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Can't Buy a Thrill: Substantive Due Process, Equal Protection, and Criminalizing Sex Toys

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CAN'T BUY A THRILL:* SUBSTANTIVE DUE PROCESS, EQUAL PROTECTION, AND CRIMINALIZING SEX TOYS

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This Comment explores the split between the Fifth and Eleventh Circuits on the issue of sexual privacy and statutes that ban the sale and distribution of sexual devices. Through a discussion centered around Lawrence v. Texas, *the Comment argues that the statutes, although perhaps silly or repugnant, are not unconstitutional as a matter of privacy, substantive due process liberty, equal protection, nor First Amendment sexual expression. In fact, a finding of unconstitutionality could potentially do more harm than good to the greater goals of understanding female sexuality and providing sexual realization and autonomy. Those goals will be best served, as they have been thus far, via legislative means and further scientific research into the role and nature of sex and orgasm in modern relationships.*

I. INTRODUCTION

> It's the day for civic freebies as a number of businesses in New York City and across the country offer giveaways to voters who have cast their ballots. Starbucks is giving away free cups of coffee, Ben and Jerry's will give away free scoops of ice cream . . . and Krispy Kreme is giving away star-shaped donuts with patriot sprinkles . . . . Elsewhere, a more unusual giveaway . . . has drawn a lot of attention.[1]

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* *Can't Buy a Thrill* is the title of the first album from recording artist Steely Dan. The band was named after "Steely Dan III from Yokohama," a strap-on dildo referred to in the William Burroughs novel, *The Naked Lunch*.

** J.D., Northwestern University School of Law, 2010; B.S., University of Tulsa, 2000. I would like to thank my friends and family for their unflagging emotional support, insightful comments, and good humor, particularly when I was unwilling or unable to accept any of it. Thanks in particular to my parents, my sister, Sarah Kalemeris, Tom Gaeta, Nick Terrell, Kevin King, and Kristen Knapp.

[1] Jennifer Lee, *Taking Election Freebies Without Guild*, NYTIMES.COM, Nov. 4, 2008, http://cityroom.blogs.nytimes.com/2008/11/04/taking-election-freebies-without-guilt; *see also* Mike Stuckey, *Free Sex Toys–and Much More–for Voting*, MSNBC.COM, Nov. 3, 2008,

On Election Day, November 4, 2008, Babeland, a sex toy retail chain, rewarded voters in New York, Los Angeles, and Seattle with free devices.[2] For men, there was the "Maverick," "always there to lend a hand," and ready to "buck[] the status quo";[3] for women, there was the "Silver Bullet," because "what our country needs right now [is] a magical solution . . ., a great stress-reliever during these troubled economic times."[4] The response was overwhelming.[5] Babeland was inundated with requests to the point that the company had to hire additional staff and ran low on supplies.[6] One possible explanation for the outstanding success of the promotion is summed up in the assertion that "[s]ex crosses party lines."[7] It does not, however, appear to cross state lines.

Alabama, Mississippi, and Virginia presently criminalize the marketing and sale of sexual devices—objects created primarily to stimulate human genitals. The Alabama and Mississippi statutes have withstood legal challenges in the Eleventh Circuit. The Virginia statute has not yet been challenged. Texas has a similar ban, but in early 2008, the Fifth Circuit Court of Appeals declared the statute an unconstitutional burden on the people's substantive due process right to sexual autonomy.

This Comment explores the split between the Fifth and Eleventh Circuits on the issue of sexual privacy and statutes that ban the sale and distribution of sexual devices. Through a discussion centered around *Lawrence v. Texas*, the Comment argues that the statutes, although perhaps silly or repugnant, are not unconstitutional as a matter of privacy, substantive due process liberty, equal protection, nor First Amendment sexual expression. In fact, a finding of unconstitutionality could potentially do more harm than good to the greater goals of understanding female sexuality and providing sexual realization and autonomy. Those goals will be best served, as they have been thus far, via legislative means and further scientific research into the role and nature of sex and orgasm in modern relationships. Part II provides a background discussion of the history of sexual devices, specifically vibrators,[8] and the laws that criminalize their

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http://www.msnbc.msn.com/id/27455136 ("Just when you thought it was safe to focus on the issues in this historic election season . . . .").

[2] *Id.*

[3] Babeland Blog, *Babeland Rocks the Vote with Free Sex Toys*, http://blog.babeland.com/2008/11/03/babeland-rocks-the-vote-with-free-sex-toys (last visited Feb. 5, 2010).

[4] *Id.*

[5] *See* Babeland Blog, *Update on the Free Sex Toys*, http://blog.babeland.com/2008/11/05/update-on-the-free-sex-toys (last visited Feb. 5, 2010).

[6] *Id.*

[7] Stuckey, *supra* note 1.

[8] Vibrators are highlighted as an example because they are more effective, more innocuous, and have a shorter history than most sexual devices. The choice is appropriate

sale in some states. Part III discusses the case history and decisions of the Fifth and Eleventh Circuits in *Reliable Consultants, Inc. v. Earle*[9] and *Williams v. King*,[10] respectively. Part IV provides background to the constitutional challenges, discussion of the existing and potential academic criticisms of the Eleventh Circuit's decision, and analysis of those criticisms. Part V contains concluding remarks.

II. BACKGROUND AND HISTORY

A. HYSTERIA, MASSAGE, & VIBRATORS

Derived from a Greek word meaning "womb,"[11] "hysteria" as a diagnosis dates back to as early as 2000 B.C.E., and documented treatment by "vulvular massage" dates to at least the first century C.E.[12] Symptoms of hysteria, described in the seventeenth century as "the most common of all diseases except fevers,"[13] include anxiety, sleeplessness, irritability, erotic fantasy, and vaginal lubrication—a set of symptoms some call "chronic arousal."[14] Vulvular massage would temporarily treat hysterical women by leading to paroxysms, or sudden outbursts of emotion or action.[15] Hysterical paroxysms are characterized by, among other things, "local spasms," loss of consciousness, flushing of the skin, "voluptuous sensations," embarrassment, confusion, and a very brief loss of control; in short, paroxyms are orgasms.[16]

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given that the relevant discussion is properly focused around the role of orgasm rather than the means of achieving it. *See* discussion *infra* Part IV.A.2. Furthermore, that even vibrators are not constitutionally protected demands the corresponding conclusion that more prurient devices are not. *Cf. infra* note 271 and accompanying text.

[9] 517 F.3d 738 (5th Cir. 2008), *reh'g en banc denied*, 538 F.3d 355 (5th Cir. 2008).

[10] 478 F.3d 1316 (11th Cir. 2007), *cert. denied*, 552 U.S. 814 (2007).

[11] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). [hereinafter AMERICAN HERITAGE DICTIONARY].

[12] *See generally* RACHEL P. MAINES, THE TECHNOLOGY OF ORGASM: "HYSTERIA," THE VIBRATOR, AND WOMEN'S SEXUAL SATISFACTION (1999) (detailing the history and medicalization of the female orgasm). Hysteria, a supposed revolt of the uterus against neglect that "combines in its connotation the pejorative elements of femininity and the irrational," has also been called "womb disease," "suffocation of the mother," "uterine congestion," "pelvic inflammation," "hysteroneurasthenia," and "frigidity." *Id.* at 21.

[13] JOSEPH FRANK PAYNE, THOMAS SYDENHAM 143 (1900).

[14] MAINES, *supra* note 12, at 8.

[15] *Id.* at 4; AMERICAN HERITAGE DICTIONARY; *supra* note 11.

[16] MAINES, *supra* note 12, at 23, 26-34 (describing historical causes and treatments of hysteria and awareness of the orgasmic nature of paroxysms). That hysterics, unlike epileptics, felt *better* after their spells and at no point became incontinent raised suspicions of malingering. *Id.* at 8.

Because "hysterical" women were not achieving orgasm by penetration and masturbation was strictly proscribed, medical treatment was necessary.[17] Furthermore, because it was a treatment rather than a cure, the task of vulvular massage had to be regularly repeated. Physicians found the treatment to be an inconvenient, routine, and difficult-to-learn chore,[18] often leading them to relegate the labor to husbands and midwives.[19] That the business was lucrative, regular, and repeat, but also annoying, provided ample incentive for inventive minds.[20] In the 1880s, Dr. Joseph Mortimer Granville developed and patented the electromechanical vibrator,[21] revolutionizing treatment of hysteria.[22]

By 1952, the American Psychiatric Association officially removed hysteria and other related disorders from the list of accepted diagnoses.[23] The vibrator, however, fell from grace almost three decades earlier.[24] Prior to the late 1920s, the vibrator held an odd social position, a welcomed medical innovation separate from similar but more risky technologies like the speculum.[25] A confluence of amenable social, medical, and

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[17] *See id.* at 3; *see also* ANNE KOEDT, THE MYTH OF THE VAGINAL ORGASM (1970), *available at* http://www.cwluherstory.com/myth-of-the-vaginal-orgasm.html.

[18] One doctor, in 1660, described the technique as "not unlike that children's game in which they try to rub their stomachs with one hand and pat their heads with the other." NATHANIEL HIGHMORE, DE PASSIONE HYSTERICA ET DE AFFECTIONE HYPOCHONDRIACA 76-77 (1660) ("Necnon in lusu illo puerorum, quo una manu pectus perfricare, altera frontem percutere conantur.").

[19] *See* MAINES, *supra* note 12, at 4.

[20] *Cf. id.* at 4, 67-110 (detailing the various methods of electrical, hydraulic, and mechanical manipulation brought to bear on the matter).

[21] *See* Rachel Maines, *Socially Camouflaged Technologies: The Case of the Electromechanical Vibrator*, *in* WOMEN, SCIENCE, AND TECHNOLOGY: A READER IN FEMINIST SCIENCE STUDIES 223, 225 (Mary Wyer ed., New York 2001).

[22] *See* MAINES, *supra* note 12, at 11 (noting the invention is less fatiguing and required less skill than manual massage, less expensive than hydriatic or steam-powered technologies, and more reliable, portable, and decentralizing than other physical therapies). The vibrator's invention also heralded a brief medical craze of treating all manner of ailments with "[u]ndulatory . . . [t]herapeutics." *See id.* at 97-99. The Food and Drug Administration regulates vibrators "for therapeutic use." 21 C.F.R. §§ 884.5940 & 5960 (2009).

[23] AMERICAN PSYCHIATRIC ASSOCIATION, MENTAL DISORDERS DIAGNOSTIC MANUAL (1952).

[24] *See* MAINES, *supra* note 12, at 20.

[25] *See id.* at 58 ("Any object or device that traveled the path of the totemic penis into the vagina was . . . suspected of having an orgasmically stimulating effect."); ROBERT BRUDENELL CARTER, ON THE PATHOLOGY AND TREATMENT OF HYSTERIA 69 (London, 1853) (noting the "remedy is worse than the disease. . . . [Y]oung[,] unmarried women . . . [are] reduced by the constant use of the speculum to the mental and moral condition of prostitutes . . . asking every medical practitioner . . . to institute an examination of the sexual organs"); *cf.* Joan P. Emerson, *Behavior in Private Places: Sustaining Definitions of Reality in Gynecological Examinations*, 2 RECENT SOC. 74 (1970) (discussing the tension between

psychological theories in that era cast the vibrator in an artificially reputable light.[26] Dominant androcentrism[27] implied that "what pleases men sexually pleases women generally."[28] Women incapable of achieving strictly vaginal orgasms (by most accounts, a majority)[29] were in need of therapy.[30] Profound lack of understanding, both physiological and psychological, of female sexuality led to confusion about the role of female sex organs and the function, if any, of female orgasm.[31] Much of this confusion continues to this day.[32] Androcentrism "created" hysterical women, and their "treatment" through massage rather than penetration was viewed as clinical rather than sexual.[33] The only real hurdle for the vibrator to clear en route to routine acceptance was the concern that massage without the assistance of a physician would lead to "compulsive masturbation, nymphomania, or

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the clinical and the sexual in gynecological exams and detailing the means of enforcing clinical perceptions, including norms against "threatening events" such as eye contact, casual conversation, and being either too modest or immodest).

[26] Hysteria was thought to have its source in women's envy of men and failure to accept their role as women, and so it was regarded as an anti-male phenomenon. *See* Koedt, *supra* note 17 (explaining that this envy stemmed from women's "inferior appendage").

[27] *See* MAINES, *supra* note 12, at 112 (defining "the androcentric paradigm of sexuality" as the idea that "sex consists of penetration (usually of the vagina) to male orgasm").

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

[29] *See* discussion *infra* Part IV.B.

[30] FRANK S. CAPRIO, THE SEXUALLY ADEQUATE FEMALE 64 (1953) (stating that any woman that "is incapable of achieving orgasm via coitus" or "prefers clitoral stimulation" should be regarded as "suffering from frigidity and requir[ing] . . . assistance").

[31] *See* Jane Gerhard, *Revisiting "The Myth of the Vaginal Orgasm": The Female Orgasm in American Sexual Thought and Second Wave Feminism*, 26 FEMINIST STUD. 449, 451-52 (2000) ("[M]edical experts had long debated . . . whether women required orgasm to be fertile[,] if orgasm . . . [was] a crucial element of a woman's physical and mental well-being[,] the social ramifications of 'excessive' female desire, [and] the role the clitoris should or could play in healthy female sexuality. . . . Early nineteenth-century anatomy textbooks noted the existence of the clitoris but believed that . . . [it] was passive and unimportant . . . . By the twentieth century, most . . . did not label the clitoris or discuss its function."). *Contra* Koedt, *supra* note 17 (arguing that there was pervasive medical and common knowledge of the existence and importance of the clitoris and clitoral stimulation).

[32] *See* ELISABETH A. LLOYD, THE CASE OF THE FEMALE ORGASM (2005) (analyzing twenty-one evolutionary accounts of female orgasm and finding that the only plausible explanation is as a byproduct of male orgasm and shared embryonic tissue, a "happy accident"). Recent research continues to challenge common and near universal "knowledge" regarding women's sexuality, often finding that knowledge both untested and wrong. *See, e.g.*, Andrea Virginia Burri et al., *Genetic and Environmental Influences on Self-Reported G-Spots in Women: A Twin Study*, 7 J. SEXUAL MED. 1842 (2010).

