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SEXUAL PRIVACY IN THE MODERN ERA: *LOWE V. SWANSON*

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I. INTRODUCTION

Federal judges have sex on the brain. It's not entirely their fault: a litany of sexual privacy cases has swamped the court system following the Supreme Court's landmark decision in *Lawrence v. Texas*.[1] The *Lawrence* Court upheld sexual privacy, but the muddled language of the decision has led to numerous subsequent battles over the precise meaning of the case.[2] The circuits are split over the implications of the *Lawrence* decision in related sexual matters.[3]

The Sixth Circuit has recently weighed in on this debate. In *Lowe v. Swanson*, the court refused to invalidate an Ohio statute that in part forbids stepparents from engaging in consensual sexual conduct with their adult stepchildren.[4] The holding is based on the court's reading of *Lawrence* as being based on rational basis review, as not creating a fundamental right to adult sexual privacy, and as not applying to anything other than consensual homosexual activity.[5] The court's interpretation of *Lawrence* squarely plants the Sixth Circuit in line with the Seventh, Tenth and Eleventh circuits in limiting the *Lawrence* holding as it relates to adult sexual privacy.[6]

But did the *Lowe* court get it right? The First, Fifth and Ninth Circuits would likely say no, reading *Lawrence* much more broadly than their sister circuits.[7] The novel nature of the question presented in *Lowe* coupled with the sharp divide in the circuits after the *Lawrence* case requires special attention as to what *Lawrence* means for consenting sexual encounters between stepparents and adult stepchildren. Through careful consideration of the *Lawrence* Court's language and actions, along with practical and legal concerns related specifically to stepparent and stepchild relationships, it becomes apparent that *Lowe v. Swanson*

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1. 539 U.S. 558 (2003).

2. *See, e.g.*, Cook v. Gates, 528 F.3d 42 (1st Cir. 2008); Seegmiller v. LaVerkin City, 528 F.3d 762 (10th Cir. 2008).

3. *See, e.g.*, *Cook*, 528 F.3d 42; *Seegmiller*, 528 F.3d 762.

4. Lowe v. Swanson, 663 F.3d 258, 260 (6th Cir. 2011); OHIO REV. CODE ANN. § 2907.03 (West 2012).

5. *See Lowe*, 663 F.3d 258.

6. *See id.*; *Seegmiller*, 528 F.3d 762; Muth v. Frank, 412 F.3d 808 (7th Cir. 2005); Williams v. Att'y Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004); Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004).

7. *Cook*, 528 F.3d 42; Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008); Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008).

was wrongfully decided.

This case note will first examine in Part II the background of the issue, including *Lawrence*, various related Circuit Court decisions, and *Lowe* itself. Part III will be dedicated to the careful analysis of the different challenges and interpretations of *Lawrence* as they apply to *Lowe* and stepparent and stepchild relationships.

II. BACKGROUND

Modern sexual privacy law has developed rapidly over the decade following *Lawrence*. A brief historical overview is necessary to appreciate fully the debate that lead to the *Lowe* decision. First, *Lawrence* will be discussed, followed by an examination of the divide in the Circuit Courts. Finally, *Lowe* itself will be presented.

A. Lawrence v. Texas

In *Lawrence v. Texas*, the petitioners were convicted of violating a Texas statute that prohibited certain consensual sexual activity between members of the same sex.[8] The Court held that the statute violated the Due Process Clause of the Constitution, saying that the petitioners were free to "engage in private conduct in the exercise of their liberty."[9] The Court expressly overturned the *Bowers v. Hardwick* decision, which had previously stated that such anti-sodomy laws were constitutional.[10]

It is how the Court came to invalidate the statute that has led to all the subsequent debate. Nowhere in the decision did the *Lawrence* Court explicitly say that adult sexual privacy is a fundamental right.[11] Additionally, the Court did not follow the usual *Washington v. Glucksburg* formula for laying out a fundamental right.[12] The majority also failed to respond to Justice Scalia's assertion in his dissent that the majority did not create a fundamental right to sexual privacy.[13] Finally, the *Lawrence* majority concluded, "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the

8. Lawrence v. Texas, 539 U.S. 558, 562–63 (2003). Namely, that activity was homosexual sodomy. *Id.*

9. *Id.* at 558.

10. *Id.* at 578; Bowers v. Hardwick, 478 U.S. 186 (1986).

11. *See Lawrence*, 539 U.S. 558.

12. *See id.*; Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). Under the *Glucksberg* formula, to create a fundamental right under substantive due process the Court must: (1) describe the right and its scope in detail, and (2) describe how the right are "implicit in the concept of ordered liberty." *Id.*

13. *See Lawrence*, 539 U.S. at 558–79; *id.* at 605 (Scalia, J., dissenting).

individual's personal and private life."[14] This language draws upon the traditional language used when applying the low-level rational basis review and when no fundamental right is present.[15]

However, it is not clear that a fundamental right was not expressed in *Lawrence* and that a heightened level of judicial review was not used.[16] The cases the *Lawrence* Court relied on all contained a protected liberty interest in sexual matters.[17] Furthermore, the Court specifically adopted Justice Stevens's dissent from *Bowers* and said that this opinion should control in *Lawrence.*[18] In his dissenting opinion in *Bowers*, Stevens described the sexual privacy line of cases as establishing a fundamental right for adults to engage in private intimate conduct.[19] Some of the language used by the majority in the *Lawrence* opinion is illuminating. The opinion states, for example, that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matter pertaining to sex,"[20] and that the Due Process Clause allowed the petitioner's conduct because "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[21] Finally, it is difficult to reconcile the majority's rejection of the statute using rational basis review with the fact that promotion of morality has been found to be a legitimate state interest in the past.[22]

The intended reach of the *Lawrence* opinion, including the continued viability of morality laws, is also ambiguous. In his dissent, Justice Scalia is clear that he believes the majority's adoption of Justice Stevens's dissent in *Bowers* "effectively decrees the end of all morals legislation," meaning that laws against "fornication, bigamy, adultery, adult incest, bestiality, and obscenity" cannot survive even rational basis review.[23] The majority is not explicit in its intentions for morality laws or the reach of its opinion, and Scalia's observations are not unfounded. The majority itself summarized Stevens's *Bowers* dissent as holding "the fact that a State's governing majority has traditionally viewed a

14. *Id.* at 560 (majority opinion).

