HUNTING EXPEDITIONS: PERVERTING SUBSTANTIVE DUE PROCESS AND UNDERMINING SEXUAL PRIVACY IN THE PURSUIT OF MORAL TROPHY GAME

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I. INTRODUCTION

"Hunting expeditions that seek trophy game in the fundamental rights forest must heed the maxim 'look before you shoot.' Such excursions, if embarked upon recklessly, endanger the very ecosystem in which such liberties thrive—our republican democracy."[2]

Adults have the right to procreate, to use contraception, to raise a family, to determine their children's upbringing, to have abortions, to own guns, to burn the American flag, and to be free from unreasonable searches and seizures, among other things. Yet for many courts, the right to use sex toys[3] is dependent on other rights or interests that legitimate their use; namely, mar-

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2. Williams v. Att'y Gen. of Alabama ("Williams IV"), 378 F.3d 1232, 1250 (11th Cir. 2004).

3. This article will mainly use the term "sex toys" to refer to the devices at issue in this case. They will also be referred to as marital aids and obscene devices, if that is how another source refers to them. The following is a definition from the online encyclopedia, Wikipedia: "A sex toy is a term for any object or device that is primarily used in facilitating human sexual pleasure. This term can also include BDSM apparatuses. Sex toys do not include contraceptives, pornography, or condoms. A related term is marital aid, often used as a euphemism for sex toys, although marital aid is broader as it can also be applied to drugs and herbs marketed as supposedly enhancing or prolonging sex." *See* http://en.wikipedia.org/wiki/Sex_toys (last visited Mar. 10, 2006). The State of Alabama defines obscene devices as "any device designed or marketed as useful primarily for the stimulation of human genital organs." ALA. CODE § 13A-12-200.2 (LexisNexis Supp. 2004).

riage or health. Still other courts find that a right to use sex toys could endanger our republican democracy,[4] regardless of whether it would promote marriage or health. Attaching this right to marriage or health results in the recognition of that right, but promotes a narrow conception of sexuality and relationships in the law. Categorically rejecting a right to use sex toys and upholding obscenity laws that prohibit their sale justifies the use of the police power to enforce a particular version of morality.[5]

Four states currently have obscenity laws prohibiting the sale of sex toys: Alabama,[6] Texas,[7] Georgia,[8] and Mississippi.[9] Other states' anti-sex toy provisions have been repealed after successful constitutional challenges.[10] These challenges illustrate the ongoing struggle to define the substantive due process doctrine in the realm of sexual privacy and liberty. The most recent and thorough illustration is *Williams v. Att'y Gen. of Alabama.*

Williams is the latest development in a series of challenges to Alabama's Anti-obscenity Enforcement Act.[11] The Act pro-

4. *Williams IV,* 378 F.3d at 1250.

5. Williams v. Pryor ("Williams II"), 240 F.3d 944, 949 (2001) ("The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny. . . .A statute banning the commercial distribution of sexual devices is rationally related to this interest.") (internal citations omitted).

6. ALA. CODE § 13A-12-200.2 (LexisNexis Supp. 2004).

7. TEX. PENAL CODE ANN. § 43.21(7) (Vernon 2003).

8. GA. CODE ANN. §16-12-80 (2005).

9. MISS. CODE ANN. § 97-29-105 (1972).

10. *See* People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo. 1985); State v. Hughes, 246 Kan. 607 (1990); State v. Brenan, 772 So. 2d 64, 65 (La. 2000). *See also* discussion *infra* Part II.

11. ALA. CODE § 13A-12-200.2 (LexisNexis Supp. (a)(1) 2004). "Distribution of obscene material —Production of obscene material (a) (1) It shall be unlawful for any person 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 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. A second or subsequent violation of this subdivision is a Class C felony if the second or subsequent violation occurs after a conviction has been obtained for a previous violation. Upon a second violation, a corporation or business entity shall be fined not less than ten thousand dollars ($10,000) nor more than fifty thousand dollars ($50,000). (2) It shall be unlawful for any person, being a wholesaler, to knowingly distribute, possess with intent to distribute, or offer or agree to distribute, for the purpose of resale or commercial distri-

hibits the sale of objects used "primarily for the stimulation of human genitals."[12] It originally prohibited only "obscene materials,"[13] but was amended in 1998 to include "obscene devices."[14] The statute makes the sale of sex toys a crime punishable by up to one year in jail and a fine of up to $10,000.[15] The statute does not regulate the possession of sex toys, but makes possession difficult by prohibiting any type of commercial distribution, including internet and mail order purchases from businesses located outside the state.[16]

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bution at retail, 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 their prurient appeal. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than twenty thousand dollars ($20,000) and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year. A second or subsequent violation of this subdivision is a Class C felony if the second or subsequent violation occurs after a conviction has been obtained for a previous violation. Upon a second violation, a corporation or business entity shall be fined not less than ten thousand dollars ($10,000) nor more than fifty thousand dollars ($50,000). (3) It shall be unlawful for any person to knowingly produce, or offer or agree to produce, 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 this subsection shall be guilty of a Class C felony."

12. *Id.*

13. ALA. CODE § 13A-12-200.1(15) (LexisNexis Supp. 2004) (amended). Material encompassing "[a]ny book, magazine, newspaper, printed or written matter, writing, description, picture, drawing, animation, photograph, motion picture, film, video tape, pictorial representation, depiction, image, electrical or electronic reproduction, broadcast, transmission, telephone communication, sound recording, article, device, equipment, matter, oral communication, live performance, or dance." *Id.*

14. 1998 Al. Acts 467. The Alabama legislature also amended the Act to include the purpose of the statute: "That in order to protect children from exposure to obscenity, prevent assaults on the sensibilities of unwilling adults by the purveyor of obscene material, and suppress the proliferation of 'adult-only video stores,' 'adult bookstores,' 'adult movie houses,' and 'adult-only entertainment,' the sale and dissemination of obscene material should be regulated without impinging on the First Amendment rights of free speech by erecting barriers to the open display of erotic and lascivious material." *Id.* § 1.

15. ALA. CODE § 13A-12-200.2 (LexisNexis Supp. 2004).

16. Williams v. Pryor ("Williams I"), 41 F. Supp. 2d 1257, 1265 (N.D. Ala. 1999) (explaining one would need to travel across state lines to obtain a sex toy or have a friend bring one purchased in another state).

The statute does not ban all products made or used for genital stimulation. It does not affect the sale of items like ribbed condoms or Viagra.[17] It does not affect vibrators and massagers that are not marketed for sexual use, regardless of what their primary use may be.[18] Likewise, the statute provides exemptions for use in scientific, medical, educational, legislative, judicial, and law enforcement settings.[19]

The *Williams* plaintiffs characterized the statute as an obstacle to healthy relationships and safe and healthy sex lives.[20] Alabama argued the statute was a legitimate means to prevent "the commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or familial relationships."[21] In *Williams I*, the district court found that while there was no fundamental right to use sex toys the statute failed rational basis review.[22] On appeal ("*Williams II*"), the Eleventh Circuit agreed with the district court's conclusion that there was no fundamental right involved, but found that the statute should be upheld under rational basis review.[23] It remanded to the district court to consider the plaintiffs' as-applied challenge.[24] In light of the Supreme Court's decision in *Lawrence v. Texas*,[25] the district court in *Williams III* found that there was a fundamental right to sexual privacy, that the statute burdened that right, and again invalidated the statute because the state failed to provide any state interest to justify that burden.[26] In July 2004, the Eleventh Circuit Court of Appeals held that there was no fundamental right to sexual privacy among consenting adults. It remanded

17. *Id.*

18. "It shall be unlawful for any person 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." ALA. CODE § 13A-12-200.2(a)(1) (LexisNexis Supp. 2004) (emphasis added).

19. "It shall be an affirmative defense to a charge of violating Sections 13A-12-200.2 and 13A-12-200.3 that the act charged was done for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose." ALA. CODE § 13A-12-200.4 (LexisNexis Supp. 2004).

20. *Williams I*, 41 F. Supp. 2d at 1264-65 (For example, plaintiff Betty Faye Haggermaker stated that she used sex toys with her husband of twenty-five years to enhance their sexual relationship and assist her in reaching orgasm.).

21. *Id.* at 1286.

22. *Id.* at 1287-88.

23. *Williams II*, 240 F.3d at 949.

24. *Id.*

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

26. Williams v. Pryor, ("Williams III"), 220 F. Supp. 2d 1257, 1299-1300 (2002).

the case to the district court to consider the as-applied challenge to the statute consistent with that holding.[27] The Supreme Court has since denied certiorari.[28]

The Eleventh Circuit followed the conservative application of substantive due process as articulated in *Washington v. Glucksberg,*[29] which promotes the notion that a right is either a fundamental right or no right at all,[30] despite *Lawrence v. Texas.*[31] Unfortunately, the Supreme Court's most recent exploration of substantive due process in *Lawrence*, for all of its poetic discussion of the spatial and relational realms of privacy, was too hesitant to provide adequate guidance on the proper approach to such claims.[32] The result is a case like *Williams* where, despite the Supreme Court's decriminalization of sodomy, the Eleventh Circuit refused to decriminalize the sale of sex toys, arguably a much less political, controversial act.

When the Eleventh Circuit suggests that a legislature could move toward an outright ban of masturbation with incremental legislation outlawing the sale of sex toys,[33] its appeal to republican democracy becomes unwieldy. When a state can dictate whether, where and when a person can touch her or his own body, that state can no longer be a part of a republican democracy. Such a ban would infringe on the most basic form of personal autonomy. In a society that evinces a discomfort with

27. *Williams IV,* 378 F.3d 1232, 1250.

28. *Williams v. King*, 125 S. Ct. 1335 (2005).

29. 521 U.S. 702 (1997).

30. *See* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name,* 117 HARV. L. REV. 1893, 1917 (2004). Discussing the *Glucksberg* standard, the district court noted in *Williams I* that "[t]he Supreme Court simply has placed the bar too high to allow recognition of an individual's use of devices 'designed or marketed as useful primarily for the stimulation of human genital organs' as a fundamental liberty interest." *Williams I*, 41 F. Supp. at 83-84.

31. 539 U.S. 558 (2003).

32. *See, e.g.*, Dale Carpenter, *Is* Lawrence *Libertarian*? 88 MINN. L. REV. 1140, 1149 (2004) ("The opinion is so opaque that it bears a great many interpretations. . . . It instructs the nation how to think about grand concepts but leaves maximum room for the Justices themselves to maneuver in the future."); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1139 (2004) ("[T]he function of lower federal courts, scholars, and practitioners now will be not so much to find the meaning of *Lawrence* as to create it.").

33. *Williams II*, 240 F.3d at 944, 950 ("[I]ncremental steps are not a defect in legislation under rational basis scrutiny, so Alabama did not act irrationally by prohibiting only the commercial distribution of sexual devices, rather than prohibiting their possession or use or by directly proscribing masturbation with or without a sexual device.").

sexuality generally,[34] courts often succeed at trivializing sex. Yet few could argue that a true democracy exists that does not allow for the pursuit of sexual health and fulfillment.

