

No. 08-31958

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The Supreme Court of the United States

October Term, 2008

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RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT,

*Petitioner,*

v.

WILLIAM R. TRACEY

*Respondent.*

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APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE THIRTEENTH CIRCUIT

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Brief for the Petitioner,  
Rushmore County, Craven, Police Department

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... iii

ISSUES PRESENTED ..... vi

STATEMENT OF THE CASE..... 1

STATEMENT OF THE FACTS ..... 3

STANDARD OF REVIEW ..... 5

SUMMARY OF THE ARGUMENT ..... 6

ARGUMENT..... 8

    I. The Fourth Amendment Permits Police Officers to Move Aside An  
    Exterior Garment to Check for a Weapon if the Scope of this Search is  
    Confined by the Facts. ....9

        A. Officer Calloway’s moving a part of Tracey’s jacket to check for  
        a weapon after he had observed the strap was a reasonable search  
        because such action was required for the promotion of the legitimate  
        governmental interest of ensuring safety .....9

            1. Officer Calloway’s observation of the strap gave rise to a  
            reasonable suspicion that Tracey was carrying a concealed  
            weapon, permitting Calloway to move aside Tracey’s jacket to  
            check for weapons.....10

            2. After Officer Calloway observed the strap in plain view,  
            moving aside Tracey’s jacket was a reasonable search because it  
            was sufficiently confined in scope and executed solely for the  
            purpose of discovering weapons.....13

            3. It would have been unreasonable to prohibit Officer Calloway  
            from moving aside Tracey’s jacket to check for a weapon after he  
            observed the strap because not checking for a weapon would create  
            unnecessary risk.....16

        B. When Officer Calloway moved aside Tracey’s jacket, it was a  
        reasonable search because it only intruded upon Tracey’s privacy to  
        the extent necessary to ensure the safety of Officer Calloway and  
        others in the area .....18

1. Based on the facts of this case, moving aside Tracey’s jacket was the least invasive method to achieve the legitimate governmental interest of protecting the safety of Officer Calloway and others in the area .....	18
2. Officer Calloway would have moved Tracey’s jacket even if he knew any evidence found would not be admitted at trial, so prohibiting such searches would not protect individuals’ privacy interests .....	20
II. An Individual Has No Right to Commit Adultery Under the Fourteenth Amendment Due Process Clause.....	21
A. An individual has no fundamental right to commit adultery .....	21
1. <u>Lawrence v. Texas</u> did not recognize a fundamental right to commit adultery .....	22
2. There is no fundamental right to commit adultery because adultery is not “deeply rooted in this Nation’s history and tradition,” nor is it “implicit in the concept of ordered liberty.”.....	25
B. The Craven anti-adultery statute passes both the rational basis test, which is the appropriate level of scrutiny to apply, and intermediate scrutiny.....	29
1. Anti-adultery statutes should be analyzed under the rational basis test.....	30
2. The Craven anti-adultery statute passes a rational basis review.....	31
3. The Craven anti-adultery statute would satisfy intermediate scrutiny if it were the correct standard of review. ....	33
CONCLUSION.....	36
CERTIFICATE OF COMPLIANCE.....	37

## TABLE OF AUTHORITIES

### **United States Supreme Court Cases:**

<u>Adams v. Williams</u> , 407 U.S. 143 (1972).....	10, 11
<u>Arizona v. Hicks</u> , 480 U.S. 321, 328 (1987).....	14, 15
<u>Clark v. Arizona</u> , 548 U.S. 735 (2006).....	21
<u>Craig v. Boren</u> , 429 U.S. 190 (1976) .....	30, 33
<u>Eisenstadt v. Baird</u> , 405 U.S. 438 (1972) .....	22
<u>F.C.C. v. Beach Communications, Inc.</u> , 508 U.S. 307 (1993).....	32
<u>Griswold v. Connecticut</u> , 381 U.S. 479 (1965).....	22
<u>Heller v. Doe by Doe</u> , 509 U.S. 312 (1993) .....	30, 32
<u>Kelley v. Johnson</u> , 425 U.S. 238 (1976).....	32
<u>Lawrence v. Texas</u> , 539 U.S. 558 (2003) .....	passim
<u>Loving v. Virginia</u> , 388 U.S. 1 (1967).....	22
<u>Minnesota v. Dickerson</u> , 508 U.S. 366 (1993) .....	17
<u>Moore v. City of East Cleveland</u> , 431 U.S. 494 (1977).....	21, 25
<u>Palko v. Connecticut</u> , 302 U.S. 319 (1937) .....	21
<u>Patterson v. New York</u> , 432 U.S. 197 (1977).....	21
<u>Planned Parenthood of Se. Pa. v. Casey</u> , 505 U.S. 833 (1992) .....	22
<u>Rochin v. California</u> , 342 U.S. 165 (1952).....	22
<u>Romer v. Evans</u> , 517 U.S. 620 (1996) .....	26, 34
<u>Rostker v. Goldberg</u> , 453 U.S. 57 (1981) .....	33
<u>Sibron v. New York</u> , 392 U.S. 40 (1968) .....	10, 11, 19
<u>Skinner v. Oklahoma ex rel. Williamson</u> , 316 U.S. 535 (1942).....	22

<u>Snyder v. Commonwealth of Mass.</u> , 291 U.S. 97 (1934) .....	21
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968) .....	passim
<u>United States v. Knights</u> , 534 U.S. 112 (2001).....	9
<u>Washington v. Glucksberg</u> , 521 U.S. 702 (1997).....	21, 25, 33

**United States Circuit Court of Appeals Cases:**

<u>Cook v. Gates</u> , 528 F.3d 42 (1st Cir. 2008) .....	23, 30, 33
<u>Culver v. McRoberts</u> , 192 F.3d 1095 (7th Cir. 1999).....	6
<u>Lofton v. Sec. of Dept. of Children &amp; Family Servs.</u> , 358 F.3d 804 (11th Cir. 2004).....	24
<u>Muth v. Frank</u> , 412 F.3d 808 (7th Cir. 2005) .....	23
<u>Reliable Consultants, Inc. v. Earle</u> , 517 F.3d 738 (5th Cir. 2008).....	23
<u>Seegmiller v. LaVerkin City</u> , 528 F.3d 762 (10th Cir. 2008).....	passim
<u>Shwago v. Spradlin</u> , 701 F.2d 470 (5th Cir. 1983).....	32
<u>United States v. Askew</u> , 529 F.3d 1119 (2008) .....	passim
<u>Williams v. Attorney General of Ala.</u> , 378 F.3d 1232 (11th Cir. 2004).....	23
<u>Witt v. Dept. of Air Force</u> , 527 F.3d 806 (9th Cir. 2008).....	30, 33

**United States District Court Cases:**

<u>Oliverson v. West Valley City</u> , 875 F.Supp. 1465 (D. Utah 1995) .....	24, 25, 26, 27
<u>Suddarth v. Slane</u> , 539 F.Supp. 612 (W.D. Va. 1982).....	24

**State Cases:**

<u>Commonwealth v. Stowell</u> , 389 Mass. 171 (Mass. 1983) .....	27
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**Constitutional Provisions:**

U.S. Const., amend. IV .....9

U.S. Const., amend. XIV, § 1 .....21

**Other Materials:**

22A C.J.S. *Criminal Law* § 1089 (West 2008).....12

Jennifer M. Collins, Punishing Family Status,  
88 B.U. L. Rev. 1327 (December, 2008).....27

## ISSUES PRESENTED

1. If a police officer observes a strap that the officer reasonably believes may be holding a concealed weapon, does the Fourth Amendment permit the officer to move aside an exterior garment to check for a weapon at the location of the strap?
2. Does the Due Process Clause of the Fourteenth Amendment permit the termination of a police officer for his participation in an extramarital affair?

