Unraveling Lawrence's Concerns About Legislated Morality: The ...
Curtis, Nathan R
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Unraveling *Lawrence*'s Concerns About Legislated Morality: The Constitutionality of Laws Criminalizing the Sale of Obscene Devices

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I. INTRODUCTION

In a decision feared by some as "the end of all morals legislation,"[1] the majority in *Lawrence v. Texas* held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[2] Since deciding *Lawrence*, the Supreme Court has not had the opportunity to opine definitively whether a law passed exclusively on moral grounds can pass the

1. Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).
2. *Id.* at 577 (majority opinion) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

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rational basis test—that is, whether public morality in itself is a legitimate governmental interest.[3] Instead, the battle has played out in circuit, district, and state courts across the country. While some courts have held—fulfilling Justice Scalia's doomsday prophecy—that public morality is an insufficient reason for a legislature to pass a law, others have narrowed the *Lawrence* holding and effectively revived morals legislation from imminent death.[4]

The first post-*Lawrence* "morals legislation" to create a genuine circuit split that could potentially reach the High Court relates to "device[s] designed or marketed as useful primarily for the stimulation of human genital organs"[5]—in essence, sex toys. With no pretext other than protecting public morality, legislatures in at least eight states have passed laws prohibiting the commercial sale and distribution of sex toys.[6] Although these laws might be "uncommonly silly,"[7] the question remains whether these legislatures, citing only public morality, have a rational basis for passing such legislation.

The two circuits to have addressed these laws are split as to their constitutionality.[8] The first circuit to visit the issue—the Eleventh

3. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (holding that a statute is constitutional under rational basis scrutiny so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification" made in the statute); United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (distinguishing for the first time between rational basis and strict scrutiny).

4. For lower court cases questioning the validity of specific morals legislation, see *Martin v. Ziherl*, 607 S.E.2d 367 (Va. 2005) (invalidating as unconstitutional a law criminalizing fornication between unmarried persons), and *In re Kandu*, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004) ("Basing legislation on moral disapproval of same-sex couples may be questionable in light of *Lawrence*."). For cases upholding morals legislation in light of *Lawrence*, see *State v. Jenkins*, No. C-040111, 2004 WL 3015091 (Ohio Ct. App. 2004) (upholding an obscenity law as not violating substantive due process of adult video store owner) and *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530, at *12 (Ark. Ct. App. 2004) ("[S]tatutes rationally related to furthering the legislatively determined 'public morality' are constitutional.").

5. *See, e.g.*, ALA. CODE § 13A-12-200.2(a)(1) (2010).

6. For a list of descriptions of statutes criminalizing the commercial sale and distribution of adult toys, see *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 740–41 (5th Cir. 2008).

7. *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting) (explaining that his duty was to decide cases in line with the Constitution, even though he felt that the law at issue was "uncommonly silly") (quoting Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

8. *Compare Reliable Consultants*, 517 F.3d at 740–41 (striking down a law prohibiting the sale of sex toys as unconstitutional in light of *Lawrence v. Texas*), *with* Williams v. Morgan

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Circuit—distinguished *Lawrence* and upheld an Alabama statute criminalizing the sale of adult toys.[9] The Fifth Circuit, only one year later, disagreed and interpreted *Lawrence* broadly to strike down a Texas sex toy statute.[10]

This Comment agrees with the Eleventh Circuit and argues for the constitutionality of morals legislation criminalizing the commercial distribution of adult toys, thus avoiding the bleak world envisioned by Justice Scalia in which there is constitutional protection for "fornication, bigamy, adultery, adult incest, bestiality, and obscenity."[11] A law banning the sale of sex toys is constitutional under the Due Process Clause because it does not implicate a fundamental right and because bare public morality[12] in itself remains in some instances a legitimate government interest. This Comment will begin in Part II by detailing the relevant portions of the *Lawrence* decision and its implications for morals legislation. Part III will look at the circuit split between the Fifth and Eleventh Circuits regarding the constitutionality of sex toy laws in light of *Lawrence*. Part IV will then analyze the constitutionality of the statutes at issue, concluding that laws banning the sale of sex toys are constitutional because (1) they do not implicate a fundamental right and (2) they serve the legitimate government interest of promoting public morality under the rational basis test. Part V will briefly conclude.

II. CONTEXT & BACKGROUND: *LAWRENCE V. TEXAS*

The facts of *Lawrence* are not complicated, but what could have been a simple holding invalidating a law criminalizing homosexual sodomy on any number of grounds has instead potentially triggered a new era of morality-free lawmaking. In *Lawrence*, after being

(*Williams VI*), 478 F.3d 1316, 1318 (11th Cir. 2007) (upholding a law prohibiting the sale of sex toys as constitutional).

9. *Williams VI*, 478 F.3d at 1318.

10. *Reliable Consultants*, 517 F.3d at 740.

11. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

12. When this Comment speaks about bare public morality, it is referring to what other authors have referred to as "religious morality." Although I disagree with the idea that all morality stems from religion (and the idea that moral legislation is unconstitutional under the Establishment Clause as suggested by one author), when I speak about bare public morality I am referring to that which is done based solely on the reigning majority opinion—not any sort of "universal" morality. *See generally* Justin P. Nichols, Comment, *The Hidden Dichotomy in the Law of Morality*, 31 CAMPBELL L. REV. 591 (2009); Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159 (2003).

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dispatched to a private residence to investigate a possible weapons disturbance, police officers observed two men engaged in a prohibited sexual act.[13] The men were prosecuted under a Texas statute criminalizing "any contact between any part of the genitals of one [man] and the mouth or anus of another."[14] After being convicted and having their convictions upheld by a Texas appeals court,[15] the petitioners appealed to the Supreme Court, arguing that the Texas statute criminalizing only homosexual sodomy was unconstitutional under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[16]

A number of years earlier, the Court in *Bowers v. Hardwick* had reviewed a similar Georgia statute criminalizing all sodomy, both homosexual and heterosexual.[17] In holding that public morality was a sufficient basis for the Georgia legislature to enact such a law, the Court reasoned, "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts would be very busy indeed."[18]

The *Lawrence* decision took little time in explicitly overruling *Bowers*. Justice Kennedy began the majority opinion by recognizing that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[19] The Court held that the intimate conduct protected by the Fourteenth Amendment included that which was criminalized by the Texas sodomy statute.[20] In overruling *Bowers*, the Court adopted the language of Justice Stevens's *Bowers* dissent: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ."[21]

In an attempt to rely on the *Bowers* precedent, the state of Texas offered public morality as its sole justification for the statute.[22]

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13. *Lawrence*, 539 U.S. at 562–63.
14. *Id.* at 563 (citing TEX. PENAL CODE ANN. §§ 21.01(1), -06(a) (West 2003)).
15. Lawrence v. State, 41 S.W.3d 349, 362 (Tex. Ct. App. 2001).
16. *Lawrence*, 539 U.S. at 563.
17. 478 U.S. 186 (1986).
18. *Id.* at 196.
19. *Lawrence*, 539 U.S. at 562.
20. *Id.* at 567.
21. *Id.* at 578 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).
22. *Id.*