[33] *Cf.* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 267-68 (1992) ("[S]ocial relations enforced by the body politic often find . . . justification in the organization of the female body itself.").

an outright rejection of intercourse."[34] The advantages of cost and convenience would quickly overcome such objections.[35]

Before the late 1920s, advertisements for vibrators, marketed to both women and their husbands, appeared in publications as commonplace as *Home Needlework Magazine*, *Hearst's*, *Popular Mechanics*, *McClure's*, and *Sears and Roebuck*.[36] Advertisements made claims of prolonging youth, health, and beauty, one of the most explicit claiming that "[a]ll the keen relish, the pleasures of youth, will throb within you."[37] Vibrators were marketed as regular household appliances; indeed, the only mechanical census that mentions their sales specifically classifies them with curling irons and hair driers.[38] Vibrators were one of the first five appliances to be electrified, possibly reflecting consumer interest and priority.[39] However, social, medical, and psychological paradigm shifts quickly spelled the end of the vibrator in the public sphere.

In the late 1920s, the vibrator began appearing in pornographic films as a masturbatory device, exposing it as a threat to the androcentric model.[40] At the same time, Freud's psychoanalytic theories of "mature" (vaginal) versus "immature" (clitoral) female sexuality, originally penned in 1905, had become developed and dominant.[41] Freud's account both entrenched the androcentric model and exposed the problem vibrators posed to it. These events corresponded with the growing awareness in the medical

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[34] *See* Gerhard, *supra* note 31, at 452.

[35] *See* MAINES, *supra* note 12, at 100.

[36] *See id.* at 19-20, 100-08 (listing publications advertising various vibrator technologies including the electromechanical vibrator); Maines, *supra* note 21, at 228-31 (presenting a similar, but not identical list).

[37] *See* Maines, *supra* note 21, at 228-31.

[38] *See id.* at 231.

[39] *See* MAINES, *supra* note 12, at 100 (noting the electrification of the vibrator preceded appliances such as the vacuum cleaner and iron).

[40] *See id.* at 20; MAINES, *supra* note 21, at 223 (noting that appearances of vibrators in stag films "may have rendered the camouflage inadequate").

[41] *See* MAINES, *supra* note 12, at 43-45 (discussing Freud's *Aetiology of Hysteria*—which finds hysteria's origin in "juvenile exposures to sexuality"—and its ascendancy to dominant paradigm in the late 1920s); Gerhard, *supra* note 31, at 452-59 (discussing Freud's theory of the primary importance of vaginal orgasm being linked to men and its development from the 1930s to the 1960s by Deutsch, Hitschmann & Bergler, and Farnham & Lundberg). Astonishingly, dedication to the assumptions of Freud's model was so deep that some researchers even suggested "treating" women by surgically transplanting the clitoris closer to the vagina. *See* MARIE BONAPARTE, FEMALE SEXUALITY 148 (1953).

community that hysteria was so overbroad as a category as to be a meaningless diagnosis.[42]

By 1930, the vibrator had disappeared from commercial catalogues entirely. It remained underground until its resurgence as a non-medical device in 1960s catalogues.[43] Since then, the "adult novelty" market has ballooned into a $1.5 billion industry.[44] In the meantime, second wave feminism had begun to dismantle Freudian androcentrism and opened the door for clitoral orgasm to re-enter healthy relationships.[45] However, the debate over the role and importance of female orgasm in modern relationships certainly has not been won,[46] as evidenced by the recent and continued attempts by certain state legislatures to regulate the means by which women achieve climax.[47] The early twentieth-century association of the vibrator with pornography brought about its temporary demise. Yet, removing it from respectable roles and relegating it to seedy sex shops also sheltered it from explicit state sanction. Ironically, the vibrator's late-twentieth-century revival, which brought it out from backrooms and basements and into national retailers and well-known boutiques,[48] has hastened its prohibition.

B. STATE REGULATION OF SEXUAL DEVICES

The 1980s and '90s saw several states enact laws prohibiting the distribution of sexual devices. Though as many as eight states once had statutes banning sales,[49] at present the number of undisputed statutes has

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[42] *See* MAINES, *supra* note 12, at 34 (noting the fracture of hysteria into three related "diseases" and the disagreement within the medical community whether sexual indulgence and masturbation were symptoms or causes of the conditions).

[43] *Id.* at 20.

[44] *See* Lessley Anderson, *A Sex Toy Story*, CNNMONEY.COM, June 1, 2006, http://money.cnn.com/magazines/business2/business2_archive/2006/05/01/8375938/index.htm.

[45] *See* Gerhard, *supra* note 31, at 459-68 (explaining Koedt's and others' incorporation of work by sexologists like Kinsey et al. and Masters & Johnson into a feminist critique of the Freudian model).

[46] *See* MAINES, *supra* note 12, at 112 ("What is impressive, however, is that the androcentric paradigm of sexuality . . . is a fixed point in the otherwise shifting sands of Western medical opinion.").

[47] *See infra* note 50 and accompanying text.

[48] *See, e.g.*, Kristin Fasullo, *Beyond* Lawrence v. Texas*: Crafting a Fundamental Right to Sexual Privacy*, 77 FORDHAM L. REV. 2997, 3013-16 (2009) (detailing the popularity of devices, including attention from Oprah Winfrey as well as offerings from retailers like Amazon.com, Walmart, and Target).

[49] *See infra* note 50. *But see* Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326, 330 (2006) (noting that the number of states with statutes that prohibit the sale of sexual devices is "almost impossible to assess accurately at any one time, due to spotty enforcement and the

dwindled to three.[50] The stories emerging from the states with invalidated laws are relatively consistent: the invalidity of each law stems from constitutional technicalities, while the underlying ability to regulate the sale of these devices is either never addressed or simply presumed to exist.[51]

The Colorado statute, for example, contained a blanket proscription of all sexual devices.[52] The Colorado Supreme Court held that, because it lacked a medical exception, the statute infringed the privacy right of those seeking "legitimate" use.[53] The Kansas statute also failed to create a medical exception, again leading to invalidation on privacy grounds.[54] In a related but distinct analysis, the Louisiana Supreme Court found that because the Louisiana statute contained no medical exception, it failed rational basis review.[55] The Georgia statute contained a blanket ban on advertising despite providing a medical exception for sale.[56] The state's supreme court held that because this amounted to a per se ban on

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fact that these laws are continually in flux"). Some estimates are as high as fourteen. *Id.* at 330-31. Virginia's statute appears to be one that is unenforced. *Cf.* Allison Klein, *In Old Town, the Sex Shop Is a Kiss-Off*, WASH. POST, Mar. 1, 2009, at A1 (suggesting "[t]he city cannot act because the store is complying with the law" despite the fact that the store markets and sells sexual devices).

[50] *See* ALA. CODE § 13A-12-200.2(a)(1) (1975 & Supp. 2003); COLO. REV. STAT. § 18-7-101 (Supp. 1984), *invalidated by* People *ex rel.* Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo. 1985); GA. CODE ANN. § 16-12-80 (2003), *invalidated by* This That & The Other Gift & Tobacco, Inc. v. Cobb County, 439 F.3d 1275 (11th Cir. 2006); KAN. STAT. ANN. § 21-4301 (2003), *invalidated by* State v. Hughes, 792 P.2d 1023 (Kan. 1990); LA. REV. STAT. ANN. § 14:106.1 (2003), *invalidated by* State v. Brenan, 772 So. 2d 64 (La. 2000); MISS. CODE ANN. § 97-29-105 (2000); TEX. PENAL CODE ANN. §§ 43.21 & 43.23 (Vernon 2003), *invalidated by* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008), *reh'g en banc denied*, 538 F.3d 355 (5th Cir. 2008); VA. CODE ANN. 18.2-373(3) (2000). At least one municipality had a similar statute. *See* ST. LOUIS REV. CODE § 11.54.010 (2008), *invalidated by* Postscript Enter. v. Whaley, 658 F.2d 1249 (8th Cir. 1981).

[51] *See, e.g.*, *Postscript Enter.*, 658 F.2d at 1254 n.6 ("We assume, without having to decide, that the City of St. Louis may, through a properly drawn ordinance, restrict the sale of items which enable, aid, or encourage private consensual sexual behavior among adults.").

[52] *See Tooley*, 697 P.2d at 370.

[53] *Id.* (noting that FDA regulations implied legitimate therapeutic use and that the statute as written "equate[s] sex with obscenity," but declining to reach whether there is a broader constitutional privacy interest violated by the statute).

[54] *See Hughes*, 792 P.2d at 1031 (citing to and agreeing with *Tooley*, [but noting that the statute permissibly defined "obscene" beyond community standards because *Miller v. California*, 413 U.S. 15 (1973), does not apply to devices).

[55] *See Brenan*, 772 So. 2d at 74 (noting that the *Miller* test does not necessarily apply to devices, but applying the *Miller* test to find devices not always obscene, thereby eliminating any state interest that could surpass therapeutic interest under rational basis review).

[56] GA. CODE ANN. § 16-12-80 (2003), *invalidated by* This That & The Other Gift & Tobacco, Inc. v. Cobb County, 439 F.3d 1275 (11th Cir. 2006).

advertising, the statute violated the First Amendment.[57] In the end, there is no clear trend in exactly to what these statutes object or what or whom they are designed to protect. The statutory language variously focuses on function, form, or both. The lack of uniformity becomes particularly clear when one considers regulation going forward. For example, it is thoroughly confounding to consider how (or even if) state legislatures will respond to devices such as Dr. Stuart Meloy's Orgasmatron, which is nothing more than electrodes and a box, designed to directly stimulate the spinal cord rather than the genitals.[58]

III. THE CIRCUIT SPLIT

A. THE ELEVENTH CIRCUIT: *WILLIAMS V. ATTORNEY GENERAL*

Williams v. Pryor,[59] in 1999, was the first step in a fairly complex case history that spans eight years and two attorneys general, involving three separate trial court hearings, two reversals and remands, and two denials of rehearing.[60] Both users and vendors challenged Alabama's obscene materials statute, amended in 1998 to prohibit the sale of devices primarily for the stimulation of human genital organs.[61] The challenge did not seek recognition of a fundamental right; rather, it claimed the statute burdened and violated rights to privacy and personal autonomy derived from the Fourteenth Amendment and bore no rational relationship to proper legislative purpose.[62] The district court found that the plaintiffs' interests did not warrant strict scrutiny, but held that the statute did not even pass rational basis review.[63] Specifically, the court found that, although the state's conceivable interests (banning public displays of obscene materials, banning the commerce of sexual stimulation and auto-eroticism for its own

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[57] *See This That & The Other*, 439 F.3d at 1284-85 (suggesting that the state's failure to argue a limiting construction of the statute, rather than an inherent flaw in the law, mandated invalidation of the entire statute).

[58] *See* Regina Nuzzo, *Call Him Doctor "Orgasmatron"*, L.A. TIMES, Feb. 11, 2008, http://www.latimes.com/features/health/la-he-orside11feb11,1,7473561.story.

[59] Williams v. Pryor (*Williams I*), 41 F. Supp. 2d 1257 (N.D. Ala. 1999), *rev'd*, 240 F.3d 944 (11th Cir. 2001).

[60] Some of this complexity stems from the fact that the complaint originated prior to, but terminated after, the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). *See, e.g.*, *Williams I*, at 1279, 1282-83 (referencing *Carey v. Population Services International*, 431 U.S. 678, 694 n.17 (1977), for the proposition that the Court has not decided whether states can regulate sexual behavior among adults).

[61] *See Williams I*, 41 F. Supp. 2d 1257; ALA. CODE § 13A-12-200.2(a)(1) (1975 & Supp. 2003).

[62] *See Williams I*, 41 F. Supp. 2d at 1260, 1275.

[63] *Id.* at 1283-84, 1287-93.

sake, and banning commerce in obscene material) were all legitimate, the statute was overbroad in achieving those interests.[64]

The Eleventh Circuit reversed on appeal, finding that the district court did not apply sufficient deference in its rational basis analysis.[65] Specifically, the panel found the state's interest in regulating public morality by discouraging autonomous sex was served, if only incrementally, by a complete ban on commerce in devices for autonomous use.[66] The panel also found that the district court misapplied three important Supreme Court precedents regarding levels of scrutiny.[67] Ultimately, the Eleventh Circuit held that, regardless of how misguided the Alabama legislature may have been, the statute still survives rational basis review.[68]

However, after affirming the district court's decision that the facial challenge on fundamental rights grounds was inadequate, the Eleventh Circuit remanded the as-applied challenge.[69] On remand, the district court, in contradiction to its finding in *Williams I*, found that states traditionally refrained from regulating the private sexual behavior of both married and unmarried couples.[70] The court charted a history from "open spaces and free expression" prior to the seventeenth century,[71] through Puritan control of sexual conduct,[72] the demise of church influence and the rise of family and neighborhood enforcement in the eighteenth century,[73] the advent of Victorian prudism in the nineteenth century, into the Comstock Act and the

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[64] *Id.* at 1285-87, 1288-93 (finding that commerce in sexual devices does not require public display, that such devices are often used within marriages and relationships rather than for auto-eroticism, and that many such devices are not obscene).

[65] Williams v. Pryor (*Williams II*), 240 F.3d 944 (11th Cir. 2001).

[66] *Id.* at 949-50 (noting that the legislation might even survive intermediate scrutiny but not addressing that question).

[67] *Id.* at 950-52 (noting that the standard for overbreadth derived from *Turner v. Safley*, 482 U.S. 78 (1987), is specific to prison regulations; that *Romer v. Evans*, 517 U.S. 620 (1996), was not based on rational basis review; and that decisions addressing prejudicial classification under equal protection are inappropriate when applied to a case involving neither classification nor equal protection).

[68] *Id.* at 952 ("The Constitution presumes that . . . improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").

[69] *Id.* at 955-56 (criticizing the trial court for failing to undertake a *Glucksberg* analysis of "deeply rooted" and "central liberty" with regard to the user plaintiffs).

[70] Williams v. Pryor (*Williams III*), 220 F. Supp. 2d 1257 (N.D. Ala. 2002) (mem.) (taking plaintiff's presented history as correct because of the state's concession of the point).

[71] *Id.* at 1278-80 (quoting MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (1990)).

[72] *Id.* (noting the Puritans' distinction between "proper sexual expression" within marriage and "sexual transgression" outside of marriage).

