage in off-duty behavior that presents no harm to the community? The cases that follow examine this question in detail.

The U.S. Circuit Courts of Appeal are currently split on the issue of whether public employees (in these cases, law enforcement officers) can be disciplined for their legal, off-duty sexual conduct. On the one hand, the Fifth and Tenth Circuits have held that public employees *can* be disciplined for this behavior, reasoning that these employees are held to a higher standard because of their duty to the public.¹⁶ Conversely, the Ninth Circuit has held that public employees *cannot* be disciplined for legal, off-duty sexual conduct because the employees have a fundamental right to privacy and intimate association.¹⁷

The circuits split on where to draw the line. If it is appropriate to punish law enforcement officers—as public employees held to a higher standard—for legal, off-

protections. Under the Fifth and Fourteenth Amendments, due process is owed when governments deprive citizens of property. Protected public employees have three distinct due process requirements: (a) notice to the employee, (b) an opportunity for the employee to respond, and (c) a final decision by an impartial decision maker.”).

¹³ In *Pickering v. Board of Education*, the Court notes that the law must “arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁴ See *Doggrell v. City of Anniston*, 277 F. Supp. 3d 1239, 1244–1252 (N.D. Ala. 2017). The video of Doggrell's speech was posted to YouTube and had “a tremendous impact on the community.” The police chief believed that the backlash to Doggrell's remarks resulted in real safety concerns to the community, and Doggrell conceded there was some potential for race riots. On their website and social media pages, the League of the South has “promot[ed] a return to segregation, overtly disparage[ed] black Americans, promot[ed] white supremacy and the inferiority of black Americans (in the context of a threatened race war), and espous[ed] plainly racist and inflammatory rhetoric. *Id.* at 1248. Note that the Southern Poverty Law Center has designated the League of the South as an “hate group” due to the organization's extremist views and racist and violent behavior. See SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/group/league-south>.

¹⁵ *Id.* at 1259 (citing *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1294 (2000)).

¹⁶ See generally *Coker v. Whittington*, 858 F.3d 304 (5th Cir. 2017); *Seegmiller v. LaVerkin City*, 528 F.3d 762 (10th Cir. 2008).

¹⁷ *Perez v. City of Roseville*, 882 F.3d 843 (9th Cir. 2018).

duty sexual conduct, other public employees must be held to the same standard. Public school teachers, especially, have been routinely disciplined and terminated for their behavior during off-hours.¹⁸ However, given that city planners, prosecutors, and politicians, for example, are just some of the many other types of public employees, it becomes clear that a uniform standard would have sweeping effects. As it currently stands, public employees and employers dealing with cases involving sexual privacy “may experience some luck of the draw, depending on where they find themselves litigating.”¹⁹

If public employees can be sanctioned for their private, legal, and off-duty sexual conduct, the rules must be enforced equally, consistently, and evenly for all types of public employees of both genders. However, given not only the extraordinary invasiveness of such a policy, but also, and more importantly, its potential unconstitutionality, this Note argues against punishing private, legal sexual conduct at all. Although the argument presented in this Note applies to all public employees engaged in legal, off-duty sexual conduct, the Note—for the sake of brevity—focuses on cases involving law enforcement officers as the employees, and sexual conduct that may generally be categorized as adultery.

Adultery was once a crime in almost all American jurisdictions.²⁰ However, recognizing that statutes criminalizing adultery are outdated, many states have repealed these laws.²¹ As of February 2020, only eighteen states still have laws

¹⁸ While the author was unable to find exact numbers, research shows there is no shortage of cases and news articles surrounding this subject; for example, teachers have been fired for expressing their personal views on their private social media pages, for posting or being tagged in pictures on social media that depict them engaging in behavior such as drinking an alcoholic beverage while on vacation, posing with a male stripper at a bridal shower, and looking down the sight of a rifle, and for lawful work they did before becoming teachers such as working as a porn actors/actresses. See, e.g., Jonathan Turley, *Teachers Under a Morality Microscope*, L.A. TIMES (Apr. 2, 2012), <http://articles.latimes.com/2012/apr/02/opinion/la-oe-turley-teachers-under-scrutiny-20120402>.

¹⁹ See David W. Garland & Amy B. Messigian, *The Circuit Split on Public Employer's Right to Discipline for Off-Duty Conduct*, 2018 EMERGING ISSUES 8651 (2018) (Furthermore, “[i]t may require another trip to the Supreme Court to answer this question definitively.”). The issues surrounding the circuit split are identified in this brief article but not thoroughly analyzed.

²⁰ Katherine Annuschat, *An Affair to Remember: The State of the Crime of Adultery in the Military*, 47 SAN DIEGO L. REV. 1161, 1166 (2010) (“Adultery has been a crime in most American jurisdictions since the colonial period, with sanctions ranging from death to a fine.”).

²¹ In July of 2018, the governor of Massachusetts, republican Charlie Baker, signed a law repealing “antiquated and inappropriate” state laws that included laws punishing “adultery and fornication” as well as contraception and abortion restrictions. Jamie Halper, *Massachusetts Repeals Long-Dormant Ban on Abortion*, BOSTON GLOBE (July 27, 2018), <https://www.bostonglobe.com/metro/2018/07/27/abortion/u49aF1xtj6ywJ8p48DdWVGJ/story.html>.

criminalizing adultery.²² In the states where anti-adultery statutes still exist, these laws are rarely enforced.²³

This Note argues that private employees are entitled to privacy for sexual conduct between consenting adults occurring during off-duty hours; therefore, public employers cannot sanction employees based on this behavior. The most compelling evidence in favor of finding a right to sexual privacy for public employees is that it already exists within the penumbra of the Constitution.²⁴ Because the constitutional right to sexual privacy already exists,²⁵ public employees are therefore protected in their legal sexual conduct.

In states that still criminalize adultery, the argument requires an additional step of analyzing the constitutionality of anti-adultery laws. Using the same logic that created the right to privacy, this Note also argues that anti-adultery statutes are unconstitutional in the same way that the Supreme Court found anti-sodomy statutes unconstitutional in *Lawrence v. Texas*.²⁶ The second step, however, is only applicable in a subset of cases. In the eighteen states that still criminalize adultery, both arguments this Note sets forth are necessary. However, in cases taking place in the

²² See ALA. CODE § 13A-13-2 (2018); ARIZ. REV. STAT. ANN. § 13-1408 (2017); FLA. STAT. § 798.01 (2017); GA. CODE ANN. § 16-6-19 (2017); IDAHO CODE § 18-6601 (2018); 720 ILL. COMP. STAT. 5/11-35 (2018); MD. CODE ANN., CRIM. LAW § 10-501 (2018); MICH. COMP. LAWS § 750.30 (2018); MINN. STAT. § 609.36 (2017); MISS. CODE ANN. § 97-29-1 (2017); N.Y. PENAL LAW § 255.17 (2018); N.C. GEN. STAT. § 14-184 (2018); N.D. CENT. CODE § 12.1-20-09 (2017); OKLA. STAT. tit. 21, § 871 (2018); 11 R.I. GEN. LAWS § 11-6-2 (2017); S.C. CODE ANN. § 16-15-60 (2018); VA. CODE ANN. § 18.2-365 (2018); WIS. STAT. § 944.16 (2018). Sonu Bedi, *An Illiberal Union*, 26 WM. & MARY BILL OF RTS. J. 1081, 1136 (2018).