## STATEMENT OF THE CASE

William Tracey brought a 42 U.S.C. §1983 claim against the Rushmore County, Craven, Police Department for violations of his Fourth Amendment rights and Fourteenth Amendment Due Process rights. (R. 2.) Tracey claimed that Officer Calloway violated the Fourth Amendment's prohibition against unreasonable searches by moving aside Tracey's jacket to check for a weapon after Officer Calloway observed a strap that he believed may have been holding a weapon, which led to the discovery of a firearm. (R. 2.) Mr. Tracey also claimed that his Fourteenth Amendment Due Process rights were violated when he was released by the Rushmore County, Craven, Police Department for his participation in an extra marital affair. (R. 2.)

The Rushmore County, Craven, Police Department filed a Motion for Summary Judgment on both counts, and the United States District Court for the District of Craven granted the Motion on February 19, 2006. (R. 7.) The District Court held that Tracey's Fourth Amendment rights were not violated because Officer Calloway acted reasonably in moving aside Tracey's jacket to check for a weapon for the purpose of ensuring his own safety. (R. 6.) When deciding the Fourteenth Amendment Due Process claim, the District Court held that "no fundamental right exist[s]" to private sexual activity generally, finding that the Supreme Court's ruling in Lawrence v. Texas did not represent the creation of such a right. (R. 6.) Additionally, the District Court held that it could not recognize that such a right exists, as the "creation of new fundamental rights" was beyond the scope of judicial and legislative branches. (R. 6.) The District Court applied a rational basis standard of review to the Craven anti-adultery statute since no fundamental right was in question. (R. 7.) The Court found that Craven had a rational

interest in regulating officer conduct and in dismissing officers who fail to conform to department regulations, which included following state laws. (R. 7.)

Tracey appealed the decision, and the United States Court of Appeals for the Thirteenth Circuit reversed and remanded the District Court's decision on April 29, 2007. (R. 12) The Court of Appeals held that Officer Calloway had a reasonable suspicion that Tracey was involved in criminal activity and that it was entirely proper for Officer Calloway to pat down the outside of Tracey's clothing based on facts that made him believe Tracey may have been carrying a concealed weapon. (R. 9.) However, the Court of Appeals held that after Officer Calloway failed to discover a weapon from the exterior pat-down, he was not permitted to extend his search beyond the outside of Tracey's clothing without probable cause. (R. 9.) The Court of Appeals found that probable cause did not exist despite Officer Calloway's observation of a strap that he believed was of the type used to carry a weapon. (R. 10.)

The Court of Appeals also reversed the District Court's decision on the Fourteenth Amendment claim by interpreting the Lawrence decision as granting a broad fundamental right to private sexual activity, including adultery. (R. 10.) The Court of Appeals, discerning "no legally significant difference" between consensual homosexual conduct and adultery, applied intermediate scrutiny to the Craven anti-adultery statute. (R. 11.) The Court of Appeals found that the "only possible state interest that could be implicated [by an anti-adultery statute] is the desire to enforce regulations condoning, what is in its view, immoral conduct." (R. 11.) The Court of Appeals found that this interest did not outweigh a private citizen's liberty interest in participating in extra-marital affairs. (R. 11.)

The Rushmore County, Craven, Police Department appealed this decision and the Supreme Court of the United States granted certiorari. (R. 13.) This Court should overturn the Court of Appeals ruling and the State's motion for summary judgment should be granted because Officer Calloway's search complied with the Fourth Amendment and Craven's anti-adultery statute does not violate Mr. Tracey's Fourteenth Amendment Due Process rights.

### STATEMENT OF THE FACTS

On June 7, 2005, Officer Maxwell Calloway went to McDonough Square as part of an eight month investigation into an illegal firearms distribution network tied to a private military company Red Tide ("R-T"). (R. 2.) He was pursuing a lead that an R-T official was meeting with prospective buyers in the Square. (R. 2.) While there, he observed William Tracey sitting on a park bench wearing a black nylon bomber jacket, which Officer Calloway thought was unusual because the temperature was in the low seventies. (R. 2.) At the time, Officer Calloway was unaware that Tracey was an undercover police officer targeting the sale of illegal firearms in Rushmore County. (R. 2.) Even though Tracey did not match the description of the R-T official Calloway was looking for, Officer Calloway's suspicions were aroused by Tracey's clothing and closely-cropped black hair. (R. 2.) Officer Calloway observed Tracey for the next twenty minutes and noticed that Tracey appeared agitated and was obviously surveying the layout of the Square and the rooftops of surrounding buildings. (R. 2.) Officer Calloway was concerned by this behavior and decided to approach Tracey. (R. 2.)

Officer Calloway identified himself as a police officer and asked Tracey his name, at which point Tracey became visibly angry, looked right and left and said "Bill,"

then began to turn away. (R. 3.) Officer Calloway was not satisfied that Tracey was not involved in criminal activity, so he grabbed Tracey's wrist, turned Tracey to face him, then began to pat down the exterior surface of Tracey's clothing to determine whether Tracey was armed. (R. 3.) Tracey began to curse and berate Officer Calloway but did not physically resist this pat-down. (R. 3.) Officer Calloway did not feel any object consistent with a weapon during the pat-down and shortly after the frisk was done, Tracey turned to leave. (R. 3.)

At that moment, Officer Calloway saw a vertical leather strap located around Tracey's upper chest area under his unzipped jacket. (R. 3.) Officer Calloway recognized that the strap was consistent with the type of strap that is used to carry a concealed firearm even though he was unsure what Tracey was using it to do. (R. 3.) Officer Calloway asked Tracey to stop and turn around and when Tracey complied, Officer Calloway reached toward Tracey to move aside the left exterior portion of Tracey's jacket to get a better view of the strap. (R. 3.) Tracey brushed away Officer Calloway's hand, so Officer Calloway reached more forcefully and moved aside the left exterior portion of Tracey's jacket to reveal a "Glock 21" .45 caliber pistol. (R. 3.) Officer Calloway seized the firearm and placed Tracey under arrest because it is a violation of Craven Statute 19-166.81 to be in possession of a concealed firearm. (R. 3.) Tracey told Officer Calloway that he was an undercover officer, but Officer Calloway was suspicious of this story and decided to hold Tracey until his story could be confirmed. (R. 3.)

Tracey was brought to Officer Calloway's precinct following his arrest, where a full search was performed. (R. 3.) Upon discovering Tracey's cell phone, Officer

Calloway found the contact information for Jacqueline Malone - the daughter of Rushmore County Police Chief Patrick Malone - located on Tracey's phone. (R. 3.)

Officer Calloway contacted Ms. Malone, believing her to be in danger as a result of her contact information being listed in Tracey's phone. (R. 4.) During the ensuing conversation with Officer Calloway, Ms. Malone spontaneously admitted to having a sexual affair with Tracey. (R. 4.) Ms. Malone also explained that Tracey was an undercover police officer. (R. 4.) Officer Calloway called Tracey's precinct to explain the situation and apologized for arresting an undercover police officer. (R. 4.) Officer Calloway also explained that he had learned of Tracey's true identity after discovering that he was having an affair with Ms. Malone. (R. 4.)

