COMMENT

Satisfying *Lawrence*: The Fifth Circuit Strikes Ban on Sex Toy Sales

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TABLE OF CONTENTS

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INTRODUCTION

At a Tupperware-style party in Huntsville, Alabama, several guests inspect products of various shapes and sizes.[1] But instead of Tupperware, the merchandise consists of dildos, vibrators, and other sexual devices.[2] The party's host, Jenna, is an agent of Falliburton, Inc. Jenna organizes in-house sales of Falliburton's merchandise.[3]

The guests have different reasons for attending the party.[4] Mary is a young single woman who has a chronic condition that makes it painful to have sex.[5] Joseph considers sex toys a good way to avoid contracting sexually transmitted diseases.[6] George and Barbara want to spice up a thirty-year marriage that almost ended because of sexual monotony.[7]

The guests chat about current affairs, including a state law that criminalizes the sale of sexual devices.[8] Jenna worries this law could

[1] This hypothetical draws from the pleading documents of *Williams v. Pryor*. Amended and Restated Complaint (Injunctive Relief Sought), Williams v. Pryor, No. CV-98-S-1938-NE, 2001 WL 36106396 (N.D. Ala. July 31, 2001).

[2] *See id.* ¶¶ 2-5 (including conventional retail storefront owners, in-house "Tupperware"-style vendors, and individual users as plaintiffs).

[3] *See id.* ¶ 7 (including plaintiff B.J. Bailey, owner of Saucy Lady, Inc., which conducted in-house "Tupperware"-style parties at which they sold sexual aids and novelties).

[4] *See id.* ¶¶ 8-16 (including plaintiffs who have different reasons for using sexual devices).

[5] *See generally* State v. Hughes, 792 P.2d 1023, 1025 (Kan. 1990) (including therapist's testimony that vibrators help women who have relaxed pelvic muscles, which lessen intensity of orgasmic response); Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326, 336-41 (2006) (examining contemporary medical and therapeutic arguments for vibrators' efficacy as therapeutic tool for anorgasmic women and women with other sexual dysfunctions); UCSB's SexInfo, Female Orgasmic Difficulties, http://www.soc.ucsb.edu/sexinfo/article/female-orgasmic-difficulties (last visited Aug. 28, 2009) (recommending vibrators as therapy for female orgasmic difficulties).

[6] *See* Amended and Restated Complaint, *supra* note 1, ¶ 11 (including plaintiff Jane Doe who used sexual devices to avoid possibility of contracting sexually transmitted diseases); *see also* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 742 (5th Cir. 2008) (noting avoidance of sexually transmitted diseases as common motive for using sexual devices).

[7] *See* Amended and Restated Complaint, *supra* note 1, ¶ 4 (including plaintiff Deborah Cooper who alleged that her sexual device purchase at adult toy party saved her marriage to plaintiff Benny Cooper).

[8] *See id.* ¶ 6, (including plaintiff Sherri Williams who owned adult store with significant percentage of its products falling under Alabama's sex toy ban); *see also* ALA. CODE § 13A-12-200.2(a)(1) (2008); *infra* Part I.D (describing Alabama's law

directly affect her livelihood.[9] Although the ban does not criminalize the use of sex toys, it impedes access to them and can affect the guests' quality of life and personal autonomy.[10] The Fifth Circuit recently declared the ban unconstitutional for violating individuals' substantive due process rights under the Fourteenth Amendment.[11] However, an Eleventh Circuit ruling upholding a similar ban has the guests wondering how their adult toy story will end.[12]

The story began in 2003, when the United States Supreme Court decided *Lawrence v. Texas*.[13] In that case, the Supreme Court struck down a Texas antisodomy law that interfered with consenting adults' rights to engage in private sexual activity.[14] However, the Court did not precisely draw the contours of the right to sexual privacy, nor did it explicitly endow the right with fundamental status.[15] In other words, the Court did not determine whether sexual privacy was a right that was "deeply rooted" in American history and tradition.[16] This ambiguity precipitated a split between the Fifth and Eleventh Circuits over the constitutionality of statutes that prohibit the sale of sex toys.[17]

banning sales of sex toys).

[9] *See supra* note 3; *see also* Brian Alexander, *Tupperware Parties with a Twist*, MSNBC.COM, Oct. 15, 2006, at 1, http://www.msnbc.msn.com/id/14061667/ (reporting lucrative market for in-house sales of sex toys, including one consultant who earned over $100,000 of personal income in 2005).

[10] *See infra* Part III.C (discussing public health rationales supporting commercial availability of sex toys).

[11] *See infra* Part II.B.

[12] *See infra* Part II.A.

[13] 539 U.S. 558 (2003).

[14] *Id.* at 578 (striking Texas's sexual devices ban because it furthers no legitimate state interest justifying its intrusion into individual's personal and private life).

[15] *See id.* at 594 (Scalia, J., dissenting) (criticizing majority for failing to explicitly state applicable standard of review); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 n.32 (5th Cir. 2008) (finding *Lawrence* did not categorize right to sexual privacy as fundamental right and declining to attempt to do so); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916 (2004) (identifying absence of any explicit statement in *Lawrence*'s majority opinion about standard of review employed as source of confusion).

[16] *See* Deck v. Missouri, 544 U.S. 622, 637, 640 (2005) (examining whether there is "deeply rooted" legal principle barring practice of shackling defendants, in determining whether such shackling violates Fourteenth Amendment). *See generally* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (stating that Due Process Clause protects those fundamental rights and liberties which are deeply rooted in this nation's history and tradition).

[17] *See generally* Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After* Lawrence v. Texas, 16 YALE J.L. & FEMINISM 1, 33-36 (2004) (noting that *Lawrence*'s language would protect private use of sex aids, but *Lawrence*'s use of word "legitimate" is confusing because it implicates rational basis review); Donald J.H.

In 2007, the Eleventh Circuit upheld an Alabama statute criminalizing the distribution of any device designed to stimulate human genital organs.[18] The court found that because no fundamental right to sexual privacy existed, it would apply the lowest level of scrutiny to assess the statute's constitutionality.[19] Called rational basis review, this level of scrutiny only requires that the governmental action be "rationally related" to a "legitimate" government interest.[20] In the case involving Alabama's statute, the Eleventh Circuit concluded that encouraging public morality was a legitimate state interest.[21] The court also found that prohibiting the sale of sex toys was rationally related to that interest.[22] As a result, Alabama's ban did not violate substantive due process rights under the Fourteenth Amendment.[23]

In contrast, the Fifth Circuit held that a similar Texas statute violated the Fourteenth Amendment's Due Process Clause under *Lawrence*.[24] However, the court avoided the question of whether sexual privacy was a fundamental right.[25] Instead, the Fifth Circuit interpreted *Lawrence* as giving "precise instructions" to find that such a statute violated the right to sexual privacy.[26]

At its core, the disagreement between the circuits turns on the scope of the right announced in *Lawrence* and the standard of review it requires.[27] Part I of this Comment introduces basic principles of substantive due process, the *Lawrence* decision, and Supreme Court decisions relating to restrictions on selling contraceptives.[28] It also explains the current state of the law regarding sexual devices statutes.[29] Part II examines the disagreement between the Eleventh Circuit's decision in *Williams v. Morgan* and the Fifth Circuit's holding

Hermann, *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 962-69 (2005) (attributing flaws of Eleventh Circuit's review of Alabama's sexual devices ban to uncertainty of *Lawrence*'s precedential scope).

[18] Williams v. Morgan, 478 F.3d 1316, 1318 (11th Cir. 2007) (upholding ALA. CODE § 13A-12-200.2(a)(1) (2007)).

[19] *Id.* at 1323.

[20] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

[21] *Williams*, 478 F.3d at 1323.

[22] *Id.* at 1324.

[23] *Id.*

[24] Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 740 (5th Cir. 2008).

[25] *Id.* at 745 n.32.

[26] *Id.*

[27] *See infra* Part I.B.

[28] *See infra* Part I.B-C.