Williams exemplifies a post-*Lochner* judicial activism that ignores decades of Supreme Court precedent on sexual privacy and liberty, disregards history, and, most importantly, fails to consider the extent of the rights at stake for the plaintiffs. This article shows how decisions like *Williams* allow a troubling level of government intrusion into individual lives by endorsing state morality judgments that have little or no bearing on public health or safety. The result is a serious threat to the most basic rights of personal autonomy and sexual liberty, particularly for women.

This article will begin in Section II by describing the history and current place of sex toys in American society and discussing the enforcement of and challenges to laws prohibiting their sale. Section III will discuss the development of substantive due process doctrine as it relates to sexual privacy and the various interpretations of *Lawrence's* effect on this doctrine. Section IV describes *Williams v. Att'y Gen. of Alabama* and its preceding decisions in detail. Section V provides analysis of *Williams* in light of *Lawrence* and changing legal and social attitudes. It argues that current applications of substantive due process result in judicial activism and describes how this doctrine must evolve to protect rights like those at stake at *Williams.*

II. WOMEN HELP THEMSELVES: TRENDS IN SEX TOYS AND THE LAW

A. *Multiple Identities: The History of Sex Toys*

Throughout their history, sex toys have been distanced from sex through euphemisms that have determined and protected the boundaries of their use. They have been characterized as medical devices that cure nervous disorders and as marital aids that enhance the relationship of husbands and wives.[35] They become obscene devices when they are directly associated with sex outside of illness or marriage. The more sex toys are associated

34. Pepper Schwartz, *Creating Sexual Pleasure and Sexual Justice in the Twenty-First Century*, 29 CONTEMP. SOC. 213, 214 (2000) (noting, for example, our society's resistance to sex education and to recognizing teen sexuality in favor of abstinence education).

35. Jennifer Senior, *Everything a Happily Married Bible Belt Woman Always Wanted To Know About Sex But Was Afraid to Ask*, N.Y. TIMES, July 4, 2004, § 6 at 32.

with sex, the more they are regulated and prohibited, with public morality as the justification.[36] This is demonstrated by obscenity laws that focus on the shape of a device[37] and enforcement that targets sex shops but not the personal vibrating massagers sold in drug stores that may also be used for sexual stimulation.[38] The only way to overcome such regulation so far has been to reconnect sex toys with their medical and marital contexts. This helps to perpetuate intolerance of sexual diversity and to stigmatize those who fall outside the acceptable boundaries of sexuality, primarily women.

In the late nineteenth century, doctors used vibrators to treat female patients for hysteria and other nervous disorders.[39] They were marketed to women as health aids in mail-order catalogs of mainstream retail stores like Sears.[40] Designed for external use, medically oriented massage therapy using vibrators was asexual and proper.[41] In 1938, the Food and Drug Administration (FDA) began regulating vibrators[42] and has since classified them as therapeutic devices for treating sexual dysfunction and urinary incontinence.[43]

In the early twentieth century, the true purpose of vibrators was exposed when some of the first sex films portrayed women using vibrators to pleasure themselves.[44] While vibrators never left the medical arena, the marketing message switched focus to

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36. *See Williams II*, 240 F.3d at 949.

37. Webber v. State, 21 S.W.3d 726 (Tex. Ct. App. 2000), involved a prosecution under the Texas obscenity law prohibiting the sale of devices "designed or marketed as useful primarily for the genital stimulation of human organs." TEX. PENAL CODE ANN.§ 43.21(7) (Vernon 2004). The court's opinion illustrates the obsession with shape. It described the testimony of the arresting officer: "Carlin testified that there was no 'mistaking the shape of this dildo for anything other than a male penis,' and that it was capable of stimulating the female sexual organ. She also testified that she did not believe the dildo she purchased could be used for anything other than sexual gratification. Under cross-examination, Carlin conceded that the dildo could be used as a doorstop or a paperweight, but testified that she would not use it for those purposes, and that it was not marketed for use as a doorstop or paperweight." *Id.* at 729.

38. Affidavit of Rachel Maines, Ph.D. for *Williams I*, 41 F. Supp.2d 1257, ¶ 10, *available at* http://www.libidomag.com/nakedbrunch/archive/maines.bruncharchive.html (last visited June 23, 2005).

39. Senior, *supra* note 35, at 32.

40. *Id.*

41. Natalie Angier, *In the History of Gynecology, a Surprising Chapter,* N.Y. TIMES, Feb. 23, 1999, at F5.

42. Maines Aff., *supra* note 38, ¶ 4.

43. 21 C.F.R. §§ 884.5940 & 884.5960.

44. *See* Angier, *supra* note 41, at F5.

marriage.[45] This message can be seen today in "Passion Parties," where women sell sex toys to other women at Tupperware-style parties. Many Passion Party saleswomen emphasize the educational component of their business and describe their products as marital aids.[46] These parties demonstrate the growing demand for sex toys by women and the increasing number of women who are consumers in the sex industry generally. The internet is a major factor in this growth given the privacy it provides women.[47] Another factor is changing attitudes about sex and women's roles in it.[48]

Only recently have vibrators and other sex toys been claimed by sex-positive therapists, educators and feminists as important tools for women's sexual pleasure outside of marriage or illness. In the 1960s, the feminist movement began focusing on women's health and sexual liberation, emphasizing women taking control of their bodies.[49] As part of feminist "consciousness raising," the Boston Women's Health Collective formed and in the 1970s began publishing the health and sex manual "Our Bodies, Ourselves."[50] The New York chapter of the National Organization for Women held a women's sexuality conference in 1973. Soon the first women-focused sex shops were established.[51] Educators and therapists held sexual workshops for women, including Betty Dodson's famous masturbation workshops.[52]

Sex toys are starting to move into the mainstream today, as indicated by the recent emergence of upscale shops selling designer sex accessories. One can be found on New York's Madison Avenue, situated among designer clothing boutiques.[53]

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45. Senior, *supra* note 35, at 32.

46. *Id.*; Mireya Navarro, *Arrest Startles Saleswomen of Sex Toys*, N.Y. TIMES, Jan. 20, 2004, at A12.

47. Mireya Navarro, *Women Tailor Sex Industry To Their Eyes,* N.Y. TIMES, Feb. 20, 2004, at A1.

48. *Id.*

49. *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 313 (2d ed. 1997) (1988). Feminists were not necessarily united on this movement's extension into the realm of sex toys. For many years, Ms. Magazine refused to publish vibrator ads from pro-sex feminist businesses. Meika Loe, *Feminism for Sale: Case Study of a Pro-Sex Feminist Business,* 13 GENDER & SOC'Y 705, 730 n.17 (1999).

50. BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, OUR BODIES, OURSELVES FOR THE NEW CENTURY: A BOOK BY AND FOR WOMEN 21 (1998).

51. *See* Loe, *supra* note 49, at 730 n.1.

52. *Id.*

53. Ruth La Ferla, *Good Vibrations, Upscale Division*, N.Y. TIMES, Oct. 3, 2004, § 9, at 15.

The focus on aesthetics in high-end sex toys helps to soften the stigma still associated with them.[54]

Despite the lingering stigma, only four states currently have obscenity laws that prohibit the sale of sex toys: Alabama,[55] Texas,[56] Georgia,[57] and Mississippi.[58] The Georgia Supreme Court has upheld its obscenity law banning sex toys against free speech and substantive due process challenges under the state and federal constitutions.[59] The Mississippi Supreme Court upheld its statute against a privacy-based challenge, emphasizing that its statute allowed for prescription of sexual devices by therapists and physicians for people who were sexually dysfunctional.[60] A paraplegic man challenged the Texas obscenity law on behalf of disabled persons under the Equal Protection doctrine[61], but his claim was dismissed on an evidentiary basis.[62]

These states continue to enforce their obscenity laws and violators face harsh penalties. In 2003, Joanne Webb, a Passion Parties saleswoman working in northeast Texas, was arrested after selling a vibrator to two undercover narcotics officers posing as a couple.[63] Webb's attorney was prepared to challenge the obscenity law as a constitutional violation of the right to privacy in sexual relationships.[64] The charges were dropped after the county attorney decided that prosecuting Webb would have been a waste of public resources.[65] In 2000, Dawn Webber was convicted under the Texas state obscenity law for selling a sex toy at

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54. *Id.*

55. ALA. CODE § 13A-12-200.2 (LexisNexis Supp. 2004).

56. TEX. PENAL CODE ANN. § 43.21(7) (Vernon 2003).

57. GA. CODE ANN. § 112-8026-2101(c (2003).

58. MISS. CODE ANN. § 97-29-105 (1972).

59. *See, e.g.,* Morrison v. State, 272 Ga. 129, 526 S.E.2d 336 (2000); Kametches v. State, 242 Ga. 721, 251 S.E.2d 232 (1978); Hostetler v. State, 145 Ga. App. 55, 243 S.E.2d 256 (Ct. App. 1978); Pierce v. State, 239 Ga. 844, 239 S.E.2d 28 (1977).

60. PHE, Inc. v. State, 877 So. 2d 1244, 1248-49 (Miss. 2004).

61. Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020, 1028 (5th Cir. Unit A June 1981).

62. *Id.* While it seems obvious that a statute that does not regulate drugs that enhance sexual function in men but prohibits the sale of devices more useful to women would be vulnerable under the equal protection doctrine, such would require a showing of intentional sex discrimination, a nearly impossible legal challenge.

63. Navarro, *supra* note 46, at A12.

64. *Id.*

65. *Texas Woman No Longer Faces Charge in the Sale of Sex Toys*, N.Y. TIMES, July 18, 2004, § 1, at 27.

an adult video store.[66] The Texas Court of Appeals affirmed her conviction and punishment of 30 days in jail and a $4,000 fine.[67]

B. Sex Toys, Sex Roles, and Phallic Replacement

It is no wonder that sex toys continue to be stigmatized and their sale prosecuted. Sex toys not only represent perversion in a general sense; they represent "deviant" sex, including non-procreative, lesbian, and gay sex. Dr. Pepper Schwartz, who provided expert testimony for the *Williams* plaintiffs, describes our society's condemnation of "deviant" sexuality:

> A fury about nonmarital sexuality—and especially any nonheterosexual conduct—condemns pleasurable behavior. A certain proportion of our society finds sexuality embarrassing and justifiable only in a marital and perhaps reproductive context. Many find sexuality itself distasteful, and therefore find threatening the notion of single young women acting on their own instincts, outside the boundaries of marriage, or gay men and lesbians defending a sexuality that is only about pleasure and intimacy.[68]

Alabama's specific concern in *Williams* is that "commerce in pursuit of orgasms by artificial means for their own sake is detrimental to the health and morality of the state."[69] This implies that the only real, legitimate, and moral way for women to orgasm is with a male sex partner in traditional penile-vaginal intercourse. Sex toys make sex possible for heterosexual women without a man, and possibly more pleasurable. Nonprocreative sex also threatens traditional female sex roles:

> Lesbian sex is nonprocreative sex—sex that is threatening to a mainstream value system anxious to keep women in place as mothers and nurturers . . . [I]mages of lesbian sexuality are powerful. They move beyond the trap of motherhood-defined femininity; they represent women's pleasuring of their own bodies.[70]

Alabama's state interest also implies that commerce in sex toys is not like any other industry with profit as its objective; rather, distributors of sex toys are themselves hedonists whose main goal is to produce artificial orgasms.

