

## NOTES

### **BEYOND LAWRENCE v. TEXAS: CRAFTING A FUNDAMENTAL RIGHT TO SEXUAL PRIVACY**

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*After the watershed 2003 U.S. Supreme Court decision Lawrence v. Texas, courts are faced with the daunting task of navigating the bounds of sexual privacy in light of Lawrence's sweeping language and unconventional structure. This Note focuses on the specific issue of state governments regulating sexual device distribution. Evaluating the substantive due process rights of sexual device retailers and users, this Note ultimately argues that the privacy interest identified in Lawrence is sufficiently broad to protect intimate decisions to engage in adult consensual sexual behavior, including the liberty to sell, purchase, and use a sexual device.*

#### INTRODUCTION

For over four years, high-end retailer Myla lay nestled among luxury retailers Cartier, Chloe, Dolce & Gabbana, Donna Karan, Gucci, and Prada on the corner of New York's 69th Street and Madison Avenue, catering to a chic clientele seeking to indulge in luxury and elegance.<sup>1</sup> With boutiques in London's posh Selfridges and Harrods department stores, celebrity clients, wares showcased on hit television shows, and innovative products featured

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1. Myla London, About Myla, <http://www.mylausa.com/infoPages/about.php> (last visited Apr. 5, 2009); Rima Suki, *Myla Opens in New York's Upper East Side*, N.Y. MAG., Oct. 4, 2004, available at <http://nymag.com/nymetro/shopping/columns/shoptalk/9965/>; see also Ruth La Ferla, *Good Vibrations, Upscale Division*, N.Y. TIMES, Oct. 3, 2004, at ST15; Uppereast.com, Madison Between 69th & 70th, <http://www.uppereast.com/madbet6970.html> (last visited Apr. 5, 2009) (enumerating the retailers directly north of Myla); Uppereast.com, Madison Between 68th & 69th, <http://www.uppereast.com/madbet6869.html> (last visited Apr. 5, 2009) (listing the stores directly south of Myla). Myla's New York flagship closed its doors in early 2009 after four years in business; it is currently seeking a new location. See Myla USA, Store Locator, <http://www.mylausa.com/infoPages/locator.php> (last visited Apr. 12, 2009).

at design expos around the world, it is no surprise that Myla is the best-selling brand per square foot of its type.<sup>2</sup> Its glass and marble façade, world-class design team, and luxury goods made from the finest silks, laces, Swarovski crystals, and pearls fit seamlessly with Madison Avenue's sophisticated image.<sup>3</sup> However, unlike any other store on Madison Avenue, Myla is part of an increasing number of boutiques offering high-end lingerie, sleepwear, and sexual devices at couture prices.<sup>4</sup> The store's upscale image and high sales volume does little to suggest the complicated state of sexual devices in America.<sup>5</sup>

During the twentieth century, eight states enacted legislation designed to prohibit the sale and distribution of sexual devices.<sup>6</sup> Over the past twenty-five years, seven of those statutes were challenged in the courts, yielding inconsistent results.<sup>7</sup>

The text of the U.S. Constitution does not explicitly provide for an individual right to privacy; however case law has acknowledged "specific guarantees" of a zone of privacy in the Bill of Rights under the penumbras

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2. See StyleFrizz, Lydia Hearst for Myla Lingerie, <http://stylefrizz.com/200808/lydia-hearst-for-myla-lingerie/> (last visited Apr. 20, 2009).

3. See *id.* See generally La Ferla, *supra* note 1.

4. See Myla London, <http://www.mylausa.com/index.php> (last visited Apr. 5, 2009); see also *infra* Part I.A.2.b. See generally La Ferla, *supra* note 1.

5. Myla is a privately held company and does not make its sales data public. It does, however, represent that it is the best-selling lingerie brand per square foot. See *supra* note 2 and accompanying text.

6. ALA. CODE § 13A-12-200.2 (2005) (prohibiting the distribution, possession with intent to distribute, and agreement to distribute sexual devices); COLO. REV. STAT. ANN. §§ 18-7-101(6), -102 (West 2008) (prohibiting the wholesale promotion—manufacture, issuance, sale, provision, mailing, delivery, transfer, transmission, publishing, distribution, circulation, dissemination—and possession with intent to wholesale promote sexual devices); GA. CODE ANN. § 16-12-80 (2007) (prohibiting the dissemination of any material the possessor knows to be obscene); KAN. STAT. ANN. § 21-4301 (2007) (prohibiting the manufacture, issue, sale, provision, transmission, distribution, mailing, circulation, dissemination, or advertising of any sexual device); LA. REV. STAT. ANN. § 14:106.1 (2008) (prohibiting the manufacture, issue, sale, provision, transmission, distribution, mailing, circulation, dissemination, or advertising of any sexual device); MISS. CODE ANN. § 97-29-105 (West 1999) (forbidding the sale, advertisement, publication, or exhibition of any device meant to stimulate the genitals); TEX. PENAL CODE ANN. §§ 43.21–43.23 (Vernon 2003), *invalidated by* *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008) (prohibiting the sale, giving, lending, advertisement, and distribution of obscene devices); VA. CODE ANN. §§ 18.2-373–18.2-374 (2004) (making it illegal to prepare, manufacture, produce, sell, lend, transport, or distribute any obscene item); see *infra* Part I.B.

7. See generally *Reliable Consultants*, 517 F.3d at 738 (striking down Texas's anti-vibrator statute); *Williams v. Morgan (Williams VI)*, 478 F.3d 1316 (11th Cir. 2007) (upholding Alabama's obscenity statute in its entirety); *This That & The Other Gift & Tobacco, Inc. v. Cobb County, Ga.*, 285 F.3d 1319 (11th Cir. 2002) (holding that the advertising ban imposed by Georgia state law violated the First Amendment and vacating and remanding to the U.S. District Court for the Northern District of Georgia); *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985) (invalidating Colorado's anti-vibrator statute); *State v. Hughes*, 792 P.2d 1023 (Kan. 1990) (striking down Kansas's anti-vibrator statute); *State v. Brenan*, 772 So. 2d 64 (La. 2000) (invalidating Louisiana's anti-vibrator statute); *PHE, Inc. v. State*, 877 So. 2d 1244 (Miss. 2004) (declining to overturn Mississippi's anti-vibrator statute); see also *infra* Part II.

of the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>8</sup> The U.S. Supreme Court has found the right to privacy to be fundamental, and hence, subject to heightened scrutiny, although the Court has not definitively prescribed the bounds of this zone of privacy.<sup>9</sup> Over the past four decades, the judiciary has struggled to determine what is entitled to privacy protection; no area of debate has been so central to overarching privacy doctrine as the right to sexual privacy.<sup>10</sup>

Attempting to resolve the issue of sexual privacy, the U.S. Courts of Appeals for the Fifth and Eleventh Circuits have addressed whether statutes prohibiting the sale of sexual devices are constitutionally enforceable.<sup>11</sup> The courts are divided as to whether sexual privacy is a fundamental right, what standard should apply, and whether public morality may be the sole justification for a statute.

Following *Lawrence v. Texas*,<sup>12</sup> the pivotal 2003 U.S. Supreme Court case that invalidated state sodomy laws,<sup>13</sup> litigation challenging the constitutionality of statutes proscribing the sale of sexual devices has hinged on two disparate interpretations of the liberty interest announced in *Lawrence*. As part of a series of decisions, referred to collectively as *Williams v. Attorney General*, the Eleventh Circuit declined to read *Lawrence* as newly recognizing a fundamental right.<sup>14</sup> In *Williams*, the American Civil Liberties Union (ACLU) sued to enjoin the enforcement of Alabama's Anti-Obscenity Enforcement Act on behalf of user and vendor plaintiffs, and argued that the statute violated a fundamental right to sexual intimacy because it impermissibly burdened one's ability to use sexual

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8. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); see Maggie Ilene Kaminer, Note, *How Broad Is the Fundamental Right to Privacy and Personal Autonomy?—On What Grounds Should the Ban on the Sale of Sexually Stimulating Devices Be Considered Unconstitutional?*, 9 AM. U. J. GENDER SOC. POL'Y & L. 395, 399–401 (2001). See generally Shelly Elimelekh, Note, *The Constitutional Validity of Circuit Court Opinions Limiting the American Right to Sexual Privacy*, 24 CARDOZO ARTS & ENT. L.J. 261, 270 (2006).

9. See *Griswold*, 381 U.S. at 485; Elimelekh, *supra* note 8, at 270; see also Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 563 (1986) (noting the ill-defined bounds of privacy doctrine); Timothy O. Lenz, "Rights Talk" About Privacy in State Courts, 60 ALB. L. REV. 1613, 1613–14 (1997) (exploring the debate over a constitutional right to privacy and the judges' role in prescribing the boundaries of those rights).

10. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); see also Apasu-Gbotsu, *supra* note 9, at 563; E. Lauren Arnault, Comment, *Status, Conduct, and Forced Disclosure: What Does Bowers v. Hardwick Really Say?*, 36 U.C. DAVIS L. REV. 757, 759 (2003).

11. See *infra* notes 258–72, 277–86, 311–22 and accompanying text.

12. 539 U.S. 558.

13. *Id.* at 558.

14. *Williams v. Morgan (Williams VI)*, 478 F.3d 1316 (11th Cir. 2007) (finding that, even after *Lawrence*, public morality remains a sufficient rational state interest); *Williams v. Attorney Gen. (Williams IV)*, 378 F.3d 1232, 1236 (11th Cir. 2004) (holding that the *Lawrence* Court "declined the invitation" to recognize a fundamental right to sexual privacy).

devices.<sup>15</sup> The state countered that the statute was within the state's use of police power to restrict the sale of sex.<sup>16</sup> Although the U.S. District Court for the Northern District of Alabama thrice sided with plaintiffs,<sup>17</sup> the Eleventh Circuit "decline[d] the ACLU's invitation" "to add a new right to the current catalogue of fundamental rights under the Constitution: a right to sexual privacy."<sup>18</sup> Looking to the U.S. Supreme Court's missed opportunities to declare a fundamental right to sexual privacy in the past, the *Williams* court maintained that the *Lawrence* Court's failure to engage in traditional fundamental rights analysis was a tacit admission that no fundamental right to sexual privacy exists.<sup>19</sup> Additionally, the Eleventh Circuit distinguished the private sexual conduct at issue in *Lawrence* from the commercial statute at issue in *Williams*, concluding that *Lawrence* only rejects morality as a legitimate government interest where the law in question targets private and noncommercial conduct.<sup>20</sup>

The second interpretation of *Lawrence* offers a broader interpretation. In *Reliable Consultants, Inc. v. Earle*,<sup>21</sup> the Fifth Circuit, tracking the language in *Lawrence*, identified a right to be free from governmental intrusion in one's most intimate relations, including the decision of whether to bring sexual devices into the bedroom.<sup>22</sup> Further, the *Reliable Consultants* court concluded that after *Lawrence*, morality alone is an insufficient state interest to uphold a challenged statute.<sup>23</sup>

This Note posits that taken together, First and Fourteenth Amendment jurisprudence identifies a fundamental right to sexual privacy that limits the state's ability to regulate the sale of sexual devices. Part I presents the social history of sexuality in America and examines the limits and protections courts and legislatures have placed on personal privacy and obscenity. Part II then focuses on the Fifth and Eleventh Circuit split regarding whether statutes banning the sale of sexual devices may be invalidated by invoking a fundamental right to sexual privacy. Finally, Part III resolves the division among the courts by addressing the issue of sexual

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15. See ALA. CODE § 13A-12-200.2 (2005) (prohibiting the distribution, possession with intent to distribute, and agreement to distribute sexual devices); *Williams IV*, 378 F.3d at 1233–34; see also Paul F. Theiss, Case Note, *Constitutional Law—The Eleventh Circuit Fumbles the Supreme Court's Recognition of a Due Process Right to Sexual Intimacy*, 58 SMU L. REV. 481, 481–82 (2005). The user plaintiffs included women who used sexual devices therapeutically, and the vendor plaintiffs included both store owners and individuals who sold sexual devices at home parties. *Williams v. Pryor (Williams III)*, 220 F. Supp. 2d 1257, 1265–67 (N.D. Ala. 2002); see also Theiss, *supra*, at 482.

16. *Williams IV*, 378 F.3d at 1233.

17. See *Williams v. King (Williams V)*, 420 F. Supp. 2d 1224, 1231–32 (N.D. Ala. 2006); *Williams III*, 220 F. Supp. 2d at 1257; *Williams v. Pryor (Williams I)*, 41 F. Supp. 2d 1257 (N.D. Ala. 1999).

18. *Williams IV*, 378 F.3d at 1233; see also *Williams VI*, 478 F.3d at 1316; *Williams v. Pryor (Williams II)*, 240 F.3d 944, 949–50 (11th Cir. 2001).

19. *Williams IV*, 378 F.3d at 1235–37.

20. *Williams VI*, 478 F.3d at 1322; see *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

21. 517 F.3d 738 (5th Cir. 2008).

22. *Id.* at 746–47.

23. *Id.* at 745–46.

device sale, distribution, promotion, and usage under the Due Process doctrine after *Lawrence v. Texas*. The resolution assesses the fate of anti-sexual device legislation through the lens of the disparate interpretations set forth in Part II. This Note ultimately advocates for a broad right to sexual privacy free from government intrusion under *Lawrence v. Texas*.

## I. EXPLORING THE TRADITIONAL BOUNDS OF AMERICAN SEXUAL PRIVACY AND AUTONOMY

Part I traces the development of sexual autonomy in America. It examines the history of American sexual norms from the colonial era to the present and considers the place of sexual devices in that history. Part I then discusses the prevalence of sexual device use by examining statistics and assessing the devices' cultural visibility. Part I then sets forth the statutory schemes under which sexual devices have been regulated by the states. It concludes by discussing traditional Fourteenth Amendment privacy analysis and First Amendment obscenity doctrine.

### A. *The History of Sexual Autonomy in America*

#### 1. A Brief History of American Sexual Norms

Seventeenth-century émigrés from Europe to the British Colonies in North America brought with them beliefs about sexuality born out of the Protestant Reformation.<sup>24</sup> Unlike Catholicism, which condemned all carnal desires as consequences of the Biblical fall from grace, Protestantism distinguished between appropriate forms of sexual expression in marriage (that which led to reproduction) and transgressive behavior (acts outside of marriage or for nonreproductive purposes).<sup>25</sup> The early modern Protestant notion that marital love and affection were acceptable justifications for sexual behavior changed the meaning of sexuality in Anglo-American marriages.<sup>26</sup> Sex became a duty husband and wife owed one another, and could be seen as a way to enhance the marital relationship.<sup>27</sup> Although both men and women were expected to experience pleasure during intercourse, the sexual union remained closely tied to reproduction.<sup>28</sup> Women were expected, and often desired, to bear children throughout their reproductive

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24. JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 4 (2d ed. 1997). The discussion of early American intimacy in Part I.A of this Note focuses mainly on the sexual norms of Anglo-American Protestants.

25. *See id.*

26. *See id.* at 4–5.

27. *Id.* at 5.

28. *Id.* Deeply rooted Western medical and folk traditions held that female orgasm was necessary for both physical health and conception. *Id.*

years, and it is unlikely that many couples outside the wealthy used contraceptives to limit family size.<sup>29</sup>

Throughout the seventeenth century, the clergy and the courts were the most influential moral authorities in colonial America.<sup>30</sup> The best-known colonial sources of morality were the fundamentalist New England Puritans.<sup>31</sup> Leaders, such as Thomas Shephard and Cotton Mather, admonished their congregations to avoid sexual stimulation and suppress desires; they emphasized marriage as the only suitable outlet for sexual expression, and condemned masturbation and premarital sex.<sup>32</sup> However, contemporary moderate Puritans, Catholics, and Quakers, while still adhering to an ideal model of marital, reproductive sex, permitted a greater acceptance of desire and put a lesser emphasis on sexual restraint.<sup>33</sup>

While the church and courts continued to be the dominant moral authorities in eighteenth-century America, circulation of medical advice literature increased in the colonies.<sup>34</sup> Although it is impossible to determine the exact readership of these tracts, it is well documented that several gynecological and marital advice books became highly popular in America and seemingly reinforced commonly held beliefs about sexuality.<sup>35</sup> Perhaps the most widely read, *Aristotle's Masterpiece*, maintained that reproduction was the primary goal of sexuality while repeating the early modern belief that sexual pleasure for both male and female was both desirable and compulsory for conception.<sup>36</sup>

For colonial youths, courtship provided an opportunity in which they could begin to explore their sexual desires.<sup>37</sup> Although parental opinion was much considered in the selection of a suitor, parents did not arrange marriage in the colonies and young people formally courted without a chaperone and often in public view;<sup>38</sup> however, it was not uncommon for courting couples to escape from the public view to engage in immodest

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29. *Id.* at 5–6. Those couples who did wish to limit family size would do so by delaying marriage, refraining from sex while nursing, and possibly by engaging in coitus interruptus. *Id.* at 5.

30. *Id.* at 18–19.

31. *Id.* at 18.

32. *Id.*

33. *See id.* at 19.

34. *See id.*; *see, e.g.*, ARISTOTLE'S MASTERPIECE (28th ed. 1766); JOHN ARMSTRONG, THE ART OF PRESERVING HEALTH (1796); JOHN ARMSTRONG, THE OECONOMY OF LOVE: A POETICAL ESSAY (1768); *see also* STEVEN NISSENBAUM, SEX, DIET, AND DEBILITY IN JACKSONIAN AMERICA: SYLVESTER GRAHAM AND HEALTH REFORM ch. 2 (1980); Otho T. Beall, Jr., Aristotle's Master Piece, in *America: A Landmark in the Folklore of Medicine*, 20 WM. & MARY Q. (3d ser.) 207, 207–10 (1963).