15. *See, e.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

16. *See Lawrence*, 539 U.S. at 558–79.

17. *Id.* at 565–66. These cases were: Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a state law prohibiting the use of contraceptives and family planning counseling); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating a law prohibiting the distribution of contraceptives to unmarried people); Roe v. Wade, 410 U.S. 113 (1973) (recognizing the fundamental right to an abortion); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidating a state law forbidding the sale and distribution of contraceptives to people under the age of 16).

18. *Lawrence*, 536 U.S. at 577–78.

19. Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J. dissenting).

20. *Lawrence*, 536 U.S. at 572.

21. *Id.* at 578 (citing Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992)).

22. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991).

23. *Lawrence*, 536 U.S. at 599 (Scalia, J., dissenting).

particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[24] Furthermore, the Court went on to say its "obligation is to define the liberty of all, not to mandate its own moral code."[25]

The majority only alluded to the scope of its holding, never directly addressing Scalia's observations.[26] These allusions to the scope of the decision included a mandate that the State should not attempt to "define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[27] and by pointing out that "[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."[28]

With both the controversial nature of the decision of *Lawrence v. Texas* and ambiguous language of the majority's opinion, the *Lawrence* decision was bound to create discord among the circuits in related areas, and that is exactly what it has done.

B. Circuits that Construe Lawrence *Narrowly*

The Eleventh Circuit first considered the implications of *Lawrence* in *Lofton v. Secretary of Department of Children & Family Services*.[29] The court opined that *Lawrence* was about "establish[ing] a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct."[30] However, the court failed to find that *Lawrence* had created a fundamental right, noting that the traditional *Glucksberg* analysis was missing and the language used to invalidate the statute in *Lawrence* was rational basis review.[31]

The Eleventh Circuit again was asked to find a fundamental right to sexual privacy in *Williams v. Attorney General of Ala.* and refused.[32] The court echoed the reasoning in *Lofton* for not finding a fundamental right, adding that the Supreme Court has been presented with multiple opportunities to find a fundamental right to sexual privacy and has

24. *Id.* at 560.

25. *Id.* at 559.

26. *See id.* at 558–79.

27. *Id.* at 567.

28. *Id.* at 578.

29. 358 F.3d 804 (11th Cir. 2004) (holding that a Florida law prohibiting homosexual foster parents and guardians from adopting children was not unconstitutional).

30. *Id.* at 815–16.

31. *Id.* at 816–17.

32. 378 F.3d 1232 (11th Cir. 2004) (holding that an Alabama statute prohibiting the commercial distribution of devices that were primarily for sexual stimulation was not unconstitutional).

always declined to do so.[33] Furthermore, according to the majority, *Lawrence* only established the unconstitutionality of laws criminalizing adult consensual sodomy and did not create a fundamental right to homosexual sodomy.[34] The court went on to apply rational basis, naming public morality as the legitimate state interest sufficient to uphold the challenged law.[35]

In *Seegmiller v. LaVerkin City* the Tenth Circuit also refused to find that *Lawrence* created a fundamental right to sexual privacy.[36] The court stated that the Supreme Court has never validated a broad description to a liberty interest such as the right "to engage in a private act of consensual sex,"[37] and went on to find that rational basis, not heightened scrutiny, was applied in *Lawrence*.[38]

Finally, in the Seventh Circuit case *Muth v. Frank*, the Court upheld a Wisconsin statute that criminalized incestuous relationships, even if they were between two consenting adults.[39] The court distinguished the sodomy statutes in *Lawrence* from the incest statute in question, simply stating that *Lawrence* did not address incest statutes and thus the petitioner could not benefit from the holding in *Lawrence*.[40] Like the similarly-minded circuits, the Seventh Circuit also denied that a fundamental right to sexual privacy was created and asserted that rational basis was the standard of review used in *Lawrence*.[41]

C. Circuits that Construe Lawrence *Broadly*

Although the Seventh, Tenth, and Eleventh Circuits are all in agreement about what *Lawrence* stands for, other circuit courts disagree. The First Circuit summarized its position in *Cook v. Gates*, stating:

> Taking into account the precedent relied on by *Lawrence*, the tenor of its language, its special reliance on Justice Stevens' *Bowers* dissent, and its rejection of morality as an adequate basis for the law in question, we are convinced that *Lawrence* recognized that adults maintain a protected liberty interest to engage in certain 'consensual sexual intimacy in the

33. *Id.* at 1235–36.

34. *Id.* at 1236.

35. *Id.* at 1250.

36. 528 F.3d 762 (10th Cir. 2008) (holding that the city did not violate the Constitution when it reprimanded the petitioner, a police officer, for having off-duty, consensual sexual encounter with another adult).

37. *Id.* at 770.

38. *Id.* at 771.

39. 412 F.3d 808, 810 (7th Cir. 2005).

40. *Id.* at 817.