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However, because the Court overruled *Bowers*—making *Bowers* no longer controlling precedent—the State's argument was defeated and the law was struck down. Accordingly, the Court concluded that "[t]he Texas statute further[ed] no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual."[23] Many commentators have taken this statement to imply that public morality is *never* a legitimate state interest and thus will never satisfy the rational basis test.[24]

The Court appears, though, to have qualified its holding. In a possible attempt to dispel doomsday fears, Justice Kennedy explained:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.[25]

This opinion was met with an aggressive dissent by Justice Scalia.[26] Justice Scalia began by emphasizing that most of the majority opinion has no relevance to its actual holding that the Texas statute furthers no legitimate state interest that can justify its application to the petitioners under rational basis review.[27] One of

23. *Id.*

24. *See* Sonu Bedi, *Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete*, 53 CLEV. ST. L. REV. 447 (2005); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1235 (2004) (recognizing that instead of eliminating morality from lawmaking, "*Lawrence* reflected the Court's long-standing jurisprudential discomfort with explicit morals-based rationales for lawmaking"); Mitchell F. Park, Comment, *Defining One's Own Concept of Existence and the Meaning of the Universe: The Presumption of Liberty in* Lawrence v. Texas, 2006 BYU L. REV. 837. For scholarship espousing the view that *Lawrence* did not "sound the death knell for most forms of 'morals legislation,'" see John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1, 5 (2009) and Gregory Kalscheur, S.J., *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the* Declaration on Religious Freedom, 16 S. CAL. INTERDISC. L.J. 1, 7 (2006) ("[E]xplicit reliance on moral rationales for law should not be banished altogether from the realm of legitimate government interests.").

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

26. *Id.* at 586–605 (Scalia, J., dissenting). Additionally, Justice O'Connor concurred in the judgment but felt instead that the statute ought to be invalidated based on the Equal Protection Clause and not the Due Process Clause. *Id.* at 579 (O'Connor, J., concurring). This, in my opinion, would have been a much less controversial means of striking down this statute.

27. *Id.* at 586 (Scalia, J., dissenting).

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Justice Scalia's primary criticisms was the majority's failure to establish whether the right at issue was a fundamental right.[28] Justice Scalia concluded that, even though not specifically stated by the majority, the right to certain sexual intimacy was *not* a fundamental right—and essentially, without specifically stating, the majority applied the rational basis test.[29] In expressing his disapproval of such a quick overruling of *Bowers*, Justice Scalia argued that certain laws, like those against "bigamy, same-sex marriage, adult incest, prostitution, . . . bestiality, and obscenity," are only constitutional if morals legislation remains valid.[30] To Justice Scalia, this ruling represented "a massive disruption of the current social order."[31] It is in light of this decision, and the potential for this disruption, that courts have become split on the constitutionality of legislation passed only on the grounds of public morality, or "morals legislation."

III. THE CIRCUIT SPLIT

Laws prohibiting the sale of—but not the use of—sex toys have been passed in at least eight states.[32] A number of state courts have addressed the constitutionality of the statutes, and these courts are split as to their constitutionality.[33] Some of these states, however, addressed these laws before *Lawrence* was decided. Post-*Lawrence*, two circuits have addressed two substantively identical laws (one from Alabama and the other from Texas) and have come out on

28. *Id.*

29. *Id.*

30. *Id.* at 590.

31. *Id.* at 591.

32. The states include: Alabama, Colorado, Georgia, Kansas, Louisiana, Mississippi, Texas, and Virginia. *See* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 741 (5th Cir. 2008).

33. The states with sex toy statutes currently in force are Alabama, Mississippi, and Virginia. ALA. CODE § 13A-12-200.2 (2010); MISS. CODE ANN. § 97-29-105 (2010); VA. CODE ANN. § 18.2-373 (2009). The highest courts of both Alabama and Mississippi have upheld their respective state statutes against constitutional challenges. 1568 Montgomery Highway, Inc. v. City of Hoover, 2009 WL 2903458 (Ala. 2009); PHE, Inc. v. State, 877 So. 2d 1244 (Miss. 2004). The Virginia Supreme Court has not yet had a chance to review its state's statute. Louisiana, Kansas, and Colorado have all enacted similar obscene-devices statutes, but their respective state supreme courts struck them down as being unconstitutional. State v. Brenan, 772 So. 2d 64 (La. 2004); State v. Hughes, 792 P.2d 1023 (Kan. 1990); People *ex rel.* Tooley v. Seven Thirty-Five E. Colfax, Inc., 697 P.2d 348 (Colo. 1985). Georgia also passed a similar statute, but it was struck down by the Eleventh Circuit because it infringed free speech rights. This That & The Other Gift & Tobacco, Inc. v. Cobb County, 439 F.3d 1275 (11th Cir. 2006).

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opposite ends of the spectrum. This Comment will now consider these two circuit cases.

A. Alabama and Williams v. Morgan

In 1998, Alabama began criminalizing the sale and distribution of certain sexual and obscene devices. Specifically, the Alabama code prohibits the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs."[34] The statute exempts sales of devices "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose."[35] The statute does not, however, prohibit the possession, use, or gratuitous distribution of these kinds of obscene devices.[36] Six plaintiffs—both as sellers and users of sexual devices—brought an action seeking to enjoin the Attorney General of the State of Alabama from enforcing the statute.[37] The plaintiffs argued that the statute infringed upon their "fundamental right to privacy and personal autonomy" under the Fourteenth Amendment.[38]

This case has an extensive procedural history. Following a bench trial, the district court held that there was no fundamental right to use sexual devices established in the Constitution.[39] The court then proceeded to scrutinize the statute under rational basis review. The court enjoined enforcement of the statute, concluding that the statute lacked any rational basis—public morality being the only basis having been promoted.[40] On appeal to the Eleventh Circuit in 2001, which was prior to the *Lawrence* decision, the court reversed the district court's conclusion that the statute lacked a rational basis and held that the promotion and preservation of public morality provided a rational basis.[41] However, the action was remanded to the district court to determine if the plaintiff's *as-applied* fundamental-rights challenge had merit.[42]

34. ALA. CODE § 13A-12-200.2(a)(1) (2010).
35. *Id.* § 13A-12-200.4.
36. *Id.* § 13A-12-200.2(a)(1).
37. Williams v. Pryor (*Williams I*), 41 F. Supp. 2d 1257, 1260 (N.D. Ala. 1999).
38. *Id.*
39. *Id.* at 1283.
40. *Id.* at 1293.
41. Williams v. Pryor (*Williams II*), 240 F.3d 944, 952 (11th Cir. 2001).
42. *Id.* at 955.