35. D'EMILIO & FREEDMAN, *supra* note 24, at 19.

36. ARISTOTLE'S MASTERPIECE, *supra* note 34, at 32–34 (discussing traditional ideas about conception); *see* D'EMILIO & FREEDMAN, *supra* note 24, at 19–20. Colonial society put so great an emphasis on marital sex channeled toward reproduction that in New England, a bride could leave a marriage if her husband was impotent. D'EMILIO & FREEDMAN, *supra* note 24, at 23.

37. D'EMILIO & FREEDMAN, *supra* note 24, at 21.

38. *Id.*

behavior.<sup>39</sup> As the eighteenth century progressed, young couples selected their mates with less regard to property and family relations, and it became increasingly common for young people to announce a premarital pregnancy as a way of exerting control over who they married.<sup>40</sup>

During this time period, greater geographic mobility resulting from the growth of industry, social disruptions caused by war, and the spread of enlightenment ideas resulted in a breakdown of familial and community supervision of sexual behavior.<sup>41</sup> This loosening of moral control increased the sexual vulnerability of women, especially those of the lower classes, who were at risk of harassment on the streets and faced fewer guarantees that premarital intercourse would lead to marriage.<sup>42</sup> Consequently, a greater emphasis was placed on a woman's ability to maintain her sexual virtue, and moralists urged women to resist temptation and remain chaste.<sup>43</sup> Patriots urged Americans to be moderate in their passions, including engaging in sexual behavior, to avoid the decadence they believed weakened European governments; this gave rise to the symbol of woman as the passionate irrational.<sup>44</sup> At the close of the preindustrial era, sexuality was not a private matter, but rather one regulated by family and the community; it was not until the early twentieth century that notions of individual privacy became a central sexual value.<sup>45</sup>

In the nineteenth century, the middle-class ideal of the chaste, pure female was juxtaposed with increasing scientific knowledge, medical advice publications discussing sexual health, and greater opportunities for

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39. *Id.* at 22. "As long as a couple's sexual relations were channeled toward marriage, colonial society could forgive them." *Id.* Several seventeenth-century moralists noted that couples often absconded to barns and fields during harvest to commit acts filled "'with folly and lewdness.'" *Id.* at 21.

40. *See id.* at 43. Premarital pregnancy rates spiked in the late eighteenth century, leading historians to cite a "'revolt of the young' against familial controls over marriage and sexuality." *Id.* (quoting Joan Hoff-Wilson, *The Illusion of Change: Women and the American Revolution*, in *THE AMERICAN REVOLUTION: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM* 404 (Alfred Young ed., 1976)). In parts of New England, as many as one-third of all brides were pregnant on their wedding day. *Id.*

41. *See id.*

42. *See id.* at 44; *see also* CHRISTINE STANDSELL, *CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789–1860*, at 24, 27 (1986); Nancy F. Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790–1850*, in *A HERITAGE OF HER OWN* 162, 170 (Nancy F. Cott & Elizabeth H. Pleck eds., 1979); JOAN JENSEN, *LOOSENING THE BONDS: MID-ATLANTIC FARM WOMEN, 1750–1850*, at 117–18 (1986); Robert V. Wells, *Illegitimacy and Bridal Pregnancy in Colonial America*, in *BASTARDY AND ITS COMPARATIVE HISTORY* 349, 354–55 (Peter Laslett, Karla Oosterveen & Richard M. Smith eds., 1980). Despite relatively egalitarian sexual regulation among men and women in the early colonial period, the social, economic, and political changes of the late eighteenth century saw attitudes about sexuality diverge along gender lines; this change would continue for over a century. D'EMILIO & FREEDMAN, *supra* note 24, at 52.

43. *See* D'EMILIO & FREEDMAN, *supra* note 24, at 44. "In the late eighteenth century, female chastity did not yet presume an absence of sexual desire. Virtue could be attained through self-control; it was not necessarily innate or biologically determined." *Id.* at 45.

44. *See id.* at 45; *see also* Cott, *supra* note 42, at 165–68.

45. *See* D'EMILIO & FREEDMAN, *supra* note 24, at 52.

sexual exploration outside the family.<sup>46</sup> Between the 1830s and 1870s, information regarding contraceptive devices circulated widely,<sup>47</sup> and gave couples successful means to take control of their sexual and reproductive lives.<sup>48</sup> Medical advice literature stressed the importance of restraint in one's sexual life.<sup>49</sup> Much of the medical literature directed at young men stressed the dangers of masturbation, however most medical writers did not discount sexual pleasure completely.<sup>50</sup> Although popular consciousness held women to be innately pure, abundant literature urging women to abstain from masturbation contradicted that notion.<sup>51</sup> Collectively, the medical literature of the nineteenth century did not seek to suppress sexual desires, rather it "shift[ed] sexual control from traditional external community pressures to individual will, or self-control."<sup>52</sup> Medical experts maintained that when properly channeled, sexual contact encouraged intimacy, good health, and spirituality.<sup>53</sup>

Although urban middle-class families valued sexual privacy, sexuality was increasingly commoditized in working-class neighborhoods and in the

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46. *See id.* at 59–73.

47. *See, e.g.*, EDWARD BLISS FOOTE, *MEDICAL COMMON SENSE* (1858); FREDERICK HOLLICK, *THE MARRIAGE GUIDE* (1859); ROBERT DALE OWEN, *MORAL PHYSIOLOGY* (1831); Charles Knowlton, *Fruits of Philosophy: An Essay on the Population Question* (1832), reprinted in S. CHANDRASEKHAR, *A DIRTY, FILTHY BOOK* 87 (1981).

48. *See* D'EMILIO & FREEDMAN, *supra* note 24, at 58. During the course of the nineteenth century, the marital fertility rate dropped significantly, from an average of slightly over seven children in 1800, to under six children by 1825, to an average of only 5.42 children in 1850, and to 4.24 by 1880. *Id.* Concerned about the rapidly declining birth rate and bolstered by the reforming spirit of the emerging middle class, Congress passed the Comstock Act in 1873, which outlawed the circulation of obscene materials, including contraceptive information, through the mails. *See* Comstock Act, ch. 258, 17 Stat. 598 (1873); D'EMILIO & FREEDMAN, *supra* note 24, at 60; *see also* Shirley J. Burton, *The Criminally Obscene Women of Chicago*, in *MAJOR PROBLEMS IN THE HISTORY OF AMERICAN SEXUALITY* 264, 265 (Kathy Peiss ed., 2002).

49. *See* D'EMILIO & FREEDMAN, *supra* note 24, at 68–73.

50. *See id.* at 68–69. While male masturbation was frowned upon during the colonial period because it was nonprocreative, the theory that masturbation caused insanity and disease became popular in America in the nineteenth century. *Id.*; *see also* G. J. BARKER-BENFIELD, *THE HORRORS OF THE HALF-KNOWN LIFE: MALE ATTITUDES TOWARD WOMEN AND SEXUALITY IN NINETEENTH-CENTURY AMERICA* 179 (2000); PRIMERS FOR PURITY: *SEXUAL ADVICE TO VICTORIAN AMERICA* 34–46 (Ronald G. Walters ed., 1974); BENJAMIN RUSH, *MEDICAL INQUIRIES AND OBSERVATIONS UPON THE DISEASES OF THE MIND* (1812); REV. JOHN TODD, *THE STUDENT'S MANUAL* (1882).

51. D'EMILIO & FREEDMAN, *supra* note 24, at 71. Parents were advised to prevent their daughters' dangerous habits, such as touching their genitals and reading romance novels, because if left to their own devices, females' desires could be easily aroused. *Id.* at 72; *see* DR. MILLER, *LECTURES TO LADIES ONLY AT WAVERLEY HALL, SATURDAY, MAR. 19, AT 1–2 P.M. ON THE CONSTITUTION AND DISEASES OF WOMEN, THEIR CAUSES, MEANS OF PREVENTION AND CURE* (1870).

52. D'EMILIO & FREEDMAN, *supra* note 24, at 72. Ironically, these publications may have introduced many readers to the practices, such as masturbation and too frequent intercourse, that the pamphlets discouraged. *Id.*

53. *See id.* In the late nineteenth century, the notion of a romantic marriage in which sexual intimacy strengthened the union was an ideal of the urban middle class. *Id.* at 78. A successful marriage for a working couple struggling to make a living was grounded more in economic stability than romantic love. *Id.*



West.<sup>54</sup> In areas where single men congregated for work, such as mining towns, cities, and docks, an underground culture of drinking, dance halls, brothels, and assignation houses was sure to follow.<sup>55</sup> The sale of sex was not limited to its most literal incarnation; by the 1840s, pornographic literature became available in American markets.<sup>56</sup> Demand for pornographic literature and photographs expanded during the Civil War and remained high in the latter years of the nineteenth century.<sup>57</sup> The new market for sexual commerce was not met without controversy. In the decades following the Civil War, politician and public moralist Anthony Comstock unilaterally took up “the task of combating sex in print, art, [and personal] correspondence.”<sup>58</sup> After a year of lobbying the state and federal legislatures to tighten anti-obscenity laws, the U.S. Congress passed “An Act for the Suppression of Trade in, and Circulation of Obscene Literature and Articles of Immoral Use,” (the Comstock Act) in 1873 without debate.<sup>59</sup> Although the Comstock Act did not effectively restrict paths of sexual knowledge, it did successfully reinforce the notion that American sexuality should be relegated to the private sphere.<sup>60</sup> Comstock waged his anti-obscenity campaign until his death on the eve of World War I; his death, coupled with public outrage surrounding his campaign against Margaret Sanger, seemed to mark a new chapter in American sexuality.<sup>61</sup>

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54. *Id.* at 130.

55. *See id.* The ease of acquiring sexual services was not merely a working-class phenomenon; both middle- and upper-class men kept or visited prostitutes. *Id.* at 131.

56. *See id.*

57. *See id.* at 131–32.

58. *Id.* at 159. Founder of the New York Society for the Suppression of Vice, former U.S. postal inspector, and politician, Anthony Comstock’s crusade for a federal obscenity statute is often considered to be one man’s quest to regulate personal vice. However, regardless of its origins, the Comstock Act represented a fundamental shift in moral regulation from the family and church to civil law. Burton, *supra* note 48, at 265.

59. D’EMILIO & FREEDMAN, *supra* note 24, at 159. Comstock himself enforced the law as a U.S. postal inspector, and seized and destroyed twelve hundred pounds of materials ranging from penny postcards to fine arts, and from pulp fiction to Tolstoy. *Id.* at 160; *see supra* note 48.

60. *See* Comstock Act, ch. 258, 17 Stat. 598 (1873); D’EMILIO & FREEDMAN, *supra* note 24, at 160. Despite the law’s efforts, the Comstock Act did not effectively deter family planning. Americans still had access to contraceptive and sexual health advice from medical journals, physicians and pharmacists, and euphemistic advertisements in newspapers and magazines. D’EMILIO & FREEDMAN, *supra* note 24, at 60–61. Although the legal definition of obscenity has changed over time, the sentiments of the Comstock Act remain in force as modern federal anti-obscenity statutes.

61. D’EMILIO & FREEDMAN, *supra* note 24, at 223; *see also* DAVID M. KENNEDY, BIRTH CONTROL IN AMERICA: THE CAREER OF MARGARET SANGER 72–73 (1970); JAMES REED, THE BIRTH CONTROL MOVEMENT AND AMERICAN SOCIETY: FROM PRIVATE VICE TO PUBLIC VIRTUE 97 (1978). Margaret Sanger advocated for an open discussion of contraception, breaking from the nineteenth-century idea of voluntary motherhood through abstinence. D’EMILIO & FREEDMAN, *supra* note 24, at 223; *see also* Women Write Margaret Sanger for Birth Control Advice, 1924, 1930, 1935, 1936, in MAJOR PROBLEMS IN THE HISTORY OF AMERICAN SEXUALITY 316, 316–18 (Kathy Peiss ed., 2002).

## 2. The History of Sexual Devices in America

Part I.A.2 traces the history of sexual device use in America from the clinical treatment of hysteria to a contemporary device used by women and couples to prevent disease, treat sexual dysfunction, and achieve pleasure. Part I.A.2.a and I.A.2.b discuss the statistical prevalence and societal visibility of sexual devices and assess their role in modern sexuality.

The vibrator emerged as a medical instrument at the end of the nineteenth century as a means for physicians to achieve more rapid and efficient massage treatments for female patients suffering from hysteria.<sup>62</sup> Hysteria, literally “that which proceeds from the uterus,”<sup>63</sup> was a condition recognized in Western medicine from the fourth century B.C. until 1952, when the American Psychiatric Association dropped the term from official diagnostic usage.<sup>64</sup> From early on, the classic symptoms of hysteria—chronic anxiety, irritability, sleeplessness, erotic fantasies, nervousness, muscle spasms, shortness of breath, sensations of heaviness in the abdomen, lower pelvic edema, loss of appetite, and vaginal lubrication—were determined to result from sexual deprivation.<sup>65</sup> The virtual disappearance of hysteria as a diagnosis after the middle of the twentieth century “suggests it is perceptions of the pathological character of these women’s behavior that have altered, not the behavior itself.”<sup>66</sup>

Because it was known that hysterical symptoms were associated with sexual deprivation, single women suffering from hysteria were urged to marry and have intercourse with their husbands.<sup>67</sup> Afflicted women who were single, widowed, nuns, or unhappily married were prescribed genital massage and exercise as the most effective means of temporarily relieving

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62. See RACHEL P. MAINES, *THE TECHNOLOGY OF ORGASM: “HYSTERIA,” THE VIBRATOR, AND WOMEN’S SEXUAL SATISFACTION* 3 (1999); see also Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326, 327 (2006).

63. MAINES, *supra* note 62, at 21.

64. See *id.* at 2; see also ALAN KROHN, *HYSTERIA: THE ELUSIVE NEUROSIS* (1978); PHILLIP R. SLAVNEY, *PERSPECTIVES ON “HYSTERIA”* (1990); ILZA VEITH, *HYSTERIA: THE HISTORY OF A DISEASE* (1965); GEORGE R. WESLEY, *A HISTORY OF HYSTERIA* (1979).

65. MAINES, *supra* note 62, at 8, 23, 24; see also Lindemann, *supra* note 62, at 327. The term “hysteria,” although primarily used to describe cases of sexual deprivation, was a broad term used to describe a variety of unexplained female ailments. MAINES, *supra* note 62, at 8. Sigmund Freud described hysterical women as entering into paralytic states, a symptom rarely mentioned before the nineteenth century, and contemporary physicians described nonepileptic loss of consciousness as a symptom of hysteria. MAINES, *supra* note 62, at 8. See generally Edward Shorter, *Paralysis: The Rise and Fall of a “Hysterical” Symptom*, 19 J. SOC. HIST. 549 (1986). What modern physicians would diagnose as anorexia nervosa was considered a hysterical disorder into the nineteenth century. MAINES, *supra* note 62, at 8; see also JOAN JACOBS BRUMBERG, *FASTING GIRLS: THE HISTORY OF ANOREXIA NERVOSA* 67–70, 107, 115–20, 143 (1988).

66. MAINES, *supra* note 62, at 8; see also Roberta Satow, *Where Has All the Hysteria Gone?*, 66 PSYCHOANALYTIC REV. 463, 463–73 (1979).

67. See MAINES, *supra* note 62, at 9, 27.

the symptoms of hysteria.<sup>68</sup> Physicians or midwives would massage the female patient's vulva for as long as three hours in an effort to induce the "hysterical paroxysm" that would provide temporary relief.<sup>69</sup> Physicians before the twentieth century misunderstood the function of the clitoris in arousal and orgasm, and therefore believed these hysterical paroxysms were distinct from the female climax; it was believed that only vaginal intercourse with an erect penis could bring a healthy female to orgasm, and hence the treatment of hysteria through genital massage was met with little controversy.<sup>70</sup>

Because the symptoms of hysteria were chronic and seldom resolved,<sup>71</sup> treating hysterical women was a lucrative market for physicians who constantly sought novel ways to decrease the time necessary to induce the hysterical paroxysm in order to maximize the number of patients who could be treated.<sup>72</sup> From antiquity through the nineteenth century, hydrotherapy at bathing spas was recognized as a way to soothe the symptoms of hysterical disorders.<sup>73</sup> By the mid-nineteenth century, the age-old water cure was mechanized as the douche, a high-pressure shower used to stimulate the pelvic region.<sup>74</sup> Steam technology was soon adapted to the medical massage market, but like hydrotherapy douches, the size and

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68. See *id.* at 8–9, 25. Suggested exercises included horseback riding, or movement of the pelvis in a swing, carriage, or rocking chair. *Id.* at 8, 32; see also BERNARD MANDEVILLE, A TREATISE OF THE HYPOCHONDRIACK AND HYSTERICK DISEASES (Scholars' Facsimiles & Reprints, Inc. 1976) (1730).

69. MAINES, *supra* note 62, at 9; see also Lindemann, *supra* note 62, at 327.

70. See MAINES, *supra* note 62, at 9–10; see also Lindemann, *supra* note 62, at 328. Because the genital massage employed in the treatment of hysteria did not involve penetration, physicians saw nothing controversial or unethical about massaging a patient's vulva and clitoris manually or with mechanical devices. MAINES, *supra* note 62, at 10. In fact, the introduction of the speculum for pelvic examinations was met with far more skepticism than massage techniques to induce the hysterical paroxysm. *Id.*

71. Masturbation was not recommended as a treatment for hysteria until the early twentieth century. MAINES, *supra* note 62, at 9; see also H. W. LONG, SANE SEX LIFE AND SANE SEX LIVING: SOME THINGS THAT ALL SANE PEOPLE OUGHT TO KNOW ABOUT SEX NATURE AND SEX FUNCTIONING 125–27 (1919); Robert L. Dickinson & Henry H. Pierson, *The Average Sex Life of American Women*, 85 J. AM. MED. ASS'N 1113, 1113–17 (1925).

72. See MAINES, *supra* note 62, at 4. There is evidence that before the development of electromechanical or hydriatic devices, physicians sought to pass off genital massage to any other source—husbands, midwives, miscellaneous other devices. *Id.*

73. See *id.* at 72–73; see also Jacqueline S. Wilkie, *Submerged Sensuality: Technology and Perceptions of Bathing*, 19 J. SOC. HIST. 649 (1986).