41. *Id.* at 818.

home.'[42]

However, the court noted that even though *Lawrence* recognized a fundamental right to sexual privacy, the Supreme Court did not apply strict scrutiny to invalidate the Texas statute.[43] Rather, the *Lawrence* Court applied some standard between rational basis and strict scrutiny.[44]

The Ninth Circuit in *Witt v. Dep't of Air Force* acknowledged the split in the lines of interpretation of *Lawrence* and declared that in ambiguous circumstances, courts should look to what the Supreme Court actually did in the case rather than isolating relevant pieces of text.[45] In so doing, the Ninth Circuit concluded that the *Lawrence* Court had applied a heightened level of scrutiny because rational basis review affords such a minimal level of protection, and the rationale for the holding in *Lawrence* is inconsistent with how rational basis review is used.[46] Like the *Cook* court, the *Witt* court ultimately found that an intermediate standard of review is appropriate after *Lawrence*, stating that the "government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest."[47]

In *Reliable Consultants, Inc. v. Earle*, the Fifth Circuit held against the State attempting to justify laws that limit sexual privacy under a "morality" justification.[48] The court stated that upholding a statute that controls what people do in private based on a morality justification alone would be to ignore *Lawrence* and its holding that this type of justification is insufficient.[49] Interestingly, the court declined to examine the level of review used in *Lawrence*[50] and simply stated that the only way to make sense of *Lawrence* is to read it as recognizing a right to sexual privacy without delving in to a lengthy analysis.[51]

42. 528 F.3d 42, 53 (1st Cir. 2008) (holding that the "Don't Ask, Don't Tell" statute did not violate the Constitution even after the *Lawrence* decision).

43. *Id.* at 55.

44. *Id.* at 56.

45. 527 F.3d 806, 816 (9th Cir. 2008) (remanding petitioner's case for further review using an intermediate standard to determine if her off-duty sexual relationship with a civilian woman and subsequent suspension under "Don't Ask Don't Tell" violated her constitutional rights).

46. *Id.* at 816–17. The Court stated, "Were the Court applying rational basis review, it would not identify a legitimate state interest to "justify" the particular intrusion of liberty at issue in *Lawrence;* regardless of the liberty involved, any hypothetical rationale for the law would do." *Id.* at 817.

47. *Id.* at 819.

48. 517 F.3d 738 (5th Cir. 2008) (holding that a Texas statute that criminalized the selling, advertising, giving or lending of any sexual stimulation device except for a few narrow exceptions is unconstitutional).

49. *Id.* at 745–46.

50. *See id.* at 744–45.

51. *Id.* at 744.

D. Lowe v. Swanson

With the circuits so sharply divided in their readings of *Lawrence*, the Sixth Circuit joined the split with its holding in *Lowe v. Swanson*.[52] In *Lowe*, the petitioner had engaged in consensual sexual intercourse with his 22 year old stepdaughter.[53] This violated an Ohio statute that prohibited stepparents from engaging in sexual conduct with their stepchildren, and the petitioner was charged with sexual battery.[54]

Lowe petitioned the trial court to drop his charges, arguing that the statute is intended to apply when a child is involved, not two adults, and that the government has "no legitimate interest in regulating sexual activity between consenting adults."[55] The court denied his motion, and Lowe pled no contest to the charge.[56] The Ohio Court of Appeals and the Supreme Court of Ohio upheld his conviction, stating that "*Lawrence* did not announce a 'fundamental' right to all consensual adult sexual activity,"[57] and that *Lawrence* had applied rational basis review and thus rational basis applied to Lowe.[58]

The Sixth Circuit declined to engage in an analysis of *Lawrence* in order to determine the appropriate standard of review in sexual privacy cases or to determine if *Lawrence* upheld a privacy right for adult consensual activity.[59] Instead, the court simply denied Lowe's petition for habeas relief, citing the split between the circuits as proof that the Ohio courts had not unreasonably misapplied federal law.[60]

The *Lowe* court aligned itself with the *Muth* court, stating that *Lawrence* is inapplicable to the present case because *Lawrence* did not address incest or incest-like statutes.[61] The court found that *Lawrence* specifically excluded statutes such as the one in question from consideration, reasoning that stepparent and stepchild relationships are of such type where the stepchild may be coerced into the activity and consent may not be easily refused.[62]

The court also found that the state of Ohio has a far greater interest in regulating the sexual relationships between stepparents and stepchildren than Texas had in regulating homosexual sodomy. The State's

52. 663 F.3d 258 (6th Cir. 2011).
53. *Id.* at 259–60.
54. *Id.* at 260; OHIO REV. CODE ANN. § 2907.03 (West 2012).
55. *Lowe*, 663 F.3d at 260.
56. *Id.*
57. *Id.* (citing State v. Lowe, 2005 WL 1983964, at *2 (Ohio Ct. App. Aug. 15, 2005)).
58. *Id.*
59. *See id.*
60. *Id.*
61. *Id.* at 264.
62. *Id.*

"paramount concern is protecting the family from the destructive influence of intra-family, extra-marital sexual contact . . ." and this interest was left intact after the *Lawrence* decision.[63] The court dismissed Lowe's assertions that a vague governmental interest in protecting family units is insufficient to validate the statute as applied to him because there had been no evidence on the record of any familial-like relationship with the stepdaughter or "family unit" ever existed. Instead, the court asserted that the State has an interest to protect all families against sexual contact that may be harmful to the family unit, regardless of the facts surrounding any particular family dynamic in question.[64]

Finally, the court found no merit in Lowe's claim that the Ohio statute violates *Lawrence* because it is based on morality. First, the Sixth Circuit stated that the statute is not entirely premised on morality and that Ohio "has a legitimate and important interest in protecting families."[65] Second, the Court denied that *Lawrence* invalidated all criminal laws that are based in part on morality.[66]

The hasty analysis of *Lawrence* the Sixth Circuit undertook in *Lowe v. Swanson*, coupled with the novel question presented within the case, leaves the need for a more methodical and critical look into *Lawrence* and its varying interpretations to determine how laws regarding consensual relationships between stepparents and their adult stepchildren should be handled.