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On remand, the district court again struck down the statute, finding that it failed strict scrutiny.[43] The court held that the Constitution established a fundamental right to sexual privacy—one which was deeply rooted in the history and traditions of our nation.[44] Furthermore, the district court found that the right to sexual privacy does in fact "encompass a right to use sexual devices" like those marketed by the plaintiffs in the case.[45] Thus, the district court concluded that the statute unconstitutionally burdened the right to use sexual devices within private adult, consensual sexual relationships.[46] It was after this opinion that *Lawrence* was decided.[47]

The Eleventh Circuit Court of Appeals once again reversed the district court, holding that there was no *pre-existing*, fundamental, substantive-due-process right to sexual privacy triggering strict scrutiny.[48] Furthermore, the court held that *Lawrence* did not recognize a fundamental right to sexual privacy, and it refused to create such a right.[49] With strict scrutiny no longer available, the court remanded again to the district court to examine whether public morality remained a valid rational basis in light of *Lawrence* overruling *Bowers*.[50]

On remand, the district court decided "not [to] invalidate the Alabama law . . . simply because it [was] founded on concerns over public morality."[51] Quoting *Lawrence*, the district court agreed that eliminating public morality as a rational basis for legislation would cause "a 'massive disruption of the current social order,' one this court is not willing to set into motion."[52] The court concluded that this case was distinguishable from *Lawrence* such that *Lawrence* did not compel striking down the Alabama law.[53]

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43. Williams v. Pryor (*Williams III*), 220 F. Supp. 2d 1257, 1307 (N.D. Ala. 2002), *rev'd*, 378 F.3d 1232 (11th Cir. 2004).

44. *Id.* at 1296.

45. *Id.*

46. *Id.*

47. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

48. Williams v. Attorney Gen. of Ala. (*Williams IV*), 378 F.3d 1232, 1235 (11th Cir. 2004).

49. *Id.* at 1238.

50. *Id.* at 1238 n.9.

51. Williams v. King (*Williams V*), 420 F. Supp. 2d 1224, 1250 (N.D. Ala. 2006), *aff'd*, 478 F.3d 1316 (11th Cir. 2007).

52. *Id.* at 1249–50 (quoting *Lawrence*, 539 U.S. at 591 (Scalia, J., dissenting)).

53. *Id.* at 1253.

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By the third time the controversy reached the circuit court, the only question remaining was "whether public morality remain[ed] a sufficient rational basis for the challenged statute after the Supreme Court's decision in *Lawrence v. Texas*."[54] The Eleventh Circuit affirmed the holding of the district court that the statute survived rational basis scrutiny because public morality remained a legitimate governmental interest, even in light of the majority's language in *Lawrence*.[55]

The court began its analysis by determining that the statute in question was subject to rational basis review. In *Williams IV*, the court held that the Supreme Court had "declined the invitation" to recognize a fundamental right to sexual privacy, even though it had numerous opportunities to do so.[56] Thus, strict scrutiny was not available and the law would be upheld if it "[bore] a rational relation to some legitimate end."[57] The court emphasized the fact that a statute is constitutional under rational basis scrutiny so long as "'there is any reasonably conceivable state of facts that could provide a rational basis for the [statute].'"[58] Thus, under rational basis review a statute bears "a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. . . . [I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[59]

Citing numerous Supreme Court decisions, the court reiterated that "[t]he crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny."[60] The court rejected the plaintiffs' argument

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

55. *Id.*

56. Williams v. Attorney Gen. of Ala. (*Williams IV*), 378 F.3d 1232, 1236 (11th Cir. 2004).

57. *Williams VI*, 478 F.3d at 1320.

58. *Id.* (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)).

59. *Id.* at 1320–21 (quoting *FCC*, 508 U.S. at 314–15).

60. *Id.* at 1321 (quoting Williams v. Pryor (*Williams II*), 240 F.3d 944, 949 (11th Cir. 2001) (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (citing Bowers v. Hardwick, 478 U.S. 186, 196 (1986); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973); Roth v. United States, 354 U.S. 476, 485 (1957))).

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that *Lawrence* ended all morals legislation, arguing that "while the statute at issue in *Lawrence* criminalized *private* sexual conduct," the Alabama statute forbade "*public, commercial* activity."[61] The court limited the language in *Lawrence* to only certain cases: "To the extent *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is *both* private *and* non-commercial."[62] The court emphasized the public and commercial element of the activity criminalized by the Alabama statute, arguing bluntly, "There is nothing 'private' or 'consensual' about the advertising and sale of a dildo."[63]

B. *Texas and* Reliable Consultants, Inc. v. Earle

In 2008, the Fifth Circuit decided a separate case involving a similar statute. Fortunately, the history behind this case is significantly less complex. In 1979, the Texas legislature amended its obscenity statute to prohibit the "promotion" of "obscene devices," which included selling, giving, lending, distributing, or advertising for them.[64] Thus, the Texas statute was broader than the Alabama statute because even lending or gratuitously giving an obscene device was criminal. Like the Alabama statute, however, the Texas statute did not criminalize the use or possession of such a device.[65] Similar to the Alabama statute at issue in *William VI*, "obscene device" was defined as any device "designed or marketed as useful primarily for the stimulation of human genital organs."[66] A number of years later, the legislature carved out an exception for individuals who promoted obscene devices for "a bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose."[67]

Two plaintiffs who engaged in the retail distribution of sexual devices filed a declaratory action to enjoin the enforcement of the statute, alleging that it violated "the substantive liberty rights protected by the Fourteenth Amendment and the commercial speech

61. *Id.* at 1322.

62. *Id.*

63. *Id.* (quoting Williams v. Attorney Gen. of Ala. (*Williams IV*), 378 F.3d 1232, 1238 n.8 (11th Cir. 2004)).

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

65. *Id.* at 741.

66. *Id.* at 740–41 (quoting TEX. PENAL CODE ANN. § 43.21(a)(7) (Vernon 1979)).

67. *Id.* (quoting TEX. PENAL CODE § 43.23(g) (Vernon 1993)).

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rights protected by the First Amendment."[68] The district court dismissed the complaint, reasoning that the Constitution did not protect the right to publicly promote sexual devices. The case was appealed to the Fifth Circuit Court of Appeals.[69]

The circuit court addressed the due process argument first, concluding that the asserted governmental interests did not meet the constitutional standard announced in *Lawrence* for laws affecting the right to engage in private intimate conduct in the home without government intrusion.[70] First, the court reasoned that "restricting the ability to purchase an item is tantamount to restricting that item's use."[71] Furthermore, the fact that it was even illegal to lend or give a sexual device to another person undercut the argument that the statute only affected public conduct.[72] Instead, this statute unconstitutionally restricted "the exercise of the constitutional right to engage in private intimate conduct in the home free from government intrusion."[73]

In interpreting the *Lawrence* decision, the court refused to address whether the right at issue merited strict or rational basis scrutiny.[74] Instead, it opined that it was only necessary to apply the *Lawrence* decision directly to this statute without trying to read anything more into it, and, based on the holding in *Lawrence*, this statute was unconstitutional as well.[75] The court concluded, "Thus, if in *Lawrence* public morality was an insufficient justification for a law that restricted 'adult consensual intimacy in the home,' then public morality also cannot serve as a rational basis for Texas's statute, which also regulates private sexual intimacy."[76] Because the statute had already been held unconstitutional, the court did not sufficiently analyze the First Amendment claims.[77] The State petitioned for a rehearing en banc but was denied.[78]

68. *Id.* at 742.
69. *Id.*
70. *Id.* at 743.
71. *Id.* (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 683–91 (1977)).
72. *Id.* at 744.
73. *Id.*
74. *Id.*
75. *Id.* at 744–45.
76. *Id.* at 745.
77. *Id.* at 747.
78. Reliable Consultants, Inc. v. Earle, 538 F.3d 355 (5th Cir. 2008) (denying rehearing en banc).