74. See MAINES, *supra* note 62, at 13; see also SIMON BARUCH, THE PRINCIPLES AND PRACTICE OF HYDROTHERAPY: A GUIDE TO THE APPLICATION OF WATER IN DISEASE 259 (3d ed. 1908) (citing W. B. Oliver, *The Blood and Circulation*, LANCET, Jun. 27, 1896). Hydrotherapeutic equipment was often prohibitively expensive and permanently fixed. MAINES, *supra* note 62, at 13; see also Herbert Ant & Walter S. McClellan, *The Physical Equipment for Administration of Health Resort Treatment*, 123 J. AM. MED. ASS'N 695, 695–99 (1943). Sites housing hydriatic massagers became destinations, like spas, requiring transportation, lodging, meals, etc., and were hence only available to the affluent. MAINES, *supra* note 62, at 13–14.

expense of these devices limited their use to spas and physicians' offices with large physical therapy practices.<sup>75</sup>

Developed in England in the late 1880s, the electromechanical vibrator resolved many of the shortcomings of earlier water and steam powered massage devices.<sup>76</sup> It was less expensive and more portable and reliable than its predecessors, and for the first time, allowed patients to treat themselves for hysteria at home.<sup>77</sup> Within fifteen years of the introduction of the first electromechanical vibrator, designed by British physician Joseph Mortimer Granville and manufactured by Weiss, a reputable British manufacturer of medical instruments,<sup>78</sup> over a dozen battery-powered and plug-in vibrators were advertised to consumers in periodicals such as *Good Housekeeping* and *Hearst's Magazine*, and in the Sears, Roebuck and Company Electrical Goods catalog.<sup>79</sup> During the first two decades of the twentieth century, the vibrator was marketed to consumers at all price points as a home electrical appliance, not unlike a toaster or sewing machine.<sup>80</sup> During the early twentieth century, the perceived function of the vibrator was so distinct from female sexual gratification that the most widely advertised brand, White Cross Electric Vibrators, drew its name from "an Episcopalian sexual purity organization that flourished in Britain in the late 1880s."<sup>81</sup> However, the therapeutic camouflage of vibrators became difficult to maintain in the 1920s when they began appearing in erotic films.<sup>82</sup> This, compounded with a greater understanding of female sexual function, made it difficult for physicians and patients to disguise the vibrator as a mere therapeutic device, and resulted in the vibrator fading from advertising and the public (though not private) consciousness from 1928 until the 1960s when they reemerged as overtly sexual devices.<sup>83</sup>

Although no state has explicitly prohibited the personal use of sexual devices, the latter half of the twentieth century saw several states attempt to

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75. MAINES, *supra* note 62, at 14–15.

76. *See id.* at 11.

77. *See id.* at 11, 100.

78. *Id.* at 93–94. *See generally* JOSEPH MORTIMER GRANVILLE, NERVE-VIBRATION AND EXCITATION AS AGENTS IN THE TREATMENT OF FUNCTIONAL DISORDERS AND ORGANIC DISEASE 57 (London, J. & A. Churchill 1883).

79. *See* MAINES, *supra* note 62, at 102–04.

80. *Id.* at 19, 102–07. The devices were marketed primarily to females as a relaxation device in periodicals such as *Needlecraft*, *Home Needlework Journal*, *Modern Woman*, *Hearst's*, *McClure's*, *Woman's Home Companion*, and *Modern Priscilla*. *Id.*; *see supra* note 79 and accompanying text. They were also marketed toward men to give as gifts to restore health and vitality to their wives. MAINES, *supra* note 62, at 19.

81. MAINES, *supra* note 62, at 107; *see also* Lindemann, *supra* note 62, at 328.

82. MAINES, *supra* note 62, at 10, 108; *see also* Lindemann, *supra* note 62, at 329.

83. *See* MAINES, *supra* note 62, at 108–09; *see also* Lindemann, *supra* note 62, at 329. Although it is likely that vibrators were available in the years between 1928 and the 1960s, they were not advertised in reputable publications. MAINES, *supra* note 62, at 109. In the intervening years, advertisements for the "massager," not "vibrator," did appear in some low-market magazines and were promoted under names such as "Spot Reducers," "Glorifier Massagers," or "Massage Pillows." *Id.* at 108.

put possession and distribution restrictions on vibrators.<sup>84</sup> A number of states have passed legislation effectively banning the distribution and sale of all sexual devices under obscenity statutes. Such “anti-vibrator” laws have been tested in seven states: Alabama, Colorado, Georgia, Kansas, Louisiana, Mississippi, and Texas.<sup>85</sup> Because all legislation regulating sexual device distribution in this country has been part of anti-obscenity statutes, the challenger bears the burden of proving that the devices have specific nonprurient value, therefore turning to traditional therapeutic arguments.<sup>86</sup> Late-twentieth- and twenty-first-century physicians have testified to the utility of vibrators in treating anorgasmic women who “may be particularly susceptible to pelvic inflammatory diseases, psychological problems, and difficulty in marital relationships.”<sup>87</sup> Medical experts have also lauded sexual devices as safe alternatives in an era of HIV/AIDS and high incidence of sexually transmitted infections.<sup>88</sup>

The success of contemporary medical and epidemiological arguments before the courts has concerned some scholars who maintain that, “[b]y putting forth primarily medical arguments, the supporters of these statutes make the tacit concession that the statutes are partially valid, and that a female’s personal choice to masturbate with a toy does not exist as a right in and of itself.”<sup>89</sup> Unlike other sexual acts, the choice to use an insertable sexual device “does not necessarily affect anyone other than the user herself,” and hence, “vibrator bans are wholly bound up in the deprivation of individual liberties.”<sup>90</sup> Feminist scholars have noted that many sexual aids designed primarily for men, such as *Playboy* and *Viagra*, do not fall within the anti-obscenity statutes that regulate the sale of sexual devices,

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84. See *supra* note 6; see also Lindemann, *supra* note 62, at 330.

85. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742 (5th Cir. 2008) (striking down Texas’s anti-vibrator statute); *Williams v. Morgan (Williams VI)*, 478 F.3d 1316 (11th Cir. 2007) (upholding Alabama’s obscenity statute in its entirety); *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985) (invalidating Colorado’s anti-vibrator statute); *State v. Hughes*, 792 P.2d 1023 (Kan. 1990) (striking down Kansas’s anti-vibrator statute); *State v. Brennan*, 772 So. 2d 64 (La. 2000) (invalidating Louisiana’s anti-vibrator statute); *PHE, Inc. v. State*, 877 So. 2d 1244 (Miss. 2004) (declining to overturn Mississippi’s anti-vibrator statute); see also Lindemann, *supra* note 62, at 330–36; *infra* Part II. Virginia’s statute banning the distribution of sexual devices has not yet been tested. VA. CODE ANN. §§ 18.2-373–18.2-374 (2004) (making it illegal to prepare, manufacture, produce, sell, lend, transport, or distribute any obscene item).

86. Lindemann, *supra* note 62, at 343; see *infra* Part I.D.

87. Lindemann, *supra* note 62, at 337 (quoting *Hughes*, 792 P.2d at 1025 (citing the expert testimony of Dr. Douglas Mould)).

88. See LINDA SINGER, *EROTIC WELFARE: SEXUAL THEORY AND POLITICS IN THE AGE OF EPIDEMIC* (Judith Butler & Maureen MacGrogan eds., 1993); Lindemann, *supra* note 62, at 342; see also *Reliable Consultants, Inc.*, 517 F.3d at 742 (noting plaintiffs’ argument that sexual devices are beneficial for couples unable to engage in intercourse because of contagious disease).

89. Lindemann, *supra* note 62, at 342.

90. *Id.* at 343.

such as vibrators and dildos, primarily used by women and same-sex couples.<sup>91</sup>

a. *Statistical Prevalence of Sexual Device Use*

Part I.A.2.a discusses the statistical prevalence of sexual device use. Part I.A.2.b discusses the accessibility and popularity of sexual devices at retail outlets ranging from internet stores to boudoir-style boutiques to one's own living room; it further details depictions of sexual devices in the media, specifically on television.

Statistics regarding the prevalence of sexual device use have long been speculative because of the sensitivity of the topic as well as the unreliable methodology used in many surveys about sex in America.<sup>92</sup> Many contemporary reports of American sexuality still cite data collected by Dr. Alfred Kinsey in the late 1930s through the early 1950s; his methodology has since been questioned, and regardless, the America he surveyed is vastly different than that of today.<sup>93</sup>

Born out of the AIDS crisis of the 1980s, the National Health and Social Life Survey (NHSL) adapted socioscientific survey methodology in an attempt to capture the sexual practices of a representative sample of the American population in the early 1990s.<sup>94</sup> Because of the study's goal of identifying the prevalence of certain sexual behavior that may contribute to the spread of disease, female self-stimulation was not discussed at length.<sup>95</sup> The study does note that approximately two percent of women purchased sexual devices in the year preceding the survey and that approximately forty percent of women had self-stimulated in the previous year.<sup>96</sup>

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91. *Id.* at 344; see also Tristan Taormino, *Dallas Dildo Defiance*, VILLAGE VOICE, May 21, 2002, available at <http://www.villagevoice.com/people/0221.taormino,34944,24.html>.

92. See ROBERT T. MICHAEL ET AL., SEX IN AMERICA 15 (1994). Many surveys of sexual behavior in the middle decades of the twentieth century were self-selecting reports of a particular magazine's readership, and at best catalogued the sexual practices of the target audience, and at worst represented the behavior of an atypical few. See *id.* at 22–25.

93. *Id.* at 15. For more information regarding Alfred Kinsey's landmark studies on American sexuality, see ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

94. See MICHAEL ET AL., *supra* note 92, at 25–26. For a comprehensive discussion of the study's methodology see *id.* at 25–41.

95. See *id.* at 155–68.

96. *Id.* at 157–58. The study does not discuss the number of women who have used sexual devices in the past, only those who have recently purchased such aids. *Id.* at 157; see also D'EMILIO & FREEDMAN, *supra* note 24, at 175. The estimate that forty percent of American women have masturbated is not new to the late twentieth century; Katharine Bement Davis's study of Victorian women, *Factors in the Sex Life of Twenty-Two Hundred Women*, was an early attempt to quantify the sexual behavior of American women, and contained chapters examining the use of contraceptives, "auto-erotic practices," sexual desire, and homosexuality. See generally KATHARINE BEMENT DAVIS, FACTORS IN THE SEX LIFE OF TWENTY-TWO HUNDRED WOMEN (1929). The study, focusing on a sample of middle-class women, found that approximately sixty-five percent of unmarried college-educated women and forty percent of married women acknowledged masturbating at some point in their lives. *Id.* at 97–98, 152–53.

The Berman Center's 2004 study, *The Health Benefits of Sexual Aids & Devices: A Comprehensive Study of their Relationship to Satisfaction and Quality of Life*, was one of the first nationwide studies focusing exclusively on the prevalence of sexual device use among females.<sup>97</sup> The study was conducted from March 16, 2004, to April 5, 2004, via postal mail with a random national sample of 2594 women between eighteen and sixty years of age.<sup>98</sup> Overall, the study finds that forty-four percent of women have used a sexual device.<sup>99</sup> Findings indicate that one in five women self-stimulates at least once per week (17.5 million American women), and of those who self-stimulate, fifty-nine percent use a sexual device to do so.<sup>100</sup>

Despite a popular misconception, women who are in relationships, and not single women, are most likely to use a sexual aid.<sup>101</sup> Of the study participants, seventy-eight percent of women who use or have used a sexual device did so while in a relationship.<sup>102</sup> Of the women who were most likely to use a self-stimulation device, forty-three percent were living with their partners, but not married; and thirty-five percent were in a relationship, but not living together.<sup>103</sup> Nine out of ten women report being comfortable discussing their sexual device use with their partner, and most women view sexual aid use as a complement to their sexual relationship and not a substitute.<sup>104</sup>

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97. BERMAN CTR., *THE HEALTH BENEFITS OF SEXUAL AIDS & DEVICES: A COMPREHENSIVE STUDY OF THEIR RELATIONSHIP TO SATISFACTION AND QUALITY OF LIFE* 15 (2004). The Berman Center is a specialized health care center for women, focused on women's and couples' sexual health. The center, founded and run by Dr. Laura Berman, is dedicated to helping women enrich their lives in a safe, therapeutic environment. Berman Center, The Clinic, <http://www.bermancenter.com/home/clinic> (last visited Apr. 6, 2009). Dr. Berman is a sex educator and therapist based out of Chicago; she is a frequent guest on *The Oprah Winfrey Show*, and has been featured on CNN, *Good Morning America*, *The Today Show*, and in *The New York Times*, *The Los Angeles Times*, *Cosmopolitan*, *Glamour*, *Marie Claire*, *Elle*, *Fitness*, *Men's Health*, *Women's Health*, *Jane*, *Self*, *More*, and *Redbook* magazines. Berman Center, About Dr. Laura Berman, <http://www.bermancenter.com/home/clinic/staff> (last visited Apr. 6, 2009).

98. BERMAN CTR., *supra* note 97, at 15. For a comprehensive discussion of the survey's methodology see *id.* at 4–5.

99. *Id.* at 8. The proportions of women who have ever used a sexual device are as follows: forty-three percent of women between eighteen and twenty-four; fifty-one percent of women twenty-five through thirty-four; forty-six percent of women thirty-five through forty-four; forty-one percent of women forty-five through fifty-four; and thirty-two percent of women between fifty-five and sixty years of age. *Id.* at 6. The percentage of respondents testifying to sexual device use in the socioscientific Berman Center survey is similar to the percentage of respondents indicating sexual device use in self-selection reports. In the 2005 Durex Sex Survey, a self-selecting survey conducted on the website of condom manufacturer Durex, forty-five percent of Americans claimed to have used sexual devices during sex. DUREX, 2005 GLOBAL SEX SURVEY 15 (2005).

100. BERMAN CTR., *supra* note 97, at 7.

101. *Id.* at 6.

102. *New Study on Female Sexuality Reveals Increased Use of Sexual Aids by Women*, PR NEWswire, Sept. 13, 2004, <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/09-13-2004/0002249382&EDATE=>.

103. BERMAN CTR., *supra* note 97, at 6.

104. *Id.* at 10. Popular women's magazines, such as *Cosmopolitan*, offer advice on how to integrate vibrator use into partner sex. How Do I Bring Up Using a Sex Toy with My

The Berman Center's study found that, overall, women accept vibrator use as a complement to a healthy sex life and believe that sexual device use is nothing to be ashamed of.<sup>105</sup> It also found that women who have used vibrators do not consider them a substitute for sexual relations with a partner.<sup>106</sup> The study concludes that women who use a vibrator have an easier time reaching orgasm, have less pain during intercourse, have increased sexual desire, and report a higher level of arousal; these factors contribute to a higher level of sexual satisfaction and greater overall satisfaction in one's life.<sup>107</sup>

b. *From the Backroom to the Luxury Boutique: The Increasing Visibility and Availability of Sexual Devices*

Over the course of the past two decades, sexual aids have transitioned from devices sold in the basements and backrooms of adult bookstores to middle-class friendly items sold at luxury boudoir shops, national retailers, at Passion Parties, and over the Internet. "Adult Novelty" sales grew exponentially between the 1990s and 2000s to what is now a \$1.5 billion-dollar industry.<sup>108</sup>

Since 1977, trailblazing San Francisco retailer Good Vibrations has offered women "a safe, comfortable alternative to sleazy porn shops" in which they can indulge their curiosities in an atmosphere seeking to foster an open dialogue about sexuality.<sup>109</sup> In an effort to bring sexual device retailers into the mainstream and reduce the stigma associated with traditional adult novelty stores, Good Vibrations redesigned its sales floor with colorful banners, distinctive shopping bags, and "Pottery Barn-style" themed displays—surely fit for the retailer's main customer base: 35- to 45-year-old straight, middle-class women in relationships.<sup>110</sup>

Good Vibrations's innovative business model and high-volume catalogue sales inspired retail outlets in other urban centers to open similar female-friendly, well-curated boutiques. After interning with the Bay Area retailer, Claire Cavanah opened the popular store Toys in Babeland in Seattle,

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Man?, Cosmopolitan Online, [http://www.cosmopolitan.com/sex-love/advice/questions/sex-toy-with-man?click=main\\_sr](http://www.cosmopolitan.com/sex-love/advice/questions/sex-toy-with-man?click=main_sr) (last visited Apr. 6, 2009).

105. BERMAN CTR., *supra* note 97, at 15.

106. *Id.*

107. *Id.* at 15–16.

108. Lessley Anderson, *A Sex Toy Story*, CNN MONEY, June 1, 2006, [http://money.cnn.com/magazines/business2/business2\\_archive/2006/05/01/8375938/index.htm](http://money.cnn.com/magazines/business2/business2_archive/2006/05/01/8375938/index.htm); see also THOMAS W. LAQUEUR, *SOLITARY SEX: A CULTURAL HISTORY OF MASTURBATION* 78 (2004). Doc Johnson Enterprises, the world's largest supplier of sexual devices, saw extraordinary growth in the 1990s, with wholesale sales growing from \$8 million in 1990 to \$45 million in 2000, and with sales reportedly doubling between 1999 and 2001 (retail sales of over \$100 million). See LAQUEUR, *supra*, at 78.

109. See Anderson, *supra* note 108. For a description of the evolution of Good Vibrations and the philosophy of its founder, see Rona Marech, *PROFILE: Joani Blank: A Sexual Aide: Founder of Revolutionary Store Good Vibrations Brought Sex Toys to the Masses*, S.F. CHRON., Feb. 14, 2003, at E1.