On June 8, 2005, Tracey was terminated by the Rushmore County Police Department for "behavior unbecoming of an officer." (R. 4.) Chief Patrick Malone conceded that Tracey's affair with Ms. Malone was the reason for his release from the police department. (R. 4.) Tracey, as a married individual at the time of his affair with Ms. Malone, violated Craven Statute 11-198.01 which prohibits adultery. (R. 4.) Violating this statute constituted "behavior unbecoming of an officer," resulting in Tracey's termination from the Police Department. (R. 4.)

#### STANDARD OF REVIEW

In appeals from motions for summary judgment, the court reviews the lower court's grant or denial of summary judgment de novo, drawing its own conclusions of law and fact from the record and only deciding that summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Culver v. McRoberts, 192 F.3d 1095, 1097 (7th Cir. 1999) (citations and internal quotations omitted). To determine whether a genuine issue of material fact exists, the court construes all facts "in the light most favorable to the non-moving party" and draws "all reasonable and justifiable inferences in favor of that party." Id. at 1098.

### SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Thirteenth Circuit erred when it reversed the District Court's decision to grant summary judgment for the Rushmore County, Craven Police Department on both the Fourth Amendment and the Fourteenth Amendment claims. The parties have stipulated to the facts for the purpose of ruling on the Motion for Summary Judgment. (R. 2.) For each claim, the Rushmore County, Craven Police Department proved that it is entitled to judgment as a matter of law. Accordingly, this Court should reverse the Court of Appeals and affirm the District Court's grant of summary judgment for the Rushmore County, Craven, Police Department.

Police officers undertake extreme risks in the line of duty for the sake of ensuring the safety of the public. In recognition of these risks, this Court has repeatedly acknowledged that the state has a legitimate interest in allowing police officers to take reasonable steps to ensure their own safety as well as the safety of others. The Fourth Amendment protects people from "unreasonable searches," but the Supreme Court has decided that the Fourth Amendment permits officers to execute protective searches if they have a reasonable suspicion that a person is armed and dangerous. This logic stems from the Fourth Amendment's focus on reasonableness to determine the validity of a

search, and the inquiry as to the reasonableness of a search is necessarily highly fact specific.

In this case, Officer Calloway moved aside a portion of Tracey's jacket to check for a weapon because Officer Calloway had observed a strap on Tracey's chest that he reasonably believed was the type often used to carry a concealed weapon. It was reasonable for him to take whatever minimally intrusive steps were necessary to discover whether any weapons were hidden behind the jacket for two reasons: his actions were motivated by a concern for safety and his search was properly confined in scope because he only moved the jacket to check for weapons. Officer Calloway's search was reasonable under the Fourth Amendment because it was done out of a concern for his own safety and the safety of others in the area, which are legitimate government interests. Additionally, the scope of Officer Calloway's search was properly confined only to what was necessary to check for weapons. The Rushmore County, Craven Police Department is entitled to judgment as a matter of law on the Fourth Amendment claim because the undisputed material facts demonstrate that Tracey's Fourth Amendment rights were not violated by this reasonable search.

The Rushmore County, Craven Police Department is also entitled to judgment as a matter of law on the Fourteenth Amendment Claim. The Due Process Clause protects fundamental rights, but individuals do not have a fundamental right to participate in an extramarital affair. Fundamental rights protected by the Fourteenth Amendment Due Process Clause are only those rights that have historically been respected and protected. As adultery has been illegal in many states for much of this nation's history, it should not now be given the elite status of being a fundamental right. The decision in Lawrence v.

Texas merely extended the right to consensual sexual activity to homosexuals and did not recognize a fundamental right to general sexual privacy. Even if Tracey does have some right to sexual privacy, the Craven anti-adultery statute is Constitutional because it passes both the rational basis test and intermediate scrutiny. Adultery creates a potential for harm to many individuals, and the state was reasonable in attempting to regulate this behavior with a narrowly tailored statute. The fact that the statute aims at behavior that the legislature deems immoral does not make the statute fail the intermediate scrutiny tests, as many state laws regulate immoral behavior when it causes harm to others. Because there is no fundamental right to commit adultery and because the Craven anti-adultery statute was narrowly tailored to serve the compelling state interest of limiting harm to third parties, Mr. Tracey's Fourteenth Amendment Due Process rights were not violated. Accordingly, this Court should reverse the United States Court of Appeals for the Thirteenth Circuit's decision and grant summary judgment for the Rushmore County, Craven Police Department on both the Fourth Amendment and the Fourteenth Amendment claims.

#### ARGUMENT

As both parties have stipulated to the facts contained in the Statement of the Facts, there are no issues of material fact for the purpose of ruling on this Motion for Summary Judgment. (R. 2.) The Rushmore County, Craven, Police Department is entitled to judgment as a matter of law on both claims because Officer Calloway's search was reasonable under the Fourth Amendment and because Craven's anti-adultery statute does not violate the Fourteenth Amendment Due Process Clause.

**I. The Fourth Amendment Permits Police Officers to Move Aside An Exterior Garment to Check for a Weapon if the Scope of this Search is Confined by the Facts.**

Under the Fourth Amendment, the people have a right not to be subjected to “unreasonable searches.” U.S. Const. amend. IV. The reasonableness of a search is determined “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” United States v. Knights, 534 U.S. 112, 118-19 (2001) (citations omitted). The limitations placed on a protective seizure and search for weapons by the Fourth Amendment must be determined based on “the concrete factual circumstances of individual cases.” Terry v. Ohio, 392 U.S. 1, 29 (1968). When Officer Calloway moved aside the exterior portion of Tracey’s jacket to check for a weapon, it was a reasonable search under the Fourth Amendment because Tracey’s privacy was only intruded upon to the degree necessary to promote the legitimate government interest of ensuring the safety of Officer Calloway and others in the area.

**A. Officer Calloway’s moving a part of Tracey’s jacket to check for a weapon after he had observed the strap was a reasonable search because such action was required for the promotion of the legitimate governmental interest of ensuring safety.**

If an officer has a reasonable suspicion that a suspect is armed and dangerous, then there is a legitimate governmental interest in the officer’s taking the steps that are necessary to ensure his own safety and the safety of others in the area. Terry, 392 U.S. at 23 (noting that when an officer takes steps to investigate a suspect’s suspicious behavior, there is not only a governmental interest in investigating crime but also “the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally

be used against him.” The sole purpose of a search to ensure safety is to discover any weapons that are present. Accordingly, the officer must be able to articulate specific facts that led him to believe his safety was at risk, and the search “must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby . . . .” *Id.* at 25 (citations omitted) (“A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation.”). If the officer has a reasonable suspicion that a suspect is armed and dangerous, it would be unreasonable to forbid him from taking steps to ensure his safety. *Id.* at 23 (“Certainly it would be unreasonable to require that police officers take unreasonable risks in the performance of their duties.”).

*1. Officer Calloway’s observation of the strap gave rise to a reasonable suspicion that Tracey was carrying a concealed weapon, permitting Calloway to move aside Tracey’s jacket to check for weapons.*

The Supreme Court has recognized that “the constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided on the concrete factual context of the individual case.” *Sibron v. New York*, 392 U.S. 40, 60 (1968). An officer is justified in executing a protective search for weapons if he can “point to particular facts from which he reasonably inferred that the individual was armed and dangerous.” *Id.* at 64. When an officer who is justified to execute a protective search of a suspect for weapons is confronted with information that provides him with the specific location of a potential weapon on the suspect, reaching for that location on the suspect does not violate the Fourth Amendment. *Adams v. Williams*, 407 U.S. 143, 148 (1972). The Supreme Court has relied on a reasonableness balancing test to extend

Terry's safety rationale to new and limited settings. United States v. Askew, 529 F.3d 1119, 1135 (2008).