III. ANALYSIS

Several facets of the *Lawrence* and *Lowe* holdings require close scrutiny. This Part will first consider if *Lawrence* applies to stepparent and stepchild sexual relationships, followed by a discussion of whether *Lawrence* created a fundamental right and what standard of review applies to cases governed by *Lawrence*. Finally, this Part will conclude with an analysis of *Lowe* under *Lawrence.*

A. Does Lawrence *Apply?*

Despite what the *Lowe* and *Muth* courts assert, *Lawrence* is certainly about more than just homosexual sodomy. The common law system simply does not operate in such a way that confines each case's precedental value to the narrow factual circumstances giving rise to the

63. *Id.*
64. *Id.* at 264–65.
65. *Id.* at 264.
66. *Id.*

suit, unless the court is explicit in its intentions to hold so narrowly.[67] Although the *Lawrence* Court is vague about the scope of its holding, the language of *Lawrence* and its continuous use by lower circuits in a wide array of "taboo" sexual conduct cases shows that its holding governs more than homosexual sodomy.[68] The *Lawrence* Court's decree that a state should not attempt to "define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects" implicates the idea that the Court viewed its decision in *Lawrence* decision as reaching into all laws governing sexual relationships.[69] This language does, however, carve out two exceptions where the state's interests can overcome sexual privacy: first, where there is injury to a person; and second, if it would violate "an institution the law protects."[70]

Thus, incest and incest-like statutes fall within *Lawrence*'s broad sexual privacy realm and are governed by *Lawrence*, but whether or not they enjoy the same protection as homosexual sodomy depends on whether or not they fit within one of these two exceptions.[71]

The first exception, injury to a person, does not automatically apply solely because the relationship is between a stepparent and stepchild. Sexual conduct between a stepparent and stepchild could fall into this category if, for example, one of the parties were a minor, were mentally handicapped, or did not consent to the activity. However, this is true for every instance of sexual activity regardless of the relationship between the parties involved. Just because the two participating individuals have a stepparent and stepchild relationship does not necessarily mean that one of them will be injured by the sexual conduct. The plain meaning of the *Lawrence* decision is that the exception only applies when there is actually an injury to a party, not merely the possibility of an injury.[72] To hold otherwise would give states the power to curtail the vast majority of all sexual conduct because of a possibility of injury. Looking specifically at the *Lowe* case, the stepchild consented to the activity and was neither a minor nor mentally handicapped.[73] No facts on the record suggested that she was injured in any way at all, much less that she was

67. *See* Marbury v. Madison, 5 U.S. 137 (1803).

68. *See, e.g.*, Muth v. Frank, 412 F.3d 808 (7th Cir. 2005); Williams v. Att'y Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004); Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004).

69. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

70. *See id.*

71. In a separate case, the Ohio Supreme Court noted that the statute in question in *Lowe v. Swanson*, Ohio Rev. Code § 2907.03(A), is "quite obviously designed to be Ohio's criminal incest statute." State v. Noggle, 615 N.E.2d 1040, 1042 (1993).

72. *See Lawrence*, 539 U.S. at 567.

73. *See* Lowe v. Swanson, 663 F.3d 258, 259–60 (6th Cir. 2011).

injured because of her legal status as Lowe's stepdaughter.[74]

The *Lowe* court pointed to the fear of coercion as a factor in upholding the Ohio statute.[75] More specifically, the court reasoned that because of the nature of stepparent and stepchild relationships, consent may not easily be refused.[76] However, fear of coercion is not a compelling enough reason to keep the statute or to say that this causes stepparent and stepchild relationships to fall under this "injury" category. Although it is likely true that some stepparents abuse their position in gaining the "consent" of their stepchildren, it is not always true, and it is not the situation in *Lowe*. It is undisputed that the stepchild in *Lowe* consented, and there was no indication that the consent was coerced.[77] It is not only conceivable that a stepparent and stepchild could have a non-coerced consensual relationship, but it is actually what happened in *Lowe*.[78] Again, lumping all stepparent and stepchild relationships into this injury to a person exception sweeps too broadly.

Furthermore, coerced "consent" is not truly consent at all, and thus rape laws apply.[79] Any time consent is not given and sexual activity occurs the sexual activity is illegal, regardless of the legal relationship of the participants.[80] It is just as illegal for a person to have non-consensual sex with their spouse as it is with their adult stepchild.[81] Because rape laws apply to these types of scenarios, it serves no real purpose to have a separate body of law also prohibiting coercion. Taking into account practical considerations as well, stepparents are much more likely to know that coerced sexual activity is illegal because it is a form of rape, rather than know it is illegal because it occurs with their stepchild. Thus, the Ohio statute provides no deterrence effect for this undesirable conduct. It is simpler and more logical to allow rape laws to cover the scenarios within stepparent and stepchild relationships that result in actual injury to a party, and to invalidate the categorical prohibitions of stepparent and stepchild relationships that sweep too broadly to be considered to fit within this exception in *Lawrence*.