110. See Anderson, *supra* note 108; see also Marech, *supra* note 109.



which has since expanded to New York's chic SoHo, bohemian Lower East Side, and family-friendly Park Slope neighborhoods.<sup>111</sup> The Park Slope location, opening to much fanfare in June 2008, marketed itself as “kid-friendly” and features colorful displays, “upbeat music, well-dressed sales women and infant changing tables”—a respectable place for individuals and couples to shop without the sleazy imagery of the sex industry.<sup>112</sup> Evoking the decadent sophistication of seventeenth- and eighteenth-century Parisian Salons, luxury New York and Los Angeles retailer Kiki de Montparnasse sells high-end “instruments of pleasure” ranging in price from \$125 to \$1500.<sup>113</sup> Just as Victoria's Secret brought fashionable lingerie from two extremes—department stores and the adult industry—into the shopping mall, these concept stores have successfully distanced the sale of sexual aids from seedy sex shops and have reduced the stigma and awkwardness associated with shopping for them.<sup>114</sup>

Specialty boutiques are not the only retailers ushering sexual devices into mainstream availability: well-respected national retailers ranging from Amazon.com to Wal-Mart have also entered the sexual aid market with varied degrees of frankness. National superstores Target<sup>115</sup> and Wal-

111. See Babeland, Babeland Store Locations, <http://www.babeland.com/about/locations> (last visited Apr. 6, 2009); see also Sharon Pian Chan, *2000 Small Business Profiles: Toys in Babeland*, SEATTLE TIMES, Mar. 13, 2000, at Small Business 18–19.

112. Elizabeth Downey, *Family-Friendly Sex Store Opens in New York City*, FOX NEWS.COM, June 16, 2008, <http://www.foxnews.com/story/0,2933,367201,00.html>; N.Y. Magazine Daily Intel Blog, [http://nymag.com/daily/intel/2008/03/park\\_slope\\_parents\\_are\\_aflutte.html](http://nymag.com/daily/intel/2008/03/park_slope_parents_are_aflutte.html) (Mar. 3, 2008, 14:30 EST). For a discussion of the social acceptability of sexual devices, see generally Posting of Jennifer 8. Lee to N.Y. Times City Room Blog, <http://cityroom.blogs.nytimes.com/2008/11/04/taking-election-freebies-without-guilt/?scp=2-b&sq=babeland&st=nyt> (Nov. 4, 2008, 18:07 EST).

113. See Kiki de Montparnasse, <http://www.kikidm.com/shop/home.php> (last visited Apr. 6, 2009); see also Charlotte Druckman, *Toy Time*, N.Y. MAG., July 19, 2006, at 56. The boutique is also a veritable art gallery, selling “libidinous” art from renowned photographers Helmut Newton, Irving Penn, and Cindy Sherman. Time Out New York. Shopping: Kiki de Montparnasse, <http://www.timeout.com/newyork/venues/soho/607/kiki-de-montparnasse> (last visited Apr. 6, 2009).

114. See Shaun Frentner, *Victoria's Secret*, in 5 ST. JAMES ENCYCLOPEDIA OF POPULAR CULTURE 43, 43–44 (2000). See generally Nancy V. Workman, *From Victorian to Victoria's Secret: The Foundations of Modern Erotic Wear*, 30 J. POPULAR CULTURE 61, 61–73 (1996).

115. See, e.g., Target.com, Harmonic Massage Wand, [http://www.target.com/Harmonic-Massage-Wand/dp/B001C48G8/qid=1225070275/ref=br\\_1\\_2/176-36438480897446?ie=UTF8&node=644264011&frombrowse=1&pricerange=&index=tgt-mf-mv&field-browse=644264011&rank=pmrank&rh=&page=2](http://www.target.com/Harmonic-Massage-Wand/dp/B001C48G8/qid=1225070275/ref=br_1_2/176-36438480897446?ie=UTF8&node=644264011&frombrowse=1&pricerange=&index=tgt-mf-mv&field-browse=644264011&rank=pmrank&rh=&page=2) (last visited Apr. 6, 2009); Target.com, Human Touch Acuvibe Personal Massager, [http://www.target.com/Human-Touch-Acuvibe-Personal-Massager/dp/B0010YYU70/ref=sc\\_ri\\_2?ie=UTF8&pf\\_rd\\_r=124T5MXXZ9G7QQS8K6BX&pf\\_rd\\_p=451839801&pf\\_rd\\_i=B000WGWC26&pf\\_rd\\_s=bottom-10&pf\\_rd\\_m=A1VC38T7YXB528&pf\\_rd\\_t=201](http://www.target.com/Human-Touch-Acuvibe-Personal-Massager/dp/B0010YYU70/ref=sc_ri_2?ie=UTF8&pf_rd_r=124T5MXXZ9G7QQS8K6BX&pf_rd_p=451839801&pf_rd_i=B000WGWC26&pf_rd_s=bottom-10&pf_rd_m=A1VC38T7YXB528&pf_rd_t=201) (last visited Mar. 30, 2009); Target.com, Human Touch Personal Massager, [http://www.target.com/Human-Touch-Personal-Massager-AV-680/dp/B000WGWC26/ref=sc\\_ri\\_2/176-3643848-0897446](http://www.target.com/Human-Touch-Personal-Massager-AV-680/dp/B000WGWC26/ref=sc_ri_2/176-3643848-0897446) (last visited Mar. 30, 2009). It is notable that the “[g]uests who bought this item also bought” bar offers a link to K-Y Yours + Mine Couples Lubricant—a tacit admission that these devices are not mere “massagers.”

Mart<sup>116</sup> sell phallic-like “personal massagers” that resemble vibrators marketed for sexual use. Online megaretailers Amazon.com<sup>117</sup> and Drugstore.com<sup>118</sup> offer extensive sexual wellness stores selling a range of items including “Condoms, Personal Lubricants, Vibrators, Dildos, Erotic Massage, and More.”<sup>119</sup> The availability of sexual devices at such retail outlets with broad and diverse client bases may indicate growing acceptance of their sale and use.

The current trend of Passion Parties has brought the discourse about sexual devices literally into one’s living room. Popular in the southern and midwestern United States, Passion Parties are similar to Tupperware Parties—a “Passion Consultant” demonstrates how to use the company’s “premier sensual products” to the partygoers, who then have the opportunity to order any products they like.<sup>120</sup> The stated mission of Passion Parties, Inc. is “[t]o share the Passion Parties opportunity so that any woman can experience the prosperity of owning her own business; to share the products that will enhance any woman’s relationship; and to share the philosophy of women helping women.”<sup>121</sup> As a result of positioning itself as a pro-family, pro-intimacy company, Passion Parties, Inc. has done a “brisk business” in the Bible Belt.<sup>122</sup> Linda Brewer, a Passion Consultant featured in a 2004 *New York Times Magazine* piece, lauded the parties as wonderful ways for women to learn about their bodies and open the lines of communication about sex with their partners.<sup>123</sup>

Despite a bevy of pleased partygoers and ten years of continuous sales growth, Passion Parties, Inc. and similar ventures have encountered some resistance. In November 2003, Passion Parties representative Joanne Webb was arrested and charged with a misdemeanor under Texas’s obscenity law

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116. See, e.g., Walmart.com, Healthometer Gentle Touch Personal Massager, [http://www.walmart.com/catalog/product.do?product\\_id=6486432](http://www.walmart.com/catalog/product.do?product_id=6486432) (last visited Apr. 6, 2009); Walmart.com, Healthometer Mini Bird Personal Massager, [http://www.walmart.com/catalog/product.do?product\\_id=6486431](http://www.walmart.com/catalog/product.do?product_id=6486431) (last visited Apr. 6, 2009); Walmart.com, Healthometer Mini Personal Massager, [http://www.walmart.com/catalog/product.do?product\\_id=6487501](http://www.walmart.com/catalog/product.do?product_id=6487501) (last visited Apr. 6, 2009) (offering an item that is virtually identical to a device recommended on the Berman Center’s website, DrLauraBerman.com, Sex Toy Finder, <http://www.dr-lauraberman.com/public/toyfinder/product4.aspx> (last visited Apr. 6, 2009)). These items are online exclusives; none are sold in Wal-Mart stores.

117. Amazon.com, Sexual Wellness: Health & Personal Care, [http://www.amazon.com/Sexual-Wellness-Products/b/ref=sc\\_bm\\_br\\_3760901\\_1\\_67?ie=UTF8&node=3777371&no=3760901&me=ATVPDKIKX0DER](http://www.amazon.com/Sexual-Wellness-Products/b/ref=sc_bm_br_3760901_1_67?ie=UTF8&node=3777371&no=3760901&me=ATVPDKIKX0DER) (last visited Apr. 6, 2009).

118. Drugstore.com, Fun & Sexy Adult Toys, Vibrators, Lubricants & More, <http://www.drugstore.com/templates/browse/default.asp?catid=21298&trx=GFI-0-ROTABS&trxp1=21298&trxp4=60> (last visited Apr. 6, 2009).

119. Amazon.com, *supra* note 117.

120. Passion Parties®: The Ultimate Girls’ Night In®, <http://www.passionparties.com/> (last visited Apr. 6, 2009); see also Pamela Sitt, *The Party that Could Get You Arrested in Texas: In-Home Sex-Toy Sales Make for Naughty—But Increasingly Mainstream—Fun*, SEATTLE TIMES, Feb. 2, 2004, at E1.

121. Passion Parties, *supra* note 120.

122. Jennifer Senior, *Everything a Happily Married Bible Belt Woman Always Wanted to Know About Sex But Was Afraid to Ask*, N.Y. TIMES MAG., July 4, 2004, at 32.

123. See *id.*

when she sold two vibrators to undercover police officers posing as a young married couple.<sup>124</sup> After suffering from a brain tumor that left her sexually dysfunctional, Linette Servais became a sales consultant for Pure Romance, a company similar to Passion Parties, Inc. that sells sexual devices at home parties, to help other women with similar problems.<sup>125</sup> Active in her church choir for over thirty-five years, Servais's parish priest dismissed her of her choral director duties once he discovered that she was a "'consultant for a firm which sells products of a sexual nature that are not consistent with Church teachings.'"<sup>126</sup>

Although Pure Romance's product line may have been unacceptable for the pastor of St. Joseph's Catholic Church in New Franken, Wisconsin, sexual aids are not necessarily inconsistent with Christian teachings.<sup>127</sup> Online Christian retailer Book22.com sells "intimacy products for married couples" founded on the belief that "God intended that such love, as spoken of in Song of Solomon, be a beautiful and normal part of marital life."<sup>128</sup> Book22.com seeks to restore the beauty of intimacy among married couples through the sale of items ranging from massage oils and lubricants to "aids" (including vibrators and stimulation sleeves).<sup>129</sup>

The discussion of sexual device use and its relationship to women's sexual health has carried over into public discourse. *The Oprah Winfrey Show* has hosted several episodes over the years stressing the role of sexual devices in female sexual fulfillment,<sup>130</sup> and she has even featured an article

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124. See Laurie Fox, *Was Hers a Crime of Passion? Saleswoman Finds Law an Obscenity*, DALLAS MORNING NEWS, Dec. 20, 2003, at 1B; Glenna Whitley, *Sex Toy Story*, DALLAS OBSERVER, Apr. 8, 2004, available at <http://www.dallasobserver.com/2004-04-08/news/sex-toy-story/>; *Texas Mom Faces Trial for Selling Sex Toys*, CNN.COM, Feb. 11, 2004, <http://www.cnn.com/2004/LAW/02/11/obscenity.trial.reut/>; see also Jota Borgmann, *Hunting Expeditions: Perverting Substantive Due Process and Undermining Sexual Privacy in the Pursuit of Moral Trophy Game*, 15 UCLA WOMEN'S L.J. 171, 179 (2006); Elimelekh, *supra* note 8, at 261; Senior, *supra* note 122. The charges against Joanne Webb were eventually dropped. *Texas Woman No Longer Faces Charge in the Sale of Sex Toys*, N.Y. TIMES, July 18, 2004, at N27.

125. *Choir Director Canned for Focus on Wrong Organ: Catholic Priest Removes Musician from Church Who Sold Sex Toys on the Side*, MSNBC.COM, May 31, 2007, <http://www.msnbc.msn.com/id/18947154/>.

126. See *id.* (quoting Reverend Dean Dombroski's letter to his congregation regarding Servais's dismissal).

127. See *id.*

128. Book22, *Intimacy Products for Married Couples*, <http://book22.com/merchant2/> (last visited Apr. 6, 2009); see also *The Joy of Christian Sex Toys*, NAT'L PUB. RADIO, Mar. 21, 2008, <http://www.npr.org/templates/story/story.php?storyId=18975616>.

129. Book22, *Aids*, [http://www.book22.com/merchant2/merchant.mvc?Screen=CTGY&Store\\_Code=Book22&Category\\_Code=A](http://www.book22.com/merchant2/merchant.mvc?Screen=CTGY&Store_Code=Book22&Category_Code=A) (last visited Apr. 6, 2009).

130. See, e.g., *The Oprah Winfrey Show: Behind Closed Doors: Sex Therapy* (Harpo Productions broadcast Nov. 3, 2008). Dr. Laura Berman's appearance on the November 3, 2008, Oprah Winfrey Show, was so popular that Oprah.com created an online forum where women could ask Dr. Berman questions about their sexuality, including questions about sexual device use. Oprah.com, *Dr. Laura Berman Answers Your Sex Questions*, [http://www.oprah.com/article/oprahshow/20081002\\_tows\\_sexquestions/](http://www.oprah.com/article/oprahshow/20081002_tows_sexquestions/) (last visited Apr. 6, 2009). During the November 3, 2008, program, a couple engaged in therapy with Dr.

in her magazine, *O, The Oprah Magazine*, entitled “Everything You Wanted to Know About Sex Toys,” describing one woman’s experience shopping at luxury Manhattan store, Eve’s Garden, with the advice of a sex therapist.<sup>131</sup> And like any trend in popular culture, female friendly pleasure boutiques and devices have not escaped satire. On the infamous *Sex & the City* Season 1 episode, “The Turtle and the Hare,” corporate lawyer, Miranda, introduces ingénue gallerista, Charlotte, to “the Rabbit,” a trendy sexual device, which becomes popular among the series’ protagonists.<sup>132</sup> Evidenced from broader, more mainstream distribution channels and a more fluid discourse on television, sexual devices have gradually become an increasingly visible component of private sexual pleasure.

B. *A Moral Minority: Statutes Restricting the Distribution of Sexual Devices*

To date, eight states have enacted anti-obscenity statutes banning the distribution of sexual devices—Alabama, Colorado, Georgia, Kansas, Louisiana, Mississippi, Texas, and Virginia.<sup>133</sup> Seven of these states’ statutes have been tested by the courts and the outcomes have not been consistent.<sup>134</sup> Courts in Colorado, Georgia, Kansas, Louisiana, and Texas have rejected (at least parts of) anti-vibrator legislation as unconstitutional, while courts in Alabama and Mississippi have upheld such statutes; Virginia’s statute remains untested.<sup>135</sup> Part I.B of this Note examines the text and relevant case law necessary to construct the interpretive framework of each statute.

The Alabama Anti-Obscenity Enforcement Act went into effect in 1998 as a criminal statute to combat “offense[s] against public health and morals.”<sup>136</sup> The statute makes it unlawful for any individual to

knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal. Any person who violates

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Berman described the efficacy of a vibrator in inducing orgasms in women with low sex-drives. *The Oprah Winfrey Show: Behind Closed Doors: Sex Therapy*, *supra*.

131. Lisa Kogan, *Everything You Wanted to Know About Sex Toys*, O, OPRAH MAG., June 2006, available at [http://www.oprah.com/article/omagazine/omag\\_200606\\_kogan/](http://www.oprah.com/article/omagazine/omag_200606_kogan/).

132. *Sex and the City: The Turtle and the Hare* (HBO television broadcast Aug. 2, 1998).

133. See *supra* note 6 and accompanying text.

134. See *infra* Part II. Because of inconsistent enforcement, it is unclear whether a significant body of municipal ordinances prohibiting the sale of sexual devices exists. The only noted challenge to a municipal ordinance is *City of Portland v. Jacobsky*, which held that proper procedures were followed in enacting the law and that the statute was not impermissibly overbroad or vague as to violate the Maine Constitution. 496 A.2d 646 (Me. 1985).

135. See *infra* Part II.

136. ALA. CODE § 13A-12 (2005).

this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than ten thousand dollars (\$10,000) and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year.<sup>137</sup>

The 1998 Act was an amendment to Alabama's existing obscenity statute, which did not originally criminalize the distribution of sexual devices.<sup>138</sup>

From 1981 to 1985, when *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*<sup>139</sup> invalidated portions of the statute referring to sexual devices,<sup>140</sup> Colorado prohibited any individual from wholesale promoting or possessing with intent to wholesale promote any sexual device.<sup>141</sup> Wholesale promotion included the manufacture, issuance, sale, provision, mailing, delivery, transfer, transmission, publishing, distribution, circulation, dissemination, or "offer or agree[ment] to do the same."<sup>142</sup>

Georgia's anti-vibrator statute patently defines any device "designed or marketed as useful for" the stimulation of human genitalia as obscene, and categorizes as an aggravated misdemeanor any act in which an individual

sells, lends, rents, leases, gives, advertises, publishes, exhibits, or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used in this Code section, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material.<sup>143</sup>

The Eleventh Circuit found the Georgia statute to violate a sexual device retailer's First Amendment rights; however, the statute still remains on the books.<sup>144</sup>

Similarly, the Kansas and Louisiana obscenity statutes prohibit the manufacture, issue, sale, provision, transmission, distribution, mailing, circulation, dissemination, or advertising of any sexual device.<sup>145</sup> Both states' laws have been challenged successfully; however, both statutes remain viable law.<sup>146</sup>

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137. *Id.* § 13A-12-200.2(a)(1).

138. *Id.* § 13A-12-200.2; *see* Lindemann, *supra* note 62, at 331.

139. 697 P.2d 348 (Colo. 1985).