²³ Deborah Rhode, *Why Is Adultery Still a Crime?*, L.A. TIMES (May 2, 2018), <http://www.latimes.com/opinion/op-ed/la-oe-rhode-decriminalize-adultery-20160429-story.html>. In fact, when a Wisconsin woman was charged with adultery in 1990, no one could remember the last time the state had attempted to enforce the anti-adultery law, and the case garnered such national attention that it made the front page of the New York Times. See William E. Schmidt, *Adultery as a Crime: Old Laws Dusted Off in a Wisconsin Case*, N.Y. TIMES, Apr. 30, 1990, at A1.

²⁴ “The text of the U.S. Constitution does not explicitly provide for an individual right to privacy; however[,] case law has acknowledged ‘specific guarantees’ of a zone of privacy in the Bill of Rights under the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments. The U.S. Supreme Court has found the right to privacy to be fundamental, and hence, subject to heightened scrutiny, although the Court has not definitively prescribed the bounds of this zone of privacy. Over the past four decades, the judiciary has struggled to determine what is entitled to privacy protection; no area of debate has been so central to overarching privacy doctrine as the right to sexual privacy.” Kristin Fasullo, *Beyond Lawrence v. Texas: Crafting a Fundamental Right to Sexual Privacy*, 77 FORDHAM L. REV. 2997, 2998–99 (2009). The author of this article specifically posits that taken together, the First and Fourteenth Amendment identify “a fundamental right to sexual privacy that limits the state’s ability to regulate the sale of sexual devices.” *Id.* at 3000.

²⁵ See *infra* Part II.A.

²⁶ 539 U.S. 558, 578 (2003).

thirty-two states that do not criminalize adultery, the analysis necessarily ends after the first step in the argument.

Both steps in the argument are rooted in the rationale the Supreme Court used in *Lawrence v. Texas*. In *Lawrence*, the Court examined the issue of private citizens against whom criminal charges were brought based on anti-sodomy statutes. The cases involved in the current circuit split involve public employees sanctioned by their employers for legal sexual conduct, though there were no criminal charges in any of these cases.

Part II examines the background of the idea of sexual privacy and the evolution of case law surrounding the right to privacy, as well as the history of anti-adultery statutes and their enforcement. Part II also introduces the background and reasoning of the courts in the cases involved in the current circuit split as to whether public employees may be disciplined for legal, off-duty sexual conduct.

Part III argues that a right to sexual privacy exists within the Constitution, and that all remaining anti-adultery statutes are unconstitutional; therefore, private employees are entitled to sexual privacy in cases of legal sexual conduct between consenting adults occurring during off-duty hours, and any sanctions for such behavior are unconstitutional. Because a right to sexual privacy exists, public employees cannot be punished for legal, off-duty sexual conduct occurring between consenting adults because such discipline violates the First Amendment as well as the Due Process protections of the Fourteenth Amendment.²⁷ During off-duty hours, public employees are entitled to the same privacy as private citizens.

Finally, Part IV builds on the right to sexual privacy and explains why anti-adultery statutes are unconstitutional and should be repealed. Ultimately, Part IV concludes by arguing that the Supreme Court should resolve the circuit split by definitively stating that a right to sexual privacy exists for all public employees.

II. THE HISTORY OF PRIVACY RIGHTS AND ANTI-ADULTERY STATUTES

A. *The Evolution of the “Right to Privacy”*

Privacy is a constitutional right. In 1965, the Supreme Court first acknowledged this right within the penumbra of the First Amendment of the Constitution in *Griswold v. Connecticut*.²⁸ In *Griswold*, the Court struck down a Connecticut statute that criminalized the use of contraceptives.²⁹ In reaching its conclusion, the Court emphasized the right of privacy granted to married persons specifically and declared

²⁷ Going forward, all references to sexual conduct should be assumed to refer specifically to legal sexual activity between consenting adults. Perhaps the biggest example and most prominent in the discussed case law is in regard to extra-marital affairs, i.e. adultery. While some may consider this behavior to be morally wrong, this article argues that it is not legally wrong and, as such, should not be punishable by government employers.

²⁸ 381 U.S. 479, 483 (1965) (“In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion.”).

²⁹ *Id.* at 485–86 (“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 marriage relationship.”).

the government had no place in the “marital bedroom.”³⁰ Seven years after *Griswold*, in 1972, the Court extended this right to unmarried individuals under the Equal Protection Doctrine, stating, “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³¹

The following year, in 1973, the Supreme Court ruled on the landmark case *Roe v. Wade*.³² In *Roe*, the Court famously held that women have a constitutional right of personal privacy that includes the choice to have an abortion.³³ This right was reaffirmed in *Planned Parenthood v. Casey*.³⁴ In spite of the developments expanding the right to privacy, in 1977, the Supreme Court observed that it “has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults.”³⁵

Then, in 1986, in an opinion that failed to understand the issue within the broader context of human relationships and personal autonomy, the Court took a step backwards and declined to extend the right to privacy to homosexuals engaging in consensual intercourse in *Bowers v. Hardwick*.³⁶ However, nearly twenty years later, *Bowers* was overturned by *Lawrence v. Texas*, when the Court finally struck down antiquated same-sex anti-sodomy laws.³⁷ While the Court did not expressly state that individuals have a fundamental right to sexual privacy, the Court’s holding and rationale more than hint at such an implication.³⁸ In *Lawrence*, the Supreme Court

³⁰ See generally *id.* at 479.

³¹ See *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972) (holding that “if under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible” because it would be inconsistent with the Equal Protection Clause).

³² 410 U.S. 113 (1973).

³³ *Id.* at 154. The Court also noted “this right [was] not unqualified.”

³⁴ 505 U.S. 833, 846 (1992) (reaffirming *Roe*’s essential three-part holding).

³⁵ See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 694 n.17 (1977).

