Constitutional Law - The Eleventh Circuit Fumbles the Supreme Court's Recognition of a Due Process to Sexual Intimacy

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CONSTITUTIONAL LAW—THE ELEVENTH CIRCUIT FUMBLES THE SUPREME COURT'S RECOGNITION OF A DUE PROCESS RIGHT TO SEXUAL INTIMACY

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IN *Lawrence v. Texas*, the United States Supreme Court held that the Due Process Clause protects a substantive right to sexual intimacy.[1] But the Court articulated this right poorly, making *Lawrence* ambiguous. Confused by this ambiguity, the Eleventh Circuit held in *Williams v. Attorney General of Alabama* that the Due Process Clause does not guard a right to use sexual devices.[2] *Williams* rightly held that *Lawrence* did not recognize a fundamental right to sexual intimacy because the Supreme Court did not apply a strict-scrutiny standard.[3] But *Williams* misjudged the extent of the right that *Lawrence* announced, wrongly ignoring three of *Lawrence*'s propositions: (1) sexual intimacy is a form of due process liberty; (2) a state's interest in preserving public morality is not a legitimate interest that justifies criminalizing private conduct; and (3) courts ought not to subject asserted sexual-intimacy rights to a *Glucksberg* analysis.[4]

Alabama's Anti-Obscenity Enforcement Act prohibits the sale of anything designed or marketed as a sexual device.[5] The Act does not apply to a sexual device that one acquires as a gift or purchases out-of-state, nor does it prevent one from using or owning sexual devices.[6] The ACLU sued to enjoin the Act for some sexual device users and vendors, arguing that the Act violated a fundamental right to sexual intimacy because it

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1. 539 U.S. 558, 578 (2003).

2. 378 F.3d 1232, 1250 (11th Cir. 2004).

3. *Id.* at 1238.

4. Used to evaluate new fundamental-rights claims, a *Glucksberg* analysis (1) carefully describes the asserted fundamental right and then (2) determines whether that right is deeply rooted "'such that neither liberty nor justice would exist if [the right was] sacrificed.'" *Id.* at 1239 (quoting Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

5. ALA. CODE § 13A-12-200.2(a)(1) (2004) (prohibiting the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value"). The specific devices mentioned in *Williams* were vibrators, dildos, anal beads, and artificial vaginas. *Williams*, 378 F.3d at 1250.

6. *Williams*, 378 F.3d at 1233.

burdened the ability to use sexual devices.[7] The user plaintiffs included women who used sexual devices therapeutically.[8] The vendor plaintiffs—who asserted their own rights and the rights of their customers who were too embarrassed to sue[9]—sold sexual devices and paraphernalia.[10] One of the vendors did so in a store near a Wal-Mart.[11] That store had a window that displayed the paraphernalia.[12] The other vendor sold the devices and paraphernalia at Tupperware-style parties.

The district court enjoined the Act on the grounds that it lacked a rational basis and thus was an unjustified state restriction.[13] The Eleventh Circuit reversed, holding that Alabama's interest in preserving public morality provided a rational basis.[14] But it remanded because the district court had failed to conduct a *Glucksberg* analysis to determine whether the plaintiffs had a fundamental right to sexual intimacy.[15] On remand, the district court conducted this analysis and held that the plaintiffs had such a right.[16] Since the Act burdened this right, the district court enjoined the Act again.[17] The State of Alabama appealed this decision.[18]

Before *Williams* returned to the Eleventh Circuit, two cases were decided that affected the status of sexual intimacy as a due process right: *Lawrence v. Texas*[19] and *Lofton v. Secretary of the Department of Children & Family Services*.[20] In *Lawrence*, the Supreme Court invalidated a Texas statute that criminalized gay sodomy.[21] Texas argued that its interest in preserving public morality provided a legitimate interest that justified its statute.[22] But the Court rejected this argument,[23] adopting Justice Stevens's dissenting view in *Bowers v. Hardwick*: "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[24] The Court held that the Texas statute violated the most private human conduct in the most private place—sexual intimacy in the home.[25] Although the statute proscribed a specific sexual act, the Court held that framing the issue as whether the Due Process Clause protected

7. *See id.*
8. Williams v. Pryor, 220 F. Supp. 2d 1257, 1265-67 (N.D. Ala. 2002).
9. Williams v. Pryor, 41 F. Supp. 2d 1257, 1260 (N.D. Ala. 1999).
10. *Pryor*, 220 F. Supp. 2d at 1263-65.
11. *Id.* at 1265-66.
12. *Id.* at 1263-64.
13. *Williams*, 378 F.3d at 1234.
14. Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001).
15. *Id.* at 955-56.
16. *Id.*
17. *See Williams*, 378 F.3d at 1234.
18. *Id.*
19. 539 U.S. 558.
20. 368 F.3d 804.
21. *Lawrence*, 539 U.S. at 578.
22. Respondent's Brief at 4, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).
23. "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578.
24. *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (internal quotations omitted).
25. *Id.* at 567.