140. *Id.*; *see also* Kaminer, *supra* note 8, at 417–18; Nicole Schilder, Note, *Anti-vibrator Legislation: The Law Is on Shaky Ground*, 29 HASTINGS CONST. L.Q. 89, 103–04 (2001); *infra* notes 347–50 and accompanying text.

141. COLO. REV. STAT. ANN. § 18-7-102 (West 2008) (amended 1986).

142. *Id.* § 18-7-101.

143. GA. CODE ANN. § 16-12-80(a) (2007).

144. *Id.*; *This That & The Other Gift & Tobacco, Inc. v. Cobb County, Ga.*, 285 F.3d 1319, 1323–25 (11th Cir. 2002).

145. KAN. STAT. ANN. § 21-4301 (2007); LA. REV. STAT. ANN. § 14:106.1 (2008).

146. *See infra* notes 324–46 and accompanying text; *see also* Kaminer, *supra* note 8, at 416–19; Schilder, *supra* note 140, at 104–05.

Under Mississippi law, effective July 1, 1983, an individual may be prosecuted for “distributing unlawful sexual devices when he knowingly sells, advertises, publishes or exhibits to any person any three-dimensional device designed or marketed as useful primarily for the stimulation of human genital organs, or offers to do so, or possesses such devices with the intent to do so.”<sup>147</sup> A similar offense, wholesale distribution of unlawful sexual devices, makes illegal the distribution with intent to resell any sexual aid.<sup>148</sup>

The Fifth Circuit ruled that Texas’s 1979 obscenity statute was unconstitutional in the 2008 decision *Reliable Consultants, Inc. v. Earle*.<sup>149</sup> The predecessor of Texas’s current obscenity statute was enacted in 1973 with the goal of prohibiting “obscene material.”<sup>150</sup> Six years later, in 1979, the Texas legislature redefined “obscene material” consistent with the Supreme Court’s definition of obscenity detailed in the 1973 decision *Miller v. California*.<sup>151</sup> That same year, the legislature expanded the scope of the statute to prohibit the promotion and wholesale promotion of “obscene device[s],” which included selling, giving, lending, distributing, or advertising.<sup>152</sup> The legislature chose to broadly define “obscene device,” as any device “designed or marketed as useful primarily for the stimulation of the human genital organs”; this definition disregards the *Miller* test.<sup>153</sup> In 1985, the Texas Court of Criminal Appeals held that the statute did not violate an individual’s right to privacy, concluding that there was no constitutional right to “stimulate . . . another’s genitals with an object designed or marketed as useful primarily for that purpose.”<sup>154</sup> Amendments that were enacted in 1983 added a narrow affirmative defense to protect individuals who provided sexual devices for “a bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose.”<sup>155</sup> Violation was punishable by a state jail sentence of up to two years.<sup>156</sup>

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147. MISS. CODE ANN. § 97-29-105 (West 1999).

148. *Id.*

149. See *infra* notes 277–86, 311–22 and accompanying text.

150. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 740–41 (5th Cir. 2008) (citing *Miller v. California*, 413 U.S. 15, 23–25 (1973)).

151. 413 U.S. 15. Under the *Miller* test in considering whether a material is obscene, and hence not entitled to constitutional protection, a trier of fact must consider

(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* at 24 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

152. TEX. PENAL CODE ANN. § 43.23 (Vernon 2003), *invalidated by Reliable Consultants, Inc.*, 517 F.3d 738.

153. *Id.* § 43.21; see also *Reliable Consultants, Inc.*, 517 F.3d at 740–41; *supra* note 151 and accompanying text.

154. *Yorko v. State*, 690 S.W.2d 260, 263 (Tex. Crim. App. 1985).

155. TEX. PENAL CODE ANN. § 43.23, *invalidated by Reliable Consultants, Inc.*, 517 F.3d at 741 (quoting TEX. PENAL CODE ANN. § 43.23(g) (amended 1983)).

156. *Id.* § 43.239(a), (d); see *Reliable Consultants, Inc.*, 517 F.3d at 741.

C. *Within the “Privacy” of One’s Own Bedroom? Tracing the Constitutional Protection of Sexual Privacy*

Although the text of the Constitution does not explicitly set forth an individual right to privacy, case law has acknowledged “specific guarantees” of a zone of privacy in the Bill of Rights under the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>157</sup> While the U.S. Supreme Court has not definitively prescribed the bounds of this zone of privacy as it relates to sexual devices, the Court has examined an individual right of privacy with regard to reproduction,<sup>158</sup> homosexual sodomy,<sup>159</sup> and pornography.<sup>160</sup> Taken together, the cases discussed below define a privacy interest broad enough to protect an individual’s private, consensual sexual behavior from unwarranted government intrusion.<sup>161</sup> Part I.C discusses the breadth and limitations of the Fourteenth Amendment substantive due process privacy analysis.

The Constitution’s silence on the right to privacy has necessitated a jurisprudential framework through which the Court may frame questions of fundamental liberties. The Supreme Court has protected individual liberties from unwarranted government interference through the Due Process Clause of the Fourteenth Amendment.<sup>162</sup> The standard of scrutiny applied to a legislative act challenged upon due process grounds depends on whether that statute implicates a fundamental right.<sup>163</sup> If a fundamental right is involved, the Court analyzes whether the state action in question is justified by a compelling government interest, and whether that statute is narrowly tailored to achieve its goals with the least interference possible.<sup>164</sup> Statutes evaluated under strict scrutiny seldom survive judicial review.<sup>165</sup> If a

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157. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); see Kaminer, *supra* note 8, at 399–401. See generally Elimelekh, *supra* note 8, at 270.

158. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold*, 381 U.S. 479.

159. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

160. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); see also Elimelekh, *supra* note 8, at 270; *infra* Part I.D.

161. See *infra* Part I.D.

162. See *Washington v. Glucksberg*, 521 U.S. 720–21 (1997) (enumerating the liberties guaranteed by the due process clause and clearly articulating the Court’s established substantive due process analysis, commonly referred to as the “*Glucksberg* Two-Step”); Angela Holt, Comment, *From My Cold Dead Hands: Williams v. Pryor and the Constitutionality of Alabama’s Anti-vibrator Law*, 53 ALA. L. REV. 927, 937 (2002); see also Elimelekh, *supra* note 8, at 270; Kaminer, *supra* note 8, at 399. See *infra* notes 168–95 and accompanying text (discussing the Court’s use of the Due Process Clause to protect individual liberties).

163. See *Glucksberg*, 521 U.S. at 721; Holt, *supra* note 162, at 937; Kaminer, *supra* note 8, at 400.

164. *Roe v. Wade*, 410 U.S. 113, 155 (1973); see also Holt, *supra* note 162, at 937.

165. See Kaminer, *supra* note 8, at 400; see also *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (maintaining that strict scrutiny is reserved for state

fundamental right is not burdened by the challenged state action, the Court applies rational basis review. Under this lower level of scrutiny, a statute does not violate due process if it is rationally related to advancing a legitimate state interest.<sup>166</sup> A statute analyzed under rational basis scrutiny is rarely invalidated.<sup>167</sup>

In *Griswold v. Connecticut*,<sup>168</sup> the Supreme Court recognized a right to privacy in the marital bedroom. The Appellants in *Griswold*, Estelle T. Griswold, the executive director of the Planned Parenthood League of Connecticut, and C. Lee Buxton, a physician and professor at Yale Medical School, were found guilty of being accessories to contraceptive use, and were fined \$100 each.<sup>169</sup> The *Griswold* Court recognized that neither the Constitution nor the Bill of Rights directly address matters of marital intimacy; however, considering First Amendment case law, the Court acknowledged that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>170</sup> Justice William O. Douglas, writing for the majority, invalidated the Connecticut statute, reasoning that the First, Third, Fourth, Fifth, and Ninth Amendments guarantee a zone of privacy under the Bill of Rights that is broad enough to encompass the marital relationship.<sup>171</sup> In his concurrence, Justice John Marshall Harlan II disagreed with the majority’s zone of privacy rationale, instead reasoning that “the proper constitutional inquiry . . . is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values ‘implicit in the concept of ordered liberty.’”<sup>172</sup> The scope of the privacy interest identified in *Griswold* is narrow—it is restricted to the intimate choices made within traditional heterosexual marriage.<sup>173</sup> However, the decision served as a catalyst for the evolution of sexual privacy jurisprudence over the next four decades.

Seven years later, *Eisenstadt v. Baird*<sup>174</sup> “clarifie[d] the nexus between the right to privacy and personal autonomy.”<sup>175</sup> Appellee William Baird

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classifications affecting fundamental rights); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848–49 (1992) (referring to the strict scrutiny analysis in *Roe v. Wade*).

166. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313–15 (1993); *see, e.g., Williams v. King (Williams V)*, 420 F. Supp. 2d 1224, 1231–32 (N.D. Ala. 2006).

167. *Williams v. Pryor (Williams II)*, 240 F.3d 944, 948 (11th Cir. 2001) (noting that the rational basis test is “a highly deferential standard that proscribes only the very outer limits of a legislature’s power”); *Williams V*, 420 F. Supp. 2d at 1231–32 (“Statutes tested under this standard are deemed constitutional if ‘there is *any reasonable conceivable state of facts* that could provide a rational basis for the statute’” (quoting *Beach Commc’ns, Inc.*, 508 U.S. 314)).

168. 381 U.S. 479 (1965).

169. *Id.* at 480.

170. *Id.* at 484; *see also Elimelekh, supra* note 8, at 270–71; Kaminer, *supra* note 8, at 401.

171. *Griswold*, 381 U.S. at 484.

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

173. *Id.* at 495 (Goldberg, J., concurring); *see Elimelekh, supra* note 8, at 272.

174. 405 U.S. 438 (1972).



was convicted under Massachusetts law and sentenced to five years' imprisonment for lecturing to a group of Boston University students about contraceptive methods and for giving an unmarried student a package of vaginal foam.<sup>176</sup> The Massachusetts law provided that only a registered pharmacist or physician may administer or prescribe contraceptive drugs or devices, and access to such drugs or devices were exclusively available to married persons.<sup>177</sup> Under this statutory scheme, three distinct classes were delineated: (a) married couples who may obtain contraceptives for the purpose of preventing pregnancy only from a doctor's or pharmacist's prescription; (b) an unmarried individual who may not obtain contraceptives for the prevention of pregnancy; and (c) couples or singles who may obtain contraceptives from anyone to prevent the spread of disease.<sup>178</sup> The Court applied the Equal Protection Clause of the Fourteenth Amendment and held that there was no "ground of difference that rationally explains the different treatment accorded married and unmarried persons" under the Massachusetts law.<sup>179</sup> Writing for the majority, Justice William J. Brennan maintained that, although the privacy interest discussed in *Griswold* "inhered" to the marital relationship, "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals."<sup>180</sup> According to the majority, the right to privacy, therefore, must belong to all individuals, married or single, to "be free from unwarranted governmental intrusion" into fundamental matters.<sup>181</sup> Hence, even a narrow reading of *Eisenstadt* finds implicit in Justice Brennan's equal protection analysis the recognition of a right to privacy for all people, married or unmarried, from state restriction of access to contraception.<sup>182</sup>

Dicta in *Carey v. Population Services International*<sup>183</sup> made clear that the Court had not yet recognized that the right to privacy encompasses a liberty interest in sexual autonomy.<sup>184</sup> In *Carey*, the Supreme Court held that state

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175. Kaminer, *supra* note 8, at 403 (citing *Eisenstadt*, 405 U.S. at 449).

176. *Eisenstadt*, 405 U.S. at 440–41.

177. *Id.* at 441. The relevant part of the Massachusetts statute at issue in *Eisenstadt v. Baird* reads,

A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [A] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

MASS. GEN. LAWS ANN. ch. 272, § 21A (West 1966).

178. *Eisenstadt*, 405 U.S. at 442.

179. *Id.* at 447.

180. *Id.* at 453.

181. *Id.* (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[T]he right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men.")); *see also* Kaminer, *supra* note 8, at 403.

182. *See* Donald H. J. Hermann, *Pulling the Fig Leaf off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 928 (2005).

183. 431 U.S. 678 (1977).

184. *Id.* at 685–86, 694 n.17 ("[T]he Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating

legislation limiting access to contraceptives was subject to the same strict scrutiny analysis as those statutes prohibiting access.<sup>185</sup> The majority maintained that, by restricting distribution channels to a small number of retail outlets, contraceptives were “considerably less accessible to the public, reduce[d] the opportunity for privacy of selection and purchase, and lessen[ed] the possibility of price competition.”<sup>186</sup> The Court held that such restrictions clearly burden one’s fundamental right to decide whether to beget a child free from undue governmental interference.<sup>187</sup> The decision to bear or beget a child free from unqualified intrusion by the state necessarily implicates some level of sexual privacy to engage in *nonreproductive* sexual behavior; however, in *Carey*, the Court was not yet prepared to articulate a right to sexual intimacy.<sup>188</sup>

In the context of abortion, *Planned Parenthood of Southeast Pennsylvania v. Casey*<sup>189</sup> reaffirmed an individual’s right to privacy<sup>190</sup> and bodily integrity,<sup>191</sup> and tacitly acknowledged that the liberty interest created in *Griswold*, *Eisenstadt*, and *Carey* is broad enough to encompass nonreproductive sexual behavior.<sup>192</sup> Writing for the plurality, Justice Sandra Day O’Connor maintained that matters

involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these

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[private consensual sexual] behavior among adults.”); *see also* Hermann, *supra* note 182, at 928.

185. *Carey*, 431 U.S. at 686.

186. *Id.* at 689.

187. *Id.*

188. *See* Elimelekh, *supra* note 8, at 273; Hermann, *supra* note 182, at 929–30.

189. 505 U.S. 833 (1992).

190. *Id.* at 849 (citing *Carey*, 431 U.S. 678; *Moore v. East Cleveland*, 431 U.S. 494, 97 (1977) (holding that an ordinance strictly defining the family unit was an intrusion into the family without a tangible state interest). *See generally* *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the right to contraception expounded in *Griswold* to unmarried individuals); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down Virginia’s miscegenation statute); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing a right to privacy in marital relationships); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (recognizing the right to procreate as fundamental); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (holding that there exists a fundamental right for parents to control the education of their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that state regulation of liberty must be reasonably related to a valid state end).

191. *Casey*, 505 U.S. at 849 (citing *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (holding that an inmate with a serious psychotic disorder may receive treatment against his will if the medicine is in his best medical interest); *Winston v. Lee*, 470 U.S. 753 (1985) (holding that surgical intrusion into a person’s body to extract evidence is unreasonable); *Rochin v. California*, 342 U.S. 165, 172 (1952) (applying due process to prohibit “conduct that shocks the conscience”).

192. *See Casey*, 505 U.S. at 853 (acknowledging that a woman may engage in sexual activity without the intention of becoming pregnant); *see also* Hermann, *supra* note 182, at 934; Kaminer, *supra* note 8, at 406–07.

matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>193</sup>

Recognizing that a state may have a legitimate interest in protecting potential human life, Justice John Paul Stevens's opinion, concurring in part and dissenting in part, reaffirmed a woman's right to personal liberty, which includes "a right to bodily integrity, a right to control one's person."<sup>194</sup> Justice Stevens reasoned that, just as our constitutional scheme rejects "the thought of giving government the power to control men's minds," so too does it reject government control of women's bodies.<sup>195</sup>

Despite the advances in privacy law with respect to contraception, the Court's exploration of the boundaries of the privacy doctrine has not always expanded individual liberties. In August 1982, Michael Hardwick was charged with engaging in a sexual act with another male in violation of a Georgia statute criminalizing sodomy.<sup>196</sup> Justice Byron White, writing for the majority, identified the issue of the case as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."<sup>197</sup> Justice White noted that the line of cases from *Griswold* through *Carey* did not extend the privacy right to encompass any and all adult private consensual sexual conduct.<sup>198</sup> The majority further maintained the long-standing history of antisodomy laws dispels any notion that a right to engage in homosexual sodomy is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed."<sup>199</sup>

In contemporary substantive due process jurisprudence, no case has greater capacity to broadly recast the privacy doctrine than the conundrum of *Lawrence v. Texas*. On the night of September 17, 1998, the Harris County Police Department was notified of a weapons disturbance and dispatched to the Houston apartment of John Geddes Lawrence.<sup>200</sup> Upon entering the apartment, the police witnessed Lawrence and another man, Tyrone Garner, engaged in anal sex in violation of the Texas Homosexual

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193. *Casey*, 505 U.S. at 851.

194. *Id.* at 915 (Stevens, J., concurring in part, dissenting in part).

195. *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)). Justice John Paul Stevens stated that a woman's liberty interest includes those decisions of the most private and personal nature. *Id.*

196. *Bowers v. Hardwick*, 478 U.S. 186, 187–88 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); see GA. CODE ANN. § 16-6-2 (1984) (providing that one caught engaged in a sexual act involving the sexual organ of one party and the mouth or anus of another shall be punished by up to twenty years of imprisonment).

197. *Bowers*, 478 U.S. at 190.

198. *Id.* at 191 ("[A]ny claim that these cases . . . stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupported").

199. *Id.* at 191–92 (alteration in original) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)). For antisodomy laws in existence at the time the Bill of Rights was ratified in 1791, see *id.* at 192 n.5. For antisodomy laws in existence at the time the Fourteenth Amendment was ratified in 1868, see *id.* at 193 n.6.

200. *Lawrence*, 539 U.S. at 562.