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66. *See* TEX. PENAL CODE ANN. §§43.21(7)—43.23(c)(1); Webber v. State, 21 S.W.3d 726 (Tex. Ct. App. 2000).

67. *Webber*, 21 S.W.3d at 726.

68. Schwartz, *supra* note 34, at 214.

69. *Williams II*, 240 F.3d at 949.

70. Joyce Fernandes, *Sex into Sexuality: A Feminist Agenda for the '90s*, 50 ART J. 35, 38 (1991).

While the *Williams* plaintiffs could not completely obscure the connection between sex toys and pleasure, they did emphasize the marital and medical justifications for the use of sex toys.[71] The strategy was not to present plaintiffs who were perfectly sexually functional in healthy relationships who enjoyed using them, but to have heterosexual women establish their need for sex toys to avoid deviating from the norm.[72] These seemingly deviant objects prevented casual sex and sexually transmitted diseases, and they promoted healthy marriages.[73] The vendor plaintiffs were helping to preserve the norm by providing tools that would help couples stay together.[74]

The *Williams* plaintiffs did not challenge the primacy of the male role in women's lives.[75] In fact, the trial court's focus on the fear of phallic replacement can be found throughout its opinion. In an effort to address this fear, Dr. Schwartz, an expert for the plaintiffs, emphasized in her proposed testimony that women's use of vibrators played an inferior role to actual intercourse.[76] The district court noted that "[w]omen tended to rate orgasms as more intense with vibrators than in intercourse . . . but that is seen as an adjunct to partner relationships, *not a replacement.*"[77]

The Eleventh Circuit was not convinced by the plaintiffs' attempts to normalize sex toys. It agreed that Alabama had a legitimate interest in "discouraging prurient interest in autonomous sex."[78] The essence of the Eleventh Circuit's decision is really no more complicated than the contention that sex carried out for pleasure (by women—without men) is immoral. But this philosophy is likewise seen in the court decisions invalidating the sex toy provisions of their obscenity laws, which distinguish between

71. *Williams I*, 41 F. Supp. 2d at 1257, 1264-65 (The court described the plaintiff's medical and marital needs in detail. For example: "Ms. Doe began using sexual devices as a means to combat post-partum depression and to help her marital relationship. Her use of such devices was approved of and encouraged by her therapist. Using marital aids to reach orgasm improved Ms. Doe's marital relationship and helped her to overcome depression. Ms. Doe currently uses the devices to avoid the possibility of contracting sexually transmitted diseases.").

72. Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy after* Lawrence v. Texas, 16 YALE J.L. & FEMINISM 1, 23 (2004).

73. *Williams I*, 41 F. Supp. 2d at 1264-65.

74. *Id.* at 1262-64.

75. Herald, *supra* note 72, at 24.

76. *Williams I*, 41 F. Supp. 2d at 1273.

77. *Id.* (emphasis added).

78. *Williams II*, 240 F.3d at 949.

legitimate and illegitimate uses of sex toys in justifying their decision, the legitimate uses falling within the medical and marital realms.[79]

C. *Success Means Marriage and Health*

The case presented by the *Williams* plaintiffs is part of a pattern seen in successful challenges to obscenity laws, placing sex toys within the medical and marital realm. Courts are more at ease invalidating statutes because they infringe on "legitimate" medical or therapeutic purposes. [80] The result is the principle that other uses for sex toys are illegitimate, and thus could be legitimately regulated by the state.

The Supreme Courts of Kansas and Colorado invalidated their obscene device statutes as overbroad and violative of privacy rights. Colorado found the statute generally violative of the right to privacy and criticized the statute for equating sex with obscenity,[81] but it also emphasized the medical uses of sex toys.[82] The Supreme Court of Kansas found its obscenity statute impermissibly infringed upon "the constitutional right to privacy in one's home and in one's doctor's or therapist's office."[83] The court held the statute unconstitutional and overbroad because the statute did not account for the use of "such devices for purposes of medical and psychological therapy."[84] As a result, the state legislature added an exception to the definition of obscene devices when they are "disseminated or promoted for the purpose of medical or psychological therapy."[85]

Before the *Lawrence* decision, the Supreme Court of Louisiana held that its state's obscenity law did not meet rational basis

79. *See* People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo. 1985); State v. Hughes, 246 Kan. 607 (1990).

80. *Id.* Unlike Kansas, the statute was repealed and not revised to qualify the definition of obscene devised.

81. *Tooley*, 697 P.2d at 370.

82. *Id.* at 368 n.26 ("We view the right implicated by the broadly worded statute proscribing sexual devices as within the sphere of constitutionally protected privacy which encompasses the *intimate medical problems* associated with sexual activity.") (emphasis added).

83. *Hughes*, 246 Kan. at 619.

84. *Id.*

85. KAN STAT. ANN. § 21-4301 (1995). Unlike Kansas, Colorado's statute was repealed and was not revised to qualify the definition of obscene devices. In *Williams III*, the district court rejected the Attorney General's argument that a "medical affirmative defense," noting that the Supreme Court has rejected medical restrictions on access to contraceptives and abortion where there is no substantial relation to the state's interest in protecting health. 220 F. Supp. 2d at 1298-99.

review and violated due process.[86] The court found the state interest in morality to be legitimate under *Bowers v. Hardwick*,[87] but did not find that a statute banning every sexual device without a review of its prurience or its medical utility bore a rational relationship to a general "war on obscenity."[88] It commented:

> The State's unqualified ban on sexual devices ignores the fact that, in some cases, the use of vibrators is therapeutically appropriate. The Food and Drug Administration has promulgated regulations concerning "powered vaginal muscle stimulators" and "genital vibrators" for the treatment of sexual dysfunction . . . Such regulations indicate that the federal government recognizes a *legitimate* need for the availability of such devices.[89]

A legal strategy utilizing the medical and marital justifications to challenge obscenity laws, while successful in some cases, is vulnerable in courts applying the most conservative construction of substantive due process, the constitutional doctrine defining the boundaries of sexual liberty.

III. Sex Falls Into a Framework: Substantive Due Process and Sexual Liberty

A. *Running from Lochne*

Williams represents the current conflict among and within the courts about the appropriate analysis for determining the extent of sexual privacy and liberty. The Eleventh Circuit chose the most restrictive version of this analysis, even though the Supreme Court has used a different standard when addressing sexual privacy issues such as abortion and birth control.[90] The Eleventh Circuit's suggestion that republican democracy would be threatened by granting the right to sell and use sex toys[91] alludes to the judiciary's ongoing efforts to distance itself from the Supreme Court's approach to substantive due process during the so-called Lochner Era. The *Lochner* Court has been deemed the

86. State v. Brenan, 772 So. 2d 64, 65 (La. 2000).

87. 478 U.S. 186 (1986) (upholding Georgia's sodomy statute).

88. *Brenan*, 772 So. 2d at 64, 73, 76.

89. *Id.* at 75 (internal citations omitted) (emphasis added).

90. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

91. *Williams IV*, 378 F.3d at 1250.

quintessential activist court that interfered with the legislative process by implementing its own political views.[92]

The Court's activism during the Lochner Era was characterized by rigorous review of the relationship between a challenged law and its goals and narrow limits on government objectives falling within the boundaries of state police power.[93] It resulted in the invalidation of several pieces of social and economic state legislation in the name of preserving the fundamental right to contract.[94] *Lochner v. New York*[95] involved a challenge to a law limiting the workweek of bakers to 60 hours. The Supreme Court held that this restriction was not sufficiently related to promoting the health of bakers and infringed on their freedom to contract under the Fourteenth Amendment.[96] In his dissent, Justice Harlan noted the overwhelming evidence of the health hazards faced by bakers.[97] Now universally reviled, *Lochner* is often cited when critics find a court has abused its power or engaged in policymaking from the bench.[98] The court becomes a "Lochner Court" and regardless of the level of similarity a decision may have to *Lochner,* the name has an effect that any court would rather avoid.[99]

The development of substantive due process as a vehicle to pursue greater sexual liberty began after the Lochner Era ended in 1937, when *Palko v. Connecticut* was decided.[100] *Palko* intro-

92. Cass R. Sunstein, Lochner's *Legacy,* 87 COLUM. L. REV. 4873, 4873 (1987) ("The received wisdom is that Lochner was wrong because it involved 'judicial activism': an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government.").

93. *Id.* at 878.

94. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-3, 570 (2d ed. 1988).

95. 198 U.S. 45 (1905).

96. *Id.* at 57.

97. *Id.* at 70-71.

98. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1385-86 (2001). For example, Justice Rehnquist cites the fallacy of *Lochner* in his dissenting opinion in *Casey. Casey,* 505 U.S. at 957 (Rehnquist, J., dissenting). The majority in *Casey* supported its holding by noting that the overruling of *Lochner* was justified because of changed facts, but that this was not the case with *Roe v. Wade,* justifying *Roe's* affirmation. *Id.* at 861. In his dissent in *Lawrence,* Justice Scalia notes that statutes prohibiting sodomy and those prohibiting "working more than 60 hours per week in a bakery" both impose restraints on liberty. *Lawrence,* 539 U.S. at 592 (Scalia, J., dissenting).

99. Friedman, *supra* note 98, at 1386.

100. 302 U.S. 319 (1937). The replacement of the *Lochner* approach with the rational basis test was signified in Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955): "The day is gone when this Court uses the Due Process Clause of

duced the possibility of enforcing the Bill of Rights against the states by incorporating it through the Fourteenth Amendment Due Process Clause.[101] However, the Supreme Court held that the Fifth Amendment rights to a trial by jury and against double jeopardy were not "of the very essence of a scheme of ordered liberty" or principles of "justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[102]

The right to sexual privacy within a marriage was established in *Griswold v. Connecticut*,[103] and that privacy was expanded to include non-married couples under the Equal Protection doctrine in *Eisenstadt v. Baird*.[104] The right to abortion was established as part of the fundamental right to privacy in *Roe v. Wade*,[105] and reaffirmed in *Planned Parenthood v. Casey*.[106] *Casey's* holding was based on a straightforward approach that emphasized "reasoned judgment" and rejected morals-based analysis.[107]

The articulation of a more formalistic approach to substantive due process doctrine was solidified in *Washington v. Glucksberg*,[108] which held the constitution did not protect a liberty interest in assisted suicide and that the state had a legitimate interest in prohibiting assisted suicide. It incorporated the natural law language of *Palko*, requiring unenumerated rights to have an "essential" quality in order to be recognized.[109] First the court must formulate a "careful description" of the asserted right in

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the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Id.* at 488.

101. *Palko*, 302 U.S. at 324-25; *see* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 666 (2005).

102. *Palko*, 302 U.S. at 325.

103. 381 U.S. 479, 486.

104. 405 U.S. 438 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.). In both *Griswold* and *Eisenstadt*, the right to use contraceptives was specifically at issue.

105. 410 U.S. 113 (1973).

106. 505 U.S. 833 (1992). The Supreme Court also established a fundamental right to procreate under the Equal Protection Doctrine in *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942).