³⁶ 478 U.S. 186, 192 (1986) (holding the Due Process Clause did not confer any fundamental right on homosexuals to engage in acts of consensual sex, even if the conduct occurred in the privacy of their own homes). *Hardwick* was interrupted during private consensual sex by a police officer who entered his bedroom and placed him under arrest. See Art Harris, *The Unintended Battle of Michael Hardwick: After His Georgia Sodomy Case, A Right-to-Privacy Crusader*, WASH. POST, Aug. 21, 1986, at C1.

³⁷ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

³⁸ *Id.* (6-3 decision) (holding that *Bowers* was not correct when it was decided and was now overruled, and that the Texas anti-sodomy statute “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual”). See also Amanda Connor, *Is Your Bedroom a Private Place - Fornication and Fundamental Rights*, 39 N.M. L. REV. 507, 521 (2009) (stating, “while *Lawrence* did not recognize a fundamental right to homosexual sex, the reasoning of *Lawrence* leads to the conclusion that there is a fundamental right to consensual heterosexual sex.”).

struck down Texas's consensual sodomy statute as unconstitutional, noting that the case involved "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle," and that "the petitioners are entitled to respect for their private lives."³⁹ This holding was grounded in the Due Process Clause of the Fourteenth Amendment.⁴⁰ The *Lawrence* decision struck down all anti-sodomy statutes in the United States.⁴¹

Lawrence focused on a statute that criminalized same-sex sexual conduct between consenting adults who were private citizens.⁴² The holding in *Lawrence* arguably has a broad application to issues of sexual privacy generally. However, concerning public employees specifically, courts are split on whether public employees can be sanctioned for their legal sexual conduct occurring during off-duty hours.

B. Criminalizing Infidelity: A History of Anti-Adultery Statutes

The concept of adultery (as well as marriage) is a relatively new social construct compared to the length of time that individuals have engaged in recreational sexual intercourse, be it inside or outside the confines of marriage.⁴³

In any event, anti-adultery statutes stem from Puritan ideologies concerning morality and chastity.⁴⁴ One of the theories for punishing adultery was to prevent vigilante justice; that is, "to preempt violent acts of vengeance by providing an alternative way to right the wrong against the husband."⁴⁵ This view considered adultery "a private wrong that invaded a husband's rights over his wife and not as a wrong against society."⁴⁶ The Puritans, however, viewed adultery "almost entirely as

³⁹ *Lawrence*, 539 U.S. at 578.

⁴⁰ *Id.* at 525–26 (holding the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.") In her concurring opinion, Justice O'Connor bases her finding on the Equal Protection Clause of the Fourteenth Amendment rather than the Due Process Clause. *Id.* at 579 (O'Connor, J., concurring).

⁴¹ *Id.* at 525–26.

⁴² *Id.* at 562. ("The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.")

⁴³ See *Constitutional Barriers to Civil and Criminal Restrictions on Pre-and Extramarital Sex*, 104 HARV. L. REV. 1660, 1660 (1991) ("Sex is undoubtedly the world's oldest recreational activity.")

⁴⁴ See Alyssa Miller, *Punishing Passion: A Comparative Analysis of Adultery Laws in the United States of America and Taiwan and Their Effects on Women*, 41 FORDHAM INT'L L.J. 425, 428 (2010).

⁴⁵ See Annuschat, *supra* note 20, at 1166.

⁴⁶ *Id.* Furthermore, "[s]ince women were viewed as the property of their husbands, these cases were often tried as matters of theft or trespass to chattel." See Jonathan Turley, *Of Lust and the Law*, WASH. POST, Sept. 5, 2004, at B1.

an offense against morality and chastity and far less as a wrong against the husband.”⁴⁷ These Puritan ideologies later found their way in to American jurisprudence, and most states enacted statutes making adultery a crime.⁴⁸

Adultery statutes are also firmly rooted in property law; a common law case from 1707 opined that because a wife is the property of her husband, “adultery is the highest invasion of property.”⁴⁹ Using that rationale, the court held that an *admission* of adultery was sufficient provocation to reduce a charge of murder to manslaughter.⁵⁰ The Ohio Supreme Court overturned this precedent in 1992, holding that words alone are not enough to constitute reasonably sufficient provocation to justify the use of deadly force.⁵¹ The Court noted that “this archaic rule [of adultery being considered an invasion of property] has no place in modern society.”⁵²

It should also be noted that women are punished at higher rates than men for adulterous behavior and face greater social harms and repercussions than men for the same behavior.⁵³ This phenomenon is illustrated in one of the cases involved in the circuit split, *Perez v. City of Roseville*.⁵⁴ In this case, Perez—a rookie female officer—had an affair with a veteran male officer.⁵⁵ Perez was terminated; the male officer was not.⁵⁶

Many states have now repealed their anti-adultery statutes. In the states that still have these statutes on the books, enforcement is a rarity.⁵⁷ While many may consider adultery morally wrong, there is an important distinction between a moral wrong and a legal wrong. Moral wrongs are not always legal wrongs, and sometimes fall outside the scope of the law and legal punishment. As Oscar Wilde wrote, “Morality is simply

⁴⁷ See Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 225–26 (1986).

⁴⁸ *Id.* at 226. In Colonial America, the crime of adultery carried severe punishment. There are three recorded cases of execution, while other offenders were subjected to shaming punishments such as being branded with an “A” on their foreheads, and “[w]omen were routinely stripped to the waist and publicly whipped.” See Turley, *supra* note 46.

⁴⁹ *Regina v. Mawgridge* (1707), Kelyng, J. 119, 137, 84 Eng. Rep. 1107, 1115.

⁵⁰ *Id.*

⁵¹ *State v. Shane*, 590 N.E.2d 272, 278 (1992).

⁵² *Id.*

⁵³ See United Nations Working Group on the Issue of Discrimination Against Women in Law and in Practice, Policy Paper: Adultery as a Criminal Offense Violates Women’s Human Rights 1 (Oct. 2012) [hereinafter United Nations Working Group] (stating “closer analysis reveals that the criminalization of adultery is both in concept and practice overwhelmingly directed against women and girls.”) See generally Miller, *supra* note 44, at 432.

⁵⁴ 882 F.3d 843 (9th Cir. 2018).

⁵⁵ *Id.*

⁵⁶ *Id.* at 848–49.

⁵⁷ See Annuschat, *supra* note 20, at 1168.

the attitude we adopt towards people whom we personally dislike.”⁵⁸ Furthermore, “if truth were everywhere to be shown, a scarlet letter would blaze forth on many a bosom”⁵⁹ The subject of adultery is highly contentious and admittedly unlikely to garner much sympathy, in spite of the public’s apparent proclivity towards this behavior.⁶⁰ Nevertheless, adultery is a moral wrong and a private act that should fall outside the scope of the law.