The second exception to when the *Lawrence* protection does not apply is when there is "abuse of an institution the law protects."[82]

74. *See id.*
75. *Id.* at 264.
76. *Id.*
77. *See id.* at 259–60.
78. *See id.*
79. *See, e.g.*, State v. Bannister, No. 07CA33, 2008 WL 2954290 (Ohio Ct. App. Aug. 1, 2008).
80. *See id.*
81. *See id.*
82. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

Sexual relationships between stepparents and stepchildren do not abuse any institution protected by the law. Again, it is important to note the *Lawrence* language indicates that the abuse must be actual abuse, not just the mere possibility of abuse.[83]

The *Lowe* court justifies the statute in question by stating that stepparent and stepchild sexual relationships are damaging to the family.[84] It is well established that states have an interest in families and may legally protect them, thus "familial relationships" would most likely be considered "an institution the law protects."[85] However, it cannot be said that every time a stepparent and stepchild engage in sexual activity with each other it is damaging to a family unit. Lowe implicitly asserted this very point, stating that the government cannot say it is protecting a family without a finding that there was ever a family-like relationship including and involving both Lowe and the stepdaughter.[86] Although the *Lowe* court rejected this argument, saying that the state may protect any "family" no matter what form, this generalized protection of anything that might be a family is too broad to fall under the exception in *Lawrence*, which calls for actual damage done to an actual family.[87] To fit under the exception, there needs to be not only a "family" to protect, but also damage that is caused every time this type of conduct occurs. Given the wide variety and types of people and families, it cannot be assumed that stepparent and stepchild relationships will always cause damage to a family.

Even assuming, for the sake of argument, that every time a stepparent and stepchild have sexual contact it damages a family unit, the damage done does not necessarily rise to the level required to cause stepparent and stepchild relationships to be excluded from the jurisdiction of *Lawrence*. "Abuse" is a strong term, indicating that the *Lawrence* Court did not intend to call for the prohibition of an activity merely because it is at odds with a legally protected institution: the activity must be so crippling to the institution that it can be deemed abusive.[88] While extramarital sexual relationships in general are destructive to a family unit, the degree of harm caused varies greatly family to family. It cannot be said that every time a spouse sleeps with another person, even if that other person is his or her stepchild, there has been an "abuse" of the familial institution. There is nothing on the record in *Lowe* that indicates that any damage to the family unit arose due to the sexual

83. *See id.*

84. Lowe v. Swanson, 663 F.3d 258, 264–65 (6th Cir. 2011).

85. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982).

86. *Lowe*, 663 F.3d at 264.

87. *Id.* at 264–65.

88. *See Lawrence*, 539 U.S. at 567.

contact, much less that any damage was so severe as to be deemed "abusive." Allowing stepparent and stepchild relationships to fall under this exception to *Lawrence* would be too serious of a condemnation for this category of relationship without any showing of it uniformly causing any harm, let alone serious harm, to the institution of the family.

To summarize, stepparent and stepchildren relationships fall within the jurisdiction of *Lawrence*. The *Lawrence* case is the leading case on all "taboo" sexual topics, including stepparent and stepchild relationships, and is not solely about homosexual sodomy. Stepparent and stepchild relationships such as the one described in *Lowe* also do not fall into the two exceptions to the broad reach of *Lawrence* because there is no actual injury to a person or abuse of a legally protected institution that automatically arises every time a stepparent and stepchild engage in sexual activity.

B. Sexual Privacy as Fundamental Right

Having determined that stepparent and stepchild sexual relations falls under the *Lawrence* line of cases, it now must be determined what standard of review must be applied to sexual privacy cases. This hinges, in part, on whether or not *Lawrence* announced a new fundamental right to adult consensual sexual privacy.

The arguments for and against reading *Lawrence* as creating a fundamental right have been well thought out and developed over the years, and there is strong support for each side.[89] However, given the lack of clarity of the Court on this matter and the extreme weight and meaning that fundamental rights carry, it cannot be said that the *Lawrence* Court announced a fundamental right to sexual privacy.

The circuits that do not read *Lawrence* as having created a fundamental right to sexual privacy, including *Lowe*, point out that the *Lawrence* Court never mentioned that it was creating a fundamental right.[90] This is especially alarming given that Scalia, in his dissent, specifically asserted that the majority was creating a sexual privacy right, and yet the majority was still silent on the matter.[91] This is a notable omission on the part of the Court and one that was not likely to occur if, in fact, the Court was trying to create a fundamental right to sexual privacy.

Additionally, the *Lawrence* Court did not follow the usual

89. *See, e.g.*, Cook v. Gates, 528 F.3d 42 (1st Cir. 2008); Seegmiller v. LaVerkin City, 528 F.3d 762 (10th Cir. 2008).

90. *See Lawrence*, 539 U.S. 558; *see, e.g.*, Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1235 (11th Cir. 2004).

91. *See Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).

Washington v. Glucksburg formula for announcing a fundamental right.[92] The Court failed to describe explicitly even the scope of its holding, let alone the scope of any fundamental right.[93] One purpose of the *Glucksburg* formula is to make clear what is or is not part of that fundamental right.[94] Holding that a decision announces a fundamental right without having clear boundaries for what the right covers is simply unworkable and would lead to countless courtroom battles. In the *Lawrence* opinion there is no clear indication what exactly "sexual privacy" covers, and this is not explicit enough to satisfy the first prong of the *Glucksburg* formula.

The *Lawrence* Court also failed to fulfill the second prong of the *Glucksburg* test: describing how the right fits within the Constitution's "implicit [notions] of ordered liberty."[95] The Court did examine the history of sexual privacy somewhat, but this examination focused mostly on modern history and homosexual sexual activity.[96] The historical analysis of the issue may have been sufficient to satisfy the *Glucksburg* test if the fundamental right being asserted were a right to engage in homosexual sexual activity, but it was not enough to satisfy a broader fundamental right to sexual privacy.