107. *Casey*, 505 U.S. at 849-50. ("Our obligation is to define the liberty of all, not to mandate our own moral code.").

108. 521 U.S. 702 (1997).

109. *See* Alford, *supra* note 101, at 666.

order to avoid policymaking by the judiciary.[110] In order to qualify as a fundamental right protected by the Constitution, the asserted right must be deeply rooted in the nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if the right were sacrificed.[111] State legislation that burdens a fundamental right will be subjected to strict scrutiny and must be narrowly tailored to meet a compelling state interest.[112] All other legislation need only be rationally related to a legitimate government interest.[113]

B. *Straightening and Bending the Framework: Lawrence v. Texas*

The only Supreme Court decision that has centered on substantive due process since *Glucksberg* is *Lawrence v. Texas*,[114] which invalidated Texas' statute criminalizing sodomy and overruled *Bowers v. Hardwick*.[115] The Court began by characterizing the liberty involved as that of "the person both in its spatial and more transcendent dimensions."[116] It then reviewed the Court's jurisprudence defining the sphere of sexual privacy and liberty, including *Griswold, Eisenstadt, Roe,* and *Carey v. Population Services International.*[117] It criticized the way the *Bowers* Court characterized the right as a specific act: the right of homosexuals to engage in homosexual sodomy, stating that "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[118] The *Bowers* Court ignored the true breadth of the right at stake by reducing it to specific conduct and failed to place that conduct in the

110. *Glucksberg*, 521 U.S. at 720-21. The challengers asserted the liberty interests at stake as choosing how to die, the right to control the final days of life, the right to choose a humane, dignified death, and the liberty to shape death. *Id.* at 722. But the Court described the issue as "'whether the '"liberty" specially protected by the [Due Process] Clause includes a right to commit suicide which itself includes a right to assistance in doing so.'" *Id.* at 723.

111. *Id.* at 721. *Roe, Casey*, and *Carey* did not require these elements; otherwise, it would have been difficult to establish abortion and access to birth control as fundamental rights.

112. *Id.* at 721.

113. *Id.* at 722.

114. 539 U.S. 558 (2003).

115. 478 U.S. 186 (1986).

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

117. *Lawrence*, 539 U.S. 558 (2003).

118. *Id.* at 567.

broader context of relationships and personal autonomy.[119] The Court then criticized the historical analysis in *Bowers*. It noted there was no longstanding history of laws directly targeting homosexuals and emphasized the lack of enforcement of such laws in the U.S. until the 1970s.[120] But more importantly, it looked at the changes in law and growing tolerance of homosexuality nationwide and internationally.[121] Looking at the historical legal protection afforded an asserted right was only the starting point of a substantive due process analysis.[122]

The *Lawrence* Court did not determine whether sexual privacy is integral to ordered liberty, but emphasized the importance of autonomy and privacy in making personal choices around relationships, family, and sexuality. It noted that *Bowers* was problematic given the sphere of privacy established by other Supreme Court decisions and decisions made since: *Casey*,[123] which reaffirmed constitutional protection of a woman's right to terminate her pregnancy, and *Romer v. Evans*,[124] an equal protection case that rejected a state constitutional amendment founded upon animus towards lesbians and gays.[125] The Court found that the statute furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[126]

In his dissent, Justice Scalia rejected the Court's approach, noting it failed to apply a *Glucksberg* analysis or engage in the requisite strict scrutiny.[127] He found that without these essentials the Court did not declare a new fundamental right.[128] He considered the opinion a clear violation of *stare decisis*.[129] Justice Scalia

119. *Id.*

120. *Id.* at 570.

121. *Id.* at 572-73.

122. *Id.* at 572.

123. 505 U.S. 833 (1992).

124. 517 U.S. 620 (1996).

125. *Id.* at 632. Colorado amended its state constitution to repeal local ordinances providing protection against discrimination based on sexual orientation. *Id.* at 624. The court found that the only feasible basis for the amendment was animus and, thus, the amendment could not be rationally related to a legitimate state interest. *Id.* at 632.

126. *Lawrence,* 539 U.S. at 578 (2003).

127. *Id.* at 594 (Scalia, J., dissenting).

128. *Id.* at 586.

129. *Id.* at 588.

warned that *Lawrence* opened the floodgates for challenges to a myriad of morals-based laws, including obscenity statutes.[130]

Some consider *Lawrence* as having a sweeping impact on substantive due process and sexual freedom.[131] Some see its impact as less structural and more political in that it will move gay rights forward.[132] Others see *Lawrence* as a continuation of earlier approaches to substantive due process.[133] Others reject the idea that *Lawrence* has changed the substantive due process doctrine whatsoever, agreeing with Justice Scalia that the *Glucksberg* analysis remains the definitive approach to fundamental rights and relegating the application of *Lawrence* to its own facts.[134]

If the *Lawrence* Court established or recognized sexual privacy as a fundamental right, it did not do so explicitly. However, some argue that the standard of review in *Lawrence* was clearly strict, observing that the explicit declaration of a fundamental right is only an occasional practice in the Supreme Court's jurisprudence.[135] *Lawrence* is the choice between two approaches to substantive due process: *Casey* and *Glucksberg*.[136] *Casey* rejected a "deeply rooted" analysis of abortion, because the right at stake was too important.[137] This view of *Lawrence* is bolstered by the *Lawrence* Court's own observation that *Bowers* was inconsistent with *Casey* and *Romer*.[138]

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130. *Id.* at 594 (Scalia, J., dissenting) (Scalia also warns of the end of criminal laws against fornication, bigamy, adultery, and bestiality).

131. *See* Tribe, *supra* note 30, at 1898 (*Lawrence's* form is appropriate for a landmark decision that opens up possibilities); Hunter, *supra* note 32, at 1103-04 ("*Lawrence* is powerful and important and will have a profound impact on the law and especially on the lives of lesbian and gay Americans. Exactly what it means for state regulation of sexuality beyond the elimination of sodomy laws, however, is less clear; it is heavier on rhetoric than on clarity.").

132. Nicole R. Hart, *The Progress and Pitfalls of* Lawrence v. Texas, 52 BUFFALO. L. REV. 1417, 1437 (2004) ("[A]lthough the *Lawrence* Court's decision to narrow its holding does not match up with its relatively progressive rhetoric, the opinion may nonetheless serve to benefit the gay community because it is in step with popular sentiment regarding gay rights.").

133. Harvard Law Review Assn., *Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana*, 118 HARV. L. REV. 1985, 1987 (2005) ("*Lawrence* is a model not of how to evade or reshape substantive due process jurisprudence, but rather of how to apply an approach that predates *Glucksberg* itself.").

134. *See* Carpenter, *supra* note 32, at 1151.

135. Tribe, *supra* note 30, at 1917 (citing *Griswold* as another non-explicit example).

136. *Id.* at 1925.

137. *Id.* at 1927.

138. *Lawrence*, 539 U.S. at 577.

Others believe the Court chose the more conservative path of invalidating the Texas statute under rational basis review as it did in *Romer*.[139] Skeptics also note that while *Casey* did not apply a clear strict scrutiny analysis and made several references to the concept of "liberty," *Glucksberg* came after *Casey*, and *Casey's* author, Justice Kennedy, joined that more conservative opinion.[140] Scalia's dissent has been accepted by many conservative courts that dismiss *Lawrence* as having no impact on the substantive due process doctrine and thus no impact on the extent of sexual privacy and liberty guaranteed by the Constitution.[141]

In the abstract, *Lawrence's* effect on the *Glucksberg* analysis is profound. It provides for a much more flexible approach to the substantive due process analysis, rather than making a slight expansion of rights all but impossible as *Glucksberg* did. However, its effective place in the Supreme Court's jurisprudence must be considered given the activist nature of the Rehnquist Court and its many five-to-four decisions, as well as the fact that Rehnquist, who wrote the *Glucksberg* opinion, dissented in *Lawrence* as well as *Casey* and *Romer*.[142]

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139. *Romer*, 517 U.S. at 620.

140. Carpenter, *supra* note 32, at 1151.

141. Richard D. Mohr, *The Shag-A-Delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 365, 393 (2004). (*Lawrence* skirted articulating any clear principles resulting in misinterpretation by lower courts). A common pattern in the cases narrowly interpreting *Lawrence* is their fixation on a bit of dicta: "This case does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution." *Lawrence,* 539 U.S. at 578. The Virginia Court of Appeals distinguished Lawrence in a child custody case where custody was transferred from the mother to the father after the mother moved to another state and cohabitated with another man. Vanderveer v. Vanderveer, No. 0122-04-2, 2004 WL 2157930 at *12 (Va. App. Sept. 28, 2004)(unpublished opinion). Because adoption involves minors, the Eleventh Circuit also distinguished Lawrence to uphold Florida adoption laws that discriminate against gay couples. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004). The Court of Appeals of Kansas used the same reasoning to affirm a 17-year prison sentence for Matthew Limon, an 18-year-old male who performed oral sex on a consenting 14-year-old. State v. Limon, 32 Kan. App. 2d 369 (Kan. Ct. App. 2004). This was after the Supreme Court vacated the original conviction and remanded the case to the Kansas Court of Appeals to reconsider its decision in light of Lawrence. The Kansas Supreme Court eventually rectified this inconsistency, holding that the conviction violated Limon's equal protection rights and that the "Romeo and Juliet" exception to the state's statutory rape provision, which punished sodomy between adults and children of the opposite sex less severely than sodomy between adults and children of the same sex, also violated rights to equal protection under state and federal law. State v. Limon, 122 P.3d 22 (Kan. 2005).

142. Regardless of the interpretation one claims, this description of the *Lawrence* opinion aptly explains the diverse responses: "It instructs the nation how to think

Leaving the politics of the Court aside, *Lawrence* can be applied in a substantive due process analysis framing the asserted right in a way that encompasses the full extent of the right at stake rather than focusing on specific conduct at the expense of the greater liberty affected by regulating or prohibiting that act.[143] Furthermore, plaintiffs need not establish a deeply rooted history of legislative protection of the asserted right if there is an absence of proscription or if recent developments in the law indicate recognition of that liberty. This is evident in the *Lawrence* Court's analysis that considered recent national and international developments.[144] This analysis can be used not only in determining whether a right is fundamental, but also whether there is a rational basis for legislation regulating or criminalizing conduct.

IV. FURTHER PERVERSION OF SUBSTANTIVE DUE PROCESS: *WILLIAMS V. ATT'Y GEN. OF ALABAMA*

Williams v. Att'y Gen. of Alabama exemplifies a substantive due process doctrine that ignores *Lawrence* and all preceding sexual privacy cases to justify a liberty-restricting approach. The *Williams* plaintiffs alleged Alabama's obscenity statute violated their Fourteenth Amendment Due Process rights.[145] They argued that a right to privacy had been established in cases recognizing the rights to marital privacy, family and home privacy, and individual privacy and autonomy and that this right encompassed sexual privacy.[146] They argued Alabama infringed on this right by regulating indirectly what it could not regulate directly.[147] The plaintiffs were vendors and users of sex toys.[148] Some of the user plaintiffs were married women who considered sex toys an important tool to reach orgasm and thus important in maintain-

about grand concepts but leaves maximum room for the Justices themselves to maneuver in the future." Carpenter, *supra* note 32, at 1149-50.