a specific act would misjudge the "extent of the liberty at stake."[26] *Lawrence* therefore framed its inquiry as whether the Due Process Clause protected sexual intimacy.[27] The Court classified sexual intimacy as a form of due process liberty[28] because it was a way that the plaintiffs achieved personal autonomy.[29] And states may not deprive their citizens of this intimacy unless the deprivation furthers a legitimate state interest.[30]

In *Lofton*, gay plaintiffs cited *Lawrence* to argue that a Florida statute prohibiting gays from adopting children violated their fundamental right to sexual intimacy.[31] The Eleventh Circuit rejected this argument, holding that *Lawrence* was distinguishable.[32] The court also said in dictum that *Lawrence* did not recognize a fundamental right to sexual intimacy because it neither conducted a *Glucksberg* analysis nor applied strict scrutiny.[33] According to the court, *Lawrence* held only that states may not criminalize private gay conduct.[34]

With *Lawrence* and *Lofton* as fresh precedent when *Williams* re-reached the Eleventh Circuit, the court had to look through a new lens to determine whether the Due Process Clause protected a right to use sexual devices. Judge Birch delivered the *Williams* opinion that resolved this inquiry in the negative.[35] Adopting *Lofton*'s dictum, Judge Birch held that *Lawrence* did not announce a fundamental right to sexual privacy.[36] He reasoned that any other holding would "impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds, that never engaged in Glucksberg analysis, and that never invoked strict scrutiny."[37] He stressed that the Supreme Court consistently declined to recognize a fundamental right to sexual intimacy, despite having many chances to do so.[38] Although he acknowledged that *Lawrence* was the most recent of these chances,[39] he said that *Lawrence* established only that criminalizing consensual-adult sodomy was unconstitutional.[40] So he labeled *Lawrence*'s sexual-intimacy discussion "scattered dicta"[41] and

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26. *Id.*
27. *Id.* at 564.
28. *See id.* at 578.
29. *See id.* at 574.
30. *Id.* at 578.
31. Lofton v. Sec'y of the Dep't of Children and Family Servs., 358 F.3d 804, 815 (11th Cir. 2004).
32. "[Florida's] action is not criminal prohibition, but grant of a statutory privilege. And the asserted liberty interest is not the negative right to engage in private conduct without facing criminal sanctions, but the affirmative right to receive official and public recognition." *Id.* at 817.
33. *Id.* at 816-17.
34. *Id.* at 815.
35. *Williams*, 378 F.3d at 1250.
36. *See id.* at 1238.
37. *Id.*
38. *Id.* at 1235.
39. *Id.* at 1236.
40. *Id.*
41. *Id.* at 1236.

viewed the ACLU's claim as an attempt to recognize a fundamental right that no Supreme Court precedent had ever mentioned.[42] This necessitated a *Glucksberg* analysis to evaluate whether the Eleventh Circuit ought to recognize a novel fundamental right.[43] Thus, he narrowly framed the alleged right as the right to use sexual devices.[44] Declining to announce this right, he reversed the district court's decision.[45]

Judge Barkett delivered *Williams*'s dissent, arguing that the majority's opinion conflicted with *Lawrence*'s recognition of a fundamental right to sexual intimacy.[46] She emphasized that *Lawrence* had granted certiorari specifically to consider whether the petitioners, in exercising their due process liberty, were free as adults to engage in private sexual conduct.[47] Since the Supreme Court expressly resolved *Lawrence* under this issue, she said that *Lawrence*'s sexual-intimacy discussion was not "scattered dicta."[48]

Judge Barkett also attacked the majority's failure to question why *Lawrence* held criminal prohibitions against sodomy to be unconstitutional. *Lawrence*, she said, held that a state may not criminalize sodomy because adults have a right to sexual intimacy.[49] Also, she questioned the majority's inability to explain why public morality was a rational basis for criminalizing sexual intimacy when the Supreme Court did not consider public morality to be a legitimate state interest in *Lawrence*.[50] Further, she criticized how narrowly the majority framed the plaintiffs' asserted right. To her, *Lawrence* demonstrated that reducing sexual intimacy to a particular act demeans and trivializes sexual intimacy's importance to an adult's private life.[51]