[73] *Id.* at 1280-82 (noting a "gradual although irregular decline in sexual oppression").

invention of the electromechanical vibrator,[74] and finishing with the sexual revolution and the re-emergence of substantive due process in the twentieth century.[75] At all times throughout this history, married couples enjoyed sexual freedom, either through the lack of statutes or non-enforcement of existing statutes. At later points in this history, that freedom was extended to unmarried couples, leading the district court to conclude that there is an "established pattern of non-interference with virtually all consenting adult sexual behavior."[76] Having effectively announced a fundamental right to sexual privacy, the district court went on to find the statute was not narrowly tailored enough to meet a compelling state interest.[77]

Between the time of the decision of *Williams III* and its hearing on appeal,[78] the Supreme Court handed down its opinion in *Lawrence v. Texas*.[79] The Eleventh Circuit read the ambiguous *Lawrence* opinion very narrowly, characterizing any hints at a fundamental right as "scattered dicta."[80] The court therefore relied heavily on prior jurisprudence, noting that past protections of personal autonomy "[do] not warrant the sweeping conclusion that any and all important, intimate decisions are so protected," and found no Supreme Court precedent for recognizing a free-standing right to sexual privacy.[81] In fact, the Eleventh Circuit reasoned, the Court has seen repeated opportunities to recognize such a right and has invariably declined.[82]

The Eleventh Circuit then performed its own *Glucksberg* analysis for declaring a new fundamental right.[83] Despite having framed the right at issue in *Williams I* as "an individual's liberty to use sexual devices when engaging in lawful, private, sexual activity,"[84] the district court had abandoned this "careful formulation" of the right in favor of the overbroad

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[74] *Id.* at 1282-89 (acknowledging the Comstock laws as an aberration of the era, and assuming the exception of vibrators from Comstock laws was evidence of "legislative respect for sexual privacy in the marital relationship").

[75] *Id.* at 1289-94 (taking as a sign of the times, *inter alia*, the fact that the Model Penal Code excepts deviate sexual intercourse between consenting adults from criminal sanction).

[76] *Id.* at 1295.

[77] *Id.* at 1303-07.

[78] Williams v. Att'y Gen. of Ala. (*Williams IV*), 378 F.3d 1232 (11th Cir. 2004).

[79] 539 U.S. 558 (2003). *Lawrence* is discussed at length *infra* Parts IV.A.1-3.

[80] *Williams IV*, 378 F.3d at 1236-37.

[81] *Id.* at 1235 (quoting Washington v. Glucksberg, 521 U.S. 702, 727 (1997)).

[82] *Id.* at 1235-36 (noting that *Lawrence* did not apply fundamental rights analysis, ultimately applying rational basis review).

[83] *Id.* at 1239-50. The so-called "Glucksberg Two-Step" requires a "careful description" of the asserted liberty interest and inquires whether a right or liberty is objectively "deeply rooted in the nation's history and traditions." *See Glucksberg*, 521 U.S. at 721. The *Glucksberg* analysis is discussed *infra* notes 156-59 and accompanying text.

[84] Williams v. Pryor (*Williams II*), 240 F.3d 944, 953 (11th Cir. 2001).

"right to sexual privacy."[85] The circuit court warned that such a formulation, with no defined scope or bounds save for confinement to consenting adults, would encompass activities like prostitution, obscenity, and adult incest.[86] Instead, the circuit chose to reframe the right, in line with the formulation it originally accepted in *Williams II*, as one to sell, purchase, and use sexual devices.[87]

Turning to the historical analysis required by the second prong of *Glucksberg*, the circuit court found four errors in the district court's inquiry. First, the district court's misframing of the right at issue as one of "sexual privacy" led to an irrelevant exploration of the history of sex in America.[88] Second, the district court, in its analysis of history and tradition, placed too much emphasis on contemporary practices and attitudes.[89] Third, the district court incorrectly equated a history of *non-interference* with the asserted right with a history of *protection* of that right.[90] Finally, the district court's reliance solely on the testimony of the plaintiff's expert and the state's putative concessions was flawed.[91] The circuit court reversed the district court's ruling and remanded the case for consideration of the effect of *Lawrence*'s overruling of *Bowers v. Hardwick*[92] on the legitimacy of regulating sexual morality.[93]

On this remand, the district court responded to the circuit court's repeated admonitions and found that, because the statute facially applies to people of many lifestyles, it does not conflict with *Lawrence*'s invalidation

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[85] *Williams IV*, 378 F.3d at 1239 & n.10 (remarking that such a mistake is understandable given the imprecise language utilized in *Williams II*, 240 F.3d at 953).

[86] *Id.* at 1239-40.

[87] *Id.* at 1242 (acknowledging that the minimum, "careful" formulation is merely one of selling and purchasing, but noting that the commercial burden is "tantamount to restrictions on the use" and so requiring use analysis as well).

[88] *Id.* at 1242-43 (noting that the correct inquiry would be one into the treatment of sexual *devices*).

[89] *Id.* at 1243-44 & n.14 (noting that *Glucksberg*'s reference to contemporary practice was a non-essential confirmation of its historical finding of no deeply-rooted right rather than, as here, a contradiction of it, and observing that the contemporary trend actually "proves too much" by confirming the court's deference to democratic process).

[90] *Id.* at 1244-45 (noting that by finding a negative rather than affirmative protection, the district court inverted the *Glucksberg* inquiry in a way that would support a fundamental freedom to pollute, discriminate, and commit marital rape as well as give a perverse incentive to legislatures to regulate all aspects of life).

[91] *Id.* at 1246-50 (noting that the plaintiff's expert's testimony often amounts to bare and biased assertion without independent verification, or statements in contradiction with the expert's previous academic works; also noting that the state did not, as the trial court claimed and relied on, concede this historical treatment).

[92] 478 U.S. 186 (1986).

[93] *Williams IV*, 378 F.3d. at 1250.

of a statute based on its impact on homosexual lifestyles.[94] On final appeal, in by far the shortest opinion in this line of cases, the circuit court finally affirmed, emphasizing that the statute here involved *public*, *commercial* activity as opposed to *Lawrence*'s invalidation of prohibitions on a type of *private*, *non-commercial* activity.[95] The circuit court's switch from focusing on private use in *Williams II* and *Williams IV* to focusing on public commerce in *Williams VI* can be explained by the change in relevant question from the existence of a fundamental right to the existence of a rational basis after *Lawrence*.[96]

The *Williams* saga ultimately focused on a proposed fundamental right to use sexual devices in private sexual activity and the burden imposed on that interest by regulating public commerce in those devices. The *Williams* courts concluded that no such right exists and, therefore, that the state's commercial regulation easily passed rational basis review. The Fifth Circuit would address the same questions concerning a substantially similar statute exactly one year later.

B. THE FIFTH CIRCUIT: *RELIABLE CONSULTANTS, INC. V. EARLE*

In *Reliable Consultants, Inc. v. Earle*,[97] the Fifth Circuit heard a declaratory challenge on Fourteenth Amendment grounds to a Texas statute that criminalized the buying, selling, advertising, giving, or lending of any device designed or marketed for sexual stimulation.[98] To begin, the court noted the potential for several presumably non-prurient interests in sexual devices, including situations where one partner is physically unable to engage in intercourse or has a contagious disease, where the devices may be

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[94] *See* Williams v. King (*Williams V*), 420 F. Supp. 2d 1224 (N.D. Ala. 2006) (noting that none of the targeted devices represent implements common to the homosexual lifestyle, nor does the law target a specific, *identifiable* class for discrimination or harm out of simple hostility).

[95] *See* Williams v. Morgan (*Williams VI*), 478 F.3d 1316, 1322 (11th Cir. 2007).

[96] *Compare Williams IV*, 378 F.3d at 1242 ("[O]ur analysis must be framed not simply in terms of *whether the Constitution protects a right* to *sell* and *buy* sexual devices, but whether it protects a right to *use* such devices.") (emphasis added), *with Williams VI*, 478 F.3d at 1323 ("[W]e do not read *Lawrence*, the overruling of *Bowers*, or the *Lawrence* court's reliance on Justice Stevens's dissent, to have rendered public morality altogether illegitimate *as a rational basis*.") (emphasis added).

[97] 517 F.3d 738 (5th Cir. 2008), *reh'g en banc denied* 538 F.3d 355 (5th Cir. 2008).

[98] *See id.* at 740; TEX. PENAL CODE ANN. § 43.21, 43.23 (Vernon 2003), *invalidated by* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008). The case also presented a First Amendment challenge, but the court did not reach that issue because doing so was unnecessary to invalidate the statute in this case and "it may be premature." *See Reliable Consultants*, 517 F.3d at 747.

necessary for therapeutic needs, or where they facilitate the decision to refrain from premarital intercourse.[99]

Next, the court turned its attention to the impact of *Lawrence* on its substantive due process analysis.[100] Unlike the Eleventh Circuit, the Fifth Circuit found no need to formulate the right at stake as one involving either the sale, purchase, or use of sexual devices.[101] Indeed, the circuit court determined that the *Lawrence* Court had already defined and defended the right at stake: the right "to be free from governmental intrusion regarding 'the most private of human contact, sexual behavior.'"[102] Unlike the Alabama statute, which merely prohibited commerce in such devices, the Texas statute prohibited lending and giving, thereby eliminating arguments that the statute affected only public, commercial conduct.[103] The court found that the state's interest in public morality could not justify so significant an intrusion into "adult consensual intimacy in the home."[104] Finally, the court found that the state's interest in protecting minors and unwilling adults from exposure to the devices and their advertisements is not rationally connected to the statute, particularly since an unwilling recipient would first have to affirmatively seek out the device in order to be exposed to it.[105]

Writing in dissent, Judge Hawkins suggested that, rather than the majority's approach of sidestepping scrutiny, *Lawrence* demands a rational basis standard of review.[106] Chief Judge Jones's later dissent from the court's denial of rehearing en banc expanded on that position, noting that "the *Reliable* majority exploited [*Lawrence*'s] broad and vague statements about liberty while ignoring the Court's self-imposed limits" in a manner that "trivializes that decision and 'demeans the importance of its holding

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[99] *Reliable Consultants*, 517 F.3d at 742.

[100] *Id.* at 743-47 (finding that *Lawrence* majority rested entirely on substantive due process grounds and applying the *Lawrence* analysis to the Texas statute).

[101] *Id.* at 743.

[102] *Id.* at 743-44 (finding substantial similarity—prohibition of a particular sexual act—between the law in *Bowers* and the law here (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003))).

[103] *Id.* at 744.

[104] *Id.* at 745 (quoting *Lawrence*, 539 U.S. at 564). In a footnote, however, the court observed that its holding "in no way overtly expresses or implies that public morality can never be a constitutional justification for a law." *Id.* at 564 n.36.

[105] *Id.* at 746.

[106] *Id.* at 749 (Hawkins, J., concurring in part and dissenting in part).

which deals a fatal blow to criminal laws aimed at punishing homosexuals.'"[107]

Judge Garza's separate dissent from the denial of rehearing en banc, before questioning the Supreme Court's method of announcing unenumerated rights, criticized the *Reliable* majority for misunderstanding the right announced in *Lawrence* and for extending that right far beyond its limits in several ways.[108] First, although the *Reliable* majority recognized that the *Lawrence* Court did not announce a new fundamental right, by ignoring levels of scrutiny, it created "something outside of substantive due process jurisprudence entirely": "a *commercial* right *ex nihilo* to promote sexual devices."[109] Second, Judges Garza and Elrod (in separate dissents) thought the *Reliable* majority overstepped its bounds by overruling a prior statement of a circuit panel and a line of rulings by the Supreme Court.[110] Specifically, the *Reliable* court overruled, *sub silentio*, the Fifth Circuit's prior precedent upholding the constitutionality of the same statute in *Red Bluff Drive Inn, Inc. v. Vance*.[111] Moreover, that precedent stemmed from a direct line of Supreme Court cases permitting obscenity regulations, such as *Sewell v. Georgia*,[112] thereby placing the *Reliable* majority in violation of the Court's admonition that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[113]

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[107] Reliable Consultants, Inc. v. Earle, 538 F.3d 355, 356 & n.1 (5th Cir. 2008) (Jones, C.J., Jolly, Smith, Clement & Owen, JJ., dissenting from denial of rehearing en banc) (quoting Muth v. Frank, 412 F.3d 808, 819 (7th Cir. 2005) (Evans, J., concurring)).

[108] *Id.* at 358 (Garza, J., dissenting from denial of rehearing en banc).

[109] *Id.* at 359.

[110] *Id.* at 360 n.5; *id.* at 365 (Elrod, J., dissenting from denial of rehearing en banc) (citing *Lowry v. Texas A & M University System*, 117 F.3d 242, 247 (5th Cir. 1997), for the rule that a previous panel decision may only be overruled by "'a subsequent decision of the Supreme Court or by the Fifth Circuit sitting *en banc*'"; noting also the creation of a circuit split with the Eleventh and, arguably, Tenth Circuits).

[111] *Reliable Consultants*, 538 F.3d at 360 n.5 (Garza, J., dissenting from denial of rehearing en banc).

[112] 435 U.S. 982 (1978).

[113] *Id.* (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)); *accord* United States v. Harb, No. 2:07-CR-426 TS, 2009 WL 499467, at *2 (D. Utah Feb. 27, 2009) (declining to extend substantive due process right in *Lawrence* beyond its facts, noting the Supreme Court must further interpret *Lawrence* before the lower courts can overrule binding precedent).

C. STATE COURTS

The Alabama statute, upheld by the Eleventh Circuit, withstood another challenge, this time in front of the Alabama Supreme Court, on both United States and Alabama constitutional claims.[114] After lengthy recitation and discussion of the *Williams* and *Reliable* courts' positions, the Alabama court adopted the Eleventh Circuit's interpretation of *Lawrence* wholesale.[115] The Alabama court specifically emphasized the public/private and commercial/noncommercial distinctions, as well as the lack of a targeted class.[116]

Conversely, two Texas courts have balked at utilizing the Fifth Circuit's announcement of a fundamental right to sexual privacy.[117] In *Varkonyi v. State*,[118] the defendant had been convicted of promotion or possession of obscene materials with intent to promote.[119] He claimed on appeal that the state's definition of "promote" criminalized his constitutionally protected possession of obscene material in the privacy of his own home.[120] The appeals court noted that the opinion in *Reliable* did not address the line of Supreme Court cases holding that the constitutionally protected right to private possession of obscene material does not give rise to a correlative right to receive those materials or sell or transmit them to others.[121] Though merely declining to extend the *Reliable* holding,[122] the appellate court did not distinguish in any detail the restrictions on commerce in privately acceptable materials that are alternatively acceptable and unacceptable based, ostensibly, on nothing more than whether the material is a sexual device or merely "obscenity."[123]

In *Villarreal v. State*,[124] the defendant was convicted of violating Texas's statute banning distribution of sexual devices.[125] The Texas

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[114] 1568 Montgomery Highway, Inc. v. City of Hoover, No. 1070531, 2009 WL 2903458 (Ala. Sept. 11, 2009).

[115] *Id.* at *22.