143. *Lawrence*, 539 U.S. at 567 (criticizing Bowers' narrow characterization of the right at stake).

144. *Id.* at 573 (discussing a similar case decided by the European Court of Human Rights and the fact that, since *Bowers*, 12 out of 25 states had ended their statutory bans on sodomy and of those remaining, only four statutes specifically targeted homosexual conduct).

145. *Williams I*, 41 F. Supp. 2d at 1274.

146. *Id.* at 1277. The plaintiffs cited many cases including *Griswold, Carey, Roe,* and *Skinner*, and Wisconsin v. Yoder, 406 U.S. 205 (1972).

147. Brief of Plaintiffs-Appellees at 40-2, Prior v. Williams, No 99-10798-E (C.A. 11 Nov. 8, 1999), 1999 WL 33631795.

148. *Williams I*, 41 F. Supp. 2d at 1260.

ing healthy marriages.[149] Others were single women who used sex toys to combat depression, avoid contracting STDs, and satisfy their sexual needs without a sex partner.[150]

The plaintiffs provided experts to testify on the role of sex toys in alleviating sexual dysfunction, particularly for women, and in providing an outlet for sexual expression for people who do not have sex partners.[151] Dr. Alfred Jack Turner testified that sexual expression and experience of orgasm were vital to a person's mental health.[152] Dr. Schwartz testified to the importance of the availability of a variety of sex toys to meet the individual needs of persons with sexual dysfunction.[153]

Alabama's Attorney General[154] argued that the statute did not prohibit the possession or use of sex toys and thus did not restrict any individual's conduct.[155] He argued that the cases cited by the plaintiffs were limited strictly to the context of marriage, contraception, procreation, and abortion and could not cover the "right to purchase a product to use in the pursuit of having an orgasm."[156] The proffered state interest in the statute was prohibiting "the commerce of sexual stimulation and autoeroticism, for its own sake, unrelated to marriage, procreation or familial relationships" as "an evil, an obscenity, detrimental to the health and morality of the state."[157]

The District Court for the Northern District of Alabama found that the right to privacy was too narrow to include the use of sex toys and a fundamental right could not be established

149. *Id.* at 1264-65.

150. *Id.*

151. *Id.* at 1270.

152. *Id.*

153. *Id.* at 1272. Drs. Turner and Schwartz describe sexual dysfunction as the inability to have an orgasm and the collateral effects this inability has on a person's physical and psychological well-being. *Id.* at 1269-73.

154. William Pryor, the original attorney general defending the Alabama statute, was appointed to the Eleventh Circuit Court of Appeals by President Bush during a congressional recess and eventually confirmed by the Senate on June 9, 2005. Carl Hulse, *True Test of Senate Compromise Lies Ahead*, N.Y. TIMES, June 10, 2005, at A14. Pryor was a controversial judicial nominee because of his efforts to repeal parts of the Voting Rights Act and the Violence Against Women Act and his support for the display of the Ten Commandments in a state judicial building. Editorial, *Playing the Religion Card*, N.Y. TIMES, Aug. 4, 2003, at A12.

155. *Williams I*, 41 F. Supp. 2d at 1277. The District Court rejected this distinction and found that if the right to use sex toys were fundamental, strict scrutiny review would apply to a statute prohibiting their distribution. *Id.* at 1281.

156. *Id.* at 1278-79.

157. *Id.* at 1286.

under *Glucksberg*.[158] Finding there were less restrictive means that could still meet the state interest, it held that, while there was a legitimate interest in protecting children and unwilling adults from obscene displays and prohibiting the commerce of sexual devices, the statute was not rationally related to those purposes.[159] The court found that the state's attempt to ban sexual stimulation in and of itself interfered with sexual stimulation in the context of marriage and procreation.[160] Thus the statute was an exaggerated response to state concerns and overbroad in its reach.[161] The district court granted the plaintiffs' motion for permanent injunctive relief.[162]

The Eleventh Circuit Court of Appeals affirmed the district court's conclusion that use of sex toys was not a fundamental right, but held that promotion and preservation of public morality was a sufficient basis for a ban on the commercial distribution of sexual devices.[163] The court suggested an outright ban on the possession or use of sex toys or masturbation itself would have been acceptable.[164] It remanded the case for the district court to consider the as-applied challenge of the user plaintiffs.[165] It directed the district court to determine whether the Alabama statute infringed on "a fundamental right to sexual privacy of the specific plaintiffs in this case."[166] It noted that the district court "analyzed neither whether our nation has a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried persons nor whether contemporary practice bolsters or undermines any such history."[167]

158. *Id.* at 1282-84.
159. *Id.* at 1287-88.
160. *Id.* at 1289-90.
161. *Id.* at 1293.
162. *Id.*
163. *Williams II*, 240 F.3d at 944, 949. It also critiqued the district court's reliance on three Supreme Court decisions—Turner v. Safley, 482 U.S. 78 (1987), City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (holding that a zoning ordinance prohibiting use of a home by developmentally disabled persons was not rationally related to a legitimate government purpose and, thus, violated the Equal Protection Clause), and *Romer*—that had applied a modified rational basis review inappropriate for this case. *Id.* at 950-53.
164. *Williams II*, 240 F.3d at 950 ("[I]ncremental steps are not a defect in legislation under rational basis scrutiny, so Alabama did not act irrationally by prohibiting only the commercial distribution of sexual devices, rather than prohibiting their possession or use or by directly proscribing masturbation with or without a sexual device").
165. *Id.* at 955.
166. *Id.*
167. *Id.* at 955-56.

On remand the District Court found that there was a deeply rooted history of "state non-interference with private sexual relationships" and held there was a fundamental right to sexual privacy for consenting adults.[168] It held that this right encompassed the right to use sex toys.[169] It concluded that the statute was a significant burden on that right.[170] In its as-applied analysis it rejected the Attorney General's argument that the plaintiffs would be exempt from prosecution through the affirmative defense of medical use as unjustifiably burdensome.[171] Because the Attorney General failed to give an explanation of why sexual devices would be harmful to the plaintiffs' health or to demonstrate a compelling state interest for the statute under strict scrutiny, the court entered summary judgment for the plaintiffs.[172]

Before the Eleventh Circuit's second review of the case, the Supreme Court decided *Lawrence v. Texas* in June 2003.[173] In its reversal of the District Court's first decision, the Eleventh Circuit had relied on *Bowers v. Hardwick* in finding the statute had a rational basis.[174] Despite *Lawrence's* overruling of *Bowers,* the court held on second review that there was no fundamental right to sexual privacy or a right to purchase and use sexual devices under the Fourteenth Amendment and, applying rational basis review, once again upheld the statute.[175]

The Eleventh Circuit first noted that the right to privacy or personal autonomy was not a fundamental right yet articulated; that in *Casey* the Court expressly stated it had not yet done so.[176] It emphasized that the *Lawrence* Court had not recognized a right to sexual privacy, finding it had applied rational basis review rather than engaging in a full fundamental rights analysis still required under *Glucksberg.*[177] Finding no basis to declare the asserted right as part of any articulated right, the court applied *Glucksberg.*[178]

168. *Williams III,* 220 F. Supp. 2d at 1294-96.
169. *Id.* at 1296.
170. *Id.* at 1298.
171. *Id.*
172. *Id.* at 1299-1300.
173. 539 U.S. 558 (2003).
174. *Williams II,* 240 F.3d at 944, 949.
175. *Williams IV,* 378 F.3d at 1232, 1236 (2004).
176. *Id.* at 1235-36.
177. *Id.* at 1236.
178. *Id.* at 1239.

Despite its direction to the district court to inquire whether there was a right to sexual privacy, the Eleventh Circuit criticized the district court for framing the issue too broadly on remand.[179] The district court's limitation of the right to sexual privacy to consenting adults had not established a constitutionally cognizable standard.[180] The Eleventh Circuit reframed the right as "the right to use sexual devices when engaging in lawful, private sexual activity," recognizing that restrictions on the sale of sex toys effectively restricted their use.[181]

In determining whether the use of sex toys by adults in private sexual relations was deeply rooted in the nation's history and implicit in the concept of ordered liberty, the court was severely critical of the district court's analysis.[182] By framing the issue as a right to sexual privacy, the district court conducted a historical analysis of sexuality in the United States generally.[183] The court criticized the district court's reliance on contemporary practice, which it deemed irrelevant under a *Glucksberg* analysis.[184] The court considered the district court findings of a limited number of statutes banning sexual devices in the United States and few sex toy-related prosecutions insignificant.[185] It explained that the dearth of statutory bans would not indicate silent legislative approval if commerce in sex toys was not widespread enough to raise concern among legislators.[186]

The court explained that historical analysis should focus on affirmative statutory protection of the use of sex toys to establish a deeply rooted history and tradition.[187] It asserted that the history of sex toys is, in fact, a history of proscription and cited the Comstock Law as a significant indication.[188] Historian Rachel

179. *Id.* at 1240 (acknowledging that its own ambiguity led to the district court's error).

180. *Id.*

181. *Id.* at 1242.

182. *Id.* at 1242-43.

183. *Id.* at 1242.

184. *Id.* at 1243. While the *Glucksberg* Court noted recent legislative affirmations of the societal taboo against assisted suicide, this was not essential to its conclusion because such prohibitions existed throughout U.S. history.

185. *Id.* at 1244.

186. *Id.* at 1245.

187. *Id.*

188. The "Comstock Law" is an 1873 federal statute that made it illegal to send any "obscene, lewd, or lascivious" books through the mail. Wikipedia.org, The Free Encyclopedia, http://en.wikipedia.org/wiki/Comstock_law (last visited June 20, 2006).

Maines[189] proposed to testify that the articles "of rubber" confiscated under the Comstock Laws were almost all contraceptives.[190] The court found her proposed testimony to be incomplete, biased, and beyond her specific expertise.[191] The court found a contemporaneous description of the articles as sex toys was more reliable than Maines's retrospective explanations.[192] The court reversed the grant of summary judgment and remanded the case to the district court to consider the as-applied challenge consistent with the holding that the right to sexual privacy could not be established as a fundamental right.[193] The majority agreed that the district court could reexamine the court of appeals' previous holding that public morality was a legitimate basis for the statute in light of *Lawrence*.[194]

In her dissenting opinion, Justice Barkett criticized the court's failure to appropriately apply *Lawrence*, arguing the Supreme Court had in fact acknowledged a right to private sexual intimacy.[195] She contended that *Lawrence* reaffirmed a substantive due process right to sexual privacy established by earlier decisions such as *Griswold*, *Eisenstadt*, *Carey* and *Roe*.[196]

Justice Barkett emphasized that the holding in *Lawrence* was founded on a substantive due process analysis and that the Supreme Court expressly stated its desire to do so in order to finally settle the constitutionality of sodomy statutes.[197] The issue certified in *Lawrence* was whether criminal prosecution of adult consensual sexual intimacy in the home violates vital liberty and privacy interests protected by the Due Process Clause of the Fourteenth Amendment; therefore, it was a case centered on

189. Maines is a history scholar and author of the book THE TECHNOLOGY OF ORGASM: "HYSTERIA," THE VIBRATOR, AND WOMEN'S SEXUAL SATISFACTION (Johns Hopkins Studies in the History of Technology) (The Johns Hopkins University Press 1998).