One of the cases decided in Sibron involved an officer who observed a suspect talking to known narcotics addicts, approached the suspect, and reached into the suspect's pocket in the hopes of finding narcotics, never claiming to be searching for a weapon. 392 U.S. at 46. The Court held that this search was unreasonable, partly because there was no initial limited exploration for arms and the officer never claimed to be searching for a weapon, nor did he point to specific facts that led him to believe the suspect was armed and dangerous. Id. at 65, 46.

In contrast, the Court held that the search in Adams was reasonable under the Fourth Amendment when a police officer reached to a suspect's waistband where a gun was thought to be hidden based on an informant's tip even though the officer did not first pat down the exterior surface of the suspect's clothing. 407 U.S. at 148. In that case, an informant had told the officer that a person sitting in a vehicle nearby had a gun at his waist and was carrying narcotics. Id. at 145. The officer walked to the car and when the suspect rolled down the window, the officer immediately reached into the car and removed a fully loaded gun from the suspect's waistband that had not been visible but had been exactly where the informant said it would be. Id. The Court held that this search was reasonable, noting that the suspect had been somewhat uncooperative with the officer, which, combined with the belief that the suspect had a gun on his body, gave the officer reason to fear for his safety. Id. at 148.

In Askew, police officers performed a Terry search of a suspect and discovered no weapons. 529 F.3d 1119, 1124 (D.C. Cir. 2008). In a later effort to facilitate a showup<sup>1</sup> by uncovering a suspect's clothing so that the victim could see it clearly, an officer unzipped the suspect's jacket and felt a hard object. Id. at 1125. After the show-up, the officers unzipped the jacket and discovered a gun, leading to the suspect's arrest. Id. The D.C. Circuit Court held that this search was unreasonable, emphasizing that the officers unzipped the jacket in order to discover evidence and not out of a concern for officer safety. Id. at 1133. The court decided that the situation did not fall into the category of cases that permit officers to go beyond the specifics of a Terry pat-down of the exterior of a suspect's clothing by allowing "limited intrusions carefully tailored to reveal or eliminate an officer's reasonable articulable suspicion that a person or place poses a danger to himself or others nearby." Id. at 1136. The justification for this decision was that the officers were not concerned for their safety at the time that they unzipped the suspect's jacket. Id.

Like the suspect in Adams, Tracey was unfriendly when approached by an officer. Given Officer Calloway's experience and knowledge, his personal observance of the strap was similar to if he had been told by a reliable informant that Tracey was carrying a gun because he recognized that the strap was of the type used to carry a concealed weapon. It was therefore reasonable for Officer Calloway to conclude that the strap was being used for this purpose. As required by Sibron, Calloway could point to specific facts that led him to believe that Tracey was carrying a gun: the characteristics and

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<sup>1</sup> A showup is the process by which the victim views the suspect for identification purposes when a suspect is found at or near a crime scene and can be viewed by the suspect immediately. 22A C.J.S. *Criminal Law* § 1089 (West 2008).

location of the strap. Following the reasoning in Adams, it was therefore reasonable for Calloway to do a more pointed search by moving the exterior left portion of Tracey's jacket to see if the strap was carrying a gun. It would not make sense (and in fact may be more invasive) to require an officer to do a pat-down of the outside of a suspect's clothing when the officer can articulate specific facts that give him reason to believe a weapon is being held in a specific location on the suspect.

Unlike the officers in Askew who opened a suspect's jacket to search for evidence, Officer Calloway unzipped Tracey's jacket out of a concern for his safety because he had reason to believe the strap he had observed was holding a gun. Accordingly, the Fourth Amendment permitted him to move Tracey's jacket because the intrusion was limited to what was necessary to reveal whether the strap was holding a weapon. The situation clearly fits into the category of cases that allow "limited intrusions carefully tailored to reveal or eliminate an officer's reasonable articulable suspicion that a person or place poses a danger to himself or others nearby." Askew, 529 F.3d at 1136. Because Calloway's concern that there was a concealed weapon under Tracey's jacket was based on specific, reliable facts, moving the exterior portion of Tracey's jacket to look for a weapon was a reasonable search under the Fourth Amendment.

*2. After Officer Calloway observed the strap in plain view, moving aside Tracey's jacket was a reasonable search because it was sufficiently confined in scope and executed solely for the purpose of discovering weapons.*

The Supreme Court has described a "demand for specificity in the information upon which police action is predicated" as "the central teaching of this Court's Fourth Amendment jurisprudence." Terry, 392 U.S. at 21 n. 18. In executing a search for

weapons, an officer is not permitted to perform a “general exploratory search,” but must “confine his search to what [is] minimally necessary to learn whether [the suspect is] armed and to disarm [him] once he discover[s] the weapons...” Id. at 30 (dicta). The ‘plain view’ doctrine “may not be used to extend a general exploratory search from one object to another until something incriminating at least emerges,” but it may legitimate action beyond the scope of the primary search itself. Arizona v. Hicks, 480 U.S. 321, 328, 326 (1987). Searches that are executed solely for the purpose of discovering weapons are reasonable because they are confined in scope to what is necessary to protect the investigating officers or others nearby. Askew, 529 F.3d at 1123.

When an officer in Terry observed individuals behaving suspiciously by walking past the same store multiple times and talking amongst themselves, he approached them, identified himself as a police officer, and asked for their names. 392 U.S. at 5. When the suspects only mumbled in response, the officer grabbed one individual, spun him around and patted down the outside of his clothing. Id. The officer felt a pistol in the individual’s left breast pocket and had to remove the overcoat to retrieve a .38-caliber revolver from the pocket. Id. at 7. The Court held that this search was reasonable under the Fourth Amendment because officers are entitled to conduct a limited search of the outside of the outer clothing of suspects that, based on specific facts, officers reasonably believe to be armed and dangerous. Id. at 30.

In Hicks, a bullet had been fired through the floor of an apartment and police officers had gone to the apartment to investigate. Id. at 321. While there, a police officer noticed expensive stereo equipment that looked out of place in the modest apartment, so he moved some of the equipment to read and record the serial numbers. Id. This

information led to the discovery that the equipment had been taken in an armed robbery. Id. The Court held that the officer's moving of the stereo equipment to record the serial numbers was a search that violated the Fourth Amendment, partly because the officer had "tak[en] action, unrelated to the objectives of the authorized intrusion, which...did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry." Id. at 325.

The officers in Askew admitted that they unzipped a suspect's jacket so that victims could see what the suspect had on during a show-up. 529 F.3d at 1125. The officers felt a hard object under the suspect's jacket before the show-up but waited until after the show-up to unzip the jacket. Id. The court found that the search violated the Fourth Amendment because it was not properly confined in scope to discover weapons out of a concern of officer safety, but instead was done to discover evidence. Id. at 1127.