[29] *See infra* Part I.D.

in *Reliable Consultants, Inc. v. Earle*.[30] Part III argues the Fifth Circuit's result is correct.[31] First, the Fifth Circuit did not attempt to construe *Lawrence* as either a strict scrutiny or rational basis case.[32] Instead, it applied the unchallenged *Lawrence* principle that rejects public morality as a basis for laws affecting sexual privacy.[33] Second, the Eleventh Circuit's view is inconsistent with the Supreme Court's precedent in contraception cases.[34] The Eleventh Circuit allowed states to ban the sale of sex toys, so long as the states did not restrict their use.[35] However, in cases where states had banned sales of contraception, the Supreme Court held that banning the sale of items is tantamount to banning their use.[36] Third, this Comment argues the Fifth Circuit's view better protects public health.[37] Should the Supreme Court choose to resolve this circuit split, it should favor the Fifth Circuit's view as a superior interpretation of *Lawrence*'s principles.[38]

I. BACKGROUND

The United States Supreme Court's ruling in *Lawrence* left uncertainty as to whether or not sexual privacy was a fundamental right.[39] This Part introduces the concept of substantive due process under the Fourteenth Amendment and the standards of review that correspond to fundamental and nonfundamental rights.[40] Then, it introduces the *Lawrence* decision and its relevant principles[41] and briefly describes the *Roe v. Wade*-era contraception cases as they relate to the right to privacy.[42] Finally, this Part describes modern statutes regulating sexual devices and their status under the Fourteenth Amendment.[43]

[30] *See infra* Part II.
[31] *See infra* Part III.
[32] *See infra* Part III.A.
[33] *See infra* Part III.A.
[34] *See infra* Part III.B.
[35] *See infra* Part III.B.
[36] *See infra* Part III.B.
[37] *See infra* Part III.C.
[38] *See infra* Part I.B.
[39] *See infra* Part II.
[40] *See infra* Part I.A.
[41] *See infra* Part I.B.
[42] *See infra* Part I.C.
[43] *See infra* Part I.D.

A. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[44] This Clause facially guarantees the right to fair and just procedures whenever a state takes a person's life, freedom, or property.[45] However, since the early 1950s, the Supreme Court has broadened its interpretation of the Clause to protect basic substantive rights.[46] This aspect of Fourteenth Amendment jurisprudence is known as "substantive due process."[47] Substantive due process prohibits the government from infringing on an individual's "fundamental" liberty interests, no matter what process the government provides, unless the infringement is narrowly tailored to serve a compelling state interest.[48]

The Court has discretion to decide which substantive rights the Due Process Clause protects.[49] One way that a substantive right will have protection under the Due Process Clause is if the Court determines that the right is so basic, natural, and fundamental that it deserves protection.[50] The Court may protect these "fundamental" rights, even in the absence of any explicit constitutional provision.[51] The rationale for doing so is that such rights are implicit in the word "liberty" in the Fourteenth Amendment's Due Process Clause.[52]

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[44] U.S. CONST. amend. XIV, § 1.

[45] *Id.*

[46] *See* EDWARD G. WHITE, THE CONSTITUTION AND THE NEW DEAL 244-46 (2000) (stating that by early 1950s, Supreme Court opinions employed term "substantive due process" twice).

[47] Brian Hawkins, *The* Glucksberg *Renaissance: Substantive Due Process Since* Lawrence v. Texas, 105 MICH. L. REV. 409, 412-13 (2006); *see* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (discussing substantive due process).

[48] *Glucksberg*, 521 U.S. at 720-21. *See generally* Troxel v. Granville, 530 U.S. 57, 65 (2000) (stating that Due Process Clause guarantees more than fair process and includes substantive component providing heightened protection against government interference with certain fundamental rights).

[49] *See* Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting) (expressing concern that Fourteenth Amendment gives justices "carte blanche" to cut down constitutional rights of states).

[50] *See* Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1544 (2007) (discussing Supreme Court's reasoning that rights qualify as such under Due Process Clause only if rights can claim firm roots in long-standing traditions).

[51] *Id.*; *see, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) (finding that right to marry is fundamentally important and is part of fundamental "right of privacy" implicit in Fourteenth Amendment's Due Process Clause).

[52] *See* Wilkinson v. Austin, 545 U.S. 209, 221 (2005) (stating that guarantees implicit in word "liberty" give rise to liberty interest).

When a law infringes on an individual's substantive due process rights, courts apply one of two levels of judicial review: strict scrutiny or rational basis.[53] Courts apply strict scrutiny review to laws that infringe on fundamental rights.[54] Under strict scrutiny, the law must satisfy two prongs.[55] First, the law must have a "compelling governmental interest" as its basis.[56] There is no bright-line definition of compelling interest.[57] However, the concept generally refers to necessary state goals, as opposed to discretionary goals.[58] Second, the law must be "narrowly tailored" to achieve the compelling interest.[59] A law is not narrowly tailored when it is overbroad or under inclusive.[60]

The lower level of review, rational basis review, applies when the liberty infringement does not implicate a fundamental right.[61] Under that review, in order to uphold the law, a court must deem it rationally related to a legitimate state interest.[62] Rational basis is an extremely

[53] Joshua Roberts, *Dispelling the Rational Basis for Homeschooler Exclusion from High School Interscholastic Athletics*, 38 J.L. & EDUC. 195, 196 (2009) (citing ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 818 (2d ed. 2005)).

[54] Evan Hochberg, *Selected Cases Related to* District of Columbia v. Heller, *in* NINTH ANNUAL MUNICIPAL LAW INSTITUTE, at 121, 132 (PLI Litig. & Admin. Practice, Course Handbook Series No. 217, 2009) (stating that courts generally apply strict scrutiny to laws that facially infringe on fundamental constitutional rights); *see, e.g.*, Georges v. Carney, 546 F. Supp. 469, 475 (N.D. Ill. 1982) (stating that if restrictions on access to ballot necessarily impinge on fundamental right, strict scrutiny applies).

[55] *See* Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (noting that state action satisfies strict scrutiny when it is both "necessary to further a compelling governmental interest" and is "narrow[ly] tailor[ed]").

[56] *See* Abrams v. Johnson, 521 U.S. 74, 82 (1997) (stating that law must be narrowly tailored to achieve compelling interest); Sherbert v. Verner, 374 U.S. 398, 406-08 (1963) (discussing compelling government interest prong).

[57] *See* Eric D. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 36 HASTINGS CONST. L.Q. 191, 208 (2009) (stating that courts have not enunciated clear definition of term "compelling interest").

[58] *See* Major (ret.) David E. Fitzkee & Captain Linell A. Letendre, *Religion in the Military: Navigating the Channel Between the Religion Clauses*, 59 A.F. L. Rev. 1, 16 (2007) (stating that compelling governmental interests are "vital interests").

[59] *Abrams*, 521 U.S. at 82.

[60] Fitzkee & Letendre, *supra* note 58, at 16; *see* Erin K. DeBoer, Note, *Sex, Psychology, and the Religious "Gerrymander": Why the APA's Forthcoming Policy Could Hurt Religious Freedom*, 21 REGENT U. L. REV. 407, 427 (2009) (stating that certain policy cannot meet narrowly tailored requirement if it is underinclusive and overbroad).

[61] *See, e.g.*, Vacco v. Quill, 521 U.S. 793, 799 (1997) (citing Romer v. Evans, 517 U.S. 620, 631 (1996)) (stating that Court will uphold state act that does not burden fundamental right, so long as act bears rational relation to some legitimate end).

[62] *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7 (1981) (stating that rational basis review assumes legislature's objectives are actual purposes

deferential form of review, as the legitimate interest may be a mere hypothesized interest potentially not reflective of a state's actual interest.[63] Furthermore, the party challenging the law bears the burden of proof and must negate "every conceivable basis" for the law in question.[64]

Because rational basis review is a far more lenient standard than strict scrutiny, determining which standard applies will largely control the outcome of a substantive due process case.[65] As discussed above, determining the applicable standard turns on whether the right is fundamental.[66] The following subpart discusses the status of the right to sexual privacy under the Supreme Court's decision in *Lawrence*.[67] While the Court held that the Substantive Due Process Clause protects the right to sexual privacy, the Court did not explicitly identify whether this right was fundamental.[68] As a result, courts now disagree on whether laws affecting sexual privacy trigger rational basis or strict scrutiny review.[69]

B. Lawrence v. Texas

In *Lawrence v. Texas*, the United States Supreme Court struck down a Texas statute criminalizing private consensual sexual conduct

of statute, unless circumstances show they could not have been legislation's goal); Vance v. Bradley, 440 U.S. 93, 97 (1979) (stating that under rational basis review, judicial intervention of legislature is unwarranted if court considers only that legislation is "unwise"); United States v. Carolene Prods. Co., 304 U.S. 144, 153-54 (1938) (stating that rational basis review restricts inquiry to whether any state of facts, either known or which one could reasonably assume, affords support for statute).