Of course, in some cases, immoral behavior is also illegal behavior. For example, in *Priester v. Bd. of Appeals*, Priester, a fire captain, was terminated after he sexually harassed female subordinates and created a hostile work environment.⁶¹ The Board of Trustees of the Employees’ Retirement System also denied Priester’s application for retirement benefits because they determined that he had not rendered “honorable and faithful service as an employee.”⁶² Both the Maryland trial court and appellate court upheld the Board’s decision.⁶³ In this case, Priester’s termination and denial of retirement benefits was entirely appropriate since his behavior was not only immoral, but also illegal. His actions took place in the course of his employment and negatively affected other employees.⁶⁴

However, had Priester engaged in private, off-duty behavior such as adultery, his termination and denial of benefits would not have been appropriate. The Maryland Appellate Court even noted this in their opinion, stating,

it is very clear that ‘fleeting or insignificant’ misconduct cannot amount to dishonorable or unfaithful service. [A] single act of unlawfully exceeding the speed limit or *a discreetly executed act of adultery* (with its maximum \$10

⁵⁸ OSCAR WILDE, AN IDEAL HUSBAND (1895).

⁵⁹ NATHANIEL HAWTHORNE, THE SCARLET LETTER 88 (Charles Scribner’s Sons 1919) (1850).

⁶⁰ See Zoë Heller, *In Defense of Adulterers*, THE NEW YORKER, Dec. 18, 2017, at 101 (“While we’ve become considerably more relaxed about premarital sex, gay sex, and interracial sex, our disapproval of extramarital sex has been largely unaffected by our growing propensity to engage in it. We are eating forbidden apples more hungrily than ever, but we slap ourselves with every bite.”). Jonathan Turley, a Washington Post reporter, finds the prosecution of anti-adultery statutes “baffling” given that one “could throw a stick on any corner and probably hit a couple of adulterers.” Turley pointed to an old study from 1953 by Alfred Kinsey finding “50 percent of married men and 26 percent of married women had engaged in adultery by age 40.” A more recent study from Ball State University found that women have since closed that gap. See Turley, *supra* note 46, at B1.

⁶¹ *Priester v. Bd. of Appeals*, 165 A.3d 644, 646 (Md. Ct. Spec. App. 2017).

⁶² *Id.*

⁶³ *Id.* at 646, 655 (holding that 1.) the undefined term “honorable and faithful” service, was not so impermissibly vague that it must be struck down, 2.) the term “honorable and faithful” service was not applied by the Board in an arbitrary and capricious manner inconsistent with the County pension statute and the relevant case law, 3.) the Board’s decision, which revoked and forfeited Mr. Priester’s entire County pension, was not inconsistent with the plain and unambiguous language of the pension statute and pension case law, and, 4.) the Board’s decision was supported by substantial evidence in the record and should not be reversed.).

⁶⁴ *Id.* at 646.

fine) could not reasonably abrogate the accrued benefits of 20 years of faithful employment.⁶⁵

Despite the fact that Maryland still has an anti-adultery statute in place—punishable by a mere \$10 maximum fine—and adultery is therefore technically illegal in that state, the Maryland court stated that it still would not find an act of adultery to be enough to justify a denial of retirement benefits.⁶⁶

Nevertheless, as discussed in the following section, some courts have found acts of adultery, whether criminalized by statute or not, are enough to justify sanctions by public employers of their employees.

C. Present Day Privacy Issues: The Circuit Split on Sanctions of Public Employees for Legal Off-Duty Conduct

1. *Seegmiller v. LaVerkin City*: The Tenth Circuit held the constitutional right to privacy is “not fundamental”

In 2008, the Tenth Circuit grappled with the issue of sexual privacy in the case *Seegmiller v. LaVerkin City*.⁶⁷ The case involved a female police officer, Sharon Johnson, who was formally reprimanded for having a brief affair with a male officer (who was not a member of her department), whom she met at an out-of-town conference.⁶⁸ At the time of the affair, Johnson was separated from her husband and had initiated divorce proceedings.⁶⁹ Johnson had also obtained a protective order against her husband, which he violated when he threatened to kill both himself and her.⁷⁰

Johnson’s reprimand stated that she had allowed “her personal life [to] interfere with her duties as an officer by having sexual relations with an officer from Washington County while attending a training session out of town which was paid for in part by LaVerkin City” and advised her to “avoid the appearance of impropriety” and to “take care to conduct [herself] in the future in a manner that will be consistent with the city policies and the police department policies.”⁷¹ The reprimand went on to state that “[f]urther violations will lead to additional discipline up to and including termination.”⁷²

⁶⁵ *Id.* at 658 (quoting *Employees' Ret. Sys. of Baltimore Cnty. v. Brown*, 973 A.2d. 879, 893 (Md. Ct. Spec. App. 2009)) (emphasis added) (internal quotations omitted).

⁶⁶ *Id.* at 658–59.

⁶⁷ 528 F.3d 762, 764 (10th Cir. 2008).

⁶⁸ *Id.* at 764.

⁶⁹ *Id.* at 764–65.

⁷⁰ *Id.* at 765.

⁷¹ *Id.* at 766.

⁷² *Id.*

Johnson was also falsely accused by her husband of having an affair with the Chief of Police, Kim Seegmiller, which resulted in a temporary suspension for both Johnson and Seegmiller.⁷³ The City Council launched a confidential investigation into the matter, but the story was leaked and printed on the front page of the local newspaper.⁷⁴ Stories of the investigation “also appeared in other newspapers, and were broadcast on radio and television stations throughout the state of Utah.”⁷⁵ Although the investigation ultimately failed to substantiate the allegation, both Johnson and Seegmiller’s reputations were irreparably harmed.⁷⁶ Furthermore, Johnson was asked to step down from her position on the county SWAT team.⁷⁷ While Johnson was eventually reinstated as a police officer with the city, she was not reinstated to the SWAT team because the city refused to submit to the county a required letter of good standing on her behalf.⁷⁸ With her career, reputation, and credibility undermined and maligned, Johnson resigned from the police force a few months after being reinstated.⁷⁹ In her complaint, Johnson claimed in part that “the City violated her constitutional rights by orally reprimanding her for private, off-duty conduct,” and the City violated her fundamental liberty interest “to engage in a private act of consensual sex.”⁸⁰ The district court granted summary judgment against Johnson.⁸¹

⁷³ *Id.* at 764. The author concedes that in law enforcement and military contexts, the departments may have an interest in placing rules around relationships with co-workers and supervisors. However, since Johnson was in a separate department than the male officer with whom she had an affair, and a formal investigation the allegation that she had an affair with her supervisor revealed the allegation was false, that argument is not relevant to this discussion and will not be addressed here.