[116] *Id.*

[117] *See* Varkonyi v. State, 276 S.W.3d 27 (Tex. App. 2008) (declining to extend a fundamental right to sexual privacy); Villarreal v. State, 276 S.W.3d 204 (Tex. App. 2008) (declining to follow the Fifth Circuit's announcement of same).

[118] 276 S.W.3d at 27.

[119] *Id.* at 37.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 38 ("We decline to follow *Reliable Consultants* because we do not read *Lawrence* as overruling this line of authority.").

[123] One such distinction, for example, is that some obscene materials, like child pornography, may necessarily harm others in their production.

[124] 276 S.W.3d 204 (Tex. App. 2008).

[125] *Id.* at 206.

appeals court noted that it is not bound to follow the constitutional pronouncements of federal circuit courts (including the *Reliable* decision), but it is bound to follow the finding of constitutionality of its state courts.[126] After noting several cases where Texas courts reluctantly applied the statute, the *Villarreal* court declined to follow the *Reliable* majority.[127] The court quoted one appellate chief justice's expression of frustration with his constitutional constraints by stating: "Here we go raising the price of dildos again. Since this appears to be the law in Texas[,] I must concur."[128]

The limitations on the court in *Villarreal* will not be addressed any time soon, as the Texas attorney general has declined to file a writ of certiorari in *Reliable*.[129] Until the Supreme Court further addresses sexual privacy, Texas courts are bound to follow their state courts' constitutional precedents. Violators of the statute who receive prison sentences can access the federal courts, which are bound by the *Reliable* decision, by writ of habeas corpus.[130] Whether Texas chooses to deal with this by repeal, non-enforcement, amendment, or strictly issuing fines is yet to be seen.[131]

The issue skirted in *Varkonyi* is even more troublesome. If, as the Fifth Circuit contends, *Lawrence* eliminated morality as a stand-alone rational basis, there is a direct conflict between this new jurisprudence and a long line of the Court's First Amendment doctrine. These issues demand the attention of the Supreme Court.

IV. ANALYSIS

As of this writing, the academic response to the Fifth and Eleventh Circuit lines of reasoning has universally embraced *Reliable* and rejected *Williams*.[132] These responses generally present theories of substantive due

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[126] *Id.* at 208-09 (agreeing with the *Reliable* court's ruling but conforming to controlling authority) (citing Yorko v. State, 690 S.W.2d 260 (Tex. Crim. App. 1985), and *Ex parte* Dave, 220 S.W.3d 154 (Tex. App. 2007)).

[127] *Id.* at 209.

[128] *Id.* at 207 (quoting Regalado v. State, 872 S.W.2d 7, 11 (Tex. App. 1994) (Brown, C.J., concurring)).

[129] *See* Slav Kandyba, *Texas AG Drops Adult Toy Case Appeal*, XBIZ NEWS, Nov. 4, 2008, http://www.xbiz.com/news/101202.

[130] *See* 28 U.S.C. § 2241 (2006).

[131] If Texas's reaction to *Lawrence* is any indication, repeal is not likely. The statute that *Lawrence* declared unconstitutional is still on the books. *See* TEX. PENAL CODE ANN. § 21.06 (Vernon 2003 & Supp. 2008).

[132] *See, e.g.*, Lindemann, *supra* note 49. The author excludes case notes that merely characterize existing law, such as Douglas E. Nauman, *Where Sexual Privacy Meets Public Morality: How* Williams v. King *Is Instructive for the Fourth Circuit in Applying Public Morality as a Legitimate State Interest After* Lawrence v. Texas, 29 N.C. CENT. L.J. 127 (2006).

process, similar to the Fifth Circuit's formulation in *Reliable*, that support a fundamental right to sexual autonomy. Two other potential criticisms, relying on equal protection and the First Amendment, have been hinted at in the literature. This Part briefly outlines the doctrines of substantive due process, equal protection, and free expression, presents the salient criticisms and their shortcomings, and discusses hidden pitfalls in the fight for sexual autonomy. Part IV.A argues that, under substantive due process jurisprudence, both the Fifth and Elevenths Circuits in *Williams* and *Reliable*, respectively, likely got the outcome, if not the analysis or remedy, correct. The difference in outcome between the two courts can easily be ascribed to the fact that the Texas statute burdens use in a way that the Alabama statute does not. Part IV.B argues that, though the anti-sexual device statutes have a disparate and detrimental impact on women and sexual minorities, current equal protection doctrine cannot vindicate their rights, nor should it without further research. Finally, Part IV.C argues that, while the Court's language in *Lawrence* is vague enough to provide some indication of a link between free speech and sexual expression, that link is far too tenuous to affect the outcome of these cases.

A. SUBSTANTIVE DUE PROCESS

The Fifth and Fourteenth Amendments of the Constitution prohibit the federal and state governments, respectively, from "depriv[ing] any person of life, liberty, or property, without due process of law."[133] Until the late nineteenth century, the Court acknowledged only a procedural dimension to due process, guaranteeing fundamental fairness. Gradually, the Court began to acknowledge that due process has at least a minimal substantive end as well: the requirement that the government act by means of valid laws.[134] This early formulation of substantive due process sought to delineate some independent boundaries of government power and, as such, rested as much on agency as due process.[135] *Lochner*-era Courts, often focused on redistributive economic policies as much as the bounds of the police power, identified the boundaries generally with the concept that

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[133] U.S. CONST. amend. XIV, § 1; *see* U.S. CONST. amend. V.

[134] *See* LAWRENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 1332-33 (3d ed. 2000) ("[B]y 1868, a recognized meaning of the qualifying phrase 'of law' was substantive."). *But see* JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1980) (calling substantive due process an oxymoronic contradiction in terms akin to "green pastel redness"); Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 984 (2006) (calling the formulation a pleonasm).

[135] Roosevelt, *supra* note 134, at 984.

"governmental action must serve a public purpose [or] interest, rather than benefiting (or burdening) a discrete segment of the population."[136]

This early era and its acknowledgement of a substantive component of due process ended abruptly in the late 1930s.[137] What survived was the basic concept that the benefits of a law should exceed its burdens.[138] The Court began to defer to the legislature's competence in identifying the boundaries of those benefits and burdens, except instances in which the legislature could not be trusted to do so because political checks would not ensure adequate representation of the public's interests.[139] Hence, in 1938, the Court, in *United States v. Carolene Products Co.*,[140] set out the specific boundary where the Court will question the government's otherwise constitutional actions: when those actions burden the rights of the accused, the political process, or the rights of "discrete and insular minorities."[141] The Court later began protecting fundamental rights that are not explicitly in the text of the Constitution,[142] but are part of a shared American tradition[143] and essential to the concept of liberty.[144] These include the right "to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, . . . to abortion[,] to refuse unwanted lifesaving medical treatment[,]"[145] and to engage in adult, consensual sodomy in the privacy of one's home.[146] If the

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[136] *Id.* at 986-87.

[137] *See id.* at 988-89 (suggesting that substantive due process collapsed under the weight of the economic turmoil of the 1930s and the realization that identifying partial state interventions in the market was impossible).

[138] *Id.* at 992.

[139] *Id*.

[140] 304 U.S. 144 (1938).

[141] *See id.* at 153 n.4. That *Carolene Products* became the foundation of the Equal Protection Clause doctrine rather than substantive due process is a remnant of the Court's attempt in *Bolling v. Sharpe*, 347 U.S. 497 (1954), to reverse incorporate the Equal Protection Clause into Fifth Amendment due process. *See* Roosevelt, *supra* note 134, at 997-98. This move has been characterized as "'gibberish both syntactically and historically'" because it would make the Fourteenth Amendment's separate guarantees of equal protection and due process redundant as well as force a text from 1791 to "incorporate" a text from 1868. *Id.* (quoting ELY, *supra* note 134, at 32).

[142] *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

[143] *See* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

[144] *See* Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937).

[145] Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citations omitted).

[146] Lawrence v. Texas, 539 U.S. 558 (2003). A common misconception is that these rights are decidedly liberal in nature. For criticisms of that view, see Bradley P. Jacob, Griswold *and the Defense of Traditional Marriage*, 83 N.D. L. REV. 1199, 1213 (2007) ("[J]ust about everyone, regardless of political perspective, can identify some rights that

Court finds that a fundamental right is burdened by a statute, it will apply a strict scrutiny review, which is generally fatal to the statute.[147] Strict scrutiny requires that the statute be a narrowly tailored, least restrictive means of achieving a compelling government interest.[148] If the Court finds no fundamental right, it will apply a rational basis review, which is generally not fatal to the statute,[149] requiring only that the statute be rationally related[150] to a legitimate government interest.[151]

The protection of unenumerated rights remains controversial. Because those rights and liberties are found outside the plain text of the Constitution, critics are skeptical of the legitimacy of the rights and the Court's ability to identify them.[152] The concern is that "'liberty' . . . can be read in diverse ways, and there is no particular reason to trust judicial readings, even or perhaps especially if they are morally infused."[153] The Court has openly acknowledged and shared the concern that, without strict limitation, fundamental rights will merely reflect the "predilections" of the current members of the Court.[154] The Court has addressed this concern with an

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seem so incredibly important as to require judicial application."); Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209 (2006).

[147] *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *Contra* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (surveying every strict scrutiny decision published by the district, circuit, and Supreme Courts from 1990 to 2003 and finding that strict scrutiny is not nearly as fatal as generally believed, with laws surviving more than thirty percent of challenges).

[148] *See, e.g.*, First Nat'l Bank of Bost. v. Bellotti, 435 U.S. 765, 786 (1978).

[149] *See* Gunther, *supra* note 147, at 8 ("[M]inimal scrutiny in theory and virtually none in fact.").

[150] *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313-14 (1993) (stating that legislation will be upheld under rational basis review "if there is any reasonably conceivable state of facts that could provide a rational basis" and "where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end'" (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980))); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88 (1955) ("[T]he law need not be in every respect logically consistent with its aims . . . . It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

[151] *See* Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) (noting that rational basis review requires "legitimate legislative purpose furthered by rational means").

[152] *See, e.g.*, Roosevelt, *supra* note 134, at 993.

[153] Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1567-68 (2008).

[154] Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (plurality) (citing *Lochner*-era economic due process as exemplary of the pitfalls of judge-made rights, but noting that history "counsels caution and restraint[,] . . . [not] abandonment"); *see also id.* at 544 (White, J., dissenting) ("The Judiciary . . . comes nearest to illegitimacy when it deals

institutional reluctance to announce substantive due process rights[155] and an analytic method that requires both a "careful description" of the fundamental right,[156] and that the right be "deeply rooted in this Nation's history and tradition"[157] and "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed."[158] The Court has, at times, taken a more moderate approach of "reasoned judgment," identifying rights and balancing them against competing state interests through philosophical analysis and political-moral reasoning.[159] *Lawrence v. Texas* added a new wrinkle by noting that the historical inquiry is merely a starting point of the analysis and is not necessarily dispositive on its own.[160] In one interpretation, the *Lawrence* Court based its decision on "evolving national values."[161] Which method is deployed in any given case appears to be unpredictable.[162] However, because *Lawrence* is the most recent case on point, it will be the focus of this analysis.

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with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.").

[155] *See* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended [and so the Court] exercise[s] the utmost care whenever . . . asked to break new ground in this field.").

[156] Reno v. Flores, 507 U.S. 292, 302 (1993). This "careful statement" has sometimes been characterized as requiring definition of the right at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989). The careful statement requirement has been criticized as allowing courts to pick and choose between competing accurate descriptions of the activity involved based on the desired outcome of the case. *See, e.g.*, Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1490 (2008).

[157] *Moore*, 431 U.S. at 503.

[158] Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937); *see also* Robert C. Post, *Foreward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 89 (2003) (describing this "approach as "focus[ing] on the forms of liberty prerequisite for personal dignity and autonomy"). For a general discussion of fundamental inadequacies of the focus on history and tradition, see Sunstein, *supra* note 153.

[159] *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 98-106 (2006) (citing Roe v. Wade, 410 U.S. 113 (1973), Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

[160] Lawrence v. Texas, 539 U.S. 558, 572 (2003); *cf.* Herald, *supra* note 28, at 30 ("Rather than attack the standard directly as one easily manipulated, Kennedy simply manipulates the standard, deftly showing by example the dangerous plasticity of the tradition and history doctrine.").

[161] *See* Conkle, *supra* note 159 at 115-33; Michael J. Hooi, *Substantive Due Process: Sex Toys After* Lawrence, 60 FLA. L. REV. 507, 509-10 (2008). For general discussions of the impact of *Lawrence* on substantive due process, see H.N. HIRSCH, THE FUTURE OF GAY RIGHTS IN AMERICA (2005).

[162] *See* Deana Pollard Sacks, *Elements of Liberty*, 61 SMU L. REV. 1557, 1560-61 (2008) ("To this end, the Court has constructed various interpretive methods, which are then

1. Scrutinizing Lawrence

The *Lawrence* decision has been characterized as a "maddening,"[163] "remarkably opaque" opinion that "raises a number of puzzles";[164] one that is "easy to read, but difficult to pin down";[165] and as notable for what it failed to say as for what it actually did say.[166] Because the opinion in *Lawrence* did not carefully describe a fundamental liberty interest,[167] nor specify a level of scrutiny,[168] many have debated its actual method and meaning.[169] Some read *Lawrence* as applying rational basis review to invalidate the law,[170] which merely complicates similar issues by never reaching and answering the question of fundamental rights.[171] Others suggest that the Court applied a form of strict scrutiny.[172] Still others argue that the Court applied a balancing test that is neither strict nor rational.[173]

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engaged irregularly or simply discarded." (citing, *inter alia*, the penumbra approach to privacy as being discarded less than a decade after its announcement)).

[163] Michael P. Allen, *The Underappreciated First Amendment Importance of* Lawrence v. Texas, 65 WASH. & LEE L. REV. 1045, 1051 (2008).

[164] Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 29, 45 (2003).

[165] Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1118 (2004); *see also* Mary Anne Case, *Of "This" and "That" in* Lawrence v Texas, 55 SUP. CT. REV. 75 (2003) (noting that, because the "lack of clarity concerning antecedents in the opinion goes beyond the merely grammatical," the language and reasoning "frequently point in a direction" that, upon review, "reverses itself or dissolves into ambiguity"); Herald, *supra* note 28, at 29 ("The opinion has language that gives and then takes, sometimes in the same sentence.").