190. *Williams IV*, 378 F.3d at 1246.

191. *Id.* at 1246-47.

192. *Id.* at 1247.

193. *Id.* at 1250. The plaintiffs requested en banc review arguing inconsistency with *Lawrence* and the Court of Appeals' initial ruling. Sara Hoffman Jurand, *Sexual Privacy is not a Right in the Eleventh Circuit, Despite* Lawrence, TRIAL, October 2004, at 87.

194. *Id.* at 1238 n.9.

195. *Id.* at 1253 (Barkett, J., dissenting). Barkett criticizes the majority's reliance on a footnote in *Carey*, decided 26 years before *Lawrence*, to argue that no right to sexual privacy had been established. *Id.* at 1254.

196. *Id.*

197. *Id.* at 1252-53.

substantive due process and substantially changed the doctrine.[198]

Justice Barkett criticized the majority for requiring affirmative, longstanding legislative protection of the right in order to establish the right as fundamental.[199] Decisions protecting reproductive rights could not rely on such a history and *Lawrence* itself relied only on a history of non-enforcement of sodomy statutes and changes in contemporary practices and attitudes.[200] The early history of statutory prohibitions on sodomy was not determinative in *Lawrence.*[201] Thus, the district court appropriately considered the history of nonenforcement of statutes prohibiting sexual devices in its analysis.[202]

Justice Barkett further argued that, even if no right to privacy were established, the Supreme Court still overruled *Bowers*, and thus the court should have looked to *Lawrence* for guidance on conducting a substantive due process analysis.[203] The majority failed to do so in framing the interest at stake by reducing it to a specific sexual act, just as the *Bowers* court had done by characterizing the right to homosexual sodomy.[204] Moreover, the court failed to revisit its previous analysis of the statute given the overruling of *Bowers*, making a state interest in morality alone an insufficient basis for legislation.[205] Despite remanding it to the district court, she argued the court should have at least established why its previous opinion upholding the Alabama statute could still be constitutional.[206]

While Justice Barkett exposed the majority opinion's many inconsistencies and its failure to adhere to Supreme Court precedent, her criticism was mild given the gross misinterpretation and misapplication of the law. Supreme Court precedent was blatantly ignored to promote state regulation of sexuality from a particular moral perspective. The *Williams* decision is illustrative of the worst kind of judicial activism.

198. *Id.* at 1256 (citing *Lawrence v. Texas,* 539 U.S. at 563 (2003)).
199. *Id.* at 1258.
200. *Id.*
201. *Id.* at 1251.
202. *Id.* at 1258-59.
203. *Id.* at 1256.
204. *Id.* at 1257.
205. *Id.* at 1259.
206. *Id.*

V. UNDOING *LAWRENCE*, RHYMING WITH *LOCHNER*

A. Lawrence *and the Disputed Right to Sexual Privacy*

Even if *Lawrence* did not declare a fundamental right or reaffirm a right to privacy, it was binding Supreme Court precedent whose effect on the *Williams* case was clear. Its application would have resulted in invalidation of the statute. But even without *Lawrence*, Supreme Court precedent on sexual privacy and liberty was enough to establish the unconstitutionality of this extremely intrusive legislation.

Just as relationships are more complicated than Supreme Court jurisprudence often permits,[207] *Lawrence* was apparently too complicated for the Court of Appeals to apply. The Eleventh Circuit reasoned that *Lawrence* was inapplicable to *Williams* because it found no fundamental right was declared and it applied rational basis review. It cited its previous decision, *Lofton v. Secretary of the Department of Children and Family Services*,[208] which characterized *Lawrence's* holding as "substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct."[209] Limiting *Lawrence* to very specific conduct, it applied the *Glucksberg* analysis.[210] The court directed the district court to reevaluate the state interest in the statute in light of *Lawrence*.[211] The court should have performed this analysis, especially considering that it had twice reversed the lower court's decision.[212]

The Eleventh Circuit stated that the *Williams* plaintiffs sought to establish an "overarching right to sexual privacy" or a "free-standing 'right to sexual privacy'" or a right to privacy "in the abstract."[213] Because such a broad right does not exist, the

207. C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y. 431, 434-35 (2004) ("In a number of its decisions defining the scope of Constitutional protection for adult-child or intimate adult human relationships . . . the United States Supreme Court relies upon historical traditions and norms in defining the parameters of Constitutional protection of current practices and relations. In doing so, the Court often fails to account for the true richness of Americans' historical and present-day family-related kinship practices and beliefs, as sociologists, historians, and cultural anthropologists carefully and fully expose them to be.").

208. 358 F.3d 804 (2001).

209. *Id.* at 805.

210. *Williams IV*, 378 F.3d at 1235.

211. *Id.* at 1238 n.9.

212. *Williams II*, 240 F.3d at 944; *Williams IV*, 378 F.3d at 1232.

213. *Williams IV*, 378 F.3d at 1235.

court reasoned it could not decriminalize the sale and use of sex toys.[214] But no right is ever absolute; there are limitations even on the enumerated rights in the Constitution. Speech protected by the First Amendment can be limited in its time and place by the state.[215] Likewise, the right to bear arms can be restricted in the interests of public safety.[216] The fact that a right is not absolute should not end the inquiry. The fact that sexual privacy cannot be absolute was addressed in *Lawrence* by looking at the specific facts of the case and fully examining the right at stake.[217]

Even if the Eleventh Circuit's interpretation of *Lawrence* is correct, then decriminalizing the sale of sex toys would not result in declaring a right to sexual privacy, just as the Eleventh Circuit argues *Lawrence* did not ostensibly declare or reaffirm this right. A factual comparison of *Williams* to *Lawrence* makes the outcome in *Williams* entirely illogical. The contention that there is no legitimate basis for the criminalization of sodomy but there is for criminalizing the sale of sex toys is absurd. The Virginia Supreme Court would likely agree. Relying on *Lawrence*, it recently held that its fornication statute violated the due process right of unmarried individuals to engage in intimate conduct.[218] Interestingly, Alabama repealed its law criminalizing fornication in 1977.[219]

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214. *Id.* at 1236.

215. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 799-800 (1985) ("Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.").

216. Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 824 (S.D. Ind. 1998) (holding that state has a legitimate interest in prohibiting firearms possession by domestic violence perpetrators.).

217. *Lawrence,* 539 U.S. at 578 (2003) (noting the case did not involve minors, coercion, or injury).

218. Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005) ("Indeed, but for the nature of the sexual act, the provisions of Code § 18.2-344 are identical to those of the Texas statute which *Lawrence* determined to be unconstitutional.").

219. ALA. CODE § 13A-12-200.2 (LEXIS Supp. 2004) ("Criminal sanctions are practically inadequate and, therefore, inappropriate to regulate nondeviant sexual behavior between consenting unmarried adults. Where the conduct is deviant, or unconsented to by the female, or consented to by a minor female, or one or both of the partners are married to other persons, or the relationship is incestuous, the conduct is covered by other sections of the Criminal Code. Flagrant open conduct which exceeds decent propriety does justify regulation, and may be prosecuted as public lewdness, disorderly conduct, obscenity, contributing to the delinquency of a minor or under other sections of the Criminal Code. Fornication is not a crime in England nor, generally, in the rest of the world. Many states have never made it a

A successful challenge to Alabama's obscenity statute in *Williams* did not require *Lawrence*, the declaration of a new right, or even reaffirming a right to sexual privacy. Sex toys could easily be analogized to contraceptives. Although contraceptives relate to the right "whether to bear or beget a child," the cases that established that right have been extended much further.[220] Contraceptives and sex toys are used in the same context and, without morality as a legitimate interest, their necessity in that context should not matter. The Eleventh Circuit mentions *Griswold* and *Eisenstadt*, but only to make the claim that no right to sexual privacy has been created, reasoning these cases relate only to the narrow right to choose whether to have a child.[221]

As the district court pointed out, as much as one might wish to distance sex toys from marriage and procreation, they are inevitably linked, and the plaintiffs' stories attest to that fact.[222] An important basis for the decision in *Griswold* was the sanctity of the marriage bed.[223] While marriage remains the most protected relationship in our legal system,[224] the sexual privacy cases proceeded from marriage to recognize the value of sexual relationships without marriage.[225] *Lawrence* solidifies this by recognizing the value of sexual intimacy beyond procreation and beyond heterosexuality.

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crime, and in those which have, courts have narrowed its coverage considerably. The trend of recent criminal code codifications elsewhere to omit this offense reinforces this judgment.").

220. The Texas case upholding its obscenity statute differentiated sex toys from contraceptives by reasoning that contraceptives involved the constitutionally protected right to decide whether to bear or beget a child, whereas sex toys were only for stimulation and, thus, obscene. Yorko v. State, 690 S.W.2d 260, 265 (Tex. Crim. App. 1985 (en banc)).

221. *Williams II*, 240 F.3d at 953.

222. *Williams III*, 220 F. Supp. 2d at 1305 ("The challenged statute instead serves to prevent the user plaintiffs' access to devices that they, and experts in the field of human sexuality, have averred are integral to growing, preserving, and/or repairing marital and familial relationships.").

223. *Griswold*, 381 U.S. 479, 485.

224. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) (emphasizing that invalidating Texas' sodomy statute does not thwart efforts to preserve the institution of marriage).

225. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual, married or single*, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.*) (emphasis added).

B. *Diminishing the Facts*

By failing to discuss the individual plaintiffs and their interest in the suit, the Court of Appeals failed to consider the actual impact of the obscenity law on people's lives, especially women's lives. Suggesting the plaintiffs were pawns of the ACLU, it noted that "[b]ecause the various user appellees and vendor appellees are all represented by the ACLU, *the driving force behind this litigation,* 'the ACLU' will be used to refer collectively to the appellees."[226] By taking sex toys out of the context of the plaintiffs daily lives, the court did not have to address the medical or marital justifications that other states previously considered in determining whether the statute violated privacy rights.

Commenting on the majority's dismissive tone, Justice Barkett stated the case concerned "the tradition of American citizens from the inception of our democracy to value the constitutionally protected right to be left alone in the privacy of their bedrooms and personal relationships."[227] The majority accused the dissent of overstating the effect of the law on individuals' "day-to-day sexual activities."[228] By diminishing the underlying facts of the case, the Eleventh Circuit avoided the factual similarities to *Lawrence, Griswold, Casey* and other Supreme Court precedent and trivialized the serious implications of the case for the plaintiffs and many other women.