[63] *See* cases cited *supra* note 62; *see also* Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093, 1103 (2009) (Breyer, J., concurring in part and dissenting in part) (stating that rational basis review is "a test that almost every restriction will pass").

[64] *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (stating that attacking legislation under rational basis review requires "negat[ing] every conceivable basis which might support it").

[65] *See* Jacob Sullum, *He's a Fine Parent, But Other Gay People Aren't, So He Can't Adopt*, REASON.COM, Aug. 27, 2009, http://reason.com/blog/2009/08/27/hes-a-fine-parent-but-other-ga/ (stating that rational basis test is "generally viewed as so easy to satisfy that it's hardly a test at all"); Ed Whelan, *SG Kagan's Subversion of "Don't Ask, Don't Tell" Law*, NATIONAL REVIEW ONLINE, May 19, 2009, http://bench.nationalreview.com/post/?q=YmU1OThmZGQ0NjUzNmY0ODNmMzNlYWRiYzFiMmM1ZGY= (reporting law school dean's remark that rational basis standard is "very easy to satisfy").

[66] *See supra* notes 52-60 and accompanying text.

[67] *See infra* Part I.B.

[68] *See infra* Part I.B.

[69] *See infra* Part II.

between homosexuals.[70] Specifically, the Court held that the statute unconstitutionally infringed on the substantive due process rights under the Fourteenth Amendment.[71] *Lawrence* expressly overruled *Bowers v. Hardwick*, in which the Court held that the right to privacy protection did not extend to private consensual homosexual activity.[72]

In *Lawrence*, Texas police responded to an anonymous tip about a weapons disturbance and arrived at petitioner John Lawrence's apartment.[73] Upon entering the apartment, police saw Lawrence engaging in a sexual act with another man and arrested them both.[74] A trial court subsequently convicted both men under a Texas law criminalizing "deviate sexual intercourse," defined as sexual activity between same-sex couples.[75] Lawrence challenged his conviction, arguing that it violated his equal protection and substantive due process rights.

Citing *Bowers*, the Texas Court of Appeals rejected both of Lawrence's claims.[76] The Supreme Court granted certiorari to consider whether Lawrence's conviction violated his substantive due process rights.[77] The Court did not address Lawrence's equal protection challenge because it did not view the issue as questioning if there was a fundamental right to engage in homosexual sex.[78] Rather, the Court viewed the issue as whether consenting adults were free to engage in private conduct.[79] The Fourteenth Amendment's Due Process Clause protects Lawrence's freedom to engage in private conduct.[80] The Court expressly overruled *Bowers* and held that the Constitution protects the most intimate and private aspects of an individual's life.[81] It reached

[70] Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

[71] *Id.* at 577-78 (holding that Justice Stevens's dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986), regarding sexual privacy, should have controlled case and controls in instant action).

[72] Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (reversing court of appeals decision to strike down Georgia's antisodomy statute).

[73] *Lawrence*, 539 U.S. at 562.

[74] *Id.* at 563.

[75] *Id.*; *see also* TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) (prohibiting "deviate sexual intercourse," defined as oral or anal sexual intercourse).

[76] Lawrence v. State, 41 S.W.3d 349, 362 (Tex. Crim. App. 2001) (holding that despite growing consensus to decriminalize sodomy, courts must defer to legislature's judgment).

[77] *Lawrence*, 539 U.S. at 563-64.

[78] FRANCIS GRAHAM LEE, EQUAL PROTECTION: RIGHTS AND LIBERTIES UNDER THE LAW 150 (2003).

[79] *Id.*

[80] *Id.*

[81] *Lawrence*, 539 U.S. at 574-75.

this conclusion by broadly characterizing the right at issue as one of privacy.[82] Simultaneously, the *Lawrence* Court denounced Texas's narrow characterization of the right in *Bowers* as the right to engage in sodomy.[83] The Texas law had far-reaching consequences on the most private of human conduct, sexual behavior, in the most private of places, the home.[84]

The *Lawrence* decision was a watershed in the area of individual rights.[85] One leading scholar credits the decision with recognizing that sexual activity is fundamental to personhood, and thus merits constitutional protection.[86] However, for all its historical significance, *Lawrence* failed to articulate which level of judicial scrutiny applied to laws affecting sexual privacy.[87]

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[82] *Id.* at 566-67.

[83] *Id.* at 567; *see* Tribe, *supra* note 15, at 1900 (noting that Supreme Court in *Bowers* went out of its way to recast plaintiff's claim as fundamental right to engage in homosexual sodomy).

[84] *Lawrence*, 539 U.S. at 567.

[85] *See* James Allon Garland, *Sex as a Form of Gender and Expression After* Lawrence v. Texas, 15 COLUM. J. GENDER & L. 297, 297 (2006) (considering *Lawrence* significant as first Supreme Court opinion to speak positively about sex without reference to procreation and to characterize sex as possible form of expression); Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1449 (2004) (stating *Lawrence* marks "crystallization of doctrine" and has important implications for jurisprudence of equality); Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL'Y & L. 253, 254 (2006) (declaring *Lawrence* decision groundbreaking because it was first time Supreme Court determined states could not punish gays for private, adult consensual sex); Joan Schaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?*, 54 AM. U. L. REV. 1487, 1536 n.58 (2005) (noting that if Supreme Court upheld *Bowers* in *Lawrence*, it would have all but destroyed argument for same-sex couples to marry); Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 28-29 (2003) (noting that *Lawrence* is significant part of civil rights revolution toward discrediting prejudice against homosexuals); Moni Basu, *Gay Sex Bans Overturned: Landmark Ruling Fuels Hopes of Equal Treatment*, ATLANTA J. – CONST., June 27, 2003, at A1 (announcing *Lawrence* as sweeping decision that could trigger expansion of individual privacy and gay rights); Opinion, *A Gay Rights Landmark*, N.Y. TIMES, June 27, 2003, at A26 (declaring *Lawrence* ruling as historic victory for gay Americans and important step toward winning homosexuals full equality under law).

[86] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 846 (3d ed. 2006).

[87] *See Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting) (criticizing *Lawrence* majority for failing to state applicable standard of review); *see also* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 n.32 (5th Cir. 2008) (finding *Lawrence* did not categorize right to sexual privacy as fundamental right and not attempting to do so); Tribe, *supra* note 15, at 1916 (identifying absence of any explicit statement in *Lawrence*'s majority opinion about standard of review employed to assess

The Fifth and Eleventh Circuits, respectively, have extrapolated from *Lawrence* in evaluating laws that ban the sale of sexual devices.[88] Notably, the laws the circuits considered only banned sales of sexual devices — the laws did not criminalize the actual use of these devices.[89] However, under similar circumstances, the Supreme Court has held that laws prohibiting sales of contraceptives unconstitutionally interfered with an individual's right to use them (collectively, the "Contraception Cases").[90]

C. The Contraception Cases

In 1965, the Supreme Court held in *Griswold v. Connecticut* that a state law prohibiting the use and distribution of contraceptives was unconstitutional.[91] In that case, Estelle Griswold, a physician at Planned Parenthood League of Connecticut, provided contraceptives to a married woman.[92] The State charged Griswold under a Connecticut statute that criminalized assisting another to commit an offense.[93] Because using contraceptives was illegal in Connecticut, the State convicted Griswold as if she were the principal offender.[94]

On appeal, the Supreme Court held the statute violated the right to privacy found in the penumbras of the Bill of Rights.[95] The "penumbra" is a doctrinal metaphor referring to implied powers of the federal government that emanate from explicit constitutional provisions.[96] For example, the First Amendment's right of association

constitutionality of law as source of confusion).