[166] *See* Andrew Koppelman, Lawrence*'s Penumbra*, 88 MINN. L. REV. 1171, 1180 (2004) (calling *Lawrence* "poor judicial craftsmanship" and noting "[i]ts reasoning is obscure, and it lays down no clear rule"); *see also* Herald, *supra* note 28, at 32 n.212 (suggesting that the *Lawrence* doctrine parallels the discarded obscenity doctrine of "I know it when I see it"). *But cf.* Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 746 (2010) (arguing that, after *Lawrence*, what was once haphazardly protected under privacy has now correctly shifted to protection under liberty, with either negative repercussions for the use of sexual devices if pursued under privacy or trivializing consequences for gay rights if pursued under liberty); Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1449 (2004) ("Like *Loving*, *Lawrence* marks a crystallization of doctrine.").

[167] *See* Williams v. Att'y Gen. of Ala. (*Williams IV*), 378 F.3d 1232, 1236 n.6 (11th Cir. 2004) ("Rather, the constitutional liberty interests on which the Court relied were invoked, not with 'careful description,' but with sweeping generality.").

[168] *See* Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

[169] *See* Herald, *supra* note 28, at 30 ("*Lawrence* was not written to praise liberty, but to bury *Bowers*. . . . Thus, although it is clear that *Bowers* is dead, it is unclear what doctrine lives on.").

[170] *See* Cook v. Gates, 528 F.3d 42, 51 n.5 (1st Cir. 2008).

[171] *See Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

[172] *See Cook*, 528 F.3d at 51 n.6.

[173] *See id.* at 51 n.7.

At least one scholar even suggests that *Lawrence* was as much about procedure as substance.[174]

As the circuit split in *Reliable* and *Williams* clearly demonstrates, *Lawrence* is a blunt enough instrument to be both the right and wrong tool for the job:

> By its language, the opinion's protection seems to be limited to (1) consensual acts, (2) involving adult humans, (3) in private, who are engaged in (4) safe, (5) sodomy that (6) does not bear the affirmative sanction of the government. The use of vibrators and other sex aids meets most of these criteria.[175]

Specifically, statutes concerning sexual devices legislate situations involves the use by (1) at least one consenting (2) adult (3) acting in private, of an aid that is (4) safe, and (6) no affirmative government sanction is sought.[176] The value of this juxtaposition turns on two fundamental assumptions: burdening commerce in an item is the same as prohibiting its use and the *Lawrence* decision's protection is not predicated on the act of sodomy.

The first assumption seems easy enough to prove, but not from *Lawrence*. *Lawrence* protects against at least some laws directed at private action as a means of discouraging public conduct. The issue in *Reliable* and *Williams* involves prohibition of public conduct to discourage private action; *Planned Parenthood of Southeastern Pennsylvania v. Casey*[177] controls. *Casey* clearly indicates that burdening the access to a product is essentially identical to proscribing its use, a fact that both the *Williams* and *Reliable* courts recognized.[178] The question, then, becomes whether the state can proscribe use, which, in turn, rests on the second assumption concerning the extent of *Lawrence*'s protection.

What *Lawrence* protects is dependent on, and so is as muddled as, the means by which the Court reached its decision. The Court never uses the phrase "fundamental right,"[179] but it does use "legitimate state interest,"[180]

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[174] Sunstein, *supra* note 164, at 28.

[175] Herald, *supra* note 28, at 33-34. That sexual devices can be used in sodomy is clear, but they are neither particular nor essential to sodomy, and therefore that element is omitted from this analysis.

[176] *Id.* at 34 ("With regard to . . . *Lawrence*, then, the *use* of sex aids is different only in the nature of the private sexual act.") (emphasis added).

[177] 505 U.S. 833 (1992).

[178] *See* Williams v. Att'y Gen. of Ala. (*Williams IV*), 378 F.3d 1232, 1242 (11th Cir. 2004); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 743 (5th Cir. 2008). *Casey* is not nearly as clear about what delineates an undue burden from an acceptable burden.

[179] Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (noting references to "fundamental proposition[s]" and "fundamental decisions," but not "fundamental right[s]").

[180] *Id.* at 578.

traditionally a harbinger of rational basis review.[181] The Texas statute relied on moral disapproval of homosexuals rather than of sodomy, specifically, and it sought to curtail only homosexual sodomy with a ban directed strictly at gay people.[182] Thus, the statute furthered no legitimate state interest.[183]

If pure rational basis review is all that *Lawrence* demands, the *Williams* court reached the correct conclusion. Rational basis is an extremely deferential standard. Each of the several possible state goals listed by the *Williams* courts are legitimate state interests.[184] The only question is whether the statute is a reasonable means of achieving those goals. Though the *Williams I* court suggested it was not,[185] every subsequent *Williams* court found or assumed that the statute passes this low bar.

Interestingly, because the Texas statute burdens use in a way that the Alabama statute does not, the *Reliable* court could have also reached the correct conclusion under rational basis review. First, the *Reliable* court noted that, because of the breadth of the Texas statute's prohibition, the restriction amounts to a ban on use, which eliminates public morality as a solitary legitimate state interest.[186] The only remaining legitimate interest—protecting citizens from exposure to offensive materials—fails the reasonable relation test. The court stressed that those offended or harmed by commerce in sexual devices would have to come to the nuisance.[187] However, had the court relied only on rational basis review, its decision would have gone too far. The court could have severed the restrictions on giving and borrowing, thereby diminishing the statute's burden and reestablishing morality as a legitimate state interest.[188] The *Reliable* court

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[181] *See id.* at 586, 599. *But see* Matthew Coles, Lawrence v. Texas *& the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 27-28 (2005) (cautioning against attaching significance to "legitimate," noting, Justice Douglas's use of "legitimate" while establishing a fundamental right in *Griswold*).

[182] *See* Coles, *supra* note 181, at 28-29 ("Sodomy was perfectly acceptable when practiced by ninety to ninety-six percent of Texans. . . . It was only wrong when performed by same-sex couples.").

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

[184] *See* Williams v. Pryor (*Williams I*), 41 F. Supp. 2d 1257, 1285-87 (N.D. Ala. 1999).

[185] *See id.* at 1288-93.

[186] *See* discussion *infra* Part IV.A.3.

[187] *See* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 746 (5th Cir. 2008).

[188] When the statute has no explicit severability provision, courts will often infer such power. *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328-29 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving the other applications in force, or to sever its problematic portions while leaving the remainder intact[.]") (citations omitted). Courts

may not have considered this option because the basis of its decision, dicta about rational bases notwithstanding, is the belief that *Lawrence* did not rely on rational basis.

Just as the *Lawrence* Court failed to use the key strict scrutiny phrases, it also failed to use key rational basis phrases, such as "minimum scrutiny," "arbitrary," "irrational," or "strong presumption of validity."[189] In fact, in the same sentence of the opinion that "legitimate state interest" appears, "justify" also appears.[190] Traditional rational basis review is so deferential that "justifications" for intrusions into individuals' lives are not implicated; it queries the legitimacy of the state's purpose without regard to the individual.[191] Furthermore, the *Lawrence* Court adopts Justice Stevens's dissent in *Bowers* as "controlling" in this case.[192] Each of the due process cases that Stevens relies on in his *Bowers* dissent are strict scrutiny cases.[193]

The major missing indicator of strict scrutiny, aside from key phrases, is a *Glucksberg* analysis of fundamental rights.[194] But such an analysis is not necessary if the right at issue is one established in a previous line of cases.[195] The Court explicitly situates *Lawrence* in the mold of *Griswold* and *Eisenstadt*, cases protecting the sacred space of relationships.[196] It is argued that the Court decided in *Lawrence* that "gay people have the same

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sometimes will not sever, even in the face of an explicit severability clause, if they find the severance to be against the intention of the legislature. *See, e.g.*, Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 1013-16 (1983) (Rehnquist & White, JJ., dissenting). However, there is no indication here that the Fifth Circuit even entertained such an inquiry, and the goal of the statute seems to be furthered by a continued ban on commerce.

[189] Coles, *supra* note 181, at 30.

[190] Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The Texas statute furthers no *legitimate state interest* which can *justify* its intrusion into the personal and private life of the individual.") (emphasis added).

[191] Coles, *supra* note 181, at 30. *But see* Case, *supra* note 165, at 83-84 (noting that the majority says "which can justify" rather than "that can justify," the former being a non-restrictive clause and so parenthetical, leading to the conclusion that despite the appearance of "justify," *Lawrence* still only applied rational basis review).

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

[193] *See* Coles, *supra* note 181.

[194] *Id.* at 32.

[195] *See id.* at 34 (citing several instances where the court did not undertake a fundamental right analysis when relying on a previously acknowledged fundamental right).

[196] *Lawrence*, 539 U.S. at 564-65; *see* David Cruz, *The "Sexual Freedom Cases?" Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 318 (2000) (suggesting these opinions most accurately portray a broader right to sex or "'freedom to engage in . . . sexual intercourse without fear of familial or reproductive consequences'" (quoting Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's* Freedom's Law, 65 FORDHAM L. REV. 1313, 1325 (1997))).

[fundamental] right to intimate relationships recognized in *Griswold*."[197] But what of couples, married and unmarried, or individuals interested in sexual devices? According to this analysis, the Fifth Circuit was correct as it explicitly noted that *Lawrence* applied and extended a pre-existing right.[198] The Eleventh Circuit's error is not necessarily fatal, however, since Alabama does not burden every means of attaining the devices.[199] By contrast, the Texas statute cuts off all avenues of procuring sexual devices and so may "unduly burden" couples' privacy rights.[200]

Lawrence's implication on standards of review is astonishingly unclear. However, at least for the *Reliable* court, the implication is inconsequential. Under either rational basis or strict scrutiny, its conclusion is justified. Level of scrutiny may also be inconsequential to the *Williams* decision. What *Casey* protects from undue burden is an otherwise facially acknowledged fundamental right. As the *Williams* court correctly notes, the statute does not burden any cognizable fundamental right because, unlike the Texas statute, it does not prohibit use. Before using *Casey* to demand strict scrutiny from the *Williams* court, critics would first have to assert that the fundamental right being protected is not the right to private use, but a right to choose the means by which to achieve orgasm. That choice is what Alabama's commercial ban burdens.

2. The Collapsible Error & the Fundamental Right to Orgasm

What is necessary for a successful strict scrutiny substantive due process claim is an assertion of sexual autonomy that focuses not on the act or the partner, which are already protected by precedent,[201] but on the end (orgasm).[202] This is best illustrated in terms of the collapsible error.

Courts commit the collapsible error when they subsume an equal protection question (is a group, e.g., homosexuals, a suspect class?) into the due process question (is there an underlying fundamental right, e.g., to marriage?), defining the underlying interest by the targeted group (gay

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[197] *See* Coles, *supra* note 181, at 36.

[198] *See* discussion *supra* Part III.B.

[199] *See* discussion *supra* Part III.A.

[200] *See* discussion *supra* Part III.B.

[201] *See* Lawrence v. Texas, 539 U.S. 558 (2003) (extending privacy right to private sex between consenting adults); Roe v. Wade, 410 U.S. 113 (1973) (declaring a right to choose to terminate pregnancies); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to choose contraception to non-married couples); Griswold v. Connecticut, 381 U.S. 479 (1965) (declaring a right of married couples to choose contraception).

[202] *See* Lindemann, *supra* note 49, at 343 (quoting the Alabama Attorney General, who declared no "constitutional right to purchase a product to use in pursuit of having an orgasm").

marriage), and then limiting their analysis to substantive due process (is there a fundamental right to gay marriage?).[203] This error generally leads to substantive due process questions so narrow that they are cognizable only as rhetorical.[204] The error also results, because of flawed analysis, in judicial denial of both due process and equal protection.[205]

Despite its repeated, but arguably honest, attempts to frame the question neither too narrowly nor too broadly, the *Williams* court committed this error.[206] The substantive due process question is nothing less than the right to unburdened pursuit of orgasm,[207] but the *Williams* court conflated the class (device users) and the question (orgasm) into the question of whether there is a fundamental right to use sexual devices in pursuit of an orgasm. The *Reliable* court narrowly missed committing the error by choosing not to define an interest at all, instead relying on the *Lawrence* Court's statement of liberty.[208]

There is a line of reasoning leading to a right to orgasm. *Griswold*, *Eisenstadt*, and *Roe*, by not discussing abstinence and other forms of sexual gratification as possible alternatives, can be bases of inferring an underlying right to adult consensual sexual activities.[209] *Lawrence* implicitly recognizes this by acknowledging sex sans procreation as a component of self-identity.[210] As gender, sex, and social paradigms break from the previous male and female binary, "right to sex" and a focus on the pleasure of the act, rather than a procreative purpose, may emerge.[211]

However, no opinion yet has enshrined sexual gratification. What the Court has recognized is a right to simple, consensual sexual expression in

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[203] Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685 (2008).

[204] *See, e.g.*, *id.* at 734-35 ("[The collapsible error] build[s] an inequality into the analysis ab initio [and] creates an (unconstitutional) irrebuttable presumption that the underlying right ([*e.g.*,] homosexual sodomy) is *not* fundamental.").

[205] *Id.* at 733.

[206] *See* Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285, 306 (2005) (claiming the Court "opportunistically replaces sexual privacy, an abstract concept[,] . . . with particular sexual devices").

[207] *Cf.* Kim Shayo Buchanan, Lawrence v. Geduldig*: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1251 (2007) ("Due process sexual liberty requires plaintiffs to assert a pleasure-based rather than a therapeutic rationale.").

[208] *See* discussion *supra* Part III.B.

[209] *See* Cruz, *supra* note 196; Angela Holt, *From My Cold Dead Hands:* Williams v. Pryor *and the Constitutionality of Alabama's Anti-Vibrator Law*, 53 ALA. L. REV. 927, 940-41 (2002) (explaining the "abstinence gap" argument).

[210] Herald, *supra* note 28, at 29 ("The *Lawrence* decision disengaged sex from reproduction by protecting sexual relationships where procreation was not possible.").