While the Eleventh Circuit acknowledged that prohibiting the sale of sex toys affects people's ability to use them,[229] most of its opinion focused on the statute as regulation of commercial activity. It noted there was nothing private or consensual about advertising and selling sex toys and emphasized the danger of children being exposed to them.[230] Its reasoning ignored the District Court's basis for invalidating the statute: there are less restrictive means available to protect children. In its opening sentences it characterized the case as allowing the time-honored use of police power to restrict "the sale of sex"[231] and in closing it characterized the effect of its decision as rejecting a fundamental

226. *Williams IV,* 378 F.3d at 1233 n.1 (emphasis added).
227. *Id.* at 1250 (Barkett, J., dissenting).
228. *Id.* at 1237 n.7.
229. *Id.* at 1242.
230. *Id.* at 1238 n.8.
231. *Id.* at 1235.

right to privacy that encompassed commercial distribution of sex toys.[232]

C. *Describing the Right into Nothing*

By disregarding the facts involved in the case, the Eleventh Circuit succeeded in limiting the right at stake. It argued that privacy was not at issue in the case because the Alabama statute was no more invasive of privacy than "any statute restricting the availability of commercial products for use in private quarters as sexual enhancements."[233] No similar statutes were cited.[234] The court failed to acknowledge the numerous commercial products sold as sexual enhancements that are not prohibited by the statute, including Viagra and ribbed condoms.

The court failed to recognize the extent of the right at stake by employing *Glucksberg's* strict requirement of a narrow characterization of the asserted right. Despite the fact that the Georgia statute at issue did not differentiate between heterosexuals and homosexuals, the *Bowers* Court very consciously characterized the asserted right as "the right of homosexuals to engage in acts of sodomy."[235] As the dissent pointed out, the Eleventh Circuit Court of Appeals made the same error as the *Bowers* court.[236] It reduced the right at stake to specific acts: the right to use sexual devices when engaging in lawful, private sexual activity. In characterizing the asserted right, it also fixated on the sexual nature of sex toys, continuously referring to right to use "sexual devices like . . . vibrators, dildos, anal beads, and artificial vaginas."[237]

There are a number of ways the court could have framed the issue narrowly enough while considering not just the conduct at issue, but its context in the lives of the plaintiffs. The right asserted could have been framed as "the right to preserve one's marriage" or "the right to safe sexual expression and fulfillment." But these are still too narrow. They are encompassed by

232. *Id.* at 1250.

233. *Id.* at 1241.

234. *Id.* at 1241 n.12. The court analogized the use of hallucinogenic drugs, child pornography or the services of a prostitute as other things that cannot be brought within sexual privacy just because they might enhance sex. *Id.* Yet these are not commercial products marketed as sexual enhancements and approved by the FDA, but categorically criminal activities.

235. *Bowers*, 478 U.S. at 191.

236. *Williams IV*, 378 F.3d at 1232, 1255 (Barkett, J., dissenting).

237. *Id.* at 1234, 1244, 1247, 1250.

the right to sexual privacy within an adult, consensual, private relationship. This was the right appropriately considered by the district court.[238]

As long as the careful description of the right amounts to a technical description of particular conduct, fundamental rights will remain static. Progress in substantive due process has been successfully curtailed by reducing the right at stake so much that the end result would be too absurd to hold up as a fundamental right.[239] The *Glucksberg* analysis, by measuring the "carefully" described right against the list of rights already established is nothing more than "a gambit toward hacking away not just at substantive due process but also at the nature of liberty itself."[240] This is especially true when courts try to characterize the list of rights in the narrowest terms, as the Eleventh Circuit did by arguing that *Griswold, Carey, Roe* and *Casey* are merely related to sexual intimacy but do not protect sexual intimacy in any way: "although these precedents recognize various substantive rights *closely related* to sexual intimacy, none of them recognize the overarching right to sexual privacy asserted here."[241]

The careful description component of the *Glucksberg* analysis, in its effect of turning any asserted right into an absurdity, can itself be exposed as absurd when it is applied to other doctrines. Applied in the First Amendment context, flag-burning as a form of speech becomes "the right to set fire to painted cloth."[242]

D. *Historical Hysteria*

The Eleventh Circuit presented a selective view of history to legitimize Alabama's regressive law. Before remanding the case to the district court the first time, it noted that the *Glucksberg* Court "discussed at length not only the long history of the proscription of suicide and assisting suicide but also the considerable contemporary nationwide legislative action to preserve such laws."[243] But in *Williams IV,* the Court of Appeals asserted that the lack of contemporary reaffirmation of suicide bans would not

238. *Williams III,* 220 F. Supp. 2d 1257, at 1275-76.
239. Herald, *supra* note 72, at 8.
240. Tribe, *supra* note 30, at 1917.
241. *See Williams IV,* 378 F.3d at 1237.
242. Tribe, *supra* note 30, at 1924.
243. *Williams II,* 240 F.3d at 955.

have changed the outcome in *Glucksberg*.[244] *Lawrence* suggests otherwise, having emphasized contemporary domestic practices and recent developments in international law.[245]

The Eleventh Circuit should have accepted the historical analysis of the district court, which, consistent with *Glucksberg* and *Lawrence*, looked at the early history and development as well as the current status of laws banning sex toys. Instead, it found the passage of the Comstock Laws in the late 1800s as most significant to its analysis. It failed to explain how this outdated law[246] relates to the passage of Alabama's law in 1998 or how the Comstock Laws, having primarily targeted contraceptives, can justify a ban on sex toys but cannot burden the sale or use of contraceptives under Supreme Court precedent.[247]

The Eleventh Circuit emphasized looking at commerce as a means of judging historical acceptance of sex toys, because a significant amount of commerce would spur legislative restrictions.[248] However, the court failed to analyze the historic evidence of commerce in sex toys. It discredited the affidavit of Dr. Maines, which established that commerce in vibrators and similar devices began in the eighteenth century and turned into mass marketing by the twentieth century.[249] Plaintiffs Sherrie Williams and B.J. Bailey represented the continuing trend. At the time the litigation was initiated, Williams owned two stores in Alabama selling sex toys.[250] She had thousands of customers and had been in business for 5 years.[251] B.J. Bailey had been in business for six years holding Tupperware-style sales parties and had generated $160,000 in revenue in one year.[252]

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244. *Williams IV*, 378 F.3d at 1243.

245. *Lawrence*, 539 U.S. at 572-73.

246. *See Williams III*, 220 F. Supp. 2d at 1289 (the district court noted that Comstock's approach to regulation of contraceptives lost support by the beginning of the twentieth century).

247. *Williams IV*, 378 F.3d at 1245. *See* Carpenter, *supra* note 31, at 1163 (noting that *Glucksberg* and *Lawrence* are consistent in their historical examinations given the "innovation" distinction made in *Glucksberg*. Legislation based on longstanding tradition carried more significance than legislation arising out of innovations, e.g. sodomy statutes targeting gays did not arise until the late twentieth century).

248. *Williams IV*, 378 F.3d at 1245 ("[T]he lack of statutory references to sexual devices is relatively meaningless without evidence that commerce in these devices was sufficiently widespread, or sufficiently in the public eye, to merit legislative attention.").

249. *See* Maines Aff., *supra* note 38, ¶¶ 3-9.

250. *Williams I*, 41 F. Supp. 2d at 1261-62.

251. *Id.*

252. *Id.* at 1263.

The Eleventh Circuit would require affirmative legal protection of the right to use sex toys to show a deeply rooted history of protection justifying their continued protection by courts. The fact that only four other states had bans effective at the time of this decision should have been persuasive on its own. While legislative concerns about public exposure to sex shops and zoning ordinances targeting them have flourished,[253] most legislatures have refrained from dictating whether sex toys are appropriate in the bedroom.

Lawrence made a clear connection between stigmatizing conduct through the law and perpetuating intolerance and discrimination.[254] When a court cannot consider increased societal acceptance of certain liberties, it cannot protect minority groups from majority oppression. This is the most important role the court can fulfill and is the reason courts can have a legitimate role in democracy.[255] Analysis that questions contemporary practice and upholds the traditions and mores of decades or centuries past does not allow for interpretations of the law that match the traditions and mores of the living people it is supposed to serve. It merely protects the rights that are already enumerated in the Constitution and any extreme violations such as the right to be free from torture.[256] It does not address issues that were unforeseeable to the Framers of the Constitution. *Lawrence* argues for the interpretation of the constitution as a living document:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution en-

253. Daniel J. McDonald, *Regulating Sexually Oriented Businesses: The Regulatory Uncertainties of a "Regime of Prohibition by Indirection" and the Obscenity Doctrine's Communal Solution*, 1997 B.Y.U. L. REV. 339, 341 (1997).

254. *Lawrence,* 539 U.S. at 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

255. *See* Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1492 ("Judges and scholars of all stripes now appear satisfied with courts' legitimacy in invalidating political efforts to single out groups for onerous treatment without good reason—a degree of accord elusive only a few decades ago.").

256. See Herald, *supra* note 72, at 14. Although whether torture is always a constitutional violation has unfortunately come into question of recent.

> dures, persons in every generation can invoke its principles in their own search for greater freedom.[257]

Creating a standard that allows no further development of rights, as a deeply rooted historical analysis excluding contemporary views does, insists that our system of government and our society today embodies complete and perfect justice for everyone.

This kind of historical analysis can be blamed in part on *Lawrence*. By trying to downplay the prejudice underlying sodomy statutes, the *Lawrence* Court ignored a long history of homophobia, discrimination and violence perpetrated against lesbians and gays—the very stigma it was trying to address by overturning *Bowers*.[258] This was not an element required in *Roe*, *Griswold*, or *Eisenstadt* to stake out greater reproductive freedom. The Court would have done well, as long as it was overruling *Bowers*, to eliminate the "deeply rooted" element of substantive due process doctrine.

Making history a "starting point" and only requiring a history of non-enforcement is still an inadequate and unfair assessment of a liberty interest. It ignores the fallacy of an analysis that considers history essential to expanding rights. While the use and sale of sex toys may not have a solid history of prosecution, American history and present sentiment and contemporary culture are fraught with gender discrimination.[259] This discrimination is evident in the majority's failure to seriously consider the impact of its decision on the plaintiffs' lives. If non-enforcement is essential to asserting a right to use sex toys, then once a salesperson for Passion Parties gets arrested, as occurred in Texas, the right is suddenly in a precarious position. There are always state officials willing to enforce a statute that much of the public finds ridiculous.

Nevertheless, just as *Bowers* and *Lawrence* presented opposing historical views of sodomy statutes, the Eleventh Circuit could have carried out a *Glucksberg* analysis that would have al-

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257. *Lawrence*, 539 U.S. at 579 (2003).

258. *Id.* at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects. . . . If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.").

259. "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 683 (1973).

lowed the plaintiffs to prevail—even if it characterized the right asserted as the right to use sex toys. As Dr. Maines stated in her affidavit for the court, various techniques and devices to produce orgasm in women including vibrators existed at the creation of the Constitution and were used by Western doctors.[260] Such devices and treatments were used by women without legal restraint or medical requirements.[261]

By rejecting the proposed testimony of Dr. Maines as biased, the court did not have to address the historical discrimination against women that has permeated the government's approach to regulating their sexuality, as evidenced by the Comstock Laws upon which the Eleventh Circuit eagerly relied in its historical analysis. Dr. Maines' affidavit highlighted the lost autonomy of women in their sexual and reproductive health. Just as abortion used to be an act carried out by women on their own,[262] so did many women for centuries cure their own hysteria by going to the baths or purchasing their own vibrators in mainstream catalogs.[263]

E. Lochner *Fusion*

While the Eleventh Circuit claimed to be avoiding judicial activism, *Williams IV* engages in its own form of judicial policymaking disguised as caution. But it is only different from *Lochner* in that it upheld legislation despite an overwhelming lack of evidence that it had any kind of rational basis, instead of invalidating legislation despite overwhelming evidence of its necessity. The lesson taken from *Lochner* is to defer to the legislature when the facts underlying a legislative decision are unclear and the legislation is not plainly unconstitutional.[264] *Williams* turns *Lochner*-based caution on its head by upholding legislation where the facts are well established, and the state interest and the constitutionality of the legislation raise serious questions of validity. While the mistake in the Lochner Era was to "make freedom of contract a preeminent constitutional value that repeatedly prevails over legislation that, in the eyes of elected rep-

260. *See* Maines Aff., *supra* note 38, ¶¶ 3,7.