Courts holding that the *Lawrence* decision did announce a fundamental right to sexual privacy also have a strong argument. First, those circuits note that the cases that the *Lawrence* majority relied upon to overturn *Bowers* all asserted a protected liberty interest in sexual matters.[97] While this fact is certainly significant, it is not sufficient to imply that a fundamental right was created because of this reliance. Furthermore, the cases that the majority relied on all asserted their respective liberty interests in the traditional manner: they all clearly explained the right and described how it fits into "concept[s] of ordered liberty."[98]

Secondly, and more persuasively, these circuits argue that because the majority explicitly adopted Justice Stevens's dissent in *Bowers*, a right to sexual privacy was asserted.[99] In the *Bowers* dissent, Stevens described the sexual privacy line of cases as establishing a fundamental right for adults to engage in private intimate conduct.[100] While it cannot

92. *See id.* at 558.

93. *See id.* at 558–79.

94. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

95. *Id.*; *see also Lawrence*, 539 U.S. at 558–79.

96. *See Lawrence*, 539 U.S. at 558–79.

97. *Id.* at 565–66; *see, e.g.*, Cook v. Gates, 528 F.3d 42 (1st Cir. 2008).

98. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

99. *Lawrence*, 539 U.S. at 577–78; *e.g.*, *Cook*, 528 F.3d at 53.

100. Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J. dissenting).

be denied that the general trend has been to grant more liberty interest rights in the sexual activities realm, this trend alone does not create a broad fundamental right to sexual privacy. Allowing judicial trends in and of themselves to create a fundamental right to something could have disastrous consequences: without well-drawn lines delineating what is and what is not part of the right, nearly anything can be made into a "fundamental right." This line of support is also weakened by the fact that the *Lawrence* majority never re-asserted this notion from Stevens in *Bowers* in the *Lawrence* opinion.[101] Again, something as important as creating a fundamental right to an activity or status cannot, and should not, be announced through implication.

Deliberate steps must be taken to form the lines of any fundamental right, and the *Lawrence* Court failed to do so. *Lawrence* should not be read as creating a fundamental right to sexual privacy because it never explicitly showed that it intended to create such a right, and because protected liberty rights are too important and too influential to allow them to be simply implied. Thus, there is no fundamental right to sexual privacy that would include the right to stepparent and stepchild consensual sexual relationships.

C. Standard of Review

Just because the *Lawrence* Court did not announce a fundamental right to sexual activity such as stepparent and stepchild relationships does not mean such relationships are offered no protection under the law. What standard of review should be used in subsequent "taboo" sexual activity cases is another area of debate after the *Lawrence* decision.

Some circuits read *Lawrence* as applying a new constitutional standard of review, which would fall somewhere between rational basis and strict scrutiny.[102] They call this standard heightened, or intermediate, review.[103] These courts cite to the language used in the opinion as a source of support for their interpretation of what standard was applied.[104] This language, much like the language used to make the argument that the court announced a protected liberty interest in sexual privacy, is strongly supportive of the sexual privacy right at issue and indicates that the Supreme Court was weighing the right heavily when making its decision. For example, the Court stated, "It is the promise of the Constitution that there is a realm of personal liberty which the

101. *See Lawrence*, 539 U.S. at 558–79.

102. *E.g.*, Witt v. Dep't of Air Force, 527 F.3d 806, 816 (9th Cir. 2008); *Cook*, 528 F.3d at 53.

103. *E.g.*, *Witt*, 527 F.3d at 816; *Cook*, 528 F.3d at 53.

104. *E.g.*, *Witt*, 527 F.3d at 816; *Cook*, 528 F.3d at 53.

government may not enter."[105] This language indicates that the Justices recognize that sexual privacy demands a higher standard of protection than what rational basis review affords.

Even more persuasively, circuits suggesting that an intermediate standard of review was used in *Lawrence* suggest that when the language of the Court is ambiguous, lower courts should look to what was actually done in the case to determine how they should proceed.[106] In *Lawrence*, the Court not only invalidated the Texas anti-homosexual sodomy law, but also overturned the previous *Bowers* case that held these types of laws to be valid.[107] Although the state advanced the previously validated theory that promoting morality is a legitimate governmental interest,[108] the Court nonetheless held that the law could not stand. This outcome indicates that the Court was using some higher standard, such as intermediate review. Using this test of looking at what actually happened in the case when there is ambiguity necessarily leads to what the Court actually meant to indicate with its holding. Looking at *Lawrence* and using the "what actually happened" test, it is clear that the Supreme Court did not apply rational basis review to the sodomy laws. Thus rational basis does not apply to any sexual privacy right that falls under the jurisdiction of *Lawrence*; intermediate review is the correct standard.[109]

However, there are still circuits that insist that rational basis review was used by the *Lawrence* Court, and their arguments are not without merit.[110] First, these courts point to one passage in the *Lawrence* decision that echoes the traditional languages used when applying rational basis review: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the individual's personal and private life."[111] Although this language undoubtedly seems to indicate that rational basis review was used, there are multiple passages throughout the decision that appear to negate this assertion and indicate that a higher standard was used.[112] Instead of pulling out line after line

105. *Lawrence*, 539 U.S. at 578 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)).

106. *See* Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1235 (11th Cir. 2004).

107. *Lawrence*, 539 U.S. at 577–78.

108. Thus, under this theory, morality would be sufficient under rational basis review to justify a law that is under a constitutionality attack.

109. It is worth noting that even the Circuits that found that there was a fundamental right to sexual privacy say that intermediate review, not strict scrutiny, was used by the Court. This is notable because strict scrutiny is the default standard when a protected liberty interest is in question. *E.g.*, Cook v. Gates, 528 F.3d 42, 52, 56 (1st Cir. 2008).