[211] *Id.*

private, married or not, procreative or not, in both hetero- and homosexual relationships. Success under current Court doctrine would turn the critique on its head. After working to separate the androcentric conflation of sex and orgasm,[212] this criticism would have us demand their fungibility. Furthermore, in the cases where the Court provides due process protection to sexual liberty, the Court has been explicit that the interest it is protecting transcends sex.[213] Judges define rights in sexual terms only when preparing to deny their existence;[214] when protecting sexual liberty, judges deliver opinions in "grand and euphemistic nonsexual terms."[215] Thus, in *Bowers*, the Court denies a right to "homosexual sodomy,"[216] while in *Lawrence* it speaks of defending a bond that is "more enduring."[217] The *Lawrence* Court struck down state interference in the formation by homosexuals of "serious domestic relationships," but stopped well short of giving sex, pleasurable or otherwise, any social or legal status.[218]

Finally, even if orgasm and its pursuit are eventually protected by Court doctrine, that does not immediately lead to the conclusion that mechanically assisted orgasm is protected. Protected pursuit of orgasm coupled with a better understanding of female sexual response[219] may call for more responsible lovers,[220] but it does not directly demand access to

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[212] *See* ANNIE POTTS, THE SCIENCE/FICTION OF SEX: FEMINIST DECONSTRUCTION AND THE VOCABULARIES OF HETEROSEX 99-100 (2002) ("[P]erhaps this embryonic idea of . . . sex would incorporate the 'possibilities' of multiple pleasures; climax would become neither the target nor the non-target of sex, neither the 'terminus ad quem' nor the origin toward which we struggle back, but rather it would be a *supplement* . . . nor would [orgasms] be mystified to (always) mean the only source of some peak experience and intimacy."). This Comment does not intend to over-generalize by referring to a single feminist position. However, a poll of the applicability of various feminist theories would fill a paper in its own right.

[213] *See* Buchanan, *supra* note 207, at 1272-73.

[214] *See id.* at 1273-74 (citing as examples Bowers v. Hardwick, 478 U.S. 186 (1986) and Williams v. Att'y Gen. of Ala. (*Williams IV*), 378 F.3d 1232 (11th Cir. 2004)).

[215] *Id.* at 1273-74 (citing as examples Lawrence v. Texas, 539 U.S. 558 (2003), Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), and Roth v. United States, 354 U.S. 476 (1957)).

[216] *Bowers*, 478 U.S. at 190.

[217] *Lawrence*, 539 U.S. at 567; *see also* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1408 (2004) (noting that no information in the record indicates that Lawrence and his sexual partner, Garner, were in a relationship, and asking rhetorically, "More enduring than what? Than sex?").

[218] *See* Franke, *supra* note 217, at 1417.

[219] *See* discussion *infra* Part IV.B.

[220] In the same sense that access to contraception is protected, but not provided in all forms by all methods, recognizing a right to pursuing orgasm does not demand that the state sanction all means of achieving orgasm. *Cf.* David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 LAW & PHIL. 507, 519 n.36 (1997) ("One might well believe that the intensely pleasurable sensations accompanying orgasm are intrinsically good, without for a moment supposing that this suggests a duty to

electromechanical vibrators. This is certainly not an attractive state of the law. It protects primarily male interests even when addressing "women's issues."[221] Nevertheless, it is an unavoidable consequence of modern substantive due process.

However, *Lawrence* did not label consensual adult sexual activity as a fundamental right calling for strict scrutiny, nor did it simply apply rational basis. Instead, "the most private human conduct, sexual behavior, and in the most private of places, the home," was described as "a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[222] It is quite possible that another line of analysis was at work.

3. Blurring Standards of Scrutiny & Coercive Morality

A final approach to *Lawrence* views it as one of several recent cases indicating that "the certainty of the dichotomy between strict scrutiny and [rational basis] scrutiny is breaking down."[223] Justice Stevens's concurrence in *City of Cleburne v. Cleburne Living Center* expressed his doubts that the strict/rational distinction is tenable.[224] Justice Marshall, dissenting in *San Antonio Independent School District v. Rodriguez*, expressed "disagreement with the Court's rigidified approach to equal protection analysis."[225] Indeed, the creation of a third category, so-called "intermediate scrutiny," was itself a clear signal that the Court was becoming dissatisfied with its categories.[226] Thus, *Lawrence* may be the

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set up state institutions to dole out orgasms . . . . There is likewise no duty on any individual to provide others with orgasms whenever he or she is in a position to do so.").

[221] *See* discussion *infra* Part IV.B; *cf.* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1300 (1991) ("Women can have abortions so that men can have sex.").

[222] Donald L. Beschle, Lawrence *Beyond Gay Rights: Taking the Rationality Requirement for Justifying Criminal Statutes Seriously*, 53 DRAKE L. REV. 231, 237 (2005) (quoting *Lawrence*, 539 U.S. at 567).

[223] *Id.* at 233; *see also* Barnett, *supra* note 156; Karlan, *supra* note 166, at 1450 (suggesting *Lawrence* "undermines the traditional tiers of scrutiny altogether"); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 946 (2004) ("[I]t is not too soon to declare that the combined effect of the methods employed by the Court in *Lawrence* and *Grutter* has done serious damage to the health of tiered scrutiny [which may be] beginning to collapse."); Sunstein, *supra* note 164, at 48 ("An alternative reading is that the Court deliberately refused to specify its 'tier' of analysis because it was rejecting the idea of tiers altogether.").

[224] 473 U.S. 432, 451 (1985) (Stevens, J., concurring) ("I have never been persuaded that these so-called 'standards' adequately explain the decisional process.").

[225] 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

[226] *See* Beschle, *supra* note 222, at 223-33.

culmination of a "crisis in analogical reasoning."[227] If *Lawrence* signaled an explicit turn toward balancing rather than tiering, what direction do we have for weighing the balance when the government's interest is morality?

The Court in *Lawrence* indicates the scope of the moral dimension, repeatedly limiting protection to "conduct not harmful to others" and "absent injury to a person."[228] This would seem to imply that "state interests are synonymous with duties to others."[229] Two categories of prohibitions then become unjustifiable: those that attempt to preserve traditional moral or cultural practices from erosion or change and those that prohibit acts as inherently wrong regardless of effect on others.[230] This does not mean that majorities must remain silent on strictly moral issues; rather, they are confined to resistance by "argument, incentives, and nongovernmental social pressure."[231] Coercion by criminal sanction confines both contemporary and future liberty by "freez[ing] traditional moral concepts."[232] In fact, coercion to virtue, a contradiction in terms,[233] directly conflicts with democratic principles by removing from minorities, by pain of punishment, the freedom to attempt to become a majority.[234]

The issue of coercive criminal sanction does not immediately remove morality as *any* rational basis for legal prohibition.[235] Rather, it insists that the government cannot rely *solely* on morality and therefore must explain,

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[227] *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992).

[228] Lawrence v. Texas, 539 U.S. 558, 567, 572 (2003); *cf.* Allen, *supra* note 163, at 1047-48 (noting that, of the many moralities in the world, the *Lawrence* Court was concerned with religious, traditional, and ethical dictates on behavior).

[229] Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 19 (2007).

[230] *See* Beschle, *supra* note 222, at 264; *see also* Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court's Vision of the Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637, 694 (2005) ("*Lawrence* diminishes the States' ability to use criminal law to serve expressive and educative purposes, tending therefore to restrict criminal law to purely instrumental uses.").

[231] Beschle, *supra* note 222, at 266.

[232] *Id.* at 265.

[233] *Id.* at 268 (noting that obedience to authority is the only "virtue" that coercion instills).

[234] *See* 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 52-53 (1988).

[235] *See* Allen, *supra* note 163, at 1053-54 (calling it "intuitive" that the *Lawrence* Court was *not* declaring that any reliance on morality automatically made a statute "constitutionally infirm"); *see also* Delahunty & Perez, *supra* note 230, at 639-40 (explaining the "Central Tradition" of political philosophy, preserved in American federalism, that the State's primary and defining attribute is as a moral community).

by more than simple majority preference, its employment of coercion.[236] This would shift the burden of proof to the state in cases involving sexual privacy.[237] Of course, this is still a relatively low hurdle. Legislatures can simply mask their moral motivations,[238] leaving "plenty of room to cook the books."[239] Nevertheless, by forcing legislators to wrangle with empirical data, it may make them at least marginally less biased while also creating a clear record for their constituents and the courts.[240] At the least, requiring a modicum of justification that goes beyond simple majority in these cases certainly is unlikely to make the process *worse*.[241]

Which way do the statutes in *Williams* and *Reliable* tip the balance? Surprisingly, again, both courts may have been correct, if for the wrong reasons. *Williams VI* mistakenly relies on morality alone as a rational basis for Alabama's prohibition.[242] However, that finding was preliminary and, in the Eleventh Circuit's opinion, preemptive of other state justifications made clear in *Williams I* (banning public displays of obscene materials, banning the commerce of sexual stimulation and auto-eroticism for its own sake, and banning commerce in obscene material).[243] Each of these justifications has the potential, however small, to withstand *Lawrence* coercive morality review. In fact, the only thing *Lawrence* coercive morality immediately protects is the one thing Alabama explicitly does *not* prohibit: use.

The *Reliable* court reached its conclusion by correctly applying the reasoning of *Lawrence*'s coercive morality review, although it is not clear that it relied on that analysis. As the *Reliable* majority explicitly states, *Lawrence* did not put an end to morality-based legislation.[244] Because the Texas statute contains additional prohibitions on borrowing and giving, it

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[236] *See* Beschle, *supra* note 222, at 279 (indicating that *Lawrence*, by such an interpretation, "makes the rational basis requirement of the Due Process Clause more than a paper tiger"); *see also* Lawrence v. Texas, 539 U.S. 558, 582, 584-85 (O'Connor, J., concurring) (repeatedly emphasizing that a state's interests must extend beyond simple morality).

[237] *See* Herald, *supra* note 28, at 35-37.

[238] Susan B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1240 (2004).

[239] Koppelman, *supra* note 166, at 1179.

[240] *See* Allen, *supra* note 163, at 1066; Goldberg, *supra* note 238 (noting that unfettered morality justifications give legislators "virtual carte blanche"); Herald, *supra* note 28, at 36-37.

[241] Allen, *supra* note 163, at 1066.

[242] *See* discussion *supra* Part III.A.

[243] *See id.*

[244] *See* text accompanying *supra* note 104.

prohibited acts unrelated to the supposed harm to others.[245] However, the *Reliable* court could have severed those offending provisions without doing harm to the statute.

B. EQUAL PROTECTION, PATHOLOGIZING SEXUALITY, AND THE HIDDEN DANGERS OF SEXUAL AUTONOMY

Much literature has arisen around the possibility that the *Lawrence* majority, like the O'Connor concurrence, may have made their decision on equal protection grounds but been reluctant to couch it explicitly in those terms.[246] The Equal Protection Clause of the Fourteenth Amendment states that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[247] Like substantive due process review, any discriminatory state law will be scrutinized at a level dependant on the nature of the classification in the statute.[248] Classifications that are based on race, national origin, religion, or alienage warrant strict scrutiny review.[249] Gender and illegitimacy classifications warrant an "intermediate scrutiny" review, requiring the state to provide "exceedingly persuasive justification"[250]—important government interest furthered by substantially related means[251]—for its policy. All other classifications, including homosexuality, warrant rational basis review.[252] If a statute is not facially discriminatory, the Court requires a showing of discriminatory intent in equal protection claims; disparate impact is merely "evidentiary" and,

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[245] Note that, despite having the more restrictive ban, Texas, unlike Alabama never advanced an interest in preventing stimulation and auto-eroticism for its own sake.

[246] *See, e.g.*, Karlan, *supra* note 166 (suggesting the Court was not clear on level of scrutiny because its decision rested on a conclusion about equality—that class-based animosity by definition lacks a legitimate government purpose—to undergird its analysis of due process, ultimately making a decision that, "sounds in equal protection" regardless of the Court's "doctrinal handle").

[247] U.S. CONST. amend. XIV, § 1.

[248] Also like substantive due process, equal protection analysis has seen blurring of the review boundaries. *See* Beschle, *supra* note 222 (arguing that the Court's doctrine has evolved to eliminate the fundamental distinctions between strict, intermediate, and rational basis scrutiny, adopting a balancing test that compares the interests if the class and the state).

[249] *See* Beschle, *supra* note 222 (describing categories warranting different levels of scrutiny). For explanation of strict scrutiny, see discussion *supra* Part IV.A.

[250] *See* Personnell Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979).

[251] *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

[252] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996). Some states have found heightened scrutiny appropriate for purposes of equal protection under their state constitutions. *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). For an explanation of rational basis review, see discussion *supra* Part IV.A.

absent a "stark pattern," "not determinative."[253] Indeed, the standard is so high that the Court rejected an equal protection challenge to a facially neutral veteran's preference scheme—one that excluded 98% of women.[254]

The equal protection criticism of anti-sexual-device statutes[255] begins with the recognition that intermediate scrutiny frequently fails to take into account important and fundamental differences between the sexes[256] and, in its attempts to recognize or equalize those differences, the state often compensates in ways that compound the problem.[257] Second, because gender discrimination by predominantly male legislatures is often a byproduct of conscious ignorance, benign obliviousness, or lack of self-awareness, intentional discrimination is an impossible standard.[258] The case of sexual devices, as the historical development of vibrators indicates, is

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[253] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); *see also Feeney*, 442 U.S. at 274 (adopting a twofold inquiry into (1) whether a statutory classification is facially discriminatory and, if not, (2) whether any "adverse effect reflects invidious . . . discrimination"; but limiting the second inquiry as "an important starting point" and still requiring a showing of "purposeful discrimination"). *But see* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (critiquing the discriminatory intent standard as an impossibility on the Freudian and cognitive psychological grounds that such intent is often simultaneously both manifest and subconscious).

[254] *See Feeney*, 442 U.S. at 256.

[255] *See generally* Herald, *supra* note 28. Though distinct from equal protection with regard to homosexuals, a similar argument can be made based on research noted *infra* notes 264–267.

[256] *See* Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1673 (1997) (arguing the state's focus on gender neutrality leads to inaction where intervention would best ensure equality).

[257] *See* LEONORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985) (noting that removing maternal preferences in divorce proceedings hurt women and children); Buchanan, *supra* note 207 (arguing that the government's reliance on the differences between men and pregnant women, *inter alia*, effectively "enforces traditional gender roles by binding women to reproductive consequences of heterosexual activity while excusing men").