⁷⁴ *Id.* at 765. See also Fred Hosier, *Employee’s Affair Gets Her Disciplined — Was It Fair?*, HR MORNING (June 26, 2008), <http://www.hrmorning.com/employees-affair-gets-her-disciplined-was-it-fair/>.

⁷⁵ *Seegmiller*, 528 F.3d at 765.

⁷⁶ Seegmiller’s attorney stated, “Chief Seegmiller has suffered a great loss of respect both in the community of La Verkin as well as statewide due to the publicity these accusations have generated.” Seegmiller had planned to run for sheriff in 2008, but his attorney noted, “[t]hose aspirations are unlikely to be successful due to the negative exposure he has received from this incident.” His attorney also stated, “Chief Seegmiller has suffered defamation of character, libel and slander by the personnel actions taken by the City Council without proper investigation as to the truth of the allegations. Mr. Seegmiller’s family suffered extreme emotional distress as well. His wife has a real estate business which also suffered.” After Seegmiller was reinstated, he submitted his resignation. However, he ultimately remained on the job. See Nancy Perkins, *La Verkin Chief Seeks \$1 Million in Damages*, DESERT NEWS (Jan. 12, 2004), <https://www.deseretnews.com/article/585036751/La-Verkin-chief-seeks-1-million-in-damages.html>.

⁷⁷ *Seegmiller*, 528 F.3d at 765.

⁷⁸ *Id.* at 766.

⁷⁹ *Id.*

⁸⁰ *Id.* at 766, 770.

⁸¹ *Id.* at 764.

On review, the Tenth Circuit affirmed the district court's decision because it determined that Johnson's asserted right "is not fundamental" and concluded that "the City only needed—and had—a rational basis for restricting it."⁸² At the time this case took place, Utah still classified adultery as a class B misdemeanor, though the statute has since been repealed.⁸³ No criminal charges were brought against Johnson for her act of adultery, however.⁸⁴ In fact, the last time an adultery charge was brought before a Utah court was in 1928.⁸⁵

2. *Coker v. Whittington*: The Fifth Circuit joins the Tenth Circuit in failing to find a right to privacy

In 2017, nine years after *Seegmiller v. LaVerkin City*, the Fifth Circuit weighed in on the sexual privacy issue and ultimately agreed with the Tenth Circuit. This case, *Coker v. Whittington*, involved two male sheriff's deputies who moved in with each other's wives.⁸⁶ The deputies were placed on administrative leave and each was ordered to "cease living with a woman not his spouse," and if they did not comply by

⁸² *Id.* at 772.

⁸³ UTAH CODE ANN. § 76-7-103 (repealed).

⁸⁴ *Seegmiller*, 528 F.3d at 772.

⁸⁵ *See, e.g.*, *State v. Holm*, 137 P.3d 726, 772 n.22 (Utah 2006) ("The most recent adultery prosecution to have reached this court appears to have occurred in 1928, under a previous criminal provision.") (citing *State v. Lewellyn*, 266 P. 261, 262 (Utah 1928)). In the *Lewellyn* case, it was, surprisingly, not the woman who was prosecuted. A husband suspected his wife of having an affair and hired a private detective. When the detective saw the wife enter into her home with the defendant, he called the husband who arrived with a police officer. The defendant was then placed under arrest. Although the wife was not arrested, she stated that if the defendant was going to jail then she was going to jail too. She insisted on sitting in the front seat of the police car with the defendant and "leaned over and kissed him." The trial court directed a verdict of not guilty. The issue of whether the directed verdict was proper was appealed up to the Utah Supreme Court which held "upon a motion for a directed verdict of acquittal the province of the court is to consider and determine as a matter of law whether or not there is substantial evidence of the guilt of accused sufficient in law to support a conviction, and, if there is, to deny the motion and submit the case to the jury." *Lewellyn*, 266 P. at 262–63. The dissent pointed out that there were additional facts to the case, and the accused could not be put on trial again for the charged offense anyway, a point to which the state had conceded. *Id.* at 265 (Straup, J., dissenting).

⁸⁶ One might assume the individuals involved in the case were "swingers," a descriptor for people who switch sexual partners. *See* DAVID K. BARNHART & ALLAN A. METCALF, *AMERICA IN SO MANY WORDS: WORDS THAT HAVE SHAPED AMERICA* 261 (1997). According to Courthouse News, the two deputies had been friends since the age of 16 and their families would often spend time together. In 2016, "both men fell in love with the other one's wife." They swapped spouses and "began living together as would a married couple" and planned to divorce and remarry. The men stated that "the entire arrangement was amicable and supported by both families." *Fired Wife-Swapping Deputies Sue Sheriff*, COURTHOUSE NEWS SERVICE (Jan. 9, 2016), <https://www.courthousenews.com/fired-wife-swapping-deputies-sue-sheriff/>.

a specified date, their employment would be considered voluntarily terminated.⁸⁷ Even if they did comply with the order, they still “would be demoted and sent to work at the Sheriff’s detention and correctional centers at a reduced rate of pay. The demotion would result in a loss of pay and prestige.”⁸⁸ The deputies did not comply and were subsequently terminated, at which time they filed a lawsuit against the sheriff, the deputy sheriff, and the Bossier Parish Sheriff’s Office.⁸⁹

The district court did not find the terminations to be unconstitutional.⁹⁰ In a brief opinion that spanned less than three full pages, the Fifth Circuit affirmed the district court’s decision, noting that even if the relationships were in fact “consensual and loving . . . sexual decisions between consenting adults take on a different color when the adults are law enforcement officers.”⁹¹ This case took place in Louisiana, where adultery is not criminalized.⁹²

3. *Perez v. City of Roseville*: The Ninth Circuit recognizes the right to privacy

In early 2018, the Ninth Circuit broke with the Fifth and Tenth Circuits on the issue of sexual privacy as it relates to law enforcement officers. In *Perez v. City of Roseville*, a former probationary police officer, Janelle Perez, was terminated after an Internal Affairs investigation discovered her sexual relationship with a fellow police officer from her department, Shad Begley.⁹³ At the time of the affair, both Perez and Begley were separated from but still married to other individuals.⁹⁴ Although the Internal Affairs investigation found no evidence of on-duty sexual contact between the two officers,⁹⁵ Perez (but not Begley) was terminated.⁹⁶ Perez argued in part that her termination “violated her constitutional rights to privacy and intimate association because it was impermissibly based in part on disapproval of her private, off-duty

⁸⁷ *Coker v. Whittington*, 858 F.3d 304, 306 (5th Cir. 2017).

⁸⁸ *Fired Wife-Swapping Deputies Sue Sheriff*, *supra* note 86.