[88] *See infra* Part II.

[89] *See infra* Part I.D.

[90] *See infra* Part I.C.

[91] Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (citing CONN. GEN. STAT. §§ 53-92, and 54-196 (1958 rev.)).

[92] *Id.* at 480.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 484-85 (stating that specific guarantees of Bill of Rights have "penumbras" in which right to privacy exists). *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 33 (2001) (stating that *Griswold* was birth of controversial constitutional right to privacy); David Helscher, Griswold v. Connecticut *and the Unenumerated Right of Privacy*, 15 N. ILL. U. L. REV. 33, 33 (1994) (identifying *Griswold*'s two different locations for source of privacy rights as expressed freedoms in Bill of Rights and unenumerated right of people through Ninth Amendment); Andrea Lockhart, Griswold v. Connecticut*: A Case Brief*, 14 J. CONTEMP. LEGAL ISSUES 35, 36-38 (breaking down *Griswold* decision and identifying opinion's method of analysis in finding right of privacy among specific provisions of Bill of Rights).

[96] *See Griswold*, 381 U.S. at 484 (stating that various guarantees in Bill of Rights

implies a right to privacy in personal associations.[97] Similarly, the Third Amendment's prohibition against quartering of soldiers in one's home in peacetime without the homeowner's consent implies a right to privacy in the home.[98] By identifying penumbral privacy rights throughout the Bill of Rights, the *Griswold* Court concluded that the Constitution guarantees a right to privacy.[99]

After establishing the existence of a constitutional right to privacy, the Court evaluated the effect of Connecticut's ban on this right.[100] Although Connecticut did not directly prohibit the sale of contraceptives, it prohibited aiding or abetting another person to commit an offense.[101] Because using contraceptives was illegal, the Connecticut statute effectively criminalized selling or distributing contraceptives.[102] The Supreme Court found that the use of contraceptives was a privacy right and struck down the law for unduly burdening this right.[103]

Several years later, the Supreme Court encountered another contraception case. In *Carey v. Population Services International*, Population Planning Associates ("PPA") engaged in mail-order sales of nonmedical contraceptive devices.[104] PPA, in its own right and on behalf of its potential customers, challenged a New York law that criminalized the distribution of contraceptives to minors under age sixteen.[105] Again, the Supreme Court struck down the statute for unduly restricting access to birth control and infringing on the fundamental right of reproductive autonomy.[106] The privacy right at

create zones of privacy); West's Encyclopedia of American Law from Answers.com, Penumbra, http://www.answers.com/topic/penumbra (last visited Jan. 29, 2009) (describing penumbra metaphor's legal history).

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

98 *Id.*

99 *Id.* at 485.

100 *Id.* at 485-86.

101 *Id.* at 481, 485.

102 *See id.* at 485 (stating that law seeks to achieve its goals by having "maximum destructive impact" upon private relationship).

103 *See id.* at 484-85 (stating that case concerns relationship lying within zone of privacy of several fundamental constitutional guarantees and that law infringing this relationship cannot stand).

104 Carey v. Population Servs. Int'l, 431 U.S. 678, 682 (1977).

105 *Id.* at 681-83.

106 *See id.* at 685-89 (discussing right of access to contraceptives as fundamental and stating that such access is essential to exercise constitutionally protected right of decision in childbearing matters).

issue was the right to privacy in connection with decisions affecting procreation.[107]

These cases recognized a right to privacy and held that this right includes access to certain items — contraception — that are associated with exercising one's privacy right.[108] The next subpart describes laws that restrict access to sexual devices.[109] These laws would later become the subject of the split between the Fifth and Eleventh Circuits regarding the scope of the right to sexual privacy under *Lawrence*.[110]

D. State Statutes Regarding Sexual Devices

Currently, only three states have statutes banning the sale of sexual devices.[111] Alabama's Anti-Obscenity Enforcement Act makes it a crime to distribute commercially any device designed to stimulate the human genital organs.[112] An initial violation constitutes a misdemeanor punishable by a fine, imprisonment, or both.[113] The Eleventh Circuit upheld this statute in *Williams v. Morgan*, discussed below in Part II.[114]

Texas's obscenity statute criminalized knowingly promoting any obscene device.[115] The term "promote" included selling, giving, providing, lending, mailing, delivering, distributing, or advertising such devices.[116] "Obscene device" included a dildo or artificial vagina, designed or marketed as primarily useful to stimulate human genital organs.[117] Unlike Alabama's Anti-Obscenity Enforcement Act, the Texas statute included an affirmative defense for certain medical or

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[107] *Id.* at 693.

[108] *See supra* notes 91-107.

[109] *See infra* Part I.D.

[110] *See infra* Part II.

[111] *See* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 741 (5th Cir. 2008) (noting that Texas, Mississippi, Alabama, and Virginia have sexual devices statutes); *infra* Part II.B (discussing 2009 Fifth Circuit decision striking Texas sexual devices statute).

[112] ALA. CODE § 13A-12-200.2(a)(1) (2008).

[113] *Id.*

[114] *See infra* Part II.A.

[115] TEX. PENAL CODE ANN. § 43.23(a) (Vernon 2007).

[116] *Id.* § 43.21(a)(5). *Compare* ALA. CODE § 13A-12-200.2(a)(1) (prohibiting only distribution of sexual devices for anything of pecuniary value), *with* TEX. PENAL CODE ANN. § 43.21(a)(5) (including words "give" and "lend" as prohibited conduct). *See generally Reliable Consultants*, 517 F.3d at 744 (noting that words "give" and "lend" particularly restrict private conduct, and their inclusion in Texas statute undercuts any argument that statute only affects public conduct).

[117] TEX. PENAL CODE ANN. § 43.21(a)(7) (2003).

psychiatric purposes.[118] The Fifth Circuit struck down the statute in *Reliable Consultants, Inc. v. Earle*, discussed below in Part II.[119] Although the language of the statutes in this circuit split were slightly different, their common restriction on commercial distribution of sex toys produced similar issues.[120]

II. ELEVENTH AND FIFTH CIRCUITS SPLIT

Lawrence's failure to specify the scope of sexual privacy and whether it is a fundamental right has created much uncertainty about the constitutionality of various laws affecting sexual conduct.[121] Laws that prohibit the sale of sexual devices are one source of such uncertainty.[122] If sexual privacy is a fundamental right, and the use of sexual devices constitutes sexual privacy, then a law that burdens this right by curtailing access to sexual devices must satisfy the high burden of strict scrutiny.[123] On the other hand, if sexual privacy is not a fundamental right, then such a law must only satisfy the low threshold of rational basis review.[124] The following subparts describe a split between the Eleventh and Fifth Circuits on the issue of whether sexual device laws are constitutional under *Lawrence*.[125]

A. Eleventh Circuit: Williams v. Morgan

In 2007, the Eleventh Circuit evaluated the constitutionality of an Alabama Code provision that prohibited the sale of sexual devices.[126]

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[118] *Id.* § 43.23(g) (including affirmative defense to protect those who possess or promote obscene devices for bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose).

[119] *See infra* Part II.B.

[120] *See infra* Part II.

[121] *See* Daniel Allender, *Applying* Lawrence*: Teenagers and the Crime Against Nature*, 58 DUKE L.J. 1825, 1835 (2009) (noting that *Lawrence* Court failed to explain whether its holding was limited to laws targeting homosexuals or whether it protects heterosexual conduct as well); *see, e.g.*, *id.* at 1847-50 (arguing that North Carolina Supreme Court decision upholding minor's conviction for engaging in nontraditional sexual activity with another minor was incorrect under *Lawrence*); Terry L. Turnipseed, *Scalia's Ship of Revulsion Has Sailed: Will* Lawrence *Protect Adults Who Adopt Lovers to Help Ensure Their Inheritance from Incest Prosecution?*, 43 HAMLINE L. REV. 95, 95-97 (2009) (questioning whether *Lawrence* protects adults who adopt adult lover or spouse from incest prosecution).