[258] *See* Herald, *supra* note 28, at 22; Lawrence, *supra* note 253; Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 296-324 (1997) (finding current precedent to require proving that the "only plausible conclusion" is discriminatory intent); Gila Stopler, *"A Rank Usurpation of Power"—The Role of Patriarchal Religion and Culture in the Subordination of Women*, 15 DUKE J. GENDER L. & POL'Y 365, 366 (2008) ("Liberalism disregards the institutions, practices, discourses, and norms of a religion or culture as a socially and politically significant site of power, which severely curtails its ability to ensure that the exercise of power and authority over the individual is justified and that the rights of the individual are safeguarded."); Waldman & Herald, *supra* note 206, at 287 (stating that "stereotypical thinking and cognitive biases lead to a skewed 'database' that undergirds legal doctrines that disadvantage women," and that "recent advances in cognitive psychology suggest that most discriminatory behavior results from . . . processes that occur far beyond the reach of the conscious self").

just such a situation where legitimate differences between men and women are smoothed over by facially neutral laws that are impossible to challenge, despite their disparate impact, because of the lack of clear ill motive.[259] With a proper understanding of the androcentrism within which the statutes are situated, the state of Alabama's position can be seen as arguing that sexual devices that are either free, borrowed, imported, or mislabeled are not a threat to morality or traditional sexual roles.[260] In this way, the state accurately describes, with clarity and no sense of irony, the irrationality of the statute's operation.[261] Thus, according to the equal protection critique, a new method of addressing legitimate equal protection concerns is called for.[262]

Scientific research into female sexuality and sexual response is scant, with most investigations consisting of extended studies of men and the later assumption that the same is true of women.[263] This is true despite studies that indicate that most women do not climax from penetration,[264] nearly half of women use sexual devices,[265] sexual devices are used primarily by

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[259] *Cf.* Buchanan, *supra* note 207, at 1241 ("The legal coercion of sexual morality is typically interpreted in a way that requires the control, surveillance, and punishment of women, but rarely of men.").

[260] *See* Waldman & Herald, *supra* note 206, at 305.

[261] *Id.*

[262] *Cf.* NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY 26 (1989) (interpreting Foucault to say that "if power is instantiated in mundane social practices and relations, then efforts to dismantle or transform the regime must address those practices and relations").

[263] *See Medical Research Lacks Female Participants*, MED. ETHICS ADVISOR, Aug. 1, 2004, at 91-92 (quoting a Society for Women's Health Research leader saying "[f]or a long time in medicine, we had this thing called the 'male norm[:]' [i]t was just assumed that the male was 'normal' and women were just small men with different plumbing and a hormone problem"); Cynthia Gorney, *Designing Women: Scientists and Capitalists Dream of Finding a Drug that Could Boost Female Sexuality, There's One Little Problem . . .* , WASH. POST, Jun. 30, 2002, at W8 (quoting a research psychologist saying psychology articles "go on and on about male sexuality, and there are all the diagnostic measures, and so on. And then they say something in two sentences, akin to: 'and we assume the same thing is true for women'"); *cf.* Waldman & Herald, *supra* note 206, at 295 ("The female is defined in relation to the male, her sexuality governed by male needs.").

[264] BARRY R. KOMISARUK ET AL., THE SCIENCE OF ORGASM 71 (2006); DESMOND MORRIS, THE NAKED WOMAN: A STUDY OF THE FEMALE BODY 213 (2005) (putting the number as high as two out of every three women).

[265] *See, e.g.*, BERMAN CTR., THE HEALTH BENEFITS OF SEXUAL AIDS & DEVICES: A COMPREHENSIVE STUDY OF THEIR RELATIONSHIP TO SATISFACTION AND QUALITY OF LIFE (2004), *available at* http://www.sexlibido.cz/LinkClick.aspx?fileticket=V2SwJSfzUsM%3D (finding the 44% of 2,594 women between eighteen and sixty years of age have used a sexual device; 20% self-stimulate at least once a week; of those, 60% use a device to do so); *see also* DUREX, GIVE AND RECEIVE: 2005 GLOBAL SEX SURVEY RESULTS (2005), *available at* http://www.data360.org/pdf/20070416064139.Global%20Sex%20Survey.pdf (finding that

women,[266] and by lesbian women in particular.[267] Indeed, almost all of the appellants in *Williams* are women, with the only men involved being either husbands of or business co-owners with female petitioners.[268] However, because there is no indication of purposeful discrimination, women have been forced to challenge the statutes on medical and therapeutic claims of substantive due process.[269]

These litigation strategies only serve to reinforce existing biases toward women and female sexuality by insinuating that female sexual gratification is not an acceptable objective in its own right.[270] Furthermore, they support a standard that, because of its focus on the application of each individual device, makes general support of sexual devices impossible.[271] Courts recognize the validity of the devices only if the device is for medical or therapeutic purposes.[272] This, in turn, forces women who use these

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43% of respondents in the United States have used a vibrator, compared to 19% of respondents that have used no sex enhancers). The author is aware of selection biases in the Durex survey; the shortcomings of the survey highlight the state of research in the field.

[266] *See* Durex, *supra* note 265 (finding that vibrators "are more popular among women than men—26% compared to 19%," a comparative disparity of almost 40%).

[267] Clive M. Davis et al., *Characteristics of Vibrator Use Among Women*, 33 J. SEX RES. 313, 316 (1996) (finding that, by age twenty, 36% of lesbian respondents had used a vibrator, compared to 11% of heterosexual women; by age thirty, 86% of lesbian respondents had used a vibrator).

[268] *See* Williams v. Pryor (*Williams I*), 41 F. Supp. 2d 1257, 1261-64 (N.D. Ala. 1999). The appellant in *Reliable* was a corporation.

[269] *See* discussion *supra* Part IV.A; Lindemann, *supra* note 49, at 338 ("The challengers argue predominantly not for the rights of sexually-healthy women but for those with dysfunctions that require physical therapy."); Waldman & Herald, *supra* note 206, at 310 ("In the medical profession, . . . female sexuality [is defined] as successful when it responds well to the needs of men, and as dysfunctional when it does not. In the legal arena, sadly, the most successful cases . . . are those where the courts can be convinced to consider the needs of these dysfunctional women . . . .").

[270] *See* Yakaré-Oulé Jansen, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 AKRON L. REV. 311, 319 (2007) (arguing that "a focus on women reduced to 'suffering bodies in need of protection by the law and by the State' can frustrate more fundamental goals, such as women's need for participation and equality" (quoting Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 HEALTH & HUM. RTS.: INT'L J. 16, 25 (2004))); Lindemann, *supra* note 49, at 344 (noting that this is "precisely the same message that the statutes themselves sent in their discouragement of autonomous female sexuality").

[271] *Cf.* Lindemann, *supra* note 49, at 337 (quoting Dr. Sandor Gardos's paraphrasing of his testimony in *Sewell v. State*, 233 S.E.2d 187 (Ga. 1977), as: "*DA*: Now Professor Doctor Gardos, you stated that these devices have therapeutic value. Is that Correct? *Gardos*: Yes. *DA*: And have you ever prescribed a device similar to this one? *Gardos*: Uh, no, I must admit that I have never prescribed that a patient attach a dildo to his or her chin").

[272] Herald, *supra* note 28, at 24.

devices into the Morton's Fork of admitting that they are either sick or criminal in the eyes of the law.[273]

However, the few studies of female sexuality that exist show that sexual dysfunction is more prevalent in women than men,[274] with at least 43% and as many as 90% of women experiencing sexual problems.[275] This seems to indicate that the "dysfunction" is actually natural, a byproduct of lack of understanding of female sexuality.[276] Some critics seize on this while pointing out the legality of products, like Viagra, that treat male sexual dysfunction, to suggest discriminatory intent.[277] Certainly, there have been upsetting juxtapositions of male and female therapeutic drugs before,[278] but the critics' argument is self-defeating in this context. Viagra and other virility drugs—which are blood flow enhancers, not mechanical devices—are regulated. Furthermore, the obscenity statutes ban the sale and distribution of other male sexual aids, such as "cock-rings." Finally, attacks on the technical details of the statute as over- or under-inclusive or lacking specificity[279] do nothing to directly promote the fundamental

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[273] *See id.*

[274] *See* Edward O. Laumann et al., *Sexual Dysfunction in the United States: Prevalence and Predictors*, 281 JAMA 537, 541 (1999).

[275] *See* MAINES, *supra* note 12, at 61 (noting early studies showing rates of 60-90%); Kevin L. Billups, *The Role of Mechanical Devices in Treating Female Sexual Dysfunction and Enhancing the Female Sexual Response*, 20 WORLD J. UROLOGY 137, 137-41 (2002) (showing a rate of 43%). *But see* MAINES, *supra* note 12, at 63-66 (noting the clear potential to interpret the existing data in the opposite direction).

[276] *See* SHERE HITE, THE HITE REPORT: A NATIONWIDE STUDY OF FEMALE SEXUALITY 236 (1976) ("Even the question being asked is wrong . . . [t]he question should not be: Why aren't women having orgasms from intercourse? But, rather: *Why have we insisted women* should *orgasm from intercourse?*"); Herald, *supra* note 28, at 25. *Contra* BERGLER & KROGER, KINSEY'S MYTH OF FEMALE SEXUALITY 48 (1954) (claiming, almost laughably, that there is no scientific or statistical objection to declaring 80-90% of the female population abnormal). Despite this, few sex specific studies have occurred. *See* Waldman & Herald, *supra* note 206, at 299 ("[T]he reasons behind women's lack of sexual responsiveness have not generated much scientific inquiry . . . . Rather [these statistics on "normalcy"] have been met with bland acceptance.").

[277] *See, e.g.*, Shelly Elimelekh, Note, *The Constitutional Validity of Circuit Court Opinions Limiting the American Right to Sexual Privacy*, 24 CARDOZO ARTS & ENT. L.J. 261, 287 (2006) (suggesting that "it is difficult to demarcate the difference between sex toys and sex drugs, yet the government has clearly drawn this distinction"); *cf.* Sarah E. Bycott, *Controversy Aroused: North Carolina Mandates Insurance Coverage of Contraceptives in the Wake of Viagra*, 79 N.C. L. REV. 779. 797 (2001) (discussing the distinction between Viagra as "medically necessary," versus contraceptives as "life-enhancing").

[278] *See, e.g.*, Virginia Postrel, *Sex Mandates*, FORBES, May 31, 1999, at 121 (quoting a Reverend's characterization of mandatory contraceptive coverage as "disgusting and demoralizing," whereas Viagra "enhances a natural function").

[279] *See, e.g.*, Elimelekh, *supra* note 277, at 287-88.

underlying principle of sexual autonomy and recognition of natural female sexual response.

A similar attack juxtaposes the Court's open acceptance and protection of "normal, healthy" non-procreative sexual pleasure—mainstream pornography, effectively defined by what heterosexual men like or are supposed to like—with the Court's reluctance to recognize the same non-procreative interests of women and sexual minorities.[280] To the extent that such a criticism highlights the fact that sexual device prohibitions disproportionately affect women and sexual minorities—groups less likely to be interested in traditional heterosexual pornographic media and more likely to be interested in traditionally non-expressive sexual aids[281]—it is certainly valid. However, the claim that bans on sexual devices "would never [have been] permitted by the standards developed to protect straight men's porn"[282] is not supported by either the language of the statutes themselves or the Court's jurisprudential history. Two important distinctions are glossed over in this criticism.

First, the exception the Court carved out for prurient pornography was one for possession and use, not for production or commerce.[283] Courts at all levels—state and federal, trial and appellate—have explicitly recognized that same exception for sexual devices.[284] Second, although neither the Fifth nor Eleventh Circuits reached the First Amendment question, the Kansas and Mississippi Supreme Courts provide relevant analysis. *Miller* and other First Amendment pornography cases are not applicable because devices are not speech or expression.[285] At best, devices are symbolic speech, subject to the content-neutral test set forth in *United States v. O'Brien*.[286] It is an unfortunate reality that pornography is more likely to capture heterosexual male interests than those of women and sexual minorities,[287] and devices are more valuable to women and sexual

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[280] *See, e.g.*, Buchanan, *supra* note 207, at 1248-49.

[281] *See supra* notes 258-261 and accompanying text.

[282] Buchanan, *supra* note 207, at 1250.

[283] *See* discussion *infra* Part IV.C.

[284] *See* discussion *supra* Part III.

[285] *See* State v. Hughes, 792 P.2d 1023, 1031 (Kan. 1990) (listing *Miller*-protected objects as "book[s], movie[s], or play[s], rather than a device"). *But see* Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 339-45 (2008) (criticizing the Court's speech/conduct distinction).

[286] *See* PHE, Inc. v. State, 877 So. 2d 1244, 1249-50 (Miss. 2004) (citing United States v. O'Brien, 391 U.S. 367 (1968)).

[287] The claim in this Comment is not that there are no "pornographic" outlets for women and sexual minorities. When it comes to pornography, the tail is long indeed. *See* Tom Chivers, "Rule 34," *Internet Rules and Laws: The Top 10 from Godwin to Poe*, THE TELEGRAPH, Oct. 23, 2009, http://www.telegraph.co.uk/technology/news/6408927/Internet-

minorities than to heterosexual men; but it is far from per se evidence of an "insidious [legal] double standard."[288] Rather, the observation suggests that, with proper scientific support, our understanding of "normal, healthy" sexual behavior in women may require a change in, not an extension of, our current protections of sexual expression.[289] Such a change would be an inappropriate undertaking for a district or circuit court.[290]

A final criticism suggests that these statutes stigmatize in the same way that the one at issue in *Lawrence* did.[291] This is patently false. *Lawrence* was concerned in relevant part with the fact that, due to the statute, merely being homosexual was taken by employers and the public as a tacit admission of criminality.[292] Here, there can be no such inference as one can be homosexual, heterosexual, married, in a relationship, or single and still have use for such devices. Though these statutes stigmatize by criminalizing the sale of devices utilized in arguably "normal" sexual conduct, there is no de facto public characterization of all potential device users (literally every member of the community) as criminal or sick. The characterization is a personal one incumbent on the individual device user to make. This may be no less damaging to the psyche, but it is fundamentally different from the stigma *Lawrence* was concerned with.

As detrimental and disturbing as the pathologizing of female sexuality may be, the scarcity and narrowness of scientific studies, both of "normal" sexual response and the role of sexual devices,[293] counsels against taking major steps on these grounds. Court imposition prior to commission and completion of better and more thorough research runs the risk of making the issue dead letter prior to any enlightenment.[294] Furthermore, if such

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rules-and-laws-the-top-10-from-Godwin-to-Poe.html; Wikipedia, *34 (Number): In Other Fields—Rule 34*, http://en.wikipedia.org/wiki/34_(number)#In_other_fields (last visited Feb. 6, 2010). Instead, this Comment claims that, by volume, the overwhelming majority of pornography is tailored to heterosexual male interests.

[288] Tristan Taormino, *Dallas Dildo Defiance*, VILLAGE VOICE, Feb. 17, 2002, *available at* http://www.villagevoice.com/issues/0221/taormino.php.

[289] *See* discussion *infra* Part IV.C (discussing potential First Amendment protections of sexual expression).

[290] Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 747 (5th Cir. 2008) (noting that addressing the First Amendment implications of *Lawrence* for this issue would be premature).