110. *E.g.*, Seegmiller v. LaVerkin City, 528 F.3d 762, 771 (10th Cir. 2008).

111. *Lawrence*, 539 U.S. at 560.

112. For example, the majority asserted, "[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matter pertaining to sex." *Id.* at 572.

that supports or negates each side, it is easier in cases of such ambiguity to look past the text of the decision and look into what is being done. As indicated above, such an inquiry leads to a finding that intermediate scrutiny was used by the *Lawrence* Court.

Additionally, these circuits argue that because no fundamental right was created, the default standard of review is then rational basis.[113] The *Lawrence* Court, they say, invalidated the sodomy law based on rational basis review.[114] This is a weighty argument because this is traditionally how the federal courts have operated in determining what standard of review to apply.[115] However, in recent years there has been the slow emergence of the intermediate review standard and this automatic assumption of what standard applies is no longer a safe one.[116] These circuits rely on an outdated system for determining the review standard, leading to illogical conclusions. As mentioned above, courts have previously held that promoting morality is a legitimate state interest sufficient to justify any law that is challenged under rational basis review, but in *Lawrence*, the Court invalidated the statute despite the fact that the state is allowed to promote the "morality" behind prohibiting homosexual activity.[117] This means that the Court, without explicitly saying as much, has now held either that morality is no longer a sufficient justification under rational basis review, or that a higher standard of review was used. Justice Scalia asserted that the Court ended morality legislation and once again the majority was silent on this observation.[118] Because morality legislation has a long history of being considered a legitimate state interest, ending all morality justification would be a drastic measure. It is doubtful that the Court would discard such a long line of case law without expressly saying it was doing so. Thus, it is more likely that they Court was applying an intermediate standard of review, rather than asserting that promoting morality is no longer a legitimate state interest.

D. Application to Lowe

Having determined that the *Lawrence* holding applies to *Lowe* and any other statute prohibiting stepparent and stepchild relationships and that an intermediate standard of review is the appropriate standard for sexual privacy cases, the decision in *Lowe* must be re-considered using

113. *E.g. Seegmiller*, 528 F.3d at 771–72.

114. *Id.* at 771.

115. *E.g.*, Arbino v. Johnson & Johnson, 880 N.E.2d 420 (2007).

116. *See, e.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 453–54 (1985).

117. *E.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); *Lawrence*, 539 U.S. at 558–79.

118. *Lawrence*, 536 U.S. at 599 (Scalia, J., dissenting).

this standard of review.

In order for the Ohio statute in question to survive a constitutionality attack under the intermediate standard of review, it must be found that the statute furthers an important government interest and that the statute is substantially related to the stated interest.[119] The *Lowe* court, along with the state, essentially asserted three reasons for the creation of the statute: fear of coercion due to the relationship between the stepparent and the stepchild, a desire to protect the family unit from intra-family and extra-marital relationships, and the promotion of morality through prohibiting an incest-like activity.[120]

Protecting an innocent party from being coerced into sexual activity that he or she truly does not consent to is undoubtedly an important governmental interest. The problem with the Ohio statute is that it is not substantially related to this interest. As mentioned above, any sexual contact that is initiated due to coercion is not consensual. The state already has laws that serve the interest of prohibiting coercion into sexual activity without making the broad assumption that all sexual conduct between stepparents and stepchildren is coerced.[121] With laws already in place to address this potential problem, there is no need to have an additional law that prohibits not only this type of coerced activity, but also all non-coerced, truly consensual sexual activity between two people just because they have a stepparent and stepchild relationship.

Furthermore, there is no reason to believe that having this ban on all stepparent and stepchildren sexual relationships will prevent this problem from happening, much less in any "substantial" way. This law likely is not well-known to people, in part because it deals with incest-like activity rather than incest as it is generally known and defined by the public.[122] While the average person may know that sexual relations with a close blood relative is prohibited by law, they likely do not know that the state also considers legal relationships, such as stepparent and stepchild relationships, incestuous. Thus, the law has no deterrence effect on any stepparent with ill intentions because he or she lacks actual knowledge of it and because the law is broader than what the average person knows to be "incest"; the stepparent will not guess that his or her actions are prohibited and the undesired activity will not be prevented.

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119. *City of Cleburne*, 473 U.S. at 441.

120. Lowe v. Swanson, 663 F.3d 258, 260–64 (6th Cir. 2011).

121. *See, e.g.*, State v. Bannister, No. 07CA33, 2008 WL 2954290 (Ohio Ct. App. Aug. 1, 2008).

122. For example, Dictionary.com defines incest as "(1) sexual intercourse between closely related persons. (2) the crime of sexual intercourse, cohabitation, or marriage between persons within the degrees of consanguinity or affinity wherein marriage is legally forbidden." *Incest*, DICTIONARY.COM, http://dictionary.reference.com/browse/incest (last visited Nov. 21, 2012).

Protecting the family unit is the second interest that the court in *Lowe* outlined as being a driving force behind the statute.[123] Speaking in the most generic terms, maintaining functional families is an important governmental issue. In *Lowe*, the specific justification for the statute the court cited is protection from "the destructive influence of intra-family, extra-marital sexual contact."[124] This narrow justification likely would be considered an important governmental interest, but the central assumptions upon which it rests are troublesome for the "substantial relationship" portion of intermediate review.