Just as the officer's observations in Terry combined with the officer's experience gave rise to a reasonable suspicion that the suspects were armed and dangerous, Officer Calloway's observations of Tracey's behavior combined with his knowledge that an illegal firearms distribution network likely met in the Square gave rise to a reasonable suspicion that Tracey was armed and dangerous. Based on these facts and following Terry, Officer Calloway's initial pat-down of the outside of Tracey's clothing was a reasonable search under the Fourth Amendment.

When Tracey turned to leave and Officer Calloway observed the leather strap on his chest because it was in plain view, it was reasonable for Officer Calloway to expand his search by moving the exterior portion of Tracey's jacket to see if there was a weapon underneath. Unlike Hicks, where the expansion of the search was "unrelated to the

objectives of the authorized intrusion,” the expanded search in this case triggered by a new observation was directly related to the original purpose for the pat-down search, which was to discover hidden weapons. Moving the exterior portion of Tracey’s jacket did not expand the scope of the search because Officer Calloway was only attempting to see if there was a concealed weapon and was far from doing an exploratory search for any evidence of criminality.

Officer Calloway only moved Tracey’s jacket to check for a weapon, so, unlike the officers in Askew, the only goal of his search was to discover weapons. The officers in Askew waited until after a show-up to investigate what hard object they felt under the suspect’s jacket, but Officer Calloway immediately checked for a weapon after he saw the strap. This difference in behavior supports the conclusion that, unlike the Askew officers who waited to execute the search, Officer Calloway was genuinely concerned for his safety and his search was motivated by this concern. Searches that are confined to what is minimally necessary to discover weapons are reasonable under the Fourth Amendment. Because moving the exterior portion of Tracey’s jacket did not expand the scope of the search and was done in response to observations of evidence in plain view solely for the purpose of discovering weapons, it was a reasonable search under the Fourth Amendment.

*3. It would have been unreasonable to prohibit Officer Calloway from moving aside Tracey’s jacket to check for a weapon after he observed the strap because not checking for a weapon would create unnecessary risk.*

The Terry Court recognized that “when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, it would appear to be clearly unreasonable to

deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.” 392 U.S. at 24. As long as the search does not go beyond what is necessary to determine if the suspect is armed, the search is valid under Terry. Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) (citation omitted).

Dickerson concerned a police officer who had manipulated a small object in a suspect’s pocket during a Terry pat-down and, through this examination, discovered that it was crack cocaine. 508 U.S. at 369. The Court held that this search was not reasonable under the Fourth Amendment because the officer had overstepped the bounds of Terry by manipulating the object, making the search clearly more than a protective search for weapons. Id. at 378. The Court emphasized that protective pat-downs are “limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.” Id. at 373 (citation omitted).

Unlike the officer in Dickerson, Officer Calloway did not expand his search to look for anything more than weapons that might be used to cause harm. The very fact that Officer Calloway did not find Tracey’s concealed weapon during the protective pat-down supports the conclusion that it was necessary for Calloway to move the exterior portion of Tracey’s jacket to discover the weapon. Under the Court’s reasoning, action that is necessary to discover weapons is reasonable under the Fourth Amendment. It would be unreasonable to require Officer Calloway to do nothing after observing a strap that he believes could be used to carry a concealed weapon just because he had already patted down the outside of Tracey’s clothing. Police officers should not be required to ignore what may reasonably be considered a threat to their safety. Accordingly, Officer

Calloway's moving the exterior portion of Tracey's jacket to check if Tracey was carrying a weapon was a reasonable search under the Fourth Amendment.

**B. When Officer Calloway moved aside Tracey's jacket, it was a reasonable search because it only intruded upon Tracey's privacy to the extent necessary to ensure the safety of Officer Calloway and others in the area.**

In determining whether a search is permitted under the Fourth Amendment as reasonable, the Supreme Court has decided "to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness." Terry, 392 U.S. at 19. The facts must be judged against an objective standard, asking whether the facts available to the officer at the moment of the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." Id. at 21. In determining whether an officer's search was reasonable under the circumstances, "due weight must be given...to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Id. at 27 (citation omitted).

*1. Based on the facts of this case, moving aside Tracey's jacket was the least invasive method to achieve the legitimate governmental interest of protecting the safety of Officer Calloway and others in the area.*

"The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Terry, 392 U.S. at 18 (citation omitted). Rather than holding that police officers can only pat down the outside of defendant's clothing when doing a protective search for weapons, the Terry Court was careful to note that "each case of this sort will, of course, have to be decided on its own facts." Id. at 30. Of course, exposing what a person has under their jacket may be a

greater intrusion into privacy than patting down the outside of a person's clothes. Askew, 529 F.3d at 1134. In Terry's sister case Sibron v. New York, the Court clarified its position by holding that a police search was a violation of the Fourth Amendment because there was no attempt at an initial limited exploration for weapons before the officer reached into the defendant's pocket. 392 U.S. at 65.

Like the police officer in the Terry case, Officer Calloway "confined his search strictly to what was minimally necessary to learn whether [the suspect was] armed and to disarm [him] once he discovered the weapon[s]." Terry, 392 U.S. at 30 (noting that the officer "did not conduct a general exploratory search for whatever evidence of criminal activity he might find"). The Askew court was correct in noting that looking under a suspect's jacket is probably more of an intrusion into his privacy than patting down the outside of his clothing. However, unlike the officer in Sibron, Officer Calloway had already patted down the outside of Tracey's garments and did not feel a weapon. When he gained new information by observing the leather strap across Tracey's chest, he had reason to believe that he had to do more to ascertain whether Tracey was armed. Clearly, the pat-down that Officer Calloway had already executed had failed to accomplish the goal of ensuring Tracey did not have a weapon, as proven by the fact that a weapon was eventually found. The extra step of moving Tracey's jacket was the action that was minimally necessary to find the weapon. Based on the facts of this case, Officer Calloway's search was reasonable under the Fourth Amendment because it was reasonable to move the exterior portion of Tracey's jacket to check for a weapon.

2. *Officer Calloway would have moved Tracey's jacket even if he knew any evidence found would not be admitted at trial, so prohibiting such searches would not protect individuals' privacy interests.*

The Terry Court recognized that “the exclusionary rule...cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections...” and that “...in some contexts the rule is ineffective as a deterrent.” 392 U.S. at 13.

Given that Calloway's knowledge and experience gave him reason to believe that the strap he had observed on Tracey's chest was likely being used to carry a concealed weapon, it is unlikely that Calloway would have let Tracey go without checking to see if he had a weapon under his jacket, even if he had known that the weapon would be excluded at trial. Calloway's interest in his own safety and the safety of others in the area would probably outweigh his interest in prosecuting Tracey. Accordingly, even if the search that Calloway executed is deemed to be a violation of the Fourth Amendment, suspects' privacy interests will not gain any extra protection because police officers will continue to do this type of search for the sake of their own safety and the safety of those around them. Knowing that privacy interests will not be better served by finding that an officer's moving aside a suspect's exterior garment after observing a strap that the officer reasonably believes may be used to carry a concealed weapon and recognizing that officer safety is a legitimate governmental interest, it is clear that such a search is reasonable under the Fourth Amendment.

## **II. An Individual Has No Right to Commit Adultery Under the Fourteenth Amendment Due Process Clause.**

The Fourteenth Amendment provides that no State “shall deprive any person of life, liberty, or property without due process of law.” U.S. Const. amend. XIV, § 1. The Supreme Court has recognized that the Due Process Clause “guarantees more than fair process,” and “provides heightened protection against government interference with certain fundamental rights and liberty interests.” Washington v. Glucksberg, 521 U.S. 702, 720 (1997). In this case, Craven anti-adultery statute did not violate Tracey’s Fourteenth Amendment rights because there is no fundamental right to commit adultery. The Court of Appeals incorrectly applied intermediate scrutiny when it analyzed the Craven anti-adultery statute because heightened scrutiny is only applied to laws that violate individuals’ fundamental rights. Therefore, the Craven anti-adultery statute is constitutional because it satisfies a rational basis review.