[122] *See supra* Part I.D.

[123] *See supra* Part I.A.

[124] *See supra* Part I.A.

[125] *See infra* Part II.A-B.

[126] Williams v. Morgan, 478 F.3d 1316, 1318 (11th Cir. 2007) (stating that issue is

In *Williams*, individual users and vendors of sexual devices filed suit to enjoin enforcement of Alabama's Anti-Obscenity Enforcement Act.[127] The plaintiffs argued that the statute violated their rights to privacy and personal autonomy under the Fourteenth Amendment.[128] After a series of remands, the Eleventh Circuit determined that using sexual devices was not a fundamental right, thus rational basis review applied.[129] Notwithstanding the Supreme Court's contrary holding in *Lawrence*, the Eleventh Circuit determined that promotion and preservation of public morality was a legitimate state interest.[130] Because the state's interest in public morality rationally related to the Anti-Obscenity Enforcement Act, the Eleventh Circuit upheld the statute.[131]

The Eleventh Circuit, however, distinguished *Lawrence* from *Williams* based on the nature of the right at stake.[132] The *Lawrence* statute criminalized private sexual conduct. In contrast, the *Williams* statute only prohibited public and commercial activity.[133] Thus, in the Eleventh Circuit's view, *Lawrence*'s rejection of public morality as a legitimate government interest only applied to laws targeting private, noncommercial conduct.[134] Because the activity in *Williams* was public and commercial, the state's interest in morality was a sufficient basis to justify upholding the Alabama statute.[135]

After distinguishing *Lawrence* on these grounds, the Eleventh Circuit allowed public morality to serve as a legitimate interest under

whether public morality remains sufficient rational basis for Alabama statute after *Lawrence*).

[127] *Id.* (noting that plaintiffs include both married and unmarried users of prohibited sexual devices, as well as retail storefront owners and in-house "Tupperware"-style vendors).

[128] *Id.*; Amended and Restated Complaint, *supra* note 1, ¶ 2 (requesting declaration that Alabama statute is unconstitutional as applied and permanent injunctive relief barring State from enforcing statute).

[129] *See Williams*, 478 F.3d at 1319-20 (holding new *Lawrence* decision did not recognize fundamental right to sexual privacy, thereby deeming strict scrutiny review "off the table").

[130] *Id.* at 1318; *see* Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1234 (11th Cir. 2004) (holding that no fundamental substantive due process right to sexual privacy exists to trigger strict scrutiny); Williams v. Pryor, 240 F.3d 944, 952 (11th Cir. 2001) (holding Alabama statute survives rational basis review).

[131] *Williams*, 478 F.3d at 1322-23.

[132] *See Williams*, 478 F.3d at 1322 (finding that *Lawrence* invalidates only those laws that target conduct that is both private and noncommercial).

[133] *Id.*

[134] *Id.*

[135] *Id.* at 1322-23.

rational basis review.[136] In support of this interpretation, the Eleventh Circuit cited Supreme Court cases upholding state laws based on moral judgments.[137] Between 1971 and 1991, the Court upheld laws based on public morality, including statutes regulating public indecency and obscene material.[138] The Eleventh Circuit also cited its own post-*Lawrence* decisions upholding the viability of public morality as a rational basis for legislation.[139] One such decision upheld a Florida law prohibiting homosexual couples from adopting children.[140] Because Florida based this law on public morality, the Eleventh Circuit found that public morality remained a legitimate state interest after *Lawrence*.[141] Accordingly, the Eleventh Circuit upheld Alabama's morality-based sexual devices statute in *Williams*.[142]

B. Fifth Circuit: Reliable Consultants, Inc. v. Earle

In 2008, the Fifth Circuit held that a Texas statute prohibiting the sale of sexual devices violated an individual's right to sexual privacy under *Lawrence*.[143] In *Reliable Consultants*, a sex toy retailer ("Reliable Consultants") sought to enjoin enforcement of a Texas statute criminalizing the sale of sexual devices.[144] Reliable Consultants alleged that the statute violated its substantive due process rights protected under the Fourteenth Amendment.[145]

Reliable Consultants argued the Texas statute impermissibly burdened its customers' due process right to engage in private intimate

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[136] *Id.* at 1323.

[137] *Id.* (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567 (1991)) (upholding public indecency statute, stating that authority to design statute protecting morals and public order fell within states' traditional police power).

[138] *See id.*; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973) (upholding Georgia's obscenity statute on grounds that legislature could act to protect social interest in order and morality); United States v. Bass, 404 U.S. 336, 348 (1971) (noting that criminal punishment usually represents moral condemnation of community).

[139] *Williams*, 478 F.3d at 1323 (citing Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004); *see* Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1250 (11th Cir. 2004) (holding that constitutional right to privacy does not cover commercial distribution of sex toys).

[140] *Williams*, 478 F.3d at 1323 (holding Florida ban on homosexuals' adopting children was legitimate state interest on grounds of public morality).

[141] *Id.*

[142] *Id.* at 1322-23.

[143] Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 746-47 (5th Cir. 2008).

[144] *Id.* at 741-42. *See generally supra* Part I.D (describing Texas's statute banning sale of sexual devices).

[145] *Reliable Consultants*, 517 F.3d at 743.

consensual conduct.[146] The Fifth Circuit interpreted *Lawrence* as giving "precise instructions" that public morality was an insufficient state interest to sustain laws affecting sexual privacy.[147] In *Reliable Consultants*, the court identified the right at issue as freedom from governmental intrusion regarding the most private human conduct — sexual behavior.[148] Under *Lawrence*, a statute that restricted sexual behavior based on public morality was unconstitutional.[149]

The Fifth Circuit observed that public morality provided insufficient grounds to uphold the Texas statute.[150] *Lawrence* expressly rejected the view that public morality could ever suffice to uphold a law that restricted consensual intimacy between adults in the home.[151] Because the Texas statute also sought to regulate private sexual intimacy, public morality was equally insufficient to serve as its rational basis.[152] Unlike the Eleventh Circuit, the Fifth Circuit determined that restrictions on the sale of sexual devices infringed on private rights.[153]

III. ANALYSIS

The Fifth Circuit's application of *Lawrence* to a sexual device statute is superior to that of the Eleventh Circuit for three reasons.[154] First, in *Williams*, the Eleventh Circuit mistakenly interpreted *Lawrence* as a rational basis case.[155] Conversely, *Reliable Consultants* correctly applied *Lawrence* as establishing due process protection for the use of sex toys.[156] Second, principles from the Contraception Cases show that restricting sales of sexual devices unnecessarily and impermissibly restricts their use.[157] Finally, public health considerations support the

[146] *Id.* at 743 (identifying that post-*Lawrence*, *Reliable Consultant*'s issue is whether statute impermissibly burdens individual's substantive due process right to engage in private and consensual intimate conduct).

[147] *Id.* at 745 n.32 (refusing to attempt to categorize right to sexual privacy as fundamental because *Lawrence* did not do so).

[148] *Id.* at 744 (quoting Supreme Court's framing of issue in *Lawrence*).

[149] *Id.* at 744-45.

[150] *Id.* at 745 (holding that since public morality was insufficient justification for restrictions on adult consensual intimacy at home, it also cannot be rational basis for Texas's statute).

[151] *Id.* (citing *Lawrence*'s adoption of Justice Stevens's dissent in *Bowers*).

[152] *Id.*

[153] *See supra* Part II.A.

[154] *See infra* Part III.A-C.

[155] *See infra* Part III.A.

[156] *See infra* Part III.A.

[157] *See infra* Part III.B.

result in *Reliable Consultants*.[158] If the Supreme Court were to review this issue according to these observations, it should uphold the Fifth Circuit's view.[159]

A. Lawrence*'s Public Morality Rule Rejects the Eleventh Circuit's Holding*

When the Eleventh Circuit decided *Williams* in 2007, the issue was whether "public morality" could qualify as a rational basis for the statute.[160] The court answered affirmatively by distinguishing *Lawrence* from *Williams*.[161] It held that because *Lawrence* involved only private conduct, *Lawrence*'s holding did not apply to *Williams*, which involved public and commercial activity.[162] This is erroneous for two reasons.[163]

1. The Eleventh Circuit Used the Wrong Standard of Review

It is unclear that *Lawrence* was a rational basis case.[164] The decision did not state whether rational basis or strict scrutiny applied.[165] Although the Court did not label the right to sexual privacy as fundamental, it likewise did not deny it such status.[166] The lack of any

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[158] *See infra* Part III.C.