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IV. THE CONSTITUTIONALITY OF SEX TOY STATUTES

The differences in the reasoning between the *Williams VI* court and the *Reliable Consultants* court demonstrate the ambiguity of the *Lawrence* decision and how reasonable minds can differ on the subject of public morality in laws. After *Lawrence*, a number of commentators attempted to dispel Justice Scalia's fears that the majority's holding would be the end of morals legislation, including government police power over polygamy, adult incest, bestiality, and the like.[79] Most commentators argued that the government would be able to continue regulating such behavior because doing so was justified on grounds other than public morality.[80] This Comment attempts to do the opposite, arguing instead that there remain a number of areas of law justified only on public morality grounds, and the majority in *Lawrence* had no intention of ending government regulation in every moral realm. Instead, even the *Lawrence* majority would have a difficult time extending its holding, as was done in *Reliable Consultants*, to eliminate laws such as those prohibiting the sale of sex toys.

This Comment will build on the *Williams VI* decision and give the full analysis of why laws banning the sale of sex toys—passed solely on grounds of public morality—are constitutional. This analysis begins with a determination of the level of scrutiny that must be afforded the statute. Because the right to sexual privacy has not been established as a fundamental right, the law is only due rational basis scrutiny.[81] As such, the analysis turns to whether public morality alone is a sufficient rational basis on which to enact the law. In concluding that bare public morality here satisfies the rational basis test, the discussion will look at both the history of morals

79. *See, e.g.*, Loewy, *supra* note 12; Nichols, *supra* note 12.

80. For example, one commentator argued that polygamy would still be illegal because the government has an interest in promoting monogamous marriages (and also an interest in protecting scarce government financial resources). Joseph Bozzuti, Note, *The Constitutionality of Polygamy Prohibitions After* Lawrence v. Texas*: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409, 433–41 (2004). Incest would still be illegal because the government has a legitimate interest in preventing conception in a manner that increases the risk of the birth of children with handicaps. *See* Philip G. Peters, *Implications of the Nonidentity Problem for State Regulation of Reproductive Liberty*, *in* HARMING FUTURE PERSONS: ETHICS, GENETICS AND THE NONIDENTITY PROBLEM 317, 329 (Melinda A. Roberts & David T. Wasserman eds., 2009).

81. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)).

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legislation, including the Supreme Court's past acceptance of morals laws, and the differences between the laws at issue in *Lawrence* and the laws under scrutiny here.

A. Level of Scrutiny for the Right to Sexual Privacy at Issue

In determining the constitutionality of these statutes, the first—and perhaps most important—determination is the level of scrutiny to be applied. Although many commentators have argued that *Lawrence* established a fundamental right to sexual privacy,[82] the Eleventh Circuit was correct in concluding that the holding of *Lawrence* was more limited and, as such, sex toy laws are only due rational basis scrutiny.[83] The Court in *Lawrence* failed to definitively establish a fundamental right to sexual privacy through a *Glucksberg* analysis.[84] Furthermore, the Court has never held that sexual privacy in itself is a fundamental right subject to strict scrutiny. Instead, when establishing fundamental rights related to children and procreation, the Court has defined such rights too narrowly to encompass the kinds of statutes at issue here. Thus, only the rational basis test should be applied to the sex toy laws at issue.

1. The absence of a Glucksberg *analysis in* Lawrence

It is established Supreme Court due process jurisprudence that a *Glucksberg* analysis is the proper method for determining whether a right is fundamental.[85] The *Glucksberg* analysis comes from the Supreme Court case of *Washington v. Glucksberg*, in which the Court unanimously held that a right to assistance in committing suicide was not protected by the Due Process Clause.[86] The Court's reasoning focused on the fact that a right to assisted suicide was not a fundamental liberty protected by the Fourteenth Amendment, and thus was only due rational basis scrutiny.[87] Because the legislature

82. For a description of some of the arguments made in favor of *Lawrence* establishing a fundamental right to sexual privacy, see Daniel Allender, Note, *Applying* Lawrence*: Teenagers and the Crime Against Nature*, 58 DUKE L.J. 1825 (2009).

83. Williams v. Morgan (*Williams VI*), 478 F.3d 1316, 1320 (11th Cir. 2007).

84. *See id.* at 1319.

85. Washington v. Glucksberg, 521 U.S. 702 (1997).

86. *Id.* at 728.

87. *Id.*

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had a legitimate interest in enacting the law—the preservation of human life—the law was held to be constitutional.[88]

Glucksberg reiterated the established two-part analysis to determine whether a liberty interest was "fundamental." First, a court must carefully formulate the interest at stake.[89] Second, the court must determine whether that interest is "deeply rooted in this Nation's history."[90] Only those interests deeply rooted in the nation's history are fundamental rights deserving of strict scrutiny.[91] All other rights warrant only rational basis review.[92]

As pointed out by Justice Scalia in his dissent, the *Lawrence* majority did not carefully formulate the interest at stake nor did it correctly analyze the nation's history to determine whether the right was deeply rooted.[93] The Court did look at the history of anti-sodomy laws, but there was no mention whatsoever of whether the right to engage in sodomy was deeply rooted in this nation's history.[94] The Court simply stated that the state had no legitimate interest in enacting the anti-sodomy law, and thus it was unconstitutional. According to Justice Scalia and many commentators, these statements implicitly admit that the right was only due rational basis scrutiny.[95]

This confusion of the issues by the *Lawrence* Court has led other courts to conclude that where the right to sexual privacy is at issue, no *Glucksberg*-type analysis is needed.[96] For example, in *Reliable Consultants*, while addressing the classification—whether fundamental or not—of the right to sexual privacy, the court reasoned, "The Supreme Court did not address the classification, nor do we need to do so . . . ."[97] The implication of this statement was that the court did not apply either strict scrutiny *or* rational basis scrutiny to the right at issue. The *Reliable Consultants* court erred in

88. *Id.* at 728 & n.20.

89. *Id.* at 722.

90. *Id.* at 721 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).