### **A. An Individual has no fundamental right to commit adultery.**

Fundamental rights and liberties are “deeply rooted in this Nation’s history and tradition,” Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977), and “implicit in the concept of ordered liberty” such that “neither liberty nor justice would exist if they were sacrificed,” Palko v. Connecticut, 302 U.S. 319, 325 (1937). This Court has consistently emphasized that these rights are fundamental because they are “so rooted in the traditions and conscience of our people.” E.g., Clark v. Arizona, 548 U.S. 735, 736 (2006); Glucksberg, 521 U.S. at 720; Patterson v. New York, 432 U.S. 197, 202 (1977); Snyder v. Commonwealth of Mass., 291 U.S. 97, 105 (1934).

The Supreme Court has found that these traditional fundamental rights include the right to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception outside of the marital relationship, Eisenstadt v. Baird, 405 U.S. 438 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165 (1952), and to abortion, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). However, the Court has never recognized an absolute right to private sexual activity that would include adultery as a fundamental right.

The Craven anti-adultery statute does not fall under the heightened scrutiny that is afforded to fundamental rights. No fundamental right exists that includes an individual's right to commit adultery. To "create" a fundamental right to commit adultery, the Court would have to find this right located within the realms of rights that have already been recognized, such as the rights to certain types of sexual privacy located in Griswold, Eisenstadt, and most recently Lawrence v. Texas, 539 U.S. 558 (2003). However, no right to adultery can be found in this line of cases. Griswold, Eisenstadt and Lawrence did not create any general right to sexual privacy, and Lawrence in particular did not recognize any new fundamental right that would include adultery. Furthermore, adultery, which has been illegal throughout most of this Nation's history, is not traditionally part of our "concept" or ordered liberty.

1. Lawrence v. Texas *did not recognize a fundamental right to commit adultery.*

The Supreme Court did not recognize a fundamental right of general sexual privacy in Lawrence v. Texas when it held that the Due Process Clause protected private

homosexual conduct. The Court wrote that “liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct.” 539 U.S. at 562. However, at no point in its decision did the Court expound on what “certain intimate conduct” included beyond the scope of private homosexual conduct. Id. The Court also applied a rational basis test to the Texas anti-sodomy statute, which indicates that no fundamental right was being violated because fundamental rights trigger a higher level of scrutiny and protection. 539 U.S. at 594 (Scalia, J. dissenting) (“the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test.”). Lawrence did not recognize a fundamental right; it merely extended to homosexuals the right to consensual sexual activity between two consenting adults found in Griswold and Eisenstadt. 539 U.S. at 564.

Many Circuit Courts have extensively searched Lawrence and concluded that it was not creating a new fundamental right to general sexual privacy that would reach beyond the scope of those rights articulated in Griswold and Eisenstadt. See, e.g., Seegmiller v. LaVerkin City, 528 F.3d 762, 771 (10th Cir. 2008); Williams v. Attorney General of Ala., 378 F.3d 1232, 1235 (11th Cir. 2004) (“The court has been presented with repeated opportunities to identify a fundamental right to sexual privacy – and has invariably declined”); Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008) (“Lawrence did not identify a protected liberty interest in all forms and manner of sexual intimacy”); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 n. 32 (5th Cir. 2008) (“Lawrence did not categorize the right to sexual privacy as a fundamental right”); Muth v. Frank, 412 F.3d 808, 817 (7th Cir. 2005) (“Lawrence . . . did not announce . . . a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual

conduct”); Lofton v. Sec. of Dept. of Children & Family Servs., 358 F.3d 804, 815-17 (11th Cir. 2004) (“The effect of [Lawrence] was to establish a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct. Nowhere, however, did the Court characterize this right as ‘fundamental’ . . . . it is a strained and ultimately incorrect reading of Lawrence to interpret it to announce a new fundamental right.”)

Some of these federal courts have directly addressed the constitutionality of anti-adultery statutes. See, e.g., Seegmiller, 528 F.3d at 771; Suddarth v. Slane, 539 F.Supp. 612 (W.D. Va. 1982); Oliverson v. West Valley City, 875 F.Supp. 1465 (D. Utah 1995). Seegmiller, Suddarth, and Oliverson all involved police officers dismissed for participating in extra-marital affairs. These cases resulted in holdings that the Fourteenth Amendment does not protect an individual’s right to adultery.

In Seegmiller, the Tenth Circuit addressed whether a police department could reprimand one of its officers for “personal impropriety,” which included an extra-marital affair. 528 F.3d at 771. The court tried to determine whether a general fundamental liberty interest to engage in consensual sex existed. It found that “[t]he Supreme Court has never identified such a right at that level of generality. . . . Although many of the Court’s ‘privacy’ decisions have implicated sexual matters, the Court has never indicated that the mere fact that an activity is sexual and private entitles it to protection as a fundamental right.” Id. at 770. Looking specifically to Lawrence, the court concluded that “nowhere in Lawrence does the Court describe the right at issue in that case as a fundamental right or a fundamental liberty interest. It instead applied rational basis review to the law and found it lacking.” Id. Under this reasoning, Seegmiller held that a

police officer could be reprimanded for sexual impropriety that included an adulterous relationship. Id. at 772.

The language of Lawrence itself and the interpretation of Lawrence by multiple Circuit Courts makes it clear that Lawrence did not create a fundamental right to general sexual privacy that would include adulterous conduct. Therefore, the Craven anti-adultery statute does not violate Tracey's Fourteenth Amendment right to Due Process

*2. There is no fundamental right to commit adultery because adultery is not “deeply rooted in this Nation’s history and tradition,” nor is it “implicit in the concept of ordered liberty.”*

All due process cases begin by “examining our Nation's history, legal traditions, and practices.” Glucksberg, 521 at 720. Because fundamental rights are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty” the Supreme Court has always been extremely careful in the recognition of new fundamental rights. Id. This Court uses “‘the utmost care whenever we are asked to break new ground in this field,’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” Id. (quoting Moore, 431 U.S. at 502). Another vital reason for proceeding with extreme caution in the “creation” of new fundamental rights is that, it places these issues “outside the arena of public debate and legislative action,” which are the traditional places in which the laws of this nation are made. Id.

In Oliverson, the U.S. District Court, District of Utah made a detailed exploration of the history of adultery laws and decided to uphold Utah's anti-adultery statute. 875 F.Supp. 1473 – 75. The court found that adultery had been illegal in “a wide variety of cultures and judicial systems” and that specifically in the United States, “there is even

greater support for the criminalization of adulterous behavior.” Id. at 1474. Oliverson concluded that no “fundamental right for married persons to have sexual intercourse outside of the marital relationship.” Id. at 1483. The court explained that the “right to commit adultery is not a right or liberty that is implicit in the concept of ordered liberty or deeply rooted in this Nation’s history and tradition . . . .The historical development of the criminalization of adultery is directly opposite to any aspect of an historical right.” Id. at 1482.