[159] *See infra* Part III.A-C.

[160] Williams v. Morgan, 478 F.3d 1316, 1318 (11th Cir. 2007).

[161] *Id.* at 1322.

[162] *Id.* at 1322-23.

[163] *See infra* Part III.A.1-2.

[164] *See* Tribe, *supra* note 15, at 1916 (identifying absence of any explicit statement in *Lawrence*'s majority opinion about standard of review employed to assess constitutionality of law as source of confusion); *see also* Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (criticizing *Lawrence* majority for failing to state applicable standard of review explicitly); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 n.32 (5th Cir. 2008) (finding that *Lawrence* did not categorize right to sexual privacy as fundamental and not attempting to do so).

[165] *Lawrence*, 539 U.S. at 586.

[166] *See* Hermann, *supra* note 17, at 951 (arguing that *Lawrence* suggests that right at issue was fundamental because majority borrowed from analysis in *Griswold*); Sunstein, *supra* note 85, at 47 (noting that *Lawrence* would be unintelligible as rational basis case and likening issue to those in Contraception Cases and *Roe v. Wade*, 410 U.S. 113 (1973)); Stephanie Francis Ward, *Avoiding* Lawrence*: Courts Considering Last Year's Major Gay Rights Ruling Are Treading Carefully*, A.B.A. J. June 2004, at 16 (reporting John Lawrence's attorney's comment that everything in majority opinion made clear that fundamental right was at issue, although it does not use phrase "fundamental right"); *see also* Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003) (placing *Lawrence* among Supreme Court's string of historic cases recognizing fundamental privacy rights). *Contra* Muth v. Frank, 412 F.3d 808, 817 (7th Cir. 2005) (interpreting *Lawrence*'s lack of using *Glucksberg* analysis as

triggering language of "fundamentality" in the Court's opinion does not necessarily mean that rational basis was the appropriate standard.[167] Therefore, the Eleventh Circuit erred when it assumed that *Lawrence* requires only rational basis review for legislation affecting the right to sexual privacy.[168] The possibility that *Lawrence* requires heightened scrutiny undermines the Eleventh Circuit's hasty conclusion that public morality may be a legitimate state interest underlying Alabama's statute.[169]

In contrast, the Fifth Circuit recognized that *Lawrence* did not specify whether the right to sexual privacy was fundamental.[170] Instead of assuming that a certain standard of review applied, it directly analogized the factual situation in *Reliable Consultants* to that in *Lawrence*.[171] Because public morality was insufficient to justify a statute interfering with sexual privacy in *Lawrence*, it would be insufficient to justify a similar statute in *Reliable Consultants*.[172]

2. Alabama's Statute Should Have Failed Even Rational Basis Review

Lawrence clearly rejected the notion that public morality could suffice to support legislation affecting sexual privacy.[173] Before

indication it was rational basis case); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004) (same); Standhardt v. Superior Court, 77 P.3d 451, 457 (Ariz. Ct. App. 2003) (same); People v. Downin, 828 N.E.2d 341, 348 (Ill. App. Ct. 2005) (same); State v. Limon, 122 P.3d 22, 29-30 (Kan. 2005) (same); Hernandez v. Robles, 855 N.E.2d 1, 17 (N.Y. 2006) (same); State v. Jenkins, No. C-040111, 2004 Ohio App. LEXIS 6663, at *11 (Ohio Ct. App. 2004) (same).

[167] *See* Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (criticizing two-tiered analysis of equal protection claims and stating that Equal Protection Clause does not mandate such bifurcated application); Tribe, *supra* note 15, at 1917 (criticizing assumption that absence of words indicating fundamentality implies rational basis review); *see also* sources cited *supra* note 166.

[168] *See supra* Part II.A.

[169] *See supra* Part II.A.

[170] Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 n.32 (5th Cir. 2008) (refusing to attempt to categorize right to sexual privacy as fundamental because *Lawrence* did not do so).

[171] *See id.* at 744-46; *see also supra* notes 147-149 and accompanying text.

[172] *See Reliable Consultants*, 517 F.3d at 745 (stating public morality interests cannot sustain sexual devices statute after *Lawrence*).

[173] *See* Lawrence v. Texas, 539 U.S. 558, 577-78 (2003) (stating that fact of governing majority traditionally viewing particular practice as immoral is not sufficient reason for upholding law prohibiting practice); *see also id.* at 582-84 (O'Connor, J., concurring) (stating that moral disapproval of homosexual sodomy is insufficient to satisfy rational basis review under Equal Protection Clause). *See*

Lawrence, Justice Stevens's dissent in *Bowers* stated that neither a majority's moral opinion nor tradition could protect a law from constitutional attack.[174] The *Lawrence* majority elevated this principle to controlling authority when it held that Stevens's dissenting analysis in *Bowers* should control in *Lawrence*.[175] Such a principle does not distinguish between public and private practices.[176] Thus, Alabama's sexual devices statute would be unconstitutional under either categorization of the activity in *Williams*.[177]

Despite *Lawrence*'s unequivocal adoption of Stevens's *Bowers* dissent, the Eleventh Circuit affirmed the vitality of the *Bowers* majority opinion.[178] In effect, the court legitimized using public morality as a rational basis for upholding the statute.[179] In support of its view, the Eleventh Circuit cited only outdated, pre-*Lawrence* Supreme Court decisions, along with its own precedents.[180] This method of analysis clashes with the basic common law tenet that lower courts must follow the decisions of courts above them.[181] Even under the law-of-the-case doctrine, the Eleventh Circuit's decision in *Williams v. Pryor* was not binding because the Supreme Court

generally Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1234-35 (2004) (noting that *Lawrence* reflected Supreme Court's longstanding jurisprudential discomfort with explicit morals-based rationales for lawmaking).

[174] *Lawrence*, 539 U.S. at 577-78; *see id.* at 583 (O'Connor, J., concurring) (pointing out circularity of argument for sufficiency of moral disapproval as rational basis).

[175] *Id.* at 577-78 (majority opinion).

[176] *See id.* (discussing "particular practice[s]" without qualifying them as public or private).

[177] Williams v. Morgan, 478 F.3d 1316, 1322 (11th Cir. 2007) (finding that *Lawrence* invalidates only those laws targeting conduct that is both private and noncommercial).

[178] *See supra* Part II.A.

[179] *Williams*, 478 F.3d at 1323.

[180] *See supra* notes 137-139 and accompanying text.

[181] *See* Amgen, Inc. v. F. Hoffman-La Roche Ltd., 494 F. Supp. 2d 54 (D. Mass. 2007) (explaining stare decisis doctrine requires court to follow higher court's applicable holding, but need only consider sister court's decision where applicable to similar fact pattern); West's Encyclopedia of American Law from Answers.com, Case Law, http://www.answers.com/topic/case-law/ (last visited Jan. 29, 2009) (describing basic tenets of U.S. common law system); *see, e.g.*, *In re* Berg, 387 B.R. 524, 560 (Bankr. N.D. Ill. 2008) (explaining that under stare decisis doctrine, Illinois Supreme Court precedent is valid until overruled by Illinois Supreme Court, U.S. Supreme Court, or subsequent legislation); *Ex parte* Holt, 19 U.S.P.Q.2d 1211, 1214 (Bd. Pat. App. & Interf. 1991) (explaining hierarchy of precedent binding on tribunals of U.S. Patent Office).

subsequently decided *Lawrence*.[182] Insofar as public morality concerns were the basis of the Alabama statute, the *Williams* decision should fail for improperly applying *Lawrence*.[183]