Conduct Law.<sup>201</sup> The men were arrested, held in jail overnight, charged, and eventually convicted by a justice of the peace.<sup>202</sup> On appeal, their convictions were upheld by the Texas Court of Appeals for the Fourteenth District relying on *Bowers v. Hardwick*.<sup>203</sup>

The U.S. Supreme Court reversed the Texas decisions on due process grounds, and in doing so, overruled *Bowers*.<sup>204</sup> Justice Anthony Kennedy maintained that because *Bowers* had not induced detrimental reliance but rather created uncertainty, stare decisis was merely instructive policy and not an “inexorable command.”<sup>205</sup> The majority opinion went on to explicitly adopt the conclusion of Justice Stevens in *Bowers* that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”<sup>206</sup> This is perhaps the most distinctive feature of *Lawrence*: the rejection of “bare moral disapproval” as a legitimate state interest.<sup>207</sup>

After examining an extensive body of history on the subject, Justice Kennedy concluded that, although there was a history of antisodomy laws condemning the act as immoral for heterosexual and homosexual couples, there was no long-standing history of legislation intending to target specifically homosexual behavior.<sup>208</sup> Justice Kennedy noted that it was not until the 1970s that any state singled out same-sex relations for criminal prosecution.<sup>209</sup> Acknowledging that tradition is a starting point, but not

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201. *Id.* at 562–63; see TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) (“A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”)

202. *Lawrence*, 539 U.S. at 563.

203. *Id.*

204. *Id.* at 577–78.

205. *Id.* at 577 (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

206. *Id.* at 577–78.

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions, by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

*Id.*

207. See Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1495 (2008) (citing *Lawrence*, 539 U.S. at 577–78).

208. *Lawrence*, 539 U.S. at 568–71; see, e.g., 2 JOEL PRENTISS BISHOP, CRIMINAL LAW § 1028 (T. H. Flood & Co. 1923) (1865); ROBERT DESTY, A COMPENDIUM OF AMERICAN CRIMINAL LAW 143 (1882); JOHN WILDER MAY, THE LAW OF CRIMES § 203 (Fred B. Rothman & Co. 1985) (1881).

209. *Lawrence*, 539 U.S. at 570 (citing 1977 Ark. Gen. Acts 828; 1983 Kan. Sess. Laws 652; 1974 Ky. Acts 847; 1977 Mo. Laws 687; 1973 Mont. Laws 1339; 1977 Nev. Stat. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399). Only nine states passed

always an ending point of substantive due process analysis, Kennedy concluded that recent history has demonstrated an “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>210</sup>

Although Justice Kennedy acknowledged the viability of deciding *Lawrence* on equal protection grounds, he emphatically declined to do so, instead viewing the issue at hand as whether a broader liberty interest in sexual intimacy exists under the due process clause.<sup>211</sup> The Court declined to decide whether the right asserted in *Lawrence* was fundamental, and consequently the appropriate standard of review under the traditional substantive due process framework remains indeterminate.<sup>212</sup> Instead, the Court examined whether there was a rational basis for the existence of a statute criminalizing same-sex intimacy, and concluded that “no legitimate state interest supported a restriction on private sexual activity between two consenting adults in private that did not cause physical or mental harm to either of the participating parties.”<sup>213</sup> Hence, the majority found that, because no legitimate state interest existed, the Texas statute did not even pass rational basis review, and therefore the issue of whether sexual intimacy involved a fundamental right need not be resolved under a strict scrutiny analysis.<sup>214</sup>

Because of its opacity, Justice Kennedy’s opinion in *Lawrence* has sparked much debate and criticism among legal scholars and jurists across the interpretive continuum. Courts and commentators who interpret *Lawrence* broadly have lauded the case as reinventing privacy jurisprudence—recasting pure privacy cases as liberty cases in which the constitutionality of a statute can be “assessed by how well [it] respect[s] the core of decisional autonomy due life-defining acts and choices.”<sup>215</sup> Many note that the spatial and temporal dimensions of *Lawrence* are broad, “involv[ing] liberty of the person both in its spatial and in its more transcendent dimensions.”<sup>216</sup> Additionally, some who have interpreted *Lawrence* broadly maintain that *Lawrence* forecloses the state’s ability to

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legislation criminalizing same-sex relations, and of those, five had repealed them since 1992. *Id.*

210. *Id.* at 572.

211. *Id.* at 574–75; see also Barnett, *supra* note 207, at 1493; Hermann, *supra* note 182, at 944.

212. See Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1413 (2008). It is noteworthy that Justice Anthony Kennedy began his opinion focusing on the protection of liberty, rather than privacy. Barnett, *supra* note 207, at 1493–94. The focus on liberty, rather than a fundamental right to privacy, deviates from the modern substantive due process analysis provided by *Glucksberg*, and defies unanimous interpretation. *Id.*

213. Hermann, *supra* note 182, at 941 (citing *Lawrence*, 539 U.S. at 567–73).

214. *Id.*

215. See, e.g., John G. Culhane, “Lawrence-ium”: *The Densest Known Substance?*, 11 WIDENER L. REV. 259, 266 (2005); Glazer, *supra* note 212, at 1415–16.

216. *Lawrence*, 539 U.S. at 562; see, e.g., Glazer, *supra* note 212, at 1415–16 & n.238 (citing courts and commentators who have interpreted the spatial and temporal dimensions of *Lawrence* broadly).

legislate morality.<sup>217</sup> Perhaps a more refined, less broad, interpretation is that morality alone is not a sufficient state interest.

In his dissenting opinion to *Lawrence*, Justice Antonin Scalia criticized the Court's decision to overturn *Bowers* while remaining silent on whether sexual autonomy was a fundamental right or considering what level of scrutiny should apply.<sup>218</sup> An "emerging awareness," Justice Scalia asserted, does not evince the kind of deeply rooted historical tradition the Court will acknowledge as a fundamental right.<sup>219</sup> After *Lawrence*, several courts have interpreted the decision narrowly, declining to use the holding in *Lawrence* to invalidate statutes banning same-sex adoption,<sup>220</sup> reducing sentences for statutory same-sex rape,<sup>221</sup> and banning the sale of sexual devices.<sup>222</sup> Other courts, including the Fifth Circuit, have found *Lawrence* broad enough to encompass liberty and autonomy of self.<sup>223</sup> Part II of this Note tracks the post-*Lawrence* decisions assessing the ability of *Lawrence* to protect an individual's liberty interest to access and use sexual devices.<sup>224</sup>

Still, a third school of legal theorists maintains that the *Lawrence* Court's self-conscious departure from the modern substantive due process analysis "points the way to an alternative" means of resolving due process issues: "protecting a 'presumption of liberty.'"<sup>225</sup> Proponents go on to state that the original meaning of the Ninth Amendment, along with the Privileges or Immunities Clause of the Fourteenth Amendment, "supports the conclusion that the Constitution *does* protect a right to liberty, as the Court hints in *Lawrence*."<sup>226</sup> Hence, *Lawrence* lays the foundation upon which a doctrine recognizing a general presumption of liberty may be built, permitting the Supreme Court to disentangle itself from the *Glucksberg* two-step.<sup>227</sup>

Though thematically distinct from the sexual privacy cases discussed *supra*, the U.S. Supreme Court's decision in *Washington v. Glucksberg*<sup>228</sup>

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217. See, e.g., Glazer, *supra* note 212, at 1416.

218. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting). Compare *id.* (stating that the *Lawrence* majority "appl[ied] an unheard-of form of rational-basis review"), with *Williams v. King (Williams V)*, 420 F. Supp. 2d 1224, 1252–53 (N.D. Ala. 2006) ("The rational-basis review applied in *Lawrence* is rare, but it is not 'unheard-of.' . . . [I]t is the form of review contemplated in . . . *Carolene Products*' footnote 4, to correct institutional imbalances when . . . the democratic process does not operate as it should.").

219. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

220. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004); Glazer, *supra* note 212, at 1417.

221. *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004); Glazer, *supra* note 212, at 1417–18.

222. See *Williams v. Attorney Gen. (Williams IV)*, 378 F.3d 1232 (11th Cir. 2004). But see *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008); see also Glazer, *supra* note 212, at 1418.

223. *Reliable Consultants, Inc.*, 517 F.3d at 740; see Glazer, *supra* note 212, at 1415–16.

224. See *infra* Part II.

225. Barnett, *supra* note 207, at 1495.

226. *Id.* at 1498.

227. See *id.*

228. 521 U.S. 702 (1997).

clearly sets forth the Court's "established method" of conducting contemporary substantive due process analysis.<sup>229</sup> Washington State has always legally prohibited assisted suicide.<sup>230</sup> The statute, in its current iteration, makes it a felony for one to "'promote a suicide attempt [by] knowingly caus[ing] or aid[ing] another person to attempt suicide.'"<sup>231</sup> In January 1994, three Washington physicians who would assist terminally ill patients in committing suicide but for Washington's criminal prohibition, along with three anonymous terminal patients, and the nonprofit Compassion in Dying sought a declaration from Washington State and its Attorney General that the statute was patently unconstitutional.<sup>232</sup> The Western District of Washington found Washington's statute banning assisted suicide to be "unconstitutional because it 'places an undue burden on the exercise of [that] constitutionally protected liberty interest.'"<sup>233</sup> The U.S. Court of Appeals for the Ninth Circuit, disagreed, citing historical precedent.<sup>234</sup> The respondents petitioned to have the case reheard en banc, where the Ninth Circuit affirmed the District Court's decision, relying on *Casey* and *Cruzan v. Director, Missouri Department of Health*.<sup>235</sup>

Writing for a unanimous Court, Chief Justice William H. Rehnquist found that the right to assisted suicide is not a fundamental liberty interest protected under the Due Process Clause of the Fourteenth Amendment.<sup>236</sup> In analyzing the validity of the Washington statute, the Court clearly restated its "establish method of substantive-due-process analysis."<sup>237</sup> This analysis would come to be known as the *Glucksberg* Two-Step:

First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively,

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229. *Id.* at 720.

230. *Id.* at 706. Washington's first Territorial Legislature forbade "'assisting another in the commission of self-murder'" in 1854. *Id.* at 706–07.

231. WASH. REV. CODE § 9A.36.060(1)–(2) (West 2009); *Glucksberg*, 521 U.S. at 707 (quoting WASH. REV. CODE § 9A.36.060(1)).

232. *Glucksberg*, 521 U.S. at 707–08.

233. *Id.* at 708 (alteration in original) (quoting *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1465 (W.D. Wash. 1994)). In reaching its conclusion, the court relied on *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992) ("[T]hat a law which serves a valid purpose . . . has the incidental effect of making it more difficult . . . to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State [interfere with] the liberty protected by the Due Process Clause."), and *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (holding that a state may permissibly apply a clear and convincing evidence standard when assessing whether or not to discontinue life-sustaining treatment). *Glucksberg*, 521 U.S. at 708. The district court also found that the Washington statute was unconstitutional on equal protection grounds. *Id.* (citing *Compassion in Dying*, 850 F. Supp. at 1466).

234. *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (1995) ("In the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction."); see *Glucksberg*, 521 U.S. at 708–09 (summarizing the procedural history of *Washington v. Glucksberg*).

235. 497 U.S. 261; see also *Glucksberg*, 521 U.S. at 709.

236. *Glucksberg*, 521 U.S. 702.

237. *Id.* at 720.

“deeply rooted in this Nation’s history and tradition.” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decisionmaking,” that direct and restrain our exposition of the Due Process Clause. . . . [T]he Fourteenth Amendment “forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”<sup>238</sup>

Chief Justice Rehnquist’s formula, though appropriated from earlier decisions, is the test used by contemporary courts when approaching questions of fundamental rights.<sup>239</sup>

D. *Obscenity Doctrine as a Means of Defining Normative Boundaries of Sexual Expression*

All eight states that have enacted bans on sexual device distribution have done so as part of those states’ general anti-obscenity legislation.<sup>240</sup> Part I.D of this Note examines the relevant obscenity doctrine as it relates to sexual expression.

In considering whether one may possess obscene films within the confines of one’s home, the U.S. Supreme Court held in *Stanley v. Georgia*<sup>241</sup> that the “mere private possession of obscene matter cannot constitutionally be made a crime.”<sup>242</sup> Justice Thurgood Marshall, writing for the court, reaffirmed Justice Louis Brandeis’s sentiment in *Olmstead v. United States*<sup>243</sup>—that the right to be let alone is the most comprehensive and most valued of all rights<sup>244</sup>—and acknowledged a “fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”<sup>245</sup> Although the Court acknowledged Robert Eli Stanley’s “right to satisfy his intellectual and emotional needs in the privacy of his own home,”<sup>246</sup> the outcome implied that Stanley also had a right to satisfy his sexual needs within his home.<sup>247</sup>

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238. *Id.* at 721 (citations omitted).

239. *See* Barnett, *supra* note 207, at 1488–89.

240. *See supra* note 86 and accompanying text; Part I.B.

241. 394 U.S. 557, 559 (1969).

242. *Id.* at 559.

243. 277 U.S. 438 (1928).

244. *Stanley*, 394 U.S. at 564; *see supra* note 181 and accompanying text.

245. *Stanley*, 394 U.S. at 564.

246. *See id.* at 565.

247. *See id.* (“He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”).



The Court maintained that there may be justifications for obscenity statutes provided they do not reach into the privacy of one's own home.<sup>248</sup>

In *Miller v. California*,<sup>249</sup> the U.S. Supreme Court set forth the standards by which obscenity is assessed. In considering the constitutionality of a California statute prohibiting the mailing of unsolicited sexually explicit materials, the Court answered the broader question—under what circumstances may the states regulate material as obscene? The Court “confine[d] the permissible scope of such regulation to works which depict or describe sexual conduct.”<sup>250</sup> In determining whether material is obscene under *Miller*, the trier of fact must consider: (a) whether the average person, applying contemporary community standards (not national standards) would find that the work appealed to prurient interests; (b) whether the work depicted or described sexual conduct, as defined by state law, in a “patently offensive” manner; and (c) whether the work, in its totality, lacked serious literary, artistic, scientific, or political value.<sup>251</sup> Justice Warren E. Burger, writing for the Court, maintained that “no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct” as defined by state law.<sup>252</sup>

In *Paris Adult Theatre I v. Slaton*,<sup>253</sup> the Court considered the constitutionality of a Georgia statute, regulating the alleged obscene materials exhibited at an adult theatre.<sup>254</sup> The Court vacated and remanded the lower court's decision, concluding that there was nothing in the Constitution prohibiting states from regulating obscene materials—even those viewed only by consenting adults—as long as the restrictive statute comports with First Amendment standards.<sup>255</sup>

In the wake of *Lawrence*, the relevance of obscenity law has been called into question.<sup>256</sup> The *Lawrence* Court's assertion that morality alone is not a sufficient reason to uphold laws prohibiting a particular act calls into question the basic premise of obscenity doctrine—“if sexual activity

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248. *Id.*

249. 413 U.S. 15 (1973).

250. *Id.* at 24.

251. *Id.* at 24–25.

252. *Id.* at 27. For clarification on what the Court deems “patently offensive,” see *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (finding scenes in the film *Carnal Knowledge*, in which it was understood that sexual acts were taking place, not to be patently offensive or obscene).

253. 413 U.S. 49 (1973).

254. GA. CODE ANN. § 26-2101 (1933) (current version at GA. CODE ANN. § 16-12-80 (2007)). The Georgia statute at issue in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, is a precursor to the anti-obscenity statute challenged in *This That And The Other Gift And Tobacco, Inc. v. Cobb County, Ga.*, 285 F.3d 1319 (11th Cir. 2002). See *supra* notes 143–44 and accompanying text.

255. *Paris Adult Theatre I*, 413 U.S. at 69–70.

256. See Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 301 (2008) (characterizing obscenity law post-*Lawrence* as an anomaly, at best).

between consenting adults can no longer be criminalized, how can descriptions or depictions of such activity be criminalized?"<sup>257</sup>

## II. THE DEBATE: THE COURTS DIVIDE OVER HOW AND WHETHER THE JUDICIARY SHOULD UPHOLD STATE BANS ON THE DISTRIBUTION OF SEXUAL DEVICES

Part II focuses on the circuit split surrounding the issue of whether statutes banning the sale of sexual devices may be invalidated by invoking a fundamental right to sexual privacy. Part II.A examines the conflicting post-*Lawrence* decisions of the Fifth and Eleventh Circuits and considers the scholarly analysis advocating judicial conservatism in upholding state sexual device bans. Part II.B discusses a number of state court challenges and examines how those decisions invalidated anti-sexual device statutes before *Lawrence*.

### A. *Rationally Related: Upholding Anti-Sexual Device Legislation*

#### 1. Judicial Decisions Upholding State Bans on the Distribution of Sexual Devices

Immediately after the enactment of the 1998 Alabama Anti-Obscenity Enforcement Act, Sherri Williams, the owner of the store Pleasures with locations in Huntsville and Decatur, Alabama, filed suit to enjoin the statute's enforcement.<sup>258</sup> The ACLU filed an amicus brief on behalf of the user and vendor plaintiffs, and argued that the statute violated a fundamental right to sexual intimacy because it impermissibly burdened one's ability to use sexual devices.<sup>259</sup> For the next nine years, Williams's claim would be considered by the Eleventh Circuit and the U.S. District Court for the Northern District of Alabama in a series of six decisions, referred to collectively as *Williams v. Attorney General*. The district court distinguished *Williams* from *Lawrence* and held that the statute survived rational basis scrutiny.<sup>260</sup> The Eleventh Circuit, in *Williams v. Morgan* ("*Williams VI*"),<sup>261</sup> found that public morality remained a legitimate rational basis justification after *Lawrence*, and hence upheld the constitutionality of the Alabama statute.<sup>262</sup>

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257. *See id.* at 301.

258. *See* ALA. CODE § 13A-12-200.2 (2005) (amended 1998); *Alabama May Soon Be Alone on Sex Toy Sales Ban*, HUNTSVILLE TIMES (Ala.), Feb. 21, 2008, at 2B. *See generally* Holt, *supra* note 162, at 928–29.

259. *See Williams v. Attorney Gen. (Williams IV)*, 378 F.3d 1232, 1233 (11th Cir. 2004); *see also* Theiss, *supra* note 15, at 481–82. The user plaintiffs included women who used sexual devices therapeutically, and the vendor plaintiffs included both store owners and individuals who sold sexual devices at home parties. *Williams v. Pryor (Williams III)*, 220 F. Supp. 2d 1257, 1265–67 (N.D. Ala. 2002); *see also* Theiss, *supra* note 15, at 482.