⁸⁹ *Coker*, 858 F.3d at 306.

⁹⁰ *Id.*

⁹¹ *Id.* at 306–07 (emphasis added).

⁹² See *La. Electorate of Gays and Lesbians, Inc. v. Connick*, 902 So. 2d 1090, 1098 (La. Ct. App. 2005) (upholding the trial court’s decision to strike portions of La. R.S. § 14:89 (crime against nature) that criminalized sodomy and stating “uncompensated sexual behavior between consenting adult humans under La.R.S. 14:89(A)(1) is no longer proscribed; therefore, it is not unlawful.”).

⁹³ *Perez v. City of Roseville*, 882 F.3d 843, 848 (9th Cir. 2018).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 848–49.

sexual conduct.”⁹⁷ Nevertheless, the district court granted summary judgment to the defendants.⁹⁸

However, on appeal, the Ninth Circuit found that there was enough evidence for Perez to survive summary judgment, noting they “have long recognized that officers and employees of a police department enjoy a right of privacy in ‘private, off-duty’ sexual behavior.”⁹⁹ Under the Ninth Circuit’s precedent, “the Constitution is violated when a public employee is terminated (a) at least in part on the basis of (b) protected conduct, such as her private, off-duty sexual activity.”¹⁰⁰ The court also stated that the decisions of the Fifth and Tenth Circuits “fail to appreciate the impact of *Lawrence v. Texas* on the jurisprudence of the constitutional right to sexual autonomy.”¹⁰¹ Ultimately, the Ninth Circuit held on that issue that “the Constitution forbids the Department from expressing its moral disapproval of Perez’s extramarital affair by terminating her employment on that basis.”¹⁰² This case took place in California, which does not criminalize adultery.

III. A CONSTITUTIONAL RIGHT TO SEXUAL PRIVACY

A. *The Supreme Court’s Approach in Lawrence v. Texas Expanded the Right to Privacy*

As explained in Part II, citizens of the United States are protected by a right to privacy under the Constitution. This right to privacy has evolved over time and includes the right to sexual privacy. Specifically, public employees have a constitutional right to sexual privacy for legal sexual conduct between consenting adults occurring during off-duty hours. This argument is rooted in the Due Process Clause of the Fourteenth Amendment, as the Supreme Court has held in a litany of cases, including *Lawrence v. Texas*.¹⁰³ In *Lawrence*, private citizens engaged in private, consensual sexual activity, and criminal charges were brought against them based on statutes that criminalized sexual activity between people of the same sex.¹⁰⁴ While the *Lawrence* Court did not explicitly state a right to sexual privacy, in overturning *Bowers* and declaring anti-sodomy statutes unconstitutional, it did

⁹⁷ *Id.*

⁹⁸ *Id.* at 850.

⁹⁹ *Id.* at 851. *See also* Thorne v. El Segundo, 726 F.2d at 468, 471 (9th Cir. 1983); Fugate v. Phx. Civil Serv. Bd., 791 F.2d 736, 741 (9th Cir. 1986).

¹⁰⁰ *Perez*, 882 F.3d at 851.

¹⁰¹ *Id.* at 856 (internal citation omitted).

¹⁰² *Id.*

¹⁰³ *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

¹⁰⁴ *See id.* at 563.

strongly emphasize “the importance of *autonomy* and *privacy* in making personal choices around relationships, family, and sexuality.”¹⁰⁵

The cases in the circuit split involve public employees sanctioned and/or fired by their employers for legal sexual conduct, though there were no criminal charges. In two cases with indistinguishable material facts, *Seegmiller* and *Perez*, the courts came to opposite conclusions. This injustice resulted in two police officers, who engaged in the same behavior, being treated in vastly differing ways. One officer received a reprimand, sanctions, and harsh consequences while the other was protected by her right to privacy.

The solution to this discrepancy is for the Supreme Court to formally extend the right to privacy to private, consensual sexual activity because this right arguably already exists within the Constitution. The right to privacy has evolved since it was first established in 1965 in *Griswold v. Connecticut*, which extended privacy to the use of contraception by heterosexual married individuals.¹⁰⁶ Seven years later, in 1972, *Eisenstadt* expanded the rights to individuals regardless of their marital status.¹⁰⁷ The following year, the landmark *Roe v. Wade* decision expanded women’s privacy rights from having the right to prevent pregnancy to having a right to terminate a pregnancy.¹⁰⁸ Privacy rights took a step backwards in 1986 when the Supreme Court declined to extend the right to privacy to same-sex sexual relationships in *Bowers*; however, the Court realized the error of this ruling and corrected it in *Lawrence*, where it held that anti-sodomy statutes are unconstitutional.¹⁰⁹ The right to privacy should be extended to all individuals regardless of marital status, sexual orientation, occupation, or any other defining factor because the government simply has no place in the bedrooms of its citizens.

B. Adultery Statutes in Eighteen States are Unconstitutional because they Violate the Constitutional Right to Privacy

In both *Coker v. Whittington* and *Perez v. City of Roseville*, anti-adultery statutes are not at issue because Louisiana and California, respectively, do not criminalize adultery. *Seegmiller v. LaVerkin City* occurred in Utah where adultery was criminalized at the time the case took place, but Utah has since repealed the statute.¹¹⁰ The court’s analysis did not depend on the existence of the anti-adultery statute, however. In fact, the issue of Utah’s existing anti-adultery statute was never raised. Therefore, it is possible to resolve the current split without ruling on anti-adultery statutes. Nevertheless, the anti-adultery laws that remain in eighteen states are

¹⁰⁵ See Jota Borgmann, *Hunting Expeditions: Perverting Substantive Due Process and Undermining Sexual Privacy in the Pursuit of Moral Trophy Game*, 15 UCLA WOMEN’S L.J. 171, 187 (2006) (emphasis added).

¹⁰⁶ *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

¹⁰⁷ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹⁰⁸ *Roe v. Wade*, 410 U.S. 113, 154 (1973).

¹⁰⁹ *Lawrence*, 539 U.S. at 578.

¹¹⁰ UTAH CODE ANN. § 76-7-103 (repealed).

unconstitutional because they violate the constitutional right to privacy and conflict with the U.S. Supreme Court's holding in *Lawrence v. Texas*.

In states where adultery is still criminalized, it is not difficult to foresee arguments arising over the existence of an anti-adultery statute; public employers could argue that because an anti-adultery statute exists, committing adultery would be a fireable offense given the "criminal" status of such behavior. Since anti-adultery statutes are unconstitutional at their core, eliminating them will avoid any confusion in cases taking place in jurisdictions with anti-adultery statutes still on the books.