On the other hand, one might argue that *Lawrence* was clearly a rational basis case, given that the opinion employed the signature language of rational basis review.[184] The *Lawrence* Court noted that the Texas statute did not further a "legitimate state interest" that could justify its intrusion into an individual's private life.[185] Some courts conclude that the use of the word "legitimate" implies rational basis.[186] Because *Lawrence* implied that the right at issue was nonfundamental, one may argue that public morality would suffice to support the Alabama sexual devices statute.[187] Accordingly, the Eleventh Circuit was correct in upholding the Alabama statute, even after *Lawrence*.[188]

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[182] *See* Alphamed, Inc. v. B. Braun Med., Inc., 367 F.3d 1280, 1286 n.3 (11th Cir. 2004) (discussing three ways to overcome stare decisis doctrine); *see, e.g.*, Heathcoat v. Potts, 905 F.2d 367, 371 (11th Cir. 1990) (analyzing applicability of Heathcoat v. Potts, 880 F.2d 419 (11th Cir. 1989) to district court's subsequent review of same case and concluding none of three exceptions applied); Piambino v. Bailey, 757 F.2d 1112, 1122-23 (11th Cir. 1985) (concluding that district court could not refuse to implement *Piambino I*'s holding in subsequent case because none of exceptions to law-of-the-case doctrine applied); Jennings v. Patterson, 488 F.2d 436, 441 (5th Cir. 1974) (remanding case to district court to reconsider case in light of subsequent Supreme Court ruling); McComb v. Crane, 174 F.2d 646, 647 (11th Cir. 1949) (holding that subsequent Supreme Court decision compelled court of appeals to reverse its judgment in former appeal, according to law-of-the-case doctrine); *see also* This That & The Other Gift & Tobacco, Inc. v. Cobb County, Ga., 439 F.3d 1275, 1283 (11th Cir. 2006) (stating that under doctrine, appellate court's conclusions of law generally bind all subsequent proceedings in same case in trial court or on later appeal).

[183] *See supra* Part II.A.

[184] *See* Lawrence v. Texas, 539 U.S. 558, 578 (stating that Texas's statute furthers no "legitimate" state interest); *see also* Muth v. Frank, 412 F.3d 808, 817 (7th Cir. 2005) (interpreting *Lawrence*'s lack of *Glucksberg* analysis as indicating it was rational basis case); Standhardt v. Superior Court, 77 P.3d 451, 457 (Ariz. Ct. App. 2003) (stating that language in *Lawrence* indicates that Court did not consider sexual conduct between same-sex partners as fundamental right); State v. Limon, 122 P.3d 22, 29-30 (Kan. 2005) (emphasizing word "legitimate" in *Lawrence* opinion).

[185] *Lawrence*, 539 U.S. at 578.

[186] *See, e.g.*, Sylvester v. Fogley, 465 F.3d 851, 857 (8th Cir. 2006); *see also* Loomis v. United States, 68 Fed. Cl. 503, 517-18 (Fed. Cl. 2005) (interpreting *Lawrence* opinion's search for legitimate state interest undermined inference that right at issue was fundamental).

[187] *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (ruling that statute is constitutional under rational basis scrutiny if there is any reasonably conceivable state of facts that could provide rational basis).

[188] *See supra* note 130.

But even assuming that the right at issue in *Lawrence* was nonfundamental, other Supreme Court decisions show that public morality cannot serve as a rational basis.[189] An empirical study of Supreme Court opinions shows that, since the mid-twentieth century, the Court has never relied exclusively on explicit morals-based justification.[190] Rather, the Court usually chose to sustain government action based on observable societal harms.[191] Such longstanding disapproval of exclusively morals-based justification is at odds with the Eleventh Circuit's approval of Alabama's morality-based law in *Williams*.[192] Insofar as the Eleventh Circuit did not base its decision on any observable societal harm and wholly accepted Alabama's purely morals-based justification, it should fail.[193]

B. Williams *Is Inconsistent with the Supreme Court's Precedent in the Contraception Cases*

The Eleventh Circuit circumvented *Lawrence* by narrowly characterizing the right at stake in *Williams* as the right to sell sexual devices.[194] It reasoned that because selling sexual devices is a public and commercial activity, *Lawrence*'s holding protecting purely private

[189] *See generally* Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify As Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 139 (1998) (arguing bare assertion of public morality cannot serve as legitimate governmental interest); Goldberg, *supra* note 173, at 1236 (concluding that mere reference to morality should not suffice as justification for lawmaking).

[190] Goldberg, *supra* note 173, at 1267-83 (discussing range of Supreme Court cases since mid-twentieth century showing little conviction to rely on state moral authority).

[191] *Id.* at 1259 (noting that in cases regarding government's power to regulate morals, Supreme Court typically chose to sustain government action based on observable societal harm); *see, e.g.*, Romer v. Evans, 517 U.S. 620, 635-36 (1996) (invalidating on amoral grounds Colorado's constitutional amendment prohibiting government entities from protecting gays from discrimination); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 582 (1991) (Souter, J., concurring) (concurring with plurality to uphold Indiana's public nudity statute, but on grounds of preventing secondary effects of adult entertainment establishments); Paris Adult Theater I v. Slaton, 413 U.S. 49, 69 (1973) (upholding Georgia obscenity statute but stating that issue goes beyond whether majority considers conduct depicted as wrong or sinful).

[192] *See* Williams v. Morgan, 478 F.3d 1316, 1322-24 (11th Cir. 2007) (holding that government's interest in morality was sufficient basis to justify upholding Alabama statute); Goldberg, *supra* note 173, at 1234-35.

[193] *See supra* notes 191-92 and accompanying text.

[194] *Williams*, 478 F.3d at 1322.

activity was inapplicable.[195] However, the Supreme Court held in *Griswold* and *Carey* that laws making it unduly burdensome to acquire contraceptives are tantamount to laws restricting their use.[196] These precedents invalidate the Eleventh Circuit's commercial activity rationale because banning sales of sexual devices unduly burdens the right to use them.[197]

Both *Griswold* and *Carey* involved an underlying right to use a product, and the Court found the restrictions on obtaining that product unduly burdensome.[198] The sexual devices statute in *Williams* similarly and unduly burdened the right to sexual privacy in two major ways.[199] First, the law makes sex toys unavailable for sale at local adult shops, thereby forcing individuals to buy such items out of state.[200] Traveling to another state to buy sexual devices is an unrealistic alternative because it involves considerable time and expense.[201] Purchasing sexual devices from out-of-state online retailers may be an unsatisfactory alternative because a customer cannot inspect the devices prior to purchase.[202] Second, the law prevents individuals from engaging in Tupperware-style parties, stripping them of the comfort and convenience of purchasing such devices in a private setting.[203] These burdens reveal the shortsightedness of sustaining Alabama's sexual devices ban on grounds that it only restricts a public and commercial activity.[204] No other realistic and suitable alternatives for individuals to obtain sexual devices exist

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[195] *Id.*

[196] *See supra* Part I.C (discussing contraception cases *Griswold* and *Carey*).

[197] *See supra* Part I.C.

[198] *See supra* Part I.C.

[199] *See generally* Part I.D (describing state statutes regarding sexual devices).

[200] *See supra* Part I.C.

[201] *See generally* Mark Waltzer, *Why Do People Prefer Online Grocery Shopping?* http://www.articlesbase.com/home-brewing-articles/why-do-people-prefer-online-grocery-shopping-536937.html (last visited Nov. 5, 2009) (identifying various reasons people prefer online grocery shopping, including saving time and avoiding stress related to driving and waiting in line).

[202] *See, e.g.*, The Adult Toy Shoppe, Return Policy, http://www.theadulttoyshoppe.com/policies.htm#return (last visited Nov. 22, 2008) (disallowing exchanges and refunds to protect health of customers and give customers peace of mind knowing they will never buy used products).

[203] *See, e.g.*, Temptations Parties, FAQs, http://www.temptationsparties.com/faq.aspx (last visited Nov. 22, 2008) (presenting testimonials indicating customers prefer this business model because they feel uneasy visiting a store or ordering online).