91. *Id.* at 767 n.9 (Souter, J., concurring); Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

92. *Glucksberg*, 521 U.S. at 766–67.

93. *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting).

94. *Id.*

95. *Id.*

96. *See* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008).

97. *Id.*

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holding that it was unnecessary to determine which level of scrutiny the right to sexual privacy should be granted.

This was never the holding of *Lawrence*. *Lawrence* did not explicitly overrule any case besides *Bowers*.[98] To hold that a *Glucksberg*-type analysis is no longer needed to establish a fundamental right for substantive due process jurisprudence would be to overstate and misinterpret *Lawrence*. Additionally, the conclusion that *Lawrence* overruled any aspect of *Glucksberg* by implication goes against the Court's instructions. The Supreme Court has instructed lower courts to not conclude that a more recent case impliedly overrules earlier precedents.[99] Thus, the court in *Reliable Consultants* erred in concluding that a *Glucksberg*-type analysis was no longer needed for determining the specific level of scrutiny due laws implicating sexual privacy. And, as will be seen below, the court in *Williams VI* was correct in treating the right to sexual privacy as only a rational basis right.

2. The right to sexual privacy is only a rational basis right

A proper analysis of the right to sexual privacy at issue in *Reliable Consultants* and *Williams VI* dictates that it be treated only as a rational basis right for two reasons. First, to treat it as a fundamental right would be to ignore the Court's reluctance to create a broad fundamental right to sexual privacy.[100] To the extent that *Lawrence* may have created a right to sexual privacy, it was limited to the specific right at issue in the case—that is, to engage in sexual activity with someone of the same sex. Second, the Court properly exercised its discretion in *Lawrence* by not explicitly creating a broad right to sexual privacy.

Only a limited number of "fundamental rights" exist for purposes of substantive due process analysis.[101] Those rights are limited to personal decisions relating to "marriage, procreation, contraception, family relationships, child rearing, and education."[102] None of those rights specifically includes the rights at issue in *Reliable Consultants* and the *Williams* cases. In fact, the Court has

98. *Lawrence*, 539 U.S. at 578.
99. Agostini v. Felton, 521 U.S. 203, 237 (1997).
100. *See Reliable Consultants*, 517 F.3d at 745 n.32.
101. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).
102. *Id.* (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)).

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never determined that a broad "right to sexual privacy" is a fundamental right for substantive due process analysis.

The Court has had numerous opportunities to create such a fundamental right, but each time has decided to define the right more narrowly so as to not encompass all sexual activity.[103] For example, in *Carey v. Population Services*, the Court was presented with the question of the constitutionality of a statute prohibiting the distribution of contraceptives to anyone under the age of sixteen by anyone other than a licensed pharmacist.[104] In holding that the statute was unconstitutional, the Court recognized a right to privacy that extended to an individual's liberty to make choices regarding contraception.[105] Thus, where the court could have established a right to privacy that extended to all decisions relating to sex, it instead limited that right to decisions related to contraception.[106] Most importantly, the Court explicitly stated:

> Contrary to the suggestion advanced in Mr. JUSTICE POWELL's opinion, we do not hold that state regulation must meet this standard "whenever it implicates sexual freedom," or "affect[s] adult sexual relations," but only when it "burden[s] an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision."[107]

Similarly, the Court in *Eisenstadt v. Baird* narrowly defined a fundamental right to decide "whether to bear or beget a child" where it could have instead created a broad right to sexual privacy.[108]

The Court had another opportunity in *Lawrence*, as it did in *Carey* and *Eisenstadt*, to create a broad right to sexual privacy.[109] The Court, though, once again limited the scope of the right in question. As mentioned above, it is debatable whether or not the Court in

103. *See* Reliable Consultants, Inc. v. Earle, 538 F.3d 355, 361 (5th Cir. 2008) (denying rehearing en banc) (citing Williams v. Attorney Gen. of Ala. (*Williams IV*), 378 F.3d 1232, 1235 (11th Cir. 2004)).

104. *Carey*, 431 U.S. at 681.

105. *Id.* at 685–86.

106. *Williams IV*, 378 F.3d at 1235–36.

107. *Carey*, 431 U.S. at 688 n.5 (citations omitted). The Court had previously addressed the Constitutionality of a statute completely banning the use of contraceptives. Griswold v. Connecticut, 381 U.S. 479 (1965). Instead of recognizing a broad right to sexual privacy, the Court emphasized "notions of privacy surrounding the marriage relationship." *Id.* at 486.

108. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

109. *See Williams IV*, 378 F.3d at 1235–36.

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Lawrence treated the right at issue as a fundamental right.[110] This Comment argued above that the failure of the Court to do a proper "fundamental right" analysis foreclosed the idea that the right in question was a fundamental right. But let us assume for a moment that *Lawrence* did intend to create a fundamental right. What is the scope of that right?

The language of *Lawrence* itself limits any right recognized by the Court to the facts of the case and Texas statute at issue. "The question before the Court [was] the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct."[111] In determining that the statute was unconstitutional, the Court remarked that its decision was based on the fact that the petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[112] Thus, in coming to its conclusion, the Court in *Lawrence* emphasized that, although the case dealt with what kinds of private activities individuals could engage in, the decision hinged on the fact that the statute dealt with *whom* you could engage in such activities. Thus, any fundamental right announced by the court is not a freestanding right to sexual privacy, but instead the right to choose with whom you want to be intimate.[113]

Those commentators who view *Lawrence* as establishing a fundamental right tend to agree with this narrow view of the fundamental right. For example, Harvard constitutional law professor Laurence Tribe articulated the liberty interest in *Lawrence* as the right to be free from the state "stigmatiz[ing] . . . intimate personal relationships between people of the same sex."[114] Other

110. *See supra* Part IV.A.1.

111. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

112. *Id.* at 578.

113. This formulation of the right comports with the holding in *Griswold v. Connecticut*. 381 U.S. 479 (1965). In *Griswold*, the Court emphasizes that it is the *relationship*, more than the *action*, that receives constitutional protection. For example, the Court states, "The present case, then, concerns a *relationship* lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which . . . seeks to achieve its goals by means having a maximum destructive impact upon that *relationship*. . . . The very idea is repulsive to the notions of privacy surrounding the marriage *relationship*." *Id.* at 485–86 (emphasis added).

114. Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1904 (2004).

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commentators have come to the same conclusion.[115] Thus, even if *Lawrence* created a fundamental right, it would not cover sex toy laws because such laws do not specifically target "intimate personal relationships between people of the same sex."[116]

Furthermore, the Court itself has recognized its responsibility to practice restraint in substantive due process analysis. In *Glucksberg*, the Court counseled, "We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[117] The Court also recognized its longstanding reluctance "to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."[118] Accordingly, the Court in interpreting its own decision in *Lawrence* will be hesitant to recognize a broad fundamental right to sexual privacy because doing so might unnecessarily replace the views of legislatures with the "policy preferences of the Members of [the] Court."[119]

Thus, because the right to sexual privacy has never been held to be a broad fundamental right, the statute at issue in *Reliable Consultants* and the *Williams* cases are only due rational basis scrutiny.