Anti-adultery statutes are plainly unconstitutional, similar to the way in which anti-sodomy statutes are unconstitutional. In finding the anti-sodomy statutes unconstitutional, the Supreme Court noted the infrequency with which the anti-sodomy statutes were enforced, stating, "In all events that infrequency makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults."¹¹¹ The anti-adultery statutes are similarly situated in that adultery charges are rarely prosecuted in today's society.¹¹² However, the threat of enforcement is nevertheless ever-present and cannot be ignored.¹¹³ Furthermore, adultery is similarly a private act committed by consenting adults. *Lawrence* made clear that the government has no business controlling the way in which adults choose to have private consensual sex. It is not a far stretch to extend that logic to say that the government also should not be involved in *with whom* adults engage in private consensual sex.

The majority's opinion in *Lawrence v. Texas* was grounded in the Due Process Clause of the Fourteenth Amendment.¹¹⁴ Justice O'Connor, in a concurring opinion, chose to look to the Equal Protection clause in support of the argument to overturn anti-sodomy statutes, stating, "We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships."¹¹⁵ Anti-adultery statutes similarly inhibit personal relationships. Furthermore, in her concurring opinion, Justice O'Connor points out,

Moral disapproval . . . is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause . . . Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient

¹¹¹ *Lawrence*, 539 U.S. at 569–70.

¹¹² Ethan Bronner, *Mass. Among 23 States Where Adultery Is a Crime, But Rarely Prosecuted*, BOSTON GLOBE (Nov. 15, 2012), <https://www.bostonglobe.com/news/nation/2012/11/15/adultery-still-crime-states-including-mass/KiIPGRcFnAeT4CGmenFTKM/story.html>.

¹¹³ For example, in 2004, John Bushey, a sixty-six-year-old Virginia attorney, was charged with adultery, a misdemeanor under Virginia's anti-adultery statute. Bushey, who had been married for eighteen years, had an affair with another woman, Nellie Mae Hensley. When Bushey ended the affair, Hensley sought revenge by reporting him to the police. Bushey ultimately pled guilty and was sentenced to 20 days of community service. See Turley, *supra* note 46, at B1.

¹¹⁴ *Lawrence*, 539 U.S. at 578–79.

¹¹⁵ *Id.* at 580 (O'Connor, J., concurring).

rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.¹¹⁶

As discussed earlier in this Note, adultery, too, is behavior often viewed with moral disapproval. The state has no real interest in criminalizing adultery, and those who engage in such activity are likely to do so regardless of the existence of laws proscribing it. Furthermore, because evidence has shown that the criminalization of adultery is “overwhelmingly directed against women and girls,” the laws are clearly discriminatory to women.¹¹⁷ Whether one looks to the Due Process Clause or the Equal Protection Clause, it is clear that anti-adultery statutes violate the U.S. Constitution.

C. Public Employees Have a Constitutional Right to Sexual Privacy

The petitioners in *Lawrence v. Texas* were adults and “their conduct was in private and consensual.”¹¹⁸ Similarly, the petitioners in *Seegmiller*, *Coker*, and *Perez* were all adults engaging in private and consensual conduct.¹¹⁹ The question in *Lawrence* was whether the petitioners were “free to engage in the private conduct in the exercise of their liberty,” and the Court addressed this issue by looking to the Due Process Clause of the Fourteenth Amendment to the Constitution.¹²⁰ The Court looked at past decisions illustrating “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹²¹

The Court concluded its opinion by stating, “As the Constitution endures, persons in every generation can invoke [Due Process] principles in their own search for greater freedom.”¹²² The next generation of cases is before us in the circuit split concerning public employees.

D. Analyzing the Logic of the Circuit Split Opinions

The Tenth Circuit rationalized in *Seegmiller* that the right to private sexual contact found in *Lawrence* is not a *fundamental* right nor a liberty interest and the Supreme Court did not announce it or categorize it as such.¹²³ The *Seegmiller* opinion states,

¹¹⁶ *Id.* at 582. (internal citations omitted).

¹¹⁷ See United Nations Working Group, *supra* note 53, at 1.

¹¹⁸ *Lawrence*, 539 U.S. at 564.

¹¹⁹ See generally *Perez v. City of Roseville*, 882 F.3d 843, 848 (9th Cir. 2018); *Coker v. Whittington*, 858 F.3d 304, 306-07 (5th Cir. 2017); *Seegmiller v. LaVerkin City*, 528 F.3d 762, 765 (10th Cir. 2008).

¹²⁰ *Lawrence*, 539 U.S. at 564.

¹²¹ *Id.* at 572.

¹²² *Id.* at 579.

¹²³ *Seegmiller*, 528 F.3d at 771.

“Broadly speaking, no one disputes a right to be free from government interference in matters of consensual sexual privacy.”¹²⁴ Yet the court’s very next sentence begins with a qualification: “But . . . a plaintiff asserting a substantive due process right must both (1) carefully describe the right and its scope; and (2) show how the right as described fits within the Constitution’s notions of ordered liberty.”¹²⁵ The court concluded that Johnson’s right to privacy was not a fundamental right.¹²⁶ The court’s rationalization for this conclusion was that Johnson did not point to “historical anecdotes” and instead relied on the fact that the defendants did not dispute that her asserted interest was a fundamental right.¹²⁷

As history has shown, this argument is not persuasive. In 1986, the Supreme Court stated in *Bowers v. Hardwick*, “It is obvious to us that neither [of the defendant’s arguments] would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.”¹²⁸ Looking back on this opinion now, we can clearly see the flaws with this argument, and, as evidenced by the *Lawrence v. Texas* decision in 2003, the Supreme Court was able to see them as well. While Ms. Johnson may not have established her right to sexual privacy as fundamental, it is not so far outside the realm of possibility to imagine that she could. Ultimately, the Tenth Circuit erred in this case when it failed to properly apply the holding in *Lawrence v. Texas*.¹²⁹

The argument in *Coker* is unpersuasive as well. In an opinion spanning less than three full pages, the Fifth Circuit looked to the district court’s decision, which stated, “There are no decisions to the contrary suggesting that the deputies, as public employees of law enforcement agencies, have constitutional rights to ‘associate’ with each other’s spouses before formal divorce.”¹³⁰ The court found “no reversible error of fact or law in the district court’s decision.”¹³¹ The issue, however, is not whether the deputies have a constitutional right to associate with each other’s spouses; the question the court should have asked is whether the deputies have a constitutional right to privacy. Had the court asked the correct question and properly applied the precedent set by *Lawrence v. Texas*, then the answer is clear: the deputies have a constitutional right to privacy.

¹²⁴ *Id.* at 769.