Despite Judge Barkett and Birch's arguments, neither judge grasped the sexual-intimacy right that *Lawrence* declared. Judge Barkett's dissent was wrong because—as Judge Birch correctly recognized in holding that *Lawrence* did not consider sexual intimacy to be a fundamental right—announcing a fundamental right without applying strict scrutiny would have been illogical. On the other hand, Judge Birch's majority opinion was wrong because it ignored *Lawrence*'s holding that sexual intimacy is a form of due process liberty. *Lawrence* considered sexual intimacy to be an entirely private activity that is "but one element" in an enduring personal bond.[52] Preserving public morality is not a legitimate state interest that justifies criminalizing those bonds. So Judge Birch's holding mistakenly ignored *Lawrence*'s recognition that "[o]ur obligation is to define the

42. *Id.* at 1239.
43. *Id.*
44. *Id.* at 1242.
45. *Id.* at 1250.
46. *Id.*
47. *Id.* at 1253 (Barkett, J., dissenting) (quoting *Lawrence* 539 U.S. at 564).
48. *Id.* at 1256.
49. *Id.* at 1251.
50. *Id.* at 1252.
51. *Id.* at 1255.
52. *Lawrence*, 539 U.S. at 567.

liberty of all, not to mandate our own moral code."[53] Yet, a due process right to sexual intimacy does not always trump a state's interests.[54] Alabama might have justified the Act on a grounds other than public morality because it had a legitimate-state interest in regulating sexual-device promotions that children could see. Considering the one vendor plaintiff's storefront display and proximity to Wal-Mart, this interest was cognizable in *Williams*. And this was cause for distinguishing *Williams* from *Lawrence* because the Texas statute lacked any rational basis.

Williams and *Lawrence* were further distinguishable because selling sexual devices was neither private conduct nor a way that the vendor-plaintiffs attained personal autonomy. Even assuming that the user-plaintiffs' sexual device use established autonomy and personal bonds, the Act only burdened sexual device use—the Act did not criminalize it. A critical factor in *Lawrence* was that the Texas statute's criminal sanctions stigmatized homosexual sodomy.[55] Such vilification was absent from *Williams*. So Judge Birch ought to have distinguished *Lawrence*, as he did in *Lofton*, by basing *Williams*'s holding on the factual differences.

Judge Birch's final mistake was subjecting the alleged sexual-intimacy right to a *Glucksberg* analysis. He recognized that *Lawrence* was the latest Supreme Court case on sexual intimacy as a due process right. But he failed to question why *Lawrence* never employed *Glucksberg*. The Supreme Court had two reasons for deciding *Lawrence* without a *Glucksberg* analysis. First, the asserted sexual-intimacy right in *Lawrence* was different than the *Glucksberg* petitioners' asserted right to assisted suicide. The Supreme Court declined to recognize a due process assisted-suicide right in *Glucksberg*, arguably because "[t]he value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life."[56] A state's interest in preserving life exceeds its interest in criminalizing private sexual conduct. Such conduct reaches the core of personal autonomy while compromising few essential state interests.

Second, *Lawrence* impliedly rejected the *Glucksberg* analysis's two prongs. *Lawrence* held that modern traditions are most relevant when analyzing sexual intimacy because they provide an emerging awareness

53. *Id.* at 571 (quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 850 (1992)) (internal quotations omitted).

54. For example, the Due Process Clause would not protect an adult's sexual intimacy with a minor because states have a legitimate interest in protecting those that cannot consent. *See id.* at 578.

55. The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but . . . a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions . . . . This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition.

Id. at 575-76.

56. *Glucksberg*, 521 U.S. at 741 (Stevens, J., concurring).

that liberty protects how adults conduct their private sex lives.[57] *Lawrence* necessarily rejected the need for courts in sexual-intimacy cases to apply *Glucksberg*'s requirement that due process rights be deeply rooted in our history. And *Lawrence* rejected *Glucksberg*'s requirement that courts describe asserted rights narrowly. *Lawrence* held that courts misapprehend and thus demean sexual intimacy if they narrowly frame an issue as whether the Due Process Clause protects a specific sexual act.

Indeed, *Lawrence* did not settle how far the Supreme Court will go to protect sexual intimacy. But while the liberty that the Supreme Court announced in *Lawrence* does not currently shield citizens from a statute only burdening sexual intimacy, *Williams* is troubling for its failure to properly delineate *Lawrence* for the Eleventh Circuit's lower courts. To guard their sexual privacy from criminal sanctions aimed only at propagating the governing majority's morality, citizens within the Eleventh Circuit's jurisdiction must now clear *Glucksberg*'s high hurdles. This will impede meaningful judicial discussions of sexual intimacy. Rather than emphasize the enduring relationships of which sexual conduct is just one element, courts under *Williams* will reduce personal bonds to particular sexual acts. And that, as *Lawrence* instructs, demeans sexual intimacy.

57. *Lawrence*, 539 U.S. at 571-72.