While the Oliverson ruling was made prior to Lawrence, its central tenant was that the privacy interests described in Griswold and Eisenstadt are not unlimited and cannot be expanded to all forms of sexual behavior. 875 F.Supp. at 1477–1485. Lawrence did not change the idea of a limited right to privacy. Instead, Lawrence simply extended a privacy right that existed for one group to another group, deciding that, “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” 539 U.S. at 574. This reasoning was largely based on the Court’s recognition in Romer v. Evans that legislation that discriminated against persons based on their sexual orientation was “born of animosity toward the class of persons affected” and fundamentally irrational. 517 U.S. 620, 634 (1996). The decision in Lawrence to expand protected conduct from one class of individuals to a discriminated class of individuals has no bearing upon the constitutionality of anti-adultery statutes.

In Lawrence, the Court recognized the potential role of historical statutes forbidding a certain type of behavior, noting that it “was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.” 539 U.S. at 570. Prior to those laws, anti-sodomy laws were “not directed at

homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally.” Id. at 568. The same cannot be said about anti-adultery laws. Adultery has never been a widely accepted, and anti-adultery statutes have historically existed throughout the United States, as “during the colonial period in the United States adultery was a crime almost everywhere.” Oliverson, 875 F.Supp at 1474. In Oliverson, the court emphasized the tradition of anti-adultery laws in the United States, explaining that “[a]dultery statutes and prosecutions under such provisions were common in the United States in the eighteenth and nineteenth centuries and at the time of the adopting of the Bill of Rights as well as at the time of the approval of the Fourteenth Amendment.” Id. Twenty-three states still have anti-adultery laws, even though many do not actively prosecute individuals for violating these laws. Jennifer M. Collins, Punishing Family Status, 88 B.U. L. Rev. 1327, 1346 - 47 (December, 2008). However, adultery statutes cannot be said to be insignificant, because military courts continue to actively prosecute adulterers. Id. In addition, adultery is a basis for reducing a homicide from murder to manslaughter in many jurisdictions. Oliverson, 875 F.Supp. 1475. There are serious legal consequences as a result of adultery that go beyond whether anti-adultery statutes are actively prosecuted in most states.

Simply because adultery has been largely decriminalized does not confer upon it the status of a fundamental right. In Commonwealth v. Stowell, a Massachusetts court ruled that the Due Process Clause did not protect the right to commit adultery, explaining, “To recognize [the absence of adultery prosecutions] is not to say that [an adultery statute] becomes invalid or judicially unenforceable.” 389 Mass. 171, 175 (Mass. 1983). In Craven, prosecutions for adultery have virtually ceased, as they had in Stowell.

However, as Stowell makes clear, the courts can uphold the statute as long as it is on the books. Additionally, the lack of prosecutions certainly does not create a fundamental right to commit a previously illegal activity.

Another important distinction between this case and Lawrence is that adultery and homosexuality are fundamentally different. The Court of Appeals did not closely examine the distinctions between homosexual conduct and adultery when it could “discern no difference” between the two. (R. 11.) However, the Court in Lawrence made it clear that there is a litany of differences between homosexual conduct and other types of sexual conduct that are not protected by the Fourteenth Amendment:

The present case does not involve . . . persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

These distinctions make it apparent that Lawrence was not opening up the door for all consensual sexual conduct to be protected by the Fourteenth Amendment. The differences between homosexual conduct and adultery make this point even clearer.

Unlike private homosexual conduct, adultery *does* involve “persons who might be injured” because it involves more than two consenting adults. Adultery involves at least one spouse who could be greatly harmed. Families could be destroyed by an adulterous relationship. Adultery is a ground for divorce in virtually every state, and a ground for reducing homicides from murder to manslaughter in some jurisdictions. These factors make adultery distinct from homosexuality. Adultery may be decriminalized in some

states because it is a subject too private and complicated for governments to effectively regulate, but that does not make it fundamental right.

Were this Court to recognize a fundamental right, it would be taking away from the people the right to create adultery laws that seek to prevent the dissolution of families. Unlike other fundamental rights, adultery is not “deeply rooted in this nation’s history.” In fact, adultery has historically been illegal in this country and continues to play an important legal role in society, even if anti-adultery laws are not strictly enforced. Furthermore, adultery is not implicit in the “concept of ordered liberty.” Fundamental rights like the right to have children, the right to marry, and the right to limited sexual privacy recognized in Griswold and Eisenstadt are recognitions of behavior that has long been considered essential to individual liberty. However, no court has found that individual liberty applies to all sexual activity. Notably, in Lawrence, the Court did not recognize any fundamental right to general sexual privacy. Lawrence merely extended the rights that had already existed for heterosexuals to homosexuals. Nowhere in this country’s history, or in its jurisprudence, is there a basis for claiming that an individual has the fundamental right to commit adultery, which is why the Craven anti-adultery statute does not violate Tracey’s Fourteenth Amendment Due Process rights.

**B. The Craven anti-adultery statute passes both the rational basis test, which is the appropriate level of scrutiny to apply, and intermediate scrutiny.**

The Court of Appeals erred in applying intermediate scrutiny to the Craven anti-adultery statute. The anti-adultery statute passes the rational basis standard of review because the law is justified by a legitimate state interest. Even if this Court does apply

intermediate scrutiny, the Craven anti-adultery statute is constitutional because the statute is substantially related to serving an important state interest.

*1. Anti-adultery statutes should be analyzed under the rational basis test.*

The Court of Appeals based its application of the intermediate scrutiny standard of review to the Craven anti-adultery statute based on the rulings in Witt v. Dept. of Air Force, 527 F.3d 806 (9th Cir. 2008), and Cook v. Gates, 528 F.3d 42 (1st Cir. 2008). In Witt, the court deduced that Lawrence used more than a rational basis review, saying that “[t]he Court [in Lawrence] declared: ‘The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.’ (citation deleted). 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.” 527 F.3d at 817. However, the court in Witt is incorrectly identifying the Lawrence test as intermediate scrutiny. Rational basis looks to see if a government action has a rational relationship to a *legitimate* state interest. Heller v. Doe by Doe, 509 U.S. 312, 320 (1993). Intermediate scrutiny, on the other hand, requires the government to show that its action serves an *important* state interest and that the action is at least substantially related to serving that interest. Craig v. Boren, 429 U.S. 190, 197 (1976). As Witt points out, Lawrence declared that the Texas statute did not further any *legitimate* state interest. Nowhere in Lawrence did the Court mention an *important* state interest or discuss whether the statute was substantially related to that interest. Therefore, the courts in Witt and Cook incorrectly interpreted Lawrence as applying heightened scrutiny when the Court had applied the rational basis test.

Additionally, in Seegmiller, the Tenth Circuit found that Lawrence only applied a rational basis standard of review due to the fact that it did not discuss any fundamental right. 528 F.3d. at 771. Seegmiller noted that the dissent in Lawrence discussed the majority decision in terms of a rational basis analysis. Id. Justice Scalia explained in his dissent in Lawrence that “having failed to establish that the right to homosexual sodomy is ‘deeply rooted in this Nation's history and tradition,’ the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test.” 539 U.S. at 594. The Court did not respond to this opinion or correct it by declaring that it had applied some other level of scrutiny. Instead the Court remained silent on whether Lawrence declared a fundamental right that deserves a heightened level of scrutiny. The only conclusion that can be drawn from this silence is that the Court used a rational basis analysis for the Texas anti-sodomy statute and found that it lacked a rational connection to a legitimate state interest. Therefore, even if the fundamental right to commit adultery exists under Lawrence as the Court of Appeals has ruled in this case, it still must be analyzed under a rational basis analysis.