260. *Williams v. Pryor (Williams I)*, 41 F. Supp. 2d 1257, 1282–84 (N.D. Ala. 1999).

261. 478 F.3d 1316 (11th Cir. 2007).

262. *Id.*

In *Williams IV*,<sup>263</sup> the court addressed the issue of whether the challenged statute infringed upon some fundamental right as guaranteed by the Constitution.<sup>264</sup> Citing *Glucksberg*, the Eleventh Circuit noted that although the Supreme Court has enumerated a number of rights touching on privacy and personal autonomy as fundamental, this does not mean that any liberty sounding in personal autonomy may be afforded constitutional protection.<sup>265</sup> In considering the ACLU's due process claim, the court held that, although "[t]he [Supreme] Court has been presented with repeated opportunities to identify a fundamental right to sexual privacy," it has consistently failed to do so.<sup>266</sup> The Eleventh Circuit then focused on the Court's "most recent opportunity to recognize a fundamental right to sexual privacy," *Lawrence v. Texas*, and declined to read *Lawrence* as announcing a new fundamental right because the Court did not engage in the traditional *Glucksberg* analysis used to identify new fundamental rights.<sup>267</sup>

*Williams IV* was subsequently remanded to the district court for further proceedings, which then returned to the Eleventh Circuit on appeal in *Williams VI*. The issue in *Williams VI* was whether public morality remained a legitimate rational basis for challenging a statute after *Lawrence*.<sup>268</sup> The court distinguished the private sexual conduct targeted by the Texas statute in *Lawrence* from the public, commercial statute at issue in *Williams*, maintaining that "[t]o the extent *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is *both private and non-commercial*."<sup>269</sup> The Eleventh Circuit continued its analysis stating that, although public morality was insufficient to sustain the Texas statute involving private sexual behavior, promoting public morality remains a sufficient rational basis for sustaining statutes regulating private, commercial activity.<sup>270</sup> Additionally, the *Williams VI* court refused to read *Lawrence* as rendering public morality "altogether illegitimate as a rational basis,"<sup>271</sup> instead upholding the

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263. 378 F.3d 1232.

264. See *id.* at 1234; Elimelekh, *supra* note 8, at 265 (summarizing *Williams IV*).

265. *Williams IV*, 378 F.3d at 1235 (citing *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997)).

266. *Id.* at 1235–36 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 n.5 (1977)).

267. *Id.* at 1237. Traditional substantive due process analysis, as reaffirmed in *Washington v. Glucksberg*, has two main features: (a) the Due Process Clause protects those rights and liberties that are deeply rooted in the history and traditions of Americans and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Glucksberg*, 521 U.S. at 720–21 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)); and (b) the fundamental liberty interest must be carefully described and the infringement must be narrowly tailored to achieve a compelling state interest, *id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

268. *Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1318 (11th Cir. 2007).

269. *Id.* at 1322; see *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

270. *Williams VI*, 478 F.3d at 1322–23.

271. *Id.* at 1323.

previously articulated notion that “[t]he law . . . is constantly based on notions of morality.”<sup>272</sup>

The Eleventh Circuit’s ultimate decision in *Williams VI* was not well received by Alabamians, who criticized the court’s holding as “backwards” and “embarrassing.”<sup>273</sup> The *Birmingham News* described Alabama Attorney General Troy King’s quixotic quest to uphold the statute as “bizarre and costly,” and noted State Representative John Rogers’s discontent with “Alabama’s embarrassing habit of bending backward to *be* backward.”<sup>274</sup> The article further criticized the legislature’s misplaced priorities—choosing to amend the state’s anti-obscenity law to include a ban on sexual devices instead of resolving issues of education, poverty, immigration, and drugs.<sup>275</sup> Interestingly, in an editorial seemingly opposed to the use of sexual devices, Huntsville resident Samuel L. Smith, Sr., adopted the libertarian view that one’s own moral compass, not the law, should govern in matters of sexual privacy.<sup>276</sup>

The rationale set forth by the Eleventh Circuit’s decisions in the *Williams* cases was reiterated and refined in a dissenting opinion by Judge Emilion Garza of the Fifth Circuit.<sup>277</sup> Following the February 12, 2008, decision of the Fifth Circuit in *Reliable Consultants, Inc. v. Earle*, the State of Texas petitioned the Fifth Circuit to rehear the case en banc.<sup>278</sup> The rehearing was denied; however, Judge Garza, in his dissenting opinion, offered a comprehensive rebuttal to the *Reliable Consultants, Inc.* majority’s prior decision.<sup>279</sup> To Judge Garza, the *Reliable Consultants, Inc.* court made two fatal errors: (1) it misunderstood the right articulated in *Lawrence*, and (2) it extended the liberty interest asserted in *Lawrence* far beyond its limits.<sup>280</sup> According to Garza, the Court in *Lawrence* failed to announce a fundamental right triggering strict scrutiny analysis, but rather recognized only a narrow privacy interest protecting “two adults who, with full and mutual consent from each other, engage[] in sexual practices” within their homes.<sup>281</sup> Although the level of scrutiny employed in *Lawrence* is indeterminate at best, Garza avowedly claims that the Court applied rational basis analysis, hence implying that a fundamental right was not recognized.<sup>282</sup> By declining to assign a level of scrutiny, the *Reliable*

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272. *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

273. See John Archibald, *Rogers Out to Bust Sex Toy Ban*, BIRMINGHAM NEWS (Ala.), Jan. 20, 2008, at 15A.

274. *Id.*

275. *Id.*

276. Samuel L. Smith, Sr., Letter to the Editor, *Out of the Rain*, HUNTSVILLE TIMES (Ala.), Apr. 13, 2008, at 22A.

277. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), *reh’g denied*, 538 F.3d 355 (5th Cir. 2008) (Garza, J., dissenting).

278. *Reliable Consultants, Inc.*, 538 F.3d at 358.

279. *Id.*

280. *Id.*

281. *Id.* at 359 (alteration in original) (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

282. *Id.*

*Consultants, Inc.* court instead took its analysis outside the realm of traditional substantive due process jurisprudence and opened its assessment to significant errors.<sup>283</sup> The *Reliable* majority erred by recasting the right announced in *Lawrence* as a sweeping privacy interest encompassing a commercial right to promote sexual devices; this, maintained Judge Garza, is inconsistent with the very narrow privacy interest actually articulated in *Lawrence*.<sup>284</sup> In other words, the Fifth Circuit “improperly broadened the scope of this narrow *personal* liberty interest to encompass *commercial* activity,”<sup>285</sup> and in the process they created a circuit split.<sup>286</sup>

In the March 2004 decision of *PHE, Inc. v. Mississippi*, the Supreme Court of Mississippi affirmed a Chancery Court ruling upholding the constitutionality of section 97–29–105 of the Mississippi Code.<sup>287</sup> Section 97–29–105 provided that “knowingly selling, advertising, publishing or exhibiting any three-dimensional device designed or marketed as useful primarily for the stimulation of human genitalia (‘sexual devices’) is illegal.”<sup>288</sup> Vendors and users of sexual devices brought suit seeking a declaratory judgment that Mississippi’s sexual device statute violated the state’s constitution.<sup>289</sup> Plaintiffs included “vendor plaintiff” PHE, Inc., a corporation that did business as Adam & Eve, known to use the U.S. Postal Service to advertise and sell its products, and “user plaintiffs” who were Mississippi residents who wished to buy sexual devices.<sup>290</sup> The vendor plaintiffs argued that the state statute unduly burdened their rights to advertise their products, and the user plaintiffs maintained that the state violated their right to be free from unwarranted governmental intrusion into their private sexual practices.<sup>291</sup> The state moved for summary judgment on the grounds that (1) limiting the distribution of sexual devices did not violate any constitutional right, and (2) restricting advertisements regarding sexual devices was consistent with the contours of regulated commercial speech.<sup>292</sup>

Judge William L. Waller, writing on behalf of the court, found that there is no “‘independent fundamental right of access to purchase [sexual devices],’ just as the United States Supreme Court found that there was no independent fundamental right of access to purchase contraceptives.”<sup>293</sup>

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283. *Id.*

284. *Id.*

285. *Id.* at 360.

286. *Id.* at 361.

287. *PHE, Inc. v. State*, 877 So. 2d 1244 (Miss. 2004); see MISS. CODE ANN. § 97-29-105 (West 1999) (forbidding the sale, advertisement, publication, or exhibition of any device meant to stimulate the genitals).

288. *PHE, Inc.*, 877 So. 2d at 1246 (citing MISS. CODE ANN. § 97-29-105); see *supra* notes 147–48 and accompanying text.

289. *PHE, Inc.*, 877 So. 2d at 1246.

290. *Id.*

291. *Id.*

292. *Id.* at 1247.

293. *Id.* at 1248 (alteration in original) (quoting *Carey v. Population Servs. Int’l*, 431 U.S. 678, 678–88 (1977)).

The Mississippi Supreme Court stated its disagreement with other courts' analogous treatment of contraceptives and sexual devices.<sup>294</sup> The court held that society's interest in protecting the right to control conception is of greater magnitude than the interest in protecting the right to purchase sexual devices.<sup>295</sup> Additionally, the Mississippi Supreme Court maintained that those who suffer from sexual dysfunction should be treated by a physician or psychologist who may prescribe sexual devices;<sup>296</sup> these devices, the court asserted, are distinct from the "novelty and gag gifts" sold by the vendor plaintiffs.<sup>297</sup>

The court next addressed whether section 97–29–105's prohibition on advertising, sale, and distribution of sexual devices violates the vendor plaintiffs' constitutional right to free speech.<sup>298</sup> Judge Waller found that sexual devices are, at best, symbolic speech, and therefore subject to the test set forth in *United States v. O'Brien*.<sup>299</sup> The *O'Brien* content-neutral test permits the regulation of symbolic speech if, by proscribing the conduct, the government is furthering a substantial government interest, if the government's interest is unrelated to suppressing free speech, and provided that the restriction is no greater than that necessary to advance the state interest.<sup>300</sup> Because plaintiffs did not raise allegations questioning any of the *O'Brien* factors, the Mississippi Supreme Court applied the *O'Brien* test and found that sexual devices were not within the ambit of symbolic speech, and therefore not constitutionally protected.<sup>301</sup>

## 2. Defending Anti-vibrator Legislation After *Lawrence*

Following the 2003 decision *Lawrence v. Texas* there has been limited scholarship declining to extend the privacy interest created in *Lawrence* beyond the act of homosexual sodomy. The two most notable analyses maintain that (1) after *Lawrence*, the regulation of morality remains a

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294. *Id.*

295. *Id.*

296. *See id.* at 1248–49.

297. *Id.* at 1249.

298. *Id.* at 1249–50.

299. 391 U.S. 367 (1968).

300. *PHE, Inc.*, 877 So. 2d at 1249 (quoting *O'Brien*, 391 U.S. 367). In *United States v. O'Brien*, the U.S. Supreme Court held that a statutory regulation of conduct that embodied both speech and nonspeech elements was "sufficiently justified if: (a) it further[ed] an important or substantial governmental interest; [(b)] if the governmental interest [was] unrelated to the suppression of free expression; and [(c)] if the incidental restriction on alleged First Amendment freedoms [was] no greater than [was] essential to the furtherance of that interest." 391 U.S. at 377.

301. *See PHE, Inc.*, 877 So. 2d at 1249.

legitimate state interest<sup>302</sup> and (2) that substantive due process should be replaced by the political question doctrine.<sup>303</sup>

Proponents of the first view hold that, in overruling *Bowers v. Hardwick*, the *Lawrence* Court merely broadened the boundary of privacy to include private, consensual, homosexual conduct, and did not recognize a fundamental right to privacy in homosexual conduct.<sup>304</sup> To arrive at this conclusion, one must reject Justice Scalia's tacit admission that *Lawrence* represented the abandonment of morality as a legitimate state interest,<sup>305</sup> and instead accept that morality remains a viable interest outside the limited right recognized in *Lawrence*.<sup>306</sup>

The second argument declining to overrule sexual device legislation acknowledges that *Lawrence* recognized a fundamental right to sexual privacy whose boundaries have not yet been explored, and holds that these questions of privacy are best addressed by state legislatures.<sup>307</sup> In applying substantive due process, privacy opinions presume that judges have "the ability and duty to determine those personal choices that define human life and sustain personal dignity," and can do so more effectively than democratically elected representatives.<sup>308</sup> By dictating a uniform, one-size-fits-all definition of personal dignity and autonomy in terms of sexual activity, the Court has crafted a doctrine inconsistent with protecting personal property rights, such as that implicated by surveillance technology, the Internet, and media communications.<sup>309</sup> Consequently, one's overall privacy, sexual and otherwise, is best protected by a democratic system that puts the issue in a broader perspective, and encompasses broader individual interests.<sup>310</sup>

### B. Cases Invalidating Statutes Prohibiting the Sale of Sexual Devices

Seeking to capitalize on the presumed market of Texans using or seeking to use sexual devices as an aspect of their sexual experiences, Reliable Consultants, Inc., doing business as Dreamer's and Le Rouge Boutique, sought declaratory action in the U.S. District Court for the Western District

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302. Douglas E. Nauman, Note, *Where Sexual Privacy Meets Public Morality: How Williams v. King Is Instructive for the Fourth Circuit in Applying Morality as a Legitimate State Interest After Lawrence v. Texas*, 29 N.C. CENT. L.J. 127, 145 (2006).

303. Patrick M. Garry, *A Different Model for the Right to Privacy: The Political Question Doctrine as a Substitute for Substantive Due Process*, 61 U. MIAMI L. REV. 169, 170, 186 (2006).

304. See Nauman, *supra* note 302, at 143.

305. *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting); see Nauman, *supra* note 302, at 143–45.

306. *Williams v. King (Williams V)*, 420 F. Supp. 2d 1224, 1247–48 (N.D. Ala. 2006); Nauman, *supra* note 302, at 145 (maintaining that *Williams V* is distinguished from *Lawrence* because the issue in *Williams* was not encapsulated in the limited right to engage in homosexual sodomy as defined in *Lawrence*).

307. See Garry, *supra* note 303, at 186.

308. *Id.* at 187.

309. *Id.* at 187–88.

310. *Id.* at 189–90.

of Texas to enjoin the enforcement of the statutory measures prohibiting the sale of sexual devices.<sup>311</sup> The plaintiff's claim, predicated on the existence of a due process right to sexual autonomy, required the court to consider whether *Lawrence* had announced a fundamental right to sexual privacy sufficiently broad to render the Texas statute "impermissibly burdens[ome on] the individual's substantive due process right to engage in private intimate conduct of his or her choosing."<sup>312</sup> Analyzing the language in *Lawrence*, Judge Thomas Morrow Reavley of the Fifth Circuit, writing for the majority, found that in answering its stated question in the affirmative—" "[whether] petitioners' criminal convictions for *adult consensual sexual intimacy* in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment"<sup>313</sup>—*Lawrence* recognized a right to be free from government interference regarding private sexual behavior.<sup>314</sup> Acknowledging the *Lawrence* Court's failure to state the applicable level of scrutiny, Judge Reavley explained that, as an inferior federal court, the court of appeals need only apply *Lawrence* to the Texas statute, not address the question of scrutiny.<sup>315</sup> The Fifth Circuit further held that justifying a statute as solely morally based can no longer satisfy rational relationship scrutiny after *Lawrence*.<sup>316</sup> Perhaps recognizing that public morality was an insufficient justification for the statute, the state asserted additional interests in protecting children from "improper sexual expression" and "protecting 'unwilling adults' from exposure";<sup>317</sup> to this end, the court found no rational relationship between the statute and these interests.<sup>318</sup> Although urged by plaintiffs, the Fifth Circuit declined to explore the commercial speech claim "because if it is necessary, it may be premature."<sup>319</sup>

Judge Rhesa Hawkins Barksdale, dissenting and concurring from the *Reliable Consultants, Inc.* majority, distinguished the private use of sexual aids in the home from the devices' commercial promotion.<sup>320</sup> Like Judge

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311. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 741–42 (5th Cir. 2008).

312. *Id.* at 744; see *Lawrence v. Texas*, 539 U.S. 588, 564 (2003).

313. *Reliable Consultants, Inc.*, 517 F.3d at 744 (quoting *Lawrence*, 539 U.S. at 564).

314. *Id.*

315. See *id.* at 744–45.

316. Compare *id.* at 745 with *supra* note 272 and accompanying text (illuminating the circuit split between the fifth and eleventh Circuits regarding whether it is permissible to legislate morality after *Lawrence*).

317. *Reliable Consultants, Inc.*, 517 F.3d at 746.

318. *Id.* at 746.

319. *Id.* at 747. Although not considered by the court in *Reliable Consultants, Inc.*, the extent to which government may regulate commercial speech is evaluated under the holding in *Central Hudson Gas and Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 566 (1980). Under *Central Hudson*, for a regulation on speech to be constitutional, the speech in question must (a) be protected by the First Amendment, i.e., concern lawful activity and not be misleading; (b) the asserted governmental interest must be substantial; (c) and the regulation must "directly advanc[e]" the governmental interest and "not [be] more extensive than is necessary to serve that interest." *Id.*

320. *Reliable Consultants, Inc.*, 517 F.3d at 748 (Barksdale, J., dissenting in part and concurring in part).



Emilio M. Garza in his dissent from the motion for rehearing en banc, Judge Barksdale believed that the majority's failure to assign a level of scrutiny to the newly promulgated right was fatal, and that rational basis scrutiny should have been properly applied.<sup>321</sup> Furthermore, she subscribed to the Eleventh Circuit's interpretation in *Williams VI* that *Lawrence*'s rejection of morality as a legitimate public interest only applies to those acts which are "both private and non-commercial."<sup>322</sup>

Although the privacy interest acknowledged in *Lawrence*, however it is defined, will likely be the dominant interpretive doctrine employed by courts confronting sexual autonomy, state court cases invalidating sexual device legislation prior to the watershed 2003 decision may be instructive in crafting sound challenges to anti-obscenity statutes.