[204] *See* Alexander, *supra* note 9, at 1 (reporting that consultant of market leader Passion Parties makes most of her sales in small towns and rural locations).

under the Alabama ban.[205] Just as prohibiting the sale of contraceptives unduly burdened an individuals' right to use them, prohibiting the sale of sex toys imposes a similar burden.[206]

C. Williams *Deprives the Public of Health Benefits*

The Eleventh Circuit's decision to uphold the Alabama sexual devices ban presents significant public policy concerns.[207] Restricting access to such devices may inflict significant health detriments on many segments of the population.[208] Although many perceive sexual devices as vehicles to sexual gratification, several studies show they benefit an individual's mental and physical health.[209] Undeniably, these devices serve important therapeutic functions, particularly for women.[210]

A 2004 Berman Center study reveals a strong correlation between the use of sexual devices and women's health.[211] The study found that vibrator use positively affected sexual function, satisfaction, and quality of life.[212] For the 59% of women in the study who masturbated at least once a week with a vibrator, access to such devices is vital.[213]

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[205] *See supra* Part I.D.

[206] *See supra* Part I.C (describing burden that statutes restricting sale of contraceptives impose on individual in *Griswold* and *Carey*) and notes 200-02 and accompanying text (describing possible burden of statutes restricting sale of sexual devices impose on individual).

[207] *See infra* notes 211-18 and accompanying text.

[208] *See infra* notes 211-18.

[209] *See generally* Lindemann, *supra* note 5, at 327-30, 336-41 (explaining that sexual devices' original purposes were medical).

[210] *See* sources cited *infra* notes 211-213 and accompanying text.

[211] BERMAN CENTER, THE HEALTH BENEFITS OF SEXUAL AIDS AND DEVICES: A COMPREHENSIVE STUDY OF THEIR RELATIONSHIP TO SATISFACTION AND QUALITY OF LIFE 8 (2004), (describing study garnering survey responses from 1,656 women regarding personal vibrator use and perceptions on quality of life). *See generally New Study on Female Sexuality Reveals Increased Use of Sexual Aids by Women*, PR NEWSWIRE, Sept. 13, 2004, http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/09-13-2004/0002249382&EDATE= (noting Berman study as one of first to explore women's use of sexual devices); *Use of Sexual Aids by Women on the Rise*, WOMEN'S HEALTH MATTERS, Oct. 25, 2004 (on file with the author) (noting trends in sales suggests that we are only in "infancy of a new sexual awakening for women").

[212] BERMAN CENTER, *supra* note 211, at 16.

[213] *Id.* at 7 (revealing that all women who used vibrators reported higher levels of sexual function according to the Female Sexual Function Index); *id.* at 5; *see* Rosen et al., *The Female Sexual Function Index (FSFI): A Multidimensional Self-Report Instrument for the Assessment of Female Sexual Function*, 26 J. SEX & MARITAL THERAPY 191, 198 (2000) (describing index measuring six major sexual functions: desire, arousal, lubrication, orgasm, global satisfaction, and pain).

The Berman Center study and others demonstrate the bona fide therapeutic benefits to using sexual devices.[214] Moreover, individuals who wish to avoid contracting sexually transmitted infections may do so by using sexual devices in lieu of sexual contact.[215] Access to sexual devices may also yield the social benefit of preserving marriages by helping couples avoid sexual monotony.[216] If states impede access to such devices through criminal laws, they threaten the mental and physical health of large segments of their population.[217] A failure to acknowledge the existence of these benefits highlights the myopic nature of the *Williams* court's public morality rationale.[218]

On the other hand, some might argue that sexual device statutes already adequately provide for the above concerns.[219] Texas's sexual devices statute contained an affirmative defense for those who used or sold sexual devices for a bona fide medical or psychiatric purpose.[220] Thus, the therapeutic measures mentioned above would qualify under this exception.[221] Individuals who wish to use sexual devices for health benefits could protect themselves from prosecution by obtaining documentation of their medical needs from medical professionals.[222]

These arguments ultimately fail because in general, sexual device purchasers care deeply about their own privacy.[223] A leading study on

[214] *See supra* notes 211-213 and accompanying text.

[215] *See supra* note 6 and accompanying text.

[216] *See supra* note 7 and accompanying text.

[217] *See, e.g.*, Amelia Hill, *Women To Get Sex Toys on the NHS*, THE OBSERVER, Sept. 29, 2002, at 11, http://www.guardian.co.uk/uk/2002/sep/29/health.publicservices (reporting that physicians are prescribing vibrators on National Health Service to women suffering from sexual problems); *id.* (noting that almost half of all women suffer from sexual dysfunction, and sex shops could be vital part of their therapy). *But see* Brian Alexander, *When Sex Toys Turn Green – for Health, That Is*, MSNBC.COM, June 21, 2007, at 1, http://www.msnbc.msn.com/id/19333870/ (reporting controversy over health and environmental consequences of common sex toy compound phthalates).

[218] *See supra* notes 136-142 and accompanying text (describing Eleventh Circuit's public morality argument in *Williams*).

[219] *See infra* text accompanying notes 220-222.

[220] TEX. PENAL CODE ANN. § 43.23(g) (Vernon 2007).

[221] *See id.* (providing exceptions for bona fide medical or psychiatric purposes).

[222] *See id.*

[223] *See* JANICE TSAI ET AL., THE EFFECT OF ONLINE PRIVACY INFORMATION ON PURCHASING BEHAVIOR: AN EXPERIMENTAL STUDY 15 (Workshop on the Econ. of Info. Sec., June 2007), http://weis2007.econinfosec.org/papers/57.pdf (finding that study participants given privacy information were more likely than those given irrelevant information to purchase from websites indicating "high privacy" symbol); Katherine Feeney, *Sex Toy Taboo*, BRISBANE TIMES, Jan. 31, 2008, http://blogs.brisbanetimes.com.au/citykat/archives/2008/01/sex_toy_taboo.html (describing women's desire to conceal online sex-

the topic indicates that specialty shops by far are the most popular way for women to purchase sex aids.[224] The embarrassment of going to a stranger to obtain permission to purchase a sexual device would be an unreasonable deterrent.[225] As a result, fewer women would obtain the therapeutic benefits from sexual devices.[226]

CONCLUSION

This Comment established three ways in which the Fifth Circuit's view regarding sexual devices statutes is superior to that of the Eleventh Circuit.[227] First, the Fifth Circuit correctly recognized that *Lawrence* did not specify whether the right to sexual privacy was fundamental.[228] In so interpreting, it directly applied *Lawrence*'s principle that public morality is insufficient to justify a statute that burdens the right to sexual privacy.[229] In contrast, the Eleventh Circuit incorrectly regarded public morality as sufficient to justify a statute burdening the right to sexual privacy.[230] Second, this Comment analogized the Contraception Cases to *Williams*, precluding distinction between *Lawrence*'s private right and *Williams*'s supposed public right.[231] Finally, this Comment showed how the Eleventh Circuit's result could harm public health by eliminating access to certain mental and physical health benefits.[232] The Supreme Court should resolve this split in favor of the Fifth Circuit's view, which comports with binding precedent and promotes public welfare.[233]

shop shopping); Sexual Health Network, Answer, Cynthia Ruberg, May 6, 2004, http://www.sexualhealth.com/question/read/women-sexual-health/pleasure/119/ (last visited Feb. 3, 2009) (advising woman who was too embarrassed to purchase sex toy of alternative ways of obtaining or making such toys).

[224] BERMAN CENTER, *supra* note 211, at 8 (noting that between 75 and 95% of women who currently use vibrators reported purchasing them at specialty shops).

[225] *See*, *e.g.*, Discovery Health, Sex Toys, http://health.discovery.com/centers/sex/sexpedia/sexaids_02.html (last visited Jan. 7, 2009) (attributing embarrassment to society's misconceptions of what sexual devices say about its user, including being perverted, failing in relationship, and having addiction to such devices); *see also* Feeney, *supra* note 223, at 1 (attributing women's shame of sex toys to fearing others' judgment).

[226] *See supra* notes 223-225 and accompanying text.

[227] *See supra* Part III.

[228] *See supra* Part III.A.

[229] *See supra* Part III.A.

[230] *See supra* Part III.A.

[231] *See supra* Part III.B.

[232] *See supra* Part III.C.

[233] *See supra* Part III.