*2. The Craven anti-adultery statute passes a rational basis review.*

A rational basis standard of review requires only that the governmental act be rationally related to a legitimate state in interest. Heller, 509 U.S. at 320. Rational basis is extremely deferential to the actions of legislatures and has been called “a paradigm of judicial restraint.” F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 314 (1993).

The Craven anti-adultery statute has a strong rational connection to a legitimate state interest. Adultery, which has been illegal in most states for most of this country's history, has the potential to harm many individuals, and drive apart many families. The

citizens of Craven have a rational interest in protecting their marriages and their families by prohibiting conduct that is detrimental to both.

Additionally, the Rushmore County, Craven Police Department had broad discretion in regulating the behavior of its officers. The ability for police departments to terminate officers who fail to conform to department regulations is well established. E.g. Kelley v. Johnson, 425 U.S. 238 (1976); Shwago v. Spradlin, 701 F.2d 470 (5th Cir. 1983). The Police Department had legitimate interest in making sure that Tracey conformed to a certain degree of conduct expected of police officers, especially where that conduct was forbidden by state statute.

In Seegmiller, the court used rational basis analysis to uphold an anti-adultery statute, saying:

It is well-settled that a police department may, “in accordance with its well-established duty to keep peace, [place] demands upon the members of the police force . . . which have no counterpart with respect to the public at large.” (quoting Kelley v. Johnson, 425 U.S. at 245). . . . We think it reasonable for the police department to privately admonish [an officers] personal conduct consistent with its code of conduct when the department believes it will further internal discipline or the public's respect for its police officers and the department they represent.

528 F.3d at 772.

In this case, in a situation nearly identical to that in Seegmiller, the Rushmore County, Craven, Police Department exercised its ability to enforce its personal code of conduct in requiring officers to obey the laws that they are hired to enforce. Tracey was released because he violated one of these laws. This Court should give deference to the Police Department’s right to regulate the behavior of its own officers given their role in society to keep the peace and enforce the laws.

*3. The Craven anti-adultery statute would satisfy intermediate scrutiny if it were the correct standard of review.*

The Craven anti-adultery statute is subject to a rational basis analysis since no fundamental right is at issue. However, a higher standard of review would have been triggered in this case if the Craven anti-adultery statute challenged a fundamental right. See, e.g., Glucksberg, 521 U.S. at 721. Intermediate scrutiny requires that the questioned government action serve an important state interest and that the action is at least substantially related to serving that interest. Craig, 429 U.S. at 197. In both Cook and Witt the courts, using the intermediate analysis that they assumed Lawrence used, ruled that the military's "Don't-Ask-Don't-Tell" policy (DADT) represented an important state interest of military regulation. Witt, 527 at 816; Cook, 528 F.3d at 54. In Cook, the court found that Congress' belief that DADT, which requires homosexuals in the military to keep their sexuality a secret, was necessary to "to preserve the military's effectiveness as a fighting force ... to ensure national security," outweighed the personal privacy interest that includes homosexual conduct. 528 F.3d at 60. Witt also recognized "judicial deference to ... congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." 527 F.3d at 8212 (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)). The Witt court also found that this interest outweighed any personal privacy interest that included homosexual conduct. Id.

The Court of Appeals could only identify one possible state interest in having an anti-adultery law: "the desire to enforce regulations, condoning, what is in its view, immoral conduct." (R. 11.) It linked the Craven anti-adultery statute with the sodomy statute that was invalidated by Lawrence, stating that it could "discern no legally

significant difference between the conduct at issue in Lawrence and the conduct in the present case.” (R. 11.)

However, there are significant differences between homosexuality and adultery, and between the rationales behind the statutes that have attempted to regulate these behaviors. See discussion supra Part II.A.2. Anti-homosexuality statutes attempted to regulate sexual activity that was permissible among heterosexuals. These statutes, as Romer made clear, were “born of animosity toward the class of persons affected” and fundamentally irrational. 517 U.S. at 634. In contrast, adultery is not like homosexuality, as the Court of Appeals suggests. Prosecution of adultery is not aimed at any minority in the way anti-homosexuality statutes were. Adultery is not a behavior that has been a fundamental right for one group, but not another. Rather, it has been illegal for much of this nation’s history, and states have only recently begun to relax their views on adultery. However, this relaxation does not change the reality that adultery has the potential to harm many individuals. In addition, anti-adultery laws remain on the books in twenty-three states as well as the military, where it is vigorously prosecuted. Adultery is also well recognized as a cause for divorce, and as a basis for reducing homicide counts from murder to manslaughter. The fundamental character and implications of adultery go well beyond that of a consensual sexual relationship similar to that in Lawrence.

The fact that morality plays a role in anti-adultery statutes should not in any way handicap the Craven anti-adultery statute in this constitutional analysis. Most statutes reflect some kind of morality, and not just the state’s view of morality, as the Court of Appeals asserted, but the view of morality of the people of that state. In this case, the

people of Craven decided that adultery, an activity it deemed immoral and a threat to families, should be punished. This state interest outweighs the private citizen's interest in participating in extra-marital affairs under an intermediate scrutiny analysis.

The Court of Appeals drastically underestimated the importance of allowing police departments to regulate the conduct of its officers. In its decision, the Court of Appeals emphasized that the military interest in Witt and Cook was more significant than the state interest here because DADT is sanctioned by the U.S. Congress and the legislative history of DADT bore out the necessity for such a policy. (R. 11.) But in this case it is not necessary for there to have been a statute explaining why a police officer should be required to follow the laws of Craven. Unlike Witt and Cook, this case involves a state actor violating a law that applies to all the citizens of a state. There has never been a federal law generally prohibiting homosexual conduct. DADT was necessary because Congress wanted to regulate behavior in the military that was not a federal crime for ordinary citizens. It would have defied reason for Craven to have specifically made a law requiring its police officers to follow a law it had previously passed. Therefore, the Craven anti-adultery statute cannot be realistically compared to the DADT policy.

The Rushmore County, Craven, Police Department has an important interest in ensuring that its officers follow the law. This interest outweighs whatever privacy interest an individual officer might have in engaging in an extra-marital affair. Tracey's fundamental rights were not violated, and therefore, he received due process under the Fourteenth Amendment. The Craven anti-adultery law, and Tracey's dismissal from the Rushmore County, Craven, Police Department for violating that law, pass both the

rational basis and intermediate scrutiny standards of review and were constitutional exercises of Craven's state power. Accordingly, the Rushmore County, Craven Police Department is entitled to judgment as a matter of law.

#### CONCLUSION

The Rushmore County, Craven, Police Department did not violate Tracey's Fourth Amendment rights because Officer Calloway conducted a reasonable search when he moved Tracey's jacket to search for a firearm. Additionally, the Rushmore County, Craven, Police Department did not violate Tracey's Fourteenth Amendment rights when it released him for his adulterous conduct, because Craven's anti-adultery statute did not implicate any fundamental rights. Because there are no issues of material fact, the Rushmore County, Craven Police Department is entitled to judgment as a matter of law. Accordingly, Petitioner asks this court to reverse the Court of Appeals and affirm the District Court's grant of summary judgment.

CERTIFICATE OF COMPLIANCE

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Competitors for Rushmore County, Craven, Police Department, *Petitioner*

Dated: \_\_\_\_\_ February 2, 2009