B. Public Morality as a Rational Basis

Having determined that sex toy statutes are to be given rational basis scrutiny because they do not implicate any fundamental rights, the question turns to whether such statutes are rationally related to any legitimate governmental interest.[120] The only governmental interest asserted by states such as Alabama and Texas in enacting these laws is public morality.[121] There is no dispute that *if* public morality were a legitimate governmental interest then it would be

115. *See* Jamal Greene, *Beyond* Lawrence*: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1868–75 (2006).

116. Tribe, *supra* note 114, at 1904.

117. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

118. *Id.*

119. *Id.* (citing Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1997)).

120. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

121. Williams v. Pryor (*Williams I*), 41 F. Supp. 2d 1257, 1286 (N.D. Ala. 1999).

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rationally related to a prohibition on the sale of sex toys. The question becomes, then, whether bare public morality is still a legitimate governmental interest. If public morality is a legitimate governmental interest then the laws are constitutional. This Comment argues that the laws are constitutional for two reasons. First, history is replete with examples of the Court upholding the ability of legislatures to legislate morals. Second, the sale of sex toys is a public activity as opposed to the private interactions between individuals at issue in *Lawrence.*[122]

1. History of morals legislation

The *Reliable Consultant* court's decision to read *Lawrence* as eliminating public morality as a rational basis completely contradicts hundreds of years of Supreme Court jurisprudence explicitly upholding such as a rational basis. As Justice Scalia mentioned in his concurrence in *Barnes v. Glen Theatre, Inc.*,

> there is no basis for thinking that our society has ever shared that Thoreauvian "you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else" beau ideal—much less for thinking it was written into the Constitution. . . . Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "*contra bonos mores*," *i.e.*, immoral. . . . While there may be great diversity of view on whether various of these prohibitions should exist . . . , there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality."[123]

There is a long history of the Court explicitly mentioning morals as a legitimate basis upon which a legislature can enact laws, and this line of cases remains good law even in light of *Lawrence.*

122. To the extent that some statutes, including that at issue in Texas, forbid even the lending or gratuitously giving of obscene devices, this second argument breaks down. *See* Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008). Thus, this Comment does not argue that this specific provision is constitutional. Nevertheless, the court in *Reliable Consultants* focused very little on the lending of obscene devices, and thus when this Comment addresses the "Texas statute" it is referencing the provisions banning the sale of obscene devices.

123. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 574–75 (1991) (Scalia, J., concurring).

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The power to legislate in the moral realm has traditionally been regarded as part of the state's police power.[124] In 1923, the Supreme Court, in the well-known case *Meyer v. Nebraska*, recognized the duty of the government to promote morality: "That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and *morally* is clear; but the individual has certain fundamental rights which must be respected."[125] Thus, as of early twentieth century, morals legislation was an acceptable practice. The Court did recognize, however, that morals legislation can extend only as far as it does not infringe on a fundamental right of the citizens.[126] As the right at issue here is not a fundamental right, sex toy statutes would have clearly been constitutional over 100 years ago.

The Court continued to support the idea of morals legislation for most of the century. In *Louis K. Liggett Co. v. Baldridge*, the Court stated:

> The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, *morals*, or some other phase of the general welfare.[127]

A quarter of a century later the Court echoed its previous acceptance of morals legislation. "Public safety, public health, *morality*, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs."[128]

In the latter part of the century some specific examples of morals legislation came before the Court. Surprisingly, the Court upheld the laws even though they were based substantially on a view of morality and impacted conduct by consenting adults. In *Paris Adult Theatre I v. Slaton* the Court was presented with the question of whether Georgia could regulate the display of obscene materials in a private,

124. In 1885, the Court in *Barbier v. Connolly* mentioned that a state can make regulations "to promote the health, peace, morals, education, and good order of the people." 113 U.S. 27, 31 (1884).

125. Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (emphasis added).

126. *Id.*

127. Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 111–12 (1928) (emphasis added).

128. Berman v. Parker, 348 U.S. 26, 32 (1954) (emphasis added).

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adult theater.[129] There was no question that it was proper exercise of the police power to prohibit the display of these kinds of films to minors.[130] However, the Court came to the surprising conclusion that "the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called 'adult' theaters from which minors are excluded."[131] The Court emphasized the fact that conduct involving consenting adults is not always beyond state regulation, reasoning that a morals law cannot go solely to what society considers "wrong" or "sinful" but suggesting instead that it must promote the state's right to "maintain a decent society."[132] Thus, *Paris Adult Theatre* upheld morals legislation, even where it impacts the activities of private, consenting adults, but only so long as the conduct impacted has a public or commercial element.[133]

The Court faced a similar law in *Barnes v. Glen Theatre, Inc.*[134] In *Barnes*, the Court addressed a public indecency statute that required dancers at adult entertainment establishments to wear pasties and a G-string.[135] The statute at issue was a morals law in that it merely "reflect[ed] moral disapproval of people appearing in the nude among strangers in public places."[136] Nevertheless, a plurality of the Court found the statute "clearly within the constitutional power of the State," reasoning that it furthered a *substantial* government interest in protecting order and morality.[137]

Thus, the Court, in *Paris Adult Theatre* and *Barnes*, has, within the last twenty-five years, upheld legislation passed to protect only the "morality" and order of society. The Court has put limits on this kind of legislation—including the requirement that there be some "public" aspect of the conduct and that the legislation not violate a fundamental right of citizens—but these cases upheld morals legislation similar to that struck down in *Lawrence*. Interestingly,

129. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 50–51 (1973).

130. *Id.* at 53.

131. *Id.* at 69.

132. *Id.* (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

133. *Id.*

134. 501 U.S. 560 (1991).

135. *Id.* at 572.

136. *Id.* at 568.

137. *Id.* at 567.

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although *Lawrence* expressed displeasure with morals legislation, neither *Paris Adult Theatre* nor *Barnes* was overruled by the Court.

This strong history of acceptance of morals legislation provides the strongest support of the constitutionality of sex toy statutes. Like the obscene material statute in *Paris Adult Theatre*, the sex toy statutes at issue here regulate conduct by consenting adults. But, also like the obscene material statute, sex toy statutes have a "public" aspect. In fact, the private use of sex toys is not prohibited.[138] Instead, most statutes only prohibit the sale of these kinds of items at public stores—akin to the prohibition of obscene films at public theaters. The state has a legitimate interest in maintaining a "decent society,"[139] and regulating the commercial sale of sex toys—like regulating the display of obscene films—is rationally related to that interest.

Thus, because promotion of order and morality remains a legitimate government interest—especially where some sort of public activity is involved—and sex toy laws involve public, commercial activity and do not implicate a fundamental right, such laws are constitutional.