¹²⁵ *Id.*

¹²⁶ *Id.* at 770.

¹²⁷ *Id.*

¹²⁸ *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

¹²⁹ See Connor, *supra* note 38, at 507. In this note, Connor analyzes the *Seegmiller* opinion and arrives at the same conclusion: “The Tenth Circuit failed to apply the reasoning from *Lawrence* in the case of *Seegmiller*.” *Id.* However, Connor concludes that “[t]here should not be a declaration of a broad fundamental right to privacy because it would hinder the government’s ability to protect the public.” *Id.* at 521.

¹³⁰ *Coker v. Whittington*, 858 F.3d 304, 306 (5th Cir. 2017).

¹³¹ *Id.*

The court acknowledged *Lawrence* only insofar as to say that the *Lawrence* decision does not mandate a change to public employee policies.¹³² The petitioners in *Lawrence* were not public employees, so there was no reason for the Supreme Court to consider that aspect in its opinion. While *Lawrence* does not mandate a change to public employee policies, that does not mean that a change to public employees is unnecessary or unwarranted. Furthermore, since the Constitution extends greater protection to public employees, the court should have factored those considerations into its decision. In its brief opinion, the court also projected that there *might* be a possibility of the plaintiffs' activities eventually having an adverse impact on their jobs.¹³³ However, the police department produced no proof of any adverse impact on job performance.¹³⁴

The Ninth Circuit in *Perez v. Johnson*, on the other hand, examined this issue in greater depth and concluded that Perez's extramarital sexual conduct was protected by "her rights to privacy and intimate association."¹³⁵ *Perez* relied on an earlier decision from 1983, *Thorne v. El Segundo*, in which the Ninth Circuit "first recognized that police officers enjoy a 'right of privacy in "private, off-duty" sexual behavior.'"¹³⁶ The *Perez* opinion pointed to the fact that there was no evidence that Perez's affair had any meaningful effect upon her job performance, nor any evidence of inappropriate behavior occurring while she was on duty.¹³⁷ Furthermore, it was "undisputed that Perez's productivity was 'average to above-average'" and there was not "any contention that [her] sexual conduct violated any narrowly drawn, constitutionally permissible regulation."¹³⁸

The *Perez* decision noted that the Ninth Circuit was in tension with the Fifth and Tenth Circuits. It rejected the approach taken by those circuits not only because it was bound by the precedent set in *Thorne*, but also because those circuits had failed to appreciate the impact the *Lawrence* decision had "on the jurisprudence of the constitutional right to sexual autonomy."¹³⁹ The *Perez* opinion stated that *Lawrence* did more than overturn anti-sodomy statutes as unconstitutional; "it recognized that

¹³² *Id.* ("That *Lawrence v. Texas*... expanded substantive constitutional rights relating to personal sexual choices does not mandate a change in policies relevant to public employment, where it was more recently reaffirmed that public employees necessarily shed some of their constitutional rights as a legitimate exchange for the privilege of their positions.") (citing *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006)). The *Garcetti* case to which the court refers, however, is wholly unrelated to issues of privacy, sexual or otherwise.

¹³³ *Id.* at 307 ("Finally, it is not hard to envision how the existence of Coker's and Golden's cohabitation with each other's wives prior to divorce and remarriage *might* be adversely used in litigation concerning the deputies' official conduct." (emphasis added)).

¹³⁴ *See id.* at 304; *Coker v. Whittington*, 169 F. Supp. 3d 677 (W.D. La. 2016).

¹³⁵ *Perez v. City of Roseville*, 882 F.3d 843, 854 (9th Cir. 2018).

¹³⁶ *Id.* (citing *Fugate v. Phx. Civil Serv. Bd.*, 791 F.2d 736 (9th Cir. 1986) (discussing *Thorne v. El Segundo*, 726 F.2d 459 (9th Cir. 1983)).

¹³⁷ *Id.* at 854–55.

¹³⁸ *Id.*

¹³⁹ *Id.* at 855–56.

intimate sexual conduct represents an aspect of the substantive liberty protected by the Due Process Clause."¹⁴⁰ Perez further stated,

Lawrence makes clear that the State may not stigmatize private sexual conduct simply because the majority has "traditionally viewed a particular practice," such as extramarital sex, "as immoral." Thus, without a showing of adverse job impact or violation of a narrow, constitutionally valid departmental rule, the Constitution forbids the Department from expressing its moral disapproval of Perez's extramarital affair by terminating her employment on that basis.¹⁴¹

Ultimately, the *Perez* opinion is the strongest opinion in this trilogy, as it is the most in line with the Supreme Court's directive in *Lawrence v. Texas*. While the Ninth Circuit properly applied the precedent set by *Lawrence*, the Tenth and Fifth Circuits failed to apply the precedent to *Seegmiller v. LaVerkin City* and *Coker v. Whittington*, respectively.

IV. CONCLUSION

The right to privacy has been evolving ever since it was first established in 1965. It should and likely will continue to evolve and expand. Per the Supreme Court, the government may not control the private, consensual bedroom activities of any person regardless of their marital status, gender, or sexual orientation. This protection extends to public employees, whose right to sexual privacy does not end by virtue of their public employment. When it comes to matters of criminal activity, public employees should, in fact, be held to a higher standard. Committing a crime is wrong regardless of one's status in society, but in cases of public employees engaging in corrupt or criminal activity, there is not only a wrong, but also a violation of trust. For instance, the public should be able to trust that law enforcement officers will do the right thing in the course of their duty to protect the public and that they will not use their position to abuse their powers.

However, when it comes to *legal*, off-duty activity, public employees have a right to privacy. Especially in states where adultery is not illegal, the government cannot sanction public employees for their private sexual conduct. In these cases, no crimes were committed. When public employees engage in legal and consensual activity that occurs outside of working hours and has no effect on their job performance, this conduct is their own private business, and they are constitutionally protected by a right to privacy. Public employers may not reprimand, sanction, or fire employees for this activity because public employees engaging in private, consensual, and otherwise legal sexual activities during off-duty hours are protected by the Constitution, and any punishment for this behavior violates their constitutional rights.

Furthermore, anti-adultery statutes further intrude upon the right to sexual privacy; these statutes are antiquated, inappropriate in today's modern society, and, ultimately, unconstitutional. As such, all remaining anti-adultery statutes should be uniformly repealed or held unconstitutional.

¹⁴⁰ *Id.* at 856 (emphasis added).

¹⁴¹ *Id.* (citation omitted).

The Supreme Court should resolve the circuit split on whether public employees may be punished for off-duty sexual conduct by taking the rationale it applied in *Lawrence v. Texas* one step further and explicitly and definitively stating that there is a fundamental right to sexual privacy.