In the pre-*Lawrence* decision *Louisiana v. Brennan*,<sup>323</sup> the Louisiana State Supreme Court struck down a statutory provision banning the promotion of sexual devices in order to promote morality and public order, holding that the statutory prohibition did not bear a rational relationship to that interest, and was therefore unconstitutional.<sup>324</sup>

Defendant Christine Brennan was arrested on three occasions for selling sexual devices at her dance wear boutique.<sup>325</sup> The devices, both those explicitly marketed for sexual use and those promoted as muscle massagers, were located in a section of the boutique separated by latticework and labeled "For adults only."<sup>326</sup> Undercover police agents purchased Ms. Brennan's wares and seized the rest upon the defendant's arrest.<sup>327</sup> Brennan pleaded not guilty to the charges and filed a motion to quash on state constitutional grounds.<sup>328</sup> Defense counsel alleged that the statute "violate[d] the privacy rights of the defendant and her customers under *Griswold v. Connecticut*, and its progeny, and privacy rights as guaranteed by Article 1, [section] 5, of the Louisiana Constitution."<sup>329</sup> The state maintained that Louisiana Revised Statute section 14:106.1 promoted a legitimate government interest, the protection of minors and nonconsenting adults from exposure to obscene materials, and that a ban on all sexual devices was a rational means to achieve that interest.<sup>330</sup>

Judge Bernette Johnson, writing for the majority, declined to "extend constitutional protection in the way of privacy to the promotion of sexual

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321. *Id.* at 749.

322. *Id.* (quoting *Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1322 (11th Cir. 2007)).

323. 772 So.2d 64 (La. 2000).

324. *Id.* at 64.

325. *Id.* at 65.

326. *Id.* at 66.

327. *Id.*

328. *Id.*

329. *Id.* (quoting *State v. Brennan*, 1998-2368 (La. App. 1 Cir. 7/1/99); 739 So. 2d 368, 369).

330. *Id.* at 67-68.

devices,”<sup>331</sup> and instead applied rational basis scrutiny to ensure that a legitimate governmental interest supported the legislation, and that the resulting law bore a rational relation to that interest.<sup>332</sup> After reviewing the legislative history of the statute, the Louisiana Supreme Court noted that the statute’s primary purpose was not to protect minors and nonconsenting adults from viewing obscene materials as assumed, but rather was part of the general war on obscenity of the mid-1980s.<sup>333</sup>

The court held that Louisiana’s unqualified ban on sexual devices ignored the fact that the use of vibrators may be therapeutically appropriate in some cases.<sup>334</sup> Given these therapeutic uses, the court concluded that the state’s actions banning all devices that were designed or marketed primarily for genital stimulation without any review of their prurience or medical use were not rationally related to the “war on obscenity.”<sup>335</sup>

In another pre-*Lawrence* decision, the Supreme Court of Kansas found that section 21-4301 of the Kansas Statutes Annotated, a statute prohibiting the dissemination of obscene devices was overbroad and ignored the therapeutic use of such devices for medical and psychological disorders.<sup>336</sup> In *Kansas v. Hughes*,<sup>337</sup> the court’s decision to invalidate the statute was based largely on the testimony of Dr. Douglas Mould, a certified psychologist and sex therapist called by the defense in an evidentiary hearing.<sup>338</sup> According to Dr. Mould’s testimony, anorgasmic women may be particularly susceptible to pelvic inflammatory diseases, psychological problems, and marital difficulties; it is common for sexual devices to be recommended to treat anorgasmic women.<sup>339</sup> Additionally, women with weak pelvic muscles suffer from a higher incidence of urinary stress incontinence.<sup>340</sup> To strengthen these muscles, incontinent women are often prescribed Kegel exercises with a dildo or dildo-type vibrator to provide resistance.<sup>341</sup> Dr. Mould testified that he often directed his patients to adult bookstores to find sexual devices suitable for their therapy; he maintained that the unavailability of sexual devices through retail outlets would substantially impact the effective treatment of anorgasmic women.<sup>342</sup> The

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331. *Id.* at 72.

332. *Id.* at 72–76.

333. *Id.* at 72–73. Minutes from the 1985 Senate Committee on Judiciary Section C considering the bill reveal that the bill’s supporters were highly concerned with waging a war on obscenity. *Id.* at 73 (citation omitted). The law was passed during the antipornography crusade of the mid-1980s after the 1986 Attorney General’s Commission on Pornography drew alleged links between pornography and violence; sexual devices were not the object of that study. *Id.*

334. *Id.* at 75; see *Eisenstadt v. Baird*, 405 U.S. 438, 448–49 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 505–07 (1965) (White, J., concurring).

335. *Brenan*, 772 So. 2d at 75–76.

336. *State v. Hughes*, 792 P.2d 1023, 1031–32 (Kan. 1990).

337. 792 P.2d 1023.

338. *Id.* at 1025.

339. *Id.*; see *supra* notes 71–83 and accompanying text.

340. *Hughes*, 792 P.2d at 1025.

341. *Id.*

342. *Id.*

state maintained that a device could be obscene even if the motivation for using the device is not obscene (i.e., medical, therapeutic, and psychological uses).<sup>343</sup>

Both the trial court and the Supreme Court of Kansas found section 21-4301 overbroad because it did not restrict its scope to distribution of devices for obscene purposes, noting the legislature cannot make a device automatically obscene merely through the use of labels.<sup>344</sup> The term “sexually provocative aspect” in section 2 of the statute, “impermissibly equates sexuality with obscenity.” “The legislature may not declare a device obscene simply because it relates to human sexuality.”<sup>345</sup> Additionally, the Food and Drug Administration has issued regulations regarding “powered vaginal muscle stimulators” and “genital vibrators” for the treatment of sexual dysfunction and the use of Kegel exercises in conjunction with such devices; these regulations are a tacit recognition of the legitimate need for the availability of sexual aids.<sup>346</sup>

In a case similar to *Hughes*, the Supreme Court of Colorado, sitting en banc, struck down Colorado’s anti-sexual device statute.<sup>347</sup> The court in *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.* found the substantive due process privacy interest developed through the contraceptive and abortion cases sufficiently broad to protect the therapeutic use of sexual devices.<sup>348</sup> Although the court did not consider whether the Colorado statute properly labeled sexual aids as obscene, it maintained that any legislation describing sexual aids as patently obscene “must be compatible with the right of a person to engage in sexual activities to the extent that right is encompassed within the constitutional right of privacy.”<sup>349</sup> Applying strict scrutiny, the Supreme Court of Colorado invalidated the statute, holding that the state interest was not “sufficiently compelling to justify the infringement on the privacy right of those seeking to use them in legitimate ways.”<sup>350</sup>

Feminist commentator Danielle Lindeman criticizes the therapeutic rationale offered by Courts in pre-*Lawrence* decisions, arguing that pathologizing the female orgasm for the sake of overturning an unconstitutional statute is in itself unjust. Because all of this country’s sexual device regulation has been part of anti-obscenity statutes, the challenger must prove that the material in question has specific nonprurient

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343. *Id.* at 1026; *cf.* KAN. STAT. ANN. § 21-4301 (2006).

344. *Hughes*, 792 P.2d at 1031; *see* NAACP v. Button, 371 U.S. 415, 429 (1963) (“[A] State cannot foreclose the exercise of constitutional rights by mere labels.”).

345. *Hughes*, 792 P.2d at 1031; *Roth v. United States*, 354 U.S. 476, 487–88 (1957) (“[S]ex and obscenity are not synonymous.”).

346. *Hughes*, 792 P.2d at 1031.

347. *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985).

348. *Id.* at 369–70.

349. *Id.* at 370 n.28.

350. *Id.* at 370.

value;<sup>351</sup> this has led to the continued espousal of therapeutic arguments.<sup>352</sup> By advancing medical arguments when there was no burden to prove the medical efficacy of the devices, the challengers implied that “female sexual gratification, in and of itself, was not a valid objective.”<sup>353</sup> “The legally-validated insinuation that the vibrator cannot be legitimated by its ability to provide female orgasms is a blow to women’s sexual rights in this country.”<sup>354</sup> However, a number of sexual aides designed predominantly for men, such as *Playboy* and *Viagra*, are not regulated by the same codes that regulate sexual devices.<sup>355</sup> Lindeman argues that, because the majority of individuals who use insertable sexual aides are women, making them either contraband or restricting them to therapeutic usage is “another institutionalized form of controlling female sexuality.”<sup>356</sup>

### III. BEYOND *LAWRENCE*: CRAFTING A RIGHT TO SEXUAL PRIVACY THAT ENCOMPASSES THE SALE AND USE OF SEXUAL DEVICES

Crafting a doctrine of sexual privacy broad enough to encompass the liberty to sell, promote, distribute, and use sexual devices must go beyond the Court’s problematic decision in *Lawrence*. The decision’s sweeping language, discussing the “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,”<sup>357</sup> and seeming rejection of solely morals-based legislation, is obfuscated by the majority’s failure to employ modern substantive due process analysis.<sup>358</sup>

The Supreme Court, however, should clarify its decision in *Lawrence* and substantiate the right to sexual privacy that many have interpreted *Lawrence* to establish. Justice Kennedy affirmatively states that the language in Justice Stevens’s dissent in *Bowers* should be controlling in *Lawrence*.<sup>359</sup> The majority’s clear adoption of the premises that (1) “the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law” and (2) individual

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351. See Lindemann, *supra* note 62, at 343; *supra* note 86 and accompanying text.

352. Lindemann, *supra* note 62, at 343.

353. *Id.* at 344.

354. *Id.*

355. *Id.*

356. *Id.* (quoting Taormino, *supra* note 91).

357. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

358. See Barnett, *supra* note 207, at 1493–94; Glazer, *supra* note 212, at 1413. There is some discussion in *Williams v. King* (*Williams V*), 420 F. Supp. 2d 1224, 1252–53 (N.D. Ala. 2006), that Justice Kennedy’s analysis in *Lawrence* is a form of rational basis review contemplated in *Carolene Products* footnote 4, however to suggest that the majority in *Lawrence* would employ obscure doctrine to mask the fact that it was not announcing a fundamental right to sexual privacy is absurd. In *Williams V*, Judge C. Lynwood Smith, Jr., of the U.S. District Court for the Northern District of Alabama, posited that the concern of paragraph three of *Carolene Products* footnote 4—that democratic processes may break down and systematically prejudice unfavorable minorities—is precisely the matter addressed by the *Lawrence* majority. *Id.* at 1252 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980)).

359. *Lawrence*, 539 U.S. at 577–78.

decisions of married or unmarried persons “concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment,”<sup>360</sup> confirms the Court’s intention to prescribe the bounds of personal liberty to include the right to be free from governmental intervention in one’s intimate relationships. At its narrowest, the liberty interest established in *Lawrence* offers additional constitutional protection for acts of homosexual sodomy; however, it is unlikely that the Court would have granted certiorari to resolve so narrow an issue, especially one considered by the Court only seventeen years before.<sup>361</sup> The most texturally and doctrinally sound interpretation of *Lawrence* guarantees Fourteenth Amendment protection for the intimate decisions to engage in any type of adult consensual sexual behavior.<sup>362</sup> Hence, after *Lawrence*, questions of sexual privacy, including the liberty to sell, purchase, and use a sexual device should be subject to strict scrutiny under the Due Process Clause.

Although strict scrutiny is the proper standard for assessing anti-sexual device legislation, these statutes do not bear a rational relationship to the stated government aims. By adopting Justice Stevens’s dissent in *Bowers*, Justice Kennedy asserts in *Lawrence* that morality alone is not a legitimate state interest for the purposes of due process analysis.<sup>363</sup> Although Justice Scalia’s declaration that *Lawrence* effectively spells the end of all morals-based legislation may be grounded in hyperbole, his reaction clearly contradicts the notion promulgated in *Williams VI*—that *Lawrence* rejects public morality as a legitimate state end only if the challenged statute targets conduct that is both private and noncommercial.<sup>364</sup> Hence, the primacy of morality reflected in the legislative record of the surviving anti-sexual device statutes indicates that they should not survive rational review under the newly articulated *Lawrence* standard.

Should the Court adopt the interpretation put forth in *Williams VI* (which it should not),<sup>365</sup> anti-sexual device laws will become more likely to survive rational review. Under *Glucksberg*, the substantive reach of the Due Process Clause must be “deeply rooted in this Nation’s history and

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360. *Id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)).

361. *See Lawrence*, 539 U.S. 558; *Bowers*, 478 U.S. 186.

362. *See Lawrence*, 539 U.S. 558. The holding in *Lawrence* does not address the status of state “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity”; this is undoubtedly a factor in *Lawrence* that has been construed narrowly by some courts. *Id.* at 590 (Scalia, J., dissenting). It is essential for the Court to differentiate between those acts that are inherently repugnant from those that have recently fallen into disfavor. *See also supra* note 313 and accompanying text.

363. *Lawrence*, 539 U.S. at 577–78.

364. *See id.* at 599 (Scalia, J., dissenting); *see supra* notes 268–72 and accompanying text. Justice Antonin Scalia’s comment is more than a tacit admission that *Lawrence* was meant to profoundly affect the state of morality-based legislation.

365. *See supra* notes 268–72.

tradition”<sup>366</sup> and “implicit in the concept of ordered liberty.”<sup>367</sup> Although there is no long-standing history of government regulation of the sale, distribution, or use of sexual devices, it would be disingenuous to argue that the use of sexual devices is “deeply rooted in this Nation’s history and tradition”<sup>368</sup> especially when the physiological effects of sexual devices were misunderstood for a significant part of their history.<sup>369</sup> Although the absence of antisodomy legislation until the 1970s mirrors the historical trajectory of anti-sexual device legislation, the *Lawrence* Court’s failure to subject the Texas statute to rational review casts doubt on whether the historical argument would have had much weight under the *Glucksberg* two-step.<sup>370</sup>

The court in *Williams VI* and the dissenting voices in *Reliable Consultants, Inc. I* and *II* express concern that acknowledging a fundamental right to distribute, manufacture, sell, promote, etc. sexual devices “improperly broaden[s] the scope of th[e] narrow *personal* liberty interest [recognized in *Lawrence*] to encompass *commercial* activity.”<sup>371</sup> This contention, however, is refuted by long-standing Supreme Court jurisprudence holding that businesses may “assert the rights of their customers and that restricting the ability to purchase an item is tantamount to restricting that item’s use.”<sup>372</sup> Hence, the vendor plaintiffs have standing to assert the use access and use rights of their customers.

Additionally, just as the Court in *Lawrence* recognized the “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,”<sup>373</sup> any discussion of the fundamental right to distribute, manufacture, sell, promote, etc. sexual devices must address the statistical prevalence and social visibility of sexual devices.<sup>374</sup> The Berman Center’s 2004 study, *The Health Benefits of Sexual Aids & Devices: A Comprehensive Study of Their Relationship to Satisfaction and Quality of Life*, found that forty-four percent of women had used a sexual device in their lifetime, and that, overall, women viewed vibrators as a beneficial part of a healthy sex life.<sup>375</sup> The prevalence of luxury boudoir boutiques,<sup>376</sup> the sale of “personal

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366. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

367. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1907)).

368. *Id.* (quoting *Moore*, 431 U.S. at 503); see *Lawrence*, 539 U.S. at 568; see *supra* Part I.A.2.

369. See *supra* Part I.A.2.

370. See *Lawrence*, 539 U.S. at 568; see *supra* Part I.A.2.

371. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), *reh’g denied*, 538 F.3d 355, 360 (5th Cir. 2008) (Garza, J., dissenting).

372. *Id.* at 743; see, e.g., *Glucksberg*, 521 U.S. at 723; *Carey v. Population Servs. Int’l*, 431 U.S. 678, 683–91 (1977).

373. *Lawrence*, 539 U.S. at 572.

374. See *supra* Part I.A.2.a–b.

375. See *supra* notes 97–107 and accompanying text.

376. See *supra* notes 108–14 and accompanying text.

massagers” at mass market retailers,<sup>377</sup> the popularity of Passion Parties,<sup>378</sup> and the open discourse on daytime television programming<sup>379</sup> further evidences America’s acceptance of sexual device use as an important part of female sexual fulfillment. The fact that nearly half of American women of reproductive age have used a sexual device,<sup>380</sup> coupled with the visibility and accessibility of retail outlets carrying such items,<sup>381</sup> suggests a consensus—more than the mere “emerging awareness” relied upon in *Lawrence*—that there exists a liberty interest in distributing, manufacturing, selling, and promoting sexual devices.

#### CONCLUSION

This Note posits that the problematic decision in *Lawrence v. Texas* must be interpreted broadly to guarantee Fourteenth Amendment protection for the intimate decisions to engage in adult consensual sexual behavior and encompass a fundamental right to sexual privacy. The late twentieth century emergence of statutes restricting the sale, distribution, manufacture, and promotion of sexual devices unduly infringes on an individual’s sexual autonomy and cannot survive after *Lawrence*. The *Lawrence* Court’s adoption of Justice Stevens’s dissent in *Bowers v. Hardwick*, stating that individual decisions regarding sexual intimacy are a protected form of liberty protected by the Due Process Clause, guaranteed Fourteenth Amendment protection for intimate decisions to engage in any type of adult consensual sexual behavior. Additionally, Justice Scalia’s dissent in *Lawrence* implicitly recognized that the Court’s decision essentially invalidated morality as a legitimate state interest for the purpose of rational review. This interpretation of *Lawrence*, when considered in the historical, social, and statistical context underlying the current circuit split regarding sexual device regulation, is sufficient to both invalidate anti-sexual device legislation and recognize a fundamental right to sexual privacy.

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377. See *supra* notes 115–16 and accompanying text.

378. See *supra* notes 120–23 and accompanying text.

379. See *supra* note 130 and accompanying text.

380. See *supra* notes 97–107 and accompanying text.

381. See *supra* Part I.A.2.b.