First, this justification assumes that the sexual conduct will be "destructive." As mentioned above, this is an assumption that should not automatically be allowed to stand. Families no longer look or operate like they did in the past. Modern families are prone to have a wide variety of beliefs and eccentricities. In a family where a stepparent and an adult stepchild both consent to engage in sexual activity, the relationship boundaries between the spouses may not be defined in such a way that extra-marital relations would be destructive. Automatically assuming that any conduct of this type will be destructive is not permissible. The court did not cite to any data that shows how families are or have been affected by sexual activity between stepparents and stepchildren.[125] There is simply no evidence of stepparent and stepchild relationships being destructive to the family unit in the manner asserted by the state for their important interest, and, based on the wide variety and types of familial relationships that exist, this blanket assumption that this type of relationship will be destructive is not sufficient to conclude that there is a substantial relationship between the state's right to protect the family and the statute in question.

Second, the justification assumes that stepparent and stepchild sexual relationships will be "intra-family," implying that there is some type of family unit in place to begin with. The *Lowe* court went as far as to say that the factual circumstances of the case do not matter, such as whether or Lowe and his stepdaughter were ever actually part of any sort of family unit together; the state has an interest in protecting all families "irrespective of the particular family dynamic."[126] By not looking into the facts to determine if the stepparent and stepchild in question ever were part of the same family, the court once again failed to acknowledge all the ways modern people both are and are not in families. Under the statute, the court will at times do nothing to protect the dynamics of non-legally recognized families—because of a lack of legal relationship

123. *Lowe*, 663 F.3d at 264.

124. *Id.*

125. *See id.* at 259–65.

126. *Id.* at 264–65.

between the parties—while punishing stepparents and stepchildren who were never really a part of the same family unit, just because one party is technically the stepparent.[127]

A broad assertion of a right to protect all families no matter what type may be sufficient under rational basis review, but under the stricter standard of intermediate review it cannot suffice. Holding that such a generalized interest in families of whatever type—even "families" that are families only on paper—is an important interest gives the government too much power to interfere on the privacy rights of citizens. Only the more narrow interest asserted by the court in *Lowe* can be said to be an important interest because it more clearly delineates what the state is trying to avoid. However, because stepparent and stepchild status is merely a technical, legal status that does not indicate to what extent, if any, both parties are members of the same family, there is no substantial relationship between protecting a family and prohibiting consenting stepchildren from having sexual relationships with their stepparents. The assumption that stepparent and stepchild status automatically makes the pair a family is too much of a leap for the modern day.

Although the state does have an important interest in protecting a family from "the destructive influence of intra-family, extra-marital sexual contact," the *Lowe* court bases its conclusion that the statute in question is substantially related to this interest because it relies on two faulty assumptions.[128] In modern times, it cannot be assumed that sexual relationships between stepparents and stepchildren will be destructive or will be damaging to any type of family unit. Thus, this justification for the statute also fails intermediate review.

Finally, the Court bases its justification on the ability of the states to promote morality.[129] This line of reasoning has critical flaws after *Lawrence*. Morality has been held to be a legitimate state interest, but not an important one, in previous cases.[130] There is nothing in case law that indicates that morality alone can be a great enough justification to

127. *See* OHIO REV. CODE ANN. § 2907.03 (West 2012). Take, for example, the following hypothetical situations: In family 1, the mother and her boyfriend have raised her child since the child was very young. As long as the mother and the boyfriend never get married, the boyfriend and the child are free to engage in consensual sexual activity when the child reaches the age of majority without fear of punishment under the statute, despite living as a family unit for years. In family 2, the mother meets her new husband late in life when her child is already an adult. The child has never lived with the new husband and perhaps has never even met him before the day they decide to engage in consensual sexual contact. In this scenario, the husband has committed a sexual assault by sleeping with his stepdaughter, despite the fact that they have never lived or functioned as a family.

128. *Lowe*, 663 F.3d at 264–65.

129. *Id.*

130. *E.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

satisfy an intermediate standard of review.[131] In *Lawrence*, the majority appears to apply an intermediate standard when looking at the anti-homosexual sodomy law. The only justification for the law was that it was based on moral condemnation for that particular type of sexual activity.[132] The Court voided the statute, in effect saying that a morality justification alone is not sufficient.[133]

Assuming, for the sake of argument, that the *Lawrence* majority used rational basis review to invalidate the statute, morality would not even be a sufficient justification under the lowest level of review; it would not even be a legitimate state interest. Morality alone cannot itself be an interest important enough to justify the statute in question in *Lowe*.

Thus, none of the three interests asserted by the *Lowe* court are sufficient under the intermediate standard of review to support the continued viability of the Ohio statute that prohibits stepparent and stepchild sexual relationships. There is no substantial relationship between the statute and a prevention of coerced sexual contact or a prevention of destructive influences on the family. Additionally, morality alone is not enough to be an important interest to justify the statute.

IV. CONCLUSION

The muddled language of the *Lawrence* Court's decision has created a wide rift between the circuits when it comes to upholding the right to adult sexual privacy. Even so, a careful analysis reveals that the Court intended to afford more protection to adult sexual privacy. The actions of the Court, coupled with some strong language used by the majority, demonstrate that an intermediate standard of review was used in *Lawrence* and is appropriate for other "taboo" sexual topics.

One such "taboo" topic is stepparent and stepchild adult consensual sexual relationships. The Ohio statute that categorically prohibits all stepparent and stepchild relations sweeps too broadly to satisfy the intermediate review required under *Lawrence*, and is thus unconstitutional. As *Lowe* itself demonstrates, there is not a sufficient enough relationship between the state's asserted interests, prevention of coercion and protection of the family, to allow a broad prohibition on this category of adult relationships. By criminalizing Lowe for engaging in sexual contact with his consenting, adult stepdaughter, the state infringes on their constitutional right to privacy. It is time for the

131. *See, e.g., id.*

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

133. *Id.* at 559–60.

state to heed the words of *Lawrence* and get out of the bedrooms of its citizens.