261. *Id.* ¶ 7.

262. D'EMILIO & FREEDMAN, *supra* note 49, at 59, 63-66 (discussing nineteenth century home remedies used by women).

263. Maines Aff., *supra* note 38, ¶ 7, 9.

264. Friedman, *supra* note 98, at 1452; Sunstein, *supra* note 92, at 874; Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights,* 103 COLUM. L. REV. 833, 837.

resentatives, serves important social purposes,"[265] the Eleventh Circuit has allowed a chosen moral code to preempt consistent Supreme Court precedent on sexual privacy.

During the Lochner Era inconsequential differences determined the outcome of many cases, leading to inconsistencies in the law.[266] These same inconsistencies are seen in *Williams'* approach and reasoning. On its first remand to the district court, the Eleventh Circuit noted that "[t]he as-applied challenges raised by the plaintiffs, married or unmarried, implicate different and important interests in sexual privacy."[267] Despite its recognition of important interests in its initial consideration of the case, the Eleventh Circuit in *Williams IV* dismissed the plaintiffs' interests as insignificant.

It disregarded Supreme Court precedent by characterizing the right at stake in a way that *Lawrence* explicitly rejected.[268] It highlighted one small aspect of the history of contraceptives to support the notion that sex toys had been historically proscribed, while disqualifying an expert on the history of sex toys. It failed to address why the sale and use of sex toys must remain criminal conduct, suggesting that a legislature could criminalize any conduct not clearly enumerated in the Constitution or by the courts.

While the court suggested that a prohibition on masturbation itself would be constitutional, it stated the following examples of "exceptional legislation" clearly failed rational basis review: an ordinance requiring male joggers to wear shirts and a regulation of hair length at a junior college.[269] This begs the question what "constitutionally cognizable standards" can result in the invalidation of these examples, but not a statute effectively banning the use of sex toys or masturbation in the privacy of the home, especially given that a ban on masturbation could not withstand a substantive due process challenge under the Elev-

265. David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 374 (2003).

266. Friedman, *supra* note 98, at 1451.

267. *Williams II,* 240 F.3d at 944, 955.

268. *Williams IV*, 378 F.3d at 1238 n.8. Its tone was blatantly disrespectful to the Supreme Court: "One would expect the Supreme Court to be manifestly more specific and articulate than it was in Lawrence if now such a traditional and significant jurisprudential principal has been jettisoned wholesale (with all due respect to Justice Scalia's ominous dissent notwithstanding)." *Williams IV,* 378 F.3d at 1238 n.8. The Eleventh Circuit never responds to the dissent's argument that *Glucksberg* is not the traditional rule, noting abundant Supreme Court precedent on privacy that does not use the *Glucksberg* approach.

269. *Williams II,* 240 F.3d at 948, n. 2.

enth Circuit's own "deeply rooted" analysis. It is decisions like *Williams* that promote the greatest inconsistency, not *Lawrence* as the Eleventh Circuit suggests.[270]

Courts must recognize that their exaggerated response to the Lochner Era is just as oppressive, if not more, than *Lochner* itself. The Supreme Court decisions that have made any kind of progress in substantive due process have rejected *Glucksberg's* key principle of placing caution above liberty. So as not to risk granting a kind of absolute liberty, *Glucksberg* embraces a type of substantive due process that provides no liberty at all.[271]

Despite its broad language, applying *Lawrence* does not have to result in judicial activism more than any other approach to substantive due process. Judicial activism occurs by the will of the judges despite strict standards.[272] In addition to ensuring legal legitimacy, courts can avoid judicial activism by ensuring their decisions have social legitimacy.[273] In fact, two Lochner-era decisions, *Meyer v. Nebraska*[274] and *Pierce v. Society of Sisters*[275] have withstood time because they protected an important liberty interest: a family's right to autonomy.[276] The district court should rule on remand, consistent with *Lawrence*, that no legitimate interest could exist to justify such an intrusion.[277]

F. *Progressive Vibrations: The Best Approach to Sexual Privacy Cases*

> "*And what is government doing but abridging that communication and communion when it insists on dictating the kinds of consensual relationships adults may enter and on channeling all such relationships, to the degree they become inwardly physi-*

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270. *See Lofton*, 358 F.3d at 817 ("We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis").

271. Tribe, *supra* note 30, at 1923.

272. Friedman, *supra* note 98, at 1453 (contemporary commentators on *Lochner* have found that the Court was deciding cases based on class bias and ideology, not law).

273. *Id.* at 1448 ("[T]he lesson of *Lochner* is that whether or not judicial decisions have a jurisprudential basis, if they lack social legitimacy, judges will be attacked as acting unlawfully.").

274. 262 U.S. 390 (1923) (the parent's right to direct the education of her child).

275. 268 U.S. 510 (1925) (the parent's right to choose private education for her child).

276. *See* Tribe, *supra* note 30, at 1934.

277. *Lawrence*, 539 U.S. at 578.

cally intimate or outwardly expressive, into some gender-specified or anatomically correct form?"[278]

A number of legal theorists have called for a greater degree of scrutiny by the courts of liberty-restricting legislation.[279] At minimum, a fundamental rights analysis should put the burden on the government to prove a compelling interest for its regulation. While this is not likely viable for substantive due process doctrine generally, the area of sexual privacy is different.[280] It is part of a larger area that, as pointed out in *Lawrence,* the Supreme Court has stepped in repeatedly to protect.[281] Because it is the personal realm, it does not implicate large-scale, systematic harm, and thus should not often conflict with areas requiring greater government oversight. Because it is not commercial,[282] it should not affect economic policy or concerns about prostitution. Because it does not concern coercion or lack of consent, it should not implicate law enforcement concerns.

To infringe upon the realm of sexual privacy, the onus should be on the government to establish a compelling interest in preventing a proven, concrete, and significant harm and its regulation of the right should be narrowly tailored to prevent such harm.[283] Any statute defended by a state that criminalizes conduct but cannot prove such concrete harm should be subjected to

278. *See* Tribe, *supra* note 30, at 1940.

279. *E.g.*, Carpenter, *supra* note 32, at 1146-47 (describing Randy Barnett's post-*Lawrence* articulation of the fundamental rights analysis, where "the onus . . . falls on the government to justify the restriction of liberty"); Brown, *supra* note 255, at 1533, 1540 ("[I]f courts are to ensure that legislators have satisfied their obligation to represent, they must be available to look at the reasons for which liberty-impairing legislation has been passed . . . The only effective way in our system for legislatures to meet their obligation to provide accessible reasons for their actions, and thus comply with the demand for reciprocity, is for courts to ask them to do so.").

280. Carpenter, *supra* note 32, at 1169-1170 (contending that *Lawrence* recognized sexual privacy could not be infringed on by the state for ordinary reasons). Rebecca Brown suggests a judicial review of legislation restricting sexual privacy that would "adjust the level of generality at which the restriction is imposed in an effort to test the legislators' true willingness to live under the laws that they pass. The question to consider, hypothetically, would be whether it is likely that the legislators would restrict the sexual behavior that constitutes the same principal source of sexual intimacy for themselves and their friends that the banned activity supplies for a minority of the affected population." Brown, *supra* note 255, at 1546.

281. *Lawrence,* 539 U.S. at 564-65, 573-74 (2003).

282. While the sale of sex toys is commercial, their use clearly falls within sexual privacy.

283. Carpenter, *supra* note 31, at 1169 ("[H]arm can always be found. Liberties regarded as fundamental. . .are protected because they have some special value to the person. . .They are not protected because protecting them entails no cost. . .they are protected despite a frank acknowledgment that harm may ensue").

strict scrutiny.[284] *Lawrence* stands for a right to one's own thoughts, relationship choices, and sexual expression. Criminal statutes infringing on autonomous sexual expression, including Alabama's obscenity statute, violate this right.

A right of sexual privacy is more likely to be found in the context of a relationship as *Lawrence* and the entire development of substantive due process highlights.[285] The emphasis on relationships is problematic in the arena of sex toys, which may not always be used within the context of a relationship.[286] The Eleventh Circuit and Alabama's Attorney General capitalized on this tendency in their attempt to separate sex toys from relationships completely.[287] But relationships, straight or gay, need not be the basis for a right. Orgasms, autonomous or not, "artificial" or "real," are worth protecting.

V. CONCLUSION

Whether the *Lawrence* Court intended to create or reaffirm a right to sexual privacy, a right to sexual privacy is insufficient. A right to sexual *privacy* is what allows shame to linger in the area of sexual rights. It allows norms that do not differentiate between harm and choice to determine rights. It is what makes anorgasmic married women who wish to use sex toys "good" and sexually healthy women who wish to do the same "bad." It is what makes anorgasmic women dysfunctional rather than normal women whose sexuality and sexual needs are ignored. It allows activist judges to continue to curtail women's rights as the Eleventh Circuit succeeded in doing in *Williams*. This is why we must demand sexual *liberty*, and reject a liberal theory that allows norms to dictate the extent of our freedoms. Despite its pitfalls, *Lawrence* moves the substantive due process doctrine in this direction.

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284. *Cf. id.* at 1167 (arguing that requiring strict scrutiny raises the risk that judges will impose their own views when interpreting the Constitution). Carpenter also finds that *Lawrence* established sexual privacy as "a special aspect of personal life that no ordinary state interest can intrude upon." Thus, fears of judicial activism are unwarranted. *Id.* at 1170.

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

286. *But see* Herald, *supra* note 72, at 35 (arguing that *Lawrence* by protecting the right to engage in an intimate relationship implies freedom in an individual's relationship with oneself).

287. *Williams I,* 41 F. Supp. 2d at 1286. This is indicated by the state's proffered interest in prohibiting the sale of sex toys for sexual conduct unrelated to procreation, marriage, and familial relationships and the court of appeal's acceptance of that interest. *Id.*

What *Lawrence* shows is that, when the state creeps into our bedrooms with morality-based legislation, it cannot dictate what our conduct will be; it can only dictate whether it will be stigmatized. Prohibitions on sodomy promote discrimination and intolerance, but do not change people and how they relate to each other in their intimate lives. Likewise, a ban on the sale of sex toys will not prevent autonomous orgasms; it will merely make it more difficult for people to fulfill human sexual needs and desires. Hopefully, the public interest legal community will find a way to rectify *Williams'* unfortunate result of upholding legislation that is both oppressive and ineffective.