2. *Distinguishing* Lawrence

The court in *Reliable Consultants* did not find sex toy statutes analogous to the kinds of statutes at issue in *Paris Adult Theatre* and *Barnes*. Instead, because sexual activity is implicated by sex toy statutes, the court found *Lawrence* to be most analogous.[140] Because *Lawrence* explicitly stated that public morality was an insufficient justification for the sodomy statute, public morality was also an insufficient justification for a sex toy statute.[141]

This direct application of Justice Kennedy's statement that morals alone do not justify laws prohibiting certain practices,[142] though, is an improper expansion of the *Lawrence* holding for two reasons. First, the sex toy statutes have a commercial element that was not present in *Lawrence*. Second, to expand the *Lawrence*

138. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 741 (5th Cir. 2008).

139. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973) (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

140. *See Reliable Consultants, Inc.*, 517 F.3d at 744.

141. *Id.* at 745.

142. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

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holding would be to diminish the importance of the Court's holding as it relates to homosexual conduct. Because *Lawrence* does not apply directly to these statutes and because, as discussed above, public morality can be a sufficient justification on which to enact a law, Justice Scalia's fear that we have seen "the end of all morals legislation"[143] was unfounded.

a. Commercial nature of the statute. In holding that states have a legitimate interest in regulating the exhibition of obscene materials in places of public accommodation, the Court in *Paris Adult Theatre* emphasized the idea that morals legislation is more likely to be upheld where public activity is involved.[144] The court in *Reliable Consultants* ignored this concept and instead decided that, because sexual activity was implicated by the statute at issue, *Lawrence* was the most appropriate case to apply.[145] Although the statute prohibited only the sale of sex toys, the court concluded that "[a]n individual who wants to legally use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device in Texas, which heavily burdens a constitutional right."[146] The court continued, "This conclusion is consistent with the decisions in *Carey* and *Griswold*, where the Court held that restricting commercial transactions unconstitutionally burdened the exercise of individual rights."[147]

In short, the argument is that although the statute at issue prohibited only public, commercial conduct—the *sale* of obscene devices—because the restriction on the sale of these devices strongly burdens their use, the statute implicates protected private activity and not just commercial activity. The court cited *Carey v. Population Services* and *Griswold v. Connecticut* to support its point.[148] Although the *Reliable Consultants* court might be correct that the statute would be unconstitutional in light of *Lawrence* if it did in fact impermissibly burden private sexual activity, the court was incorrect in concluding that *Carey* and *Griswold* applied here. Because the statute in this case impacts only public, commercial activity, this case

143. *See id.* at 539 U.S. at 599 (Scalia, J., dissenting).
144. *Paris Adult Theatre I*, 413 U.S. at 69.
145. *See Reliable Consultants, Inc.*, 517 F.3d at 744.
146. *Id.*
147. *Id.*
148. *Id.*

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is distinguishable from those Supreme Court precedents and is constitutional.

In *Carey*, the Court reviewed the constitutionality of a New York law that, among other things, prohibited distribution of contraceptives to anyone over sixteen by anyone other than a licensed pharmacist.[149]. The Court struck down the statute as impermissibly burdening "the right of the individual to be free from unwarranted governmental intrusion into the decision whether to bear or beget a child."[150] The Court reasoned that "[r]estrictions on the distribution of contraceptives clearly burden the freedom to make such decisions."[151] Thus, *Carey* stands for the proposition that, where a law restricts commercial transactions related to an individual right, the law must be analyzed as though it directly impacts that right.[152]

The issues in *Reliable Consultants* and the *Williams* cases are distinguishable from those in *Carey*, though. The right at issue in *Carey* related to a *fundamental* right to not have unwarranted governmental intrusion in the decision whether or not to have a child. The Court in *Carey*, in making its decision, cited to *Griswold v. Connecticut* and *Roe v. Wade* and its progeny.[153] Like *Carey*, those cases dealt with fundamental rights—the right to be free from governmental intrusion in the decision whether to conceive a child and in a woman's decision to terminate her pregnancy.[154]

The right implicated by sex toy laws—a right to broad sexual freedom—is *not* a fundamental right in the mold of those at issue in *Carey*, *Griswold* and *Roe*.[155] In fact, the Court in *Carey* explicitly mentioned that its holding did not apply to state regulation whenever it implicated sexual freedom: "[W]e do not hold that state regulation must meet this standard 'whenever it implicates sexual freedom,' or 'affect[s] adult sexual relations,' but only when it 'burden[s] an individual's right to decide to prevent conception or

149. Carey v. Population Servs. Int'l, 431 U.S. 678, 681 (1977) (quoting Eisenstadt v. Baird, 405 U.S. 438 (1972)).

150. *Id.* at 687 (quoting Eisenstadt v. Baird, 405 U.S. 438 (1972)).

151. *Id.*

152. *See id.*

153. *See id.*

154. *Id.*

155. *See supra* Part IV.A.

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terminate pregnancy by substantially limiting access to the means of effectuating that decision."[156]

Furthermore, the policy considerations at issue in *Carey* are not present here. In making its decision, the Court in *Carey* emphasized the fact that the statute in issue restricted the number of "distribution channels to a small fraction of the total number of possible retail outlets, reduce[d] the opportunity for privacy of selection and purchase, and lessen[ed] the possibility of price competition."[157] The sex toy laws at issue in *Reliable Consultants* and *Williams* do not produce the outcomes listed in *Carey*. These laws do not prohibit the purchase of obscene devices online, which are surely for sale in other states. Surely only a small number of physical stores sell these obscene devices as compared to the number of online retailers. Thus, eliminating the physical stores does not reduce the distribution channels to a small fraction of the total number of possible retail outlets. In fact, it is not unreasonable to assume that many individuals would prefer to purchase these kinds of devices online regardless of whether or not they are also available in local retail stores. Online retail, as opposed to public purchases, also promotes privacy in selection and purchase. Last, with the number of overall online outlets, price competition is not an issue. Thus, applying *Carey* to the facts of *Reliable Consultants* and *Williams VI* so as to analyze those cases as directly infringing the right to sexual privacy would be to impermissibly extend its holding.

Because these statutes must be analyzed under a state's power to regulate commercial activity, the right at issue in this case is not the same right to sexual privacy at issue in *Lawrence*. *Lawrence* specifically excluded public actions from its holding that public morality is an insufficient basis on which to enact laws.[158] Particularly, the Court said,

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether

156. *Carey*, 431 U.S. at 688 n.5.
157. *Id.* at 689.
158. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

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the government must give formal recognition to any relationship that homosexual persons seek to enter.[159]

The public sale of obscene devices surely constitutes "public conduct" not covered by *Lawrence* as described by the Court.[160] Instead, the law at issue, as discussed previously,[161] is more similar to the law at issue in *Paris Adult Theatre*, which was upheld because the state had a legitimate interest in regulating commerce as it related to obscene materials.[162] In that case, public morality—as it related to the state's promotion of decency—was held to be a legitimate government interest.[163] Likewise, the statute here can be upheld because the state has a legitimate interest in promoting decency by forbidding the public sale of sex toys. The *Lawrence* holding, relating to purely private conduct, cannot be applied directly, as it was done in *Reliable Consultants*, to conclude that the statute was unconstitutional. "There is nothing 'private' or 'consensual' about the advertising and sale of a dildo."[164]

b. Importance of the homosexual element in Lawrence. To extend *Lawrence* to cover the sex toy laws at issue would be to both ignore the reasons it was decided and to diminish its importance and significance to gay rights. Part of the difficulty in applying *Lawrence* to laws banning the sale of sex toys is that *Lawrence* left a number of questions unanswered. Courts, including the *Reliable Consultants* court, have misinterpreted the *Lawrence* holding in a number of areas, the most relevant of which is the extent of the right in question.