[291] *See, e.g.*, Herald, *supra* note 28, at 34 ("[T]hat same stigma is present here.").

[292] *See* Lawrence v. Texas, 539 U.S. 558, 581-82 (2003).

[293] *See* Waldman & Herald, *supra* note 206, at 303 (characterizing the state of relevant scientific study as "inaccurate or incomplete").

[294] *See* Franke, *supra* note 217, at 1415-18 (warning of the compartmentalizing nature of judicial solutions and comparing the restrictive effect of *Lawrence* on the efforts of homosexual rights activists to the effect of *Brown* on the "black civil rights movement"); Susana T. Fried & Ilana Landsberg-Lewis, *Sexual Rights: From Concept to Strategy*, *in* 3

studies do occur despite a Court decision invalidating obscenity statutes, any discrepancy between the studies' findings and the Court's reasoning would endanger the entire ruling. Finally, as the legislative and judicial struggles over the proper role of homosexuality in modern society show, backlash to changes previously thought to be relatively innocuous can be both discouraging and dangerous.[295] These are the growing pangs of any expansion of cultural consciousness, but it would be best to enter the fray with as much validating research as possible. Furthermore, exactly as the *Williams IV* court indicates, the scarcity of device bans and the reluctance of states to amend those bans where they are declared unconstitutional on technicalities indicate that the democratic process has been successful and may be superior for these ends.[296] Though this is hardly reassuring to people who benefit greatly from the use of sexual devices, achieving "victory" too early only leaves open doors that may invite failure in the future.[297]

Regardless, neither of the appellate courts that have considered the issue have made their decisions on these grounds, nor can they. What the critique demands is an expansion of equal protection with respect to gender generally and sexuality specifically. Within the courts, only the Supreme Court can achieve that end. To the extent that the critique is correct, the circuit split is ideal for the Court to clarify, expand, and empower both *Lawrence* and equal protection jurisprudence. However, that will be

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WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 114, 114 (Kelly D. Askin & Dorean Koenig eds., 2001) (calling to "sustain the fluidity of the concept and its ability to include an ever-growing understanding of the range of experiences . . . to expand the boundaries of what sexual rights mean, rather than limiting its application and meaning with over-definition"); Jansen, *supra* note 270, at 334 (noting the "risk of excluding" that would fatally limit a declaration of sexual rights).

[295] *See* Case, *supra* note 165, at 79-81 (recalling, in this "Kulturkampf," that Clinton's modest achievements for homosexuals in the military were followed by more involuntary discharges than ever; Boulder's antidiscrimination ordinance led to Amendment 2; the Hawaii Supreme Court's same-sex marriage decision led to the Defense of Marriage Act and a Hawaiian constitutional amendment; and that "*Lawrence* itself seems to have sparked intensified interest in a federal constitutional amendment on same-sex marriage and a sharp decline in support in the polls for gay rights;" not to mention the experience in Britain, which the *Lawrence* majority cited as a shining example, of "more virulent prosecution of public homosexual acts" coupled with "a very narrow definition of what was 'private' and hence not criminal").

[296] *See* Williams v. Att'y Gen. of Ala. (*Williams IV*), 378 F.3d 1232, 1244 n.14 (11th Cir. 2004). Critics may argue that statutes like the one at issue in *Lawrence* were rare as well. However, that fails to account for the foregoing arguments distinguishing the unconstitutionality of anti-sodomy laws and the constitutionality of these statutes.

[297] *Cf.* MAINES, *supra* note 12, at 66 (indicating, ironically, that legalizing vibrators actually enforces the androcentric view because it relieves men of responsibility for stimulating the clitoris).

impossible on this round of litigation, as the Texas attorney general has decided not to petition for a writ of certiorari in *Reliable*.[298]

C. FIRST AMENDMENT: PORNOGRAPHY, PROCREATION, AND SEXUAL EXPRESSION[299]

Though there is a dearth of judicial and academic support for First Amendment protection of sexual expression,[300] it is possible that *Lawrence* was a watershed decision clarifying just such a safeguard.[301] The Court's due process protection of private, sexual relationships began with a marital procreative liberty found scattered throughout the Constitution.[302] Though the Court eventually extended the safeguard to non-marital relationships, the Court did not protect sexual relationships generally.[303] Similarly, the Court began its protection of private sexual speech and expression with "the weight of the United States' 'whole constitutional heritage.'"[304] Specifically, the Court protected a man's private collection of pornography as an extension of his liberty to pursue happiness in order to safeguard his intellect and emotions.[305] However, the Court did not protect pornography generally as an expressive outlet, thereby allowing governments to regulate

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[298] *See* Kandyba, *supra* note 129.

[299] This Section focuses on *Lawrence*'s potentially instructive impact on the First Amendment's protection of speech and expression. Scholars have argued that statutes such as the one in question may also violate the Establishment Clause of the First Amendment. *Cf.* Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1 (2005). Such an argument is beyond the scope of this Comment.

[300] *See* James Allon Garland, *Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves that It Should*, 12 LAW & SEXUALITY 159, 164 n.27, 195-203 (2003) (summarizing the scholarship and the law prior to *Lawrence*).

[301] *See* Allen, *supra* note 163, at 1062 ("*Lawrence* has significantly undermined the very foundation upon which the Court has built the obscenity doctrine . . . [and so] requires a reevaluation of the doctrine."); James Allon Garland, *Sex as a Form of Gender and Expression After* Lawrence v. Texas, 15 COLUM. J. GENDER & L. 297, 299 (2006) (describing the *Lawrence* decision as "not only a potential doctrinal watershed, [but also] utterly touching"). *Contra* Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why* Miller *Should Survive* Lawrence, 15 GEO. MASON L. REV. 611 (2008).

[302] *See* Griswold v. Connecticut, 381 U.S. 479, 481-84 (1965) (referencing the "emanations" from "penumbras" of several Amendments in the Bill of Rights).

[303] *See* Garland, *supra* note 297, at 297 (calling *Lawrence* the Court's first opinion not only to recognize same-sex intimacy but also to approve of sex without any reference to procreation).

[304] *See id.* at 301 (quoting Stanley v. Georgia, 394 U.S. 557, 565 (1969)).

[305] *See Stanley*, 394 U.S. at 564-65; Garland, *supra* note 301, at 302 ("The Court concluded that governmental intrusion 'into the contents of his library' (of porn) endangered not only his thoughts but his 'emotions and sensations' and, thus, his right to 'satisfy his intellectual and emotional needs' (for porn).") (citations omitted).

it in a manner inconsistent with free expression.[306] Thus, with regard to sex prior to *Lawrence*, the Court had created a "pornographic-procreative dyad": two outlets of desire, linked by sex, that had achieved limited protection without implicating the value or meaning of the expressive act that undergirds them.[307] Against this backdrop, *Lawrence* recognized the protection previously framed in terms of procreation instead as one of intimacy that ultimately finds its expression in sex.[308] It may have reframed the pornographic portion of the dyad as well.[309]

Rather than extending its previous discussions of sex as "mysterious,"[310] "sensitive," and "key" to human existence,[311] the *Lawrence* majority focuses on the relationship, framing sex as one "expressi[ve]" component.[312] The Court never references the First Amendment directly or any of its jurisprudence on that topic.[313] However, it does discuss, in language quite similar to its opinion in *Boy Scouts of America v. Dale*,[314] "intimate and personal choices" that "define one's own concept of existence."[315] Sex that is "intimate," "personal," and private may not intuitively seem communicative, but speech can be expressive without an audience.[316] Furthermore, if sex is regarded as an expressive speech act, the fact that the action in question is illegal is not dispositive of its protection.[317]

Some critics argue that only traditional coital sex expresses appropriate values.[318] However, this is precisely the kind of monopolization of ideas against which First Amendment protections of speech and expression

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[306] *See* Garland, *supra* note 301, at 302 (noting that in other contexts, for example flag burning, claims that expressive conduct is "offensive" have been declared unconstitutional attempts to monopolize ideas).

[307] *Id.* at 303.

[308] *See* Lawrence v. Texas, 539 U.S. 588, 574, 577-78 (2003).

[309] *See generally* Garland, *supra* note 301.

[310] Roth v. United States, 354 U.S. 476, 487 (1957).

[311] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).

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

[313] *See* Garland, *supra* note 301, at 304.

[314] 530 U.S. 640 (2000).

[315] *Lawrence*, 539 U.S. at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

[316] Garland, *supra* note 301, at 298 (citing, *inter alia*, *Dale*, 530 U.S. at 648, 656).

[317] *Id.* at 305; City of Erie v. Pap's A.M., 529 U.S. 277, 283, 289 (2000) (plurality) (holding that despite bans on nudity as a summary offense, nude dancing is still entitled to First Amendment protection); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 563-66 (1991) (finding that a misdemeanor offense is still entitled to First Amendment protection).

[318] *See* John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049 (1994).

defend.[319] That similar sex acts can express a wide variety of messages[320] does not eliminate their protection. The parties involved in the expression define the expression,[321] and speech acts are protected no matter how "bizarre,"[322] "abstract[,] or perplexing."[323] This does not mean that there can be no interference with sex as an expressive act; a compelling government interest can overcome the citizen's speech right.[324] However, the government cannot object to the outward expressions of some relationships simply because an unpopular sex act is assumed to be part of it.[325]

Nevertheless, the indecisive language in *Lawrence* provides at best a tenuous link to a supposed watershed in First Amendment civil liberties. It is certainly not the kind of language that a circuit court can justify seizing when considering cases with long lines of precedent.[326] Further clarification from the Court is absolutely essential to a defensible claim for sexual devices as a necessary component of protected sexual expression.

V. CONCLUSION

> The world has been so male-centered for so long, it is no wonder that judges find it difficult to do the archaeological work necessary to unearth the biases. Even more destructive, however, is that courts show a willingness to cover biased rules in neutral rhetoric, thus bubble wrapping the problem with even more layers of protection. By returning to an analysis of substantive due process that protects only those rights historically protected, the court's 'neutral' analysis disfavors women who have for

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[319] Garland, *supra* note 301, at 298.

[320] *Id.* at 316-17 ("[S]cientific evidence shows that overwhelming majorities of Americans engage in sex to express love and to feel loved in return. By no means does this indicate that sex for pleasure . . . lacks expression. Sexual contact can show an understanding of a partner's needs or appreciation of a part of the body. Group sex can celebrate the rejection of social mores, and even autonomous sex can have educational and other creativity values." (citations omitted)).

[321] *See* Spence v. Washington, 418 U.S. 405, 410-11 (1974).

[322] *Id.* at 410.

[323] Garland, *supra* note 301, at 298 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bost., 515 U.S. 557, 569 (1995)).

[324] *See* Allen, *supra* note 163, at 1063-64 (arguing that localities would often easily be able to meet such a standard, citing protection of minors as justification for child pornography prohibitions and zoning of adult businesses).

[325] *See* Garland, *supra* note 301, at 317-18. This Comment does not contend that either sodomy or sex toys are, in fact, unpopular.

[326] *Cf.* United States v. Extreme Assocs., 431 F.3d 150, 155-56 (3d Cir. 2005) (reversing a district court's finding that *Lawrence* eliminated morality as a justification for obscenity laws because of the doctrine that inferior courts may not determine that a directly applicable Supreme Court precedent has been undermined by a later decision of the Court).

> centuries been the victims of both biased rules and stereotypical thinking, including the longstanding inertia in the medical profession towards female sexuality.[327]

The history of Western understanding of female sexuality, told specifically through the development, use, and regulation of the vibrator, makes clear the long-standing unequal treatment of women in social, medical, psychological, and legal terms. It is a profoundly troubling tale that, in the United States, has culminated in a circuit split over the ability of male legislators to impose their views of morality and normalcy on women and sexual minorities by way of statutes that essentially eliminate the availability of the devices they prefer, and sometimes even need, for sexual gratification. That much is almost universally accepted. Even the *Williams* court indicates that the Alabama legislature's regulation of sexual devices is misguided. However, nothing in this tale of woe is a cognizable constitutional argument.

The Fifth and Eleventh Circuits each heard challenges to these irksome statutes based on the substantive due process guarantee of the Fourteenth Amendment. Though the courts came to opposite conclusions, both likely reached the right result, if possibly for the wrong reasons. Because the Alabama statute did not eliminate access to sexual devices, it likely did not trigger strict scrutiny and so is a valid, reasonable exercise of the state's power to regulate public morality and to protect its citizens from obscene or offensive materials. Because the Texas statute criminalized all means of acquiring sexual devices, it properly deserved strict scrutiny and failed to present either a compelling government interest or a narrowly tailored approach. However, contrary to the actual position of the *Reliable* court and the many scholars who have considered these decisions, there is little reason to believe that there is a constitutional demand hidden in *Lawrence* that required the Fifth Circuit to announce a new right to sexual privacy. The *Reliable* court and its supporting scholars appear, ironically, to have engaged Occam's dildo[328] in their push for what may be described as justice, but cannot be described as constitutional law.

Neither circuit was asked to consider the equal protection implications of the statutes, and for good reason. While there is clearly a disparate and arguably devastating impact of these statutes on women and sexual minorities, current equal protection doctrine cannot recognize that claim. Similarly, though there may be a glimmer of hope in free expression doctrine coupled with the Court's vague statements in *Lawrence*, there is

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[327] Waldman & Herald, *supra* note 206, at 307-08.

[328] *See* Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369, 372 n.9 (1995) ("While Occam's razor requires that of two competing explanations the simplest be selected, Occam's dildo predicts that the most titillating of the two explanations will be preferred.").

not yet any solid First Amendment avenue to challenging the statutes. Those limitations may indicate flaws in the system—only time and future rulings of the Supreme Court will tell.

However, that does not mean there is nothing to be done. The current state of scientific research into female sexuality and orgasm is extremely limited. This helps to mask the damage being done by the seemingly neutral laws in Alabama, Mississippi, Texas, and Virginia. Better and more thorough medical and psychological investigations of female sexuality are absolutely essential to the future of this fight. Better understanding will force legislatures to consciously grapple with the effects of their outdated preconceptions. Failing that, it may push or even empower the Supreme Court to clarify *Lawrence*'s meaning for substantive due process, equal protection, and the First Amendment in a way that is more protective of women's rights. The above quote decries the ability of the Court to cloak itself in neutrality when applying invidious bias. This is only possible in this context to the extent that scientific and medical understanding of female sexuality isnon-representative, incomplete, and inconclusive. The responsibility, therefore, falls to physicians, psychiatrists, and the people to perform more and better research and, ultimately, to demand a reckoning, whether legislative or judicial.