The question addressed by the Court in *Lawrence* was "the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct."[165] Although the Court in some instances mentions a broad right to sexual privacy, in most instances it frames the right in terms of not *what* you can do but with *whom* you can do it. Thus, there is a strong argument that

159. *Id.*

160. *Id.*

161. *See supra* Part IV.B.1.

162. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973).

163. *Id.*

164. Williams v. Morgan (*Williams VI*), 478 F.3d 1316, 1322 (11th Cir. 2007) (quoting Williams v. Attorney Gen. of Ala. (*Williams IV*), 378 F.3d 1232, 1237 n.8 (11th Cir. 2004)).

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

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Lawrence only established a right to engage in sexual activity with someone of the same sex without unnecessary governmental intrusion. Therefore, *Lawrence* does not apply to the sex toy statutes because those statutes do not implicate the right to engage in sexual activity with someone of the same sex.

No fewer than ten times does the Court in *Lawrence* frame the issue as the right for two people of the same sex to engage in sexual activity—and not as a broader freedom of sexual intimacy. For example, the Court, in describing the statutes at issue, stated: "The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[166] The Court went on to argue: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. *The liberty protected by the Constitution allows homosexual persons the right to make this choice*."[167] At this point, the Court made no mention of a broader right to sexual freedom to engage in any activity without governmental intrusion—only the freedom to choose a sexual partner of the same sex.

In fact, the majority of the Court's historical analysis focused directly on laws limiting the sexual freedoms of homosexuals.[168] For example, in concluding its discussion of society's historical and traditional rejection of homosexual practices on moral and religious grounds, the Court stated, "The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."[169]

It would be strange if the Court were to announce a broad right to sexual freedom without governmental intrusion and without analyzing the history behind that freedom. The Court itself recognized, "History and tradition are the starting point . . . of the substantive due process inquiry."[170] Based on the Court's own analysis, without ever touching on the history and tradition of a broad right to sexual freedom, the Court did not make a sufficient

166. *Id.* at 567.

167. *Id.* (emphasis added).

168. *See id.* at 568–71.

169. *Id.* at 571.

170. *Id.* at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

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due process inquiry to announce such a right—one that would cover the sex toy laws at issue.

The Court's ultimate conclusion rested on its rejection of *Bowers* and how the *Bowers* decision particularly impacted homosexuals: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right."[171] It went on, "The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons."[172] Thus, the primary purpose in the Court overruling *Bowers* was to promote the rights and autonomy of homosexual persons. There was hardly a mention in the opinion of a right to sexual freedom that extends beyond this holding. The Court does conclude with the statement, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[173] This statement alone, however, is insufficient to create a broad right of sexual freedom for all individuals in all instances.

The kind of analysis used in the *Lawrence* opinion is not uncommon. William N. Eskridge, Jr., a Yale Law School professor and co-author of the Cato Institute's amicus brief in *Lawrence*,[174] argues:

> The key to understanding *Lawrence*—and all its doctrinal complexities—is the Supreme Court's recognition that American democratic pluralism must meet the lesbian, gay, bisexual, and transgendered (LGBT) rights movement at least halfway. After a century of discrimination and persecution, lesbians, gay men, and bisexuals have demonstrated through their lives that traditional state antigay discrimination and persecution were unjust. . . . But contrary to the dissenters, *Lawrence* only sets a new floor for gay people, and not the same floor that straight Americans can take for

171. *Id.* at 574.

172. *Id.* at 575.

173. *Id.* at 578.

174. William N. Eskridge – Profile, Jr., http://www.law.yale.edu/faculty/WEskridge.htm. The Court relied on scholarly articles and the amicus brief written by Professor Eskridge in making its decision in ruling in favor of the petitioners in *Lawrence*. *See Lawrence*, 539 U.S. at 567–68, 571–72.

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granted. *Lawrence* gives us nothing less than, but also nothing more than, a jurisprudence of tolerance.[175]

Under this reasoning, to argue that *Lawrence* came out the way it did because all people have a broad right to sexual freedom may diminish the meaning of *Lawrence* to the LGBT community and remand homosexuals back to a position of discrimination and persecution.

Thus, because the freedom announced in *Lawrence* was specific—the freedom to engage in sexual activity with someone of the same sex—to apply it directly to the facts of *Reliable Consultants* or *Williams VI* would be improper. Those cases involve not the right to engage in a relationship with someone of the same sex, but instead simply the right to purchase obscene items that could potentially be used in such a relationship. The *Reliable Consultants* court, therefore, erred in holding the statute unconstitutional in light of *Lawrence*.

V. CONCLUSION

The Supreme Court has yet to address Justice Kennedy's statement in *Lawrence* that public morality is *never* a legitimate government interest so as to satisfy rational basis scrutiny. A circuit split has emerged in an effort to interpret this statement in the realm of the sale of obscene adult items like sex toys. Although the Court may adopt Justice Kennedy's position that public morality is insufficient to allow a legislature to control what goes on in the private bedroom, the holding of *Lawrence* only goes that far. This Comment argues that, where the conduct prohibited is not purely private, but has a commercial element, and where the rights implicated are not fundamental rights, public morality remains a legitimate government interest that satisfied rational basis scrutiny.

To extend the *Lawrence* holding to apply to a legislature criminalizing only the *sale* of adult items, as was done in *Reliable Consultants*, would be impermissible for a number of reasons. First, only rational basis scrutiny applies and not any sort of strict scrutiny. As such, there is a lower threshold of constitutionality for these kinds of laws. Second, history has established morality as a legitimate government interest in many cases. These cases have never been

175. William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004).

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overruled and remain good law, even in light of the *Lawrence* decision. Next, the right at issue here involves public, commercial activity, which was explicitly disclaimed in *Lawrence*. The Court's holding in *Carey* is distinguishable, and thus the laws should be analyzed as infringing only the right to sell obscene items and not the more broad right to sexual freedom. Last, the *Lawrence* decision was heavily influenced by the fact that gay rights were involved—and such rights were not at issue in either *Williams VI* or *Reliable Consultants*.

Nathan R. Curtis[*]

* J.D. Candidate, April 2011, J. Reuben Clark Law School, Brigham Young University.

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