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SUBSTANTIVE DUE PROCESS/ PRIVACY—STAY CALM, DON'T GET HYSTERICAL: A USER'S GUIDE TO ARGUING THE UNCONSTITUTIONALITY OF ANTI-VIBRATOR STATUTES

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SUBSTANTIVE DUE PROCESS/PRIVACY—STAY CALM,
DON'T GET HYSTERICAL: A USER'S GUIDE TO ARGUING THE
UNCONSTITUTIONALITY OF ANTI-VIBRATOR STATUTES

INTRODUCTION

On March 5, 2010 the Supreme Court of Alabama upheld an Alabama statute that prohibits the sale and distribution of sexual devices.¹ The statute makes it illegal “to knowingly distribute, possess with intent to distribute, or offer or agree to distribute . . . any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value.”² For reasons to be explained in this Note, the Alabama Supreme Court decided to follow the Eleventh Circuit’s reasoning in *Williams v. Attorney General*, a 2004 case that upheld the very same Alabama statute.³ In *Williams*, the Eleventh Circuit held that the statute was constitutional and refused to extend the United States Supreme Court’s holding in *Lawrence v. Texas*⁴ to the commercial activity involved with the sale and distribution of

1. 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319, 341 (Ala. 2010) (en banc). A distributor of the devices, including vibrators and dildos, (in a counter-claim) argued that the statute violated the United States Constitution’s right to due process and that the Alabama Supreme Court should follow the reasoning in *Reliable Consultants, Inc. v. Earle*. *Id.* (citing *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008)). Dr. Marty Klein, author of *America’s War on Sex: The Attack on Law, Lust & Liberty*, stated: “‘The Supreme Court has declared our orgasms a battlefield, and sex toys another casualty.’” David Holthouse, *Alabama v. Dildos, Attorney General Troy King Stands Hard Against Stimulators*, DAME MAG., <http://www.dame-magazine.com/features/f261/AlabamavsDildos.php?Page=2> (last visited Jan. 12, 2011). In response to the ruling, Representative John Rogers (D-Birmingham) sponsored a bill to remove the ban on the devices, stating: “‘A shower head can be a sex toy. . . . It’s just a matter of bringing the state into the 21st Century.’” *Id.* Attorney General Troy King of Alabama claims the statute’s goal is to prevent the “‘evil of commerce of sexual stimulation and auto-eroticism, for its own sake.’” *Id.* Citizens of Alabama were called upon to send the Attorney General “‘the most humiliating sex toy they [could] find.’” *Id.*

2. ALA. CODE § 13A-12-200.2(a)(1) (LexisNexis 2005). Section (a)(2) makes it unlawful for “a wholesaler, to knowingly distribute, possess with intent to distribute, or offer to agree to distribute, for the purpose of resale or commercial distribution at retail” any sexual device. *Id.* § 13A-12-200.2(a)(2). Section (a)(3) made it illegal to “produce” such devices. *Id.* § 13A-12-200.2(a)(3).

3. *Williams v. Att’y Gen.*, 378 F.3d 1232, 1233 (11th Cir. 2004).

4. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (holding that a Texas statute prohibiting homosexual conduct was a violation of the Due Process Clause of the Fourteenth Amendment).

the sexual devices.⁵ Additionally, the Supreme Court of Alabama recognized that a Fifth Circuit case, *Reliable Consultants, Inc. v. Earle*,⁶ extended the ruling in *Lawrence* to a Texas statute also prohibiting the sale of sexual devices.⁷ As the Supreme Court of Alabama stated, succinctly identifying the topic of this Note: “It is clear from the discussions in *Williams VI* [*Williams v. Attorney General*, 378 F.3d 1232, 1233 (11th Cir. 2004)] and *Reliable Consultants* that the debate about the scope of *Lawrence v. Texas* remains open.”⁸

The current split in the circuit courts, most recently recognized in *1568 Montgomery Highway, Inc. v. City of Hoover* centers on just how far *Lawrence* extends beyond the facts of that case, and whether *Lawrence* is applicable to activity outside the home.⁹ The Fifth Circuit stated that “[o]nce *Lawrence* is properly understood to explain the contours of the substantive due process right to sexual intimacy, the case plainly applies.”¹⁰ The question then becomes: does *Lawrence* really plainly apply? While the Fifth Circuit seems to think the case applies to the sale and distribution of sexual devices, the Eleventh Circuit clearly does not and has stated that it “[declines] to extrapolate from *Lawrence* and its *dicta* a right to sexual privacy triggering strict scrutiny.”¹¹ Therefore, there is currently one circuit under the impression that *Lawrence* clearly applies to these statutes prohibiting the sale of sexual devices, and another circuit under the impression that they would have to “extrapolate” from the language of *Lawrence* in order to rule these statutes unconstitutional.

This Note explores the question of whether *Lawrence* extends to the commercial activity prohibited by statutes such as the one in Alabama. This Note will argue that the analysis in both the Fifth and the Eleventh Circuits regarding the sale and distribution of sexual devices are improper. While this Note argues, in agreement with the Fifth Circuit, that selling and distributing sexual devices should be constitutionally protected across the board, this Note argues that *Lawrence* is not the applicable case in asserting that these

5. *Williams*, 378 F.3d at 1238.

6. *Reliable Consultants, Inc.*, 517 F.3d at 744-45.

7. *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319, 337-41 (Ala. 2010).

8. *Id.* at 340.

9. *Id.*

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

11. *Williams v. Att’y Gen.*, 378 F.3d 1232, 1238 (11th Cir. 2004).

statutes are unconstitutional. *Lawrence* has left the question of whether there is a new fundamental right to privacy unclear.¹² The confusion over *Lawrence* is evidenced by the current circuit split. However, the proper analysis involves *Carey v. Population Services International*¹³ and the line of Supreme Court cases ruling on the sale and distribution of contraceptives since sexual devices are being used more frequently for health and birth control reasons. This Note will argue that because creating a new fundamental right is so difficult, the best way to ensure statutes, like the ones in Alabama and Texas, are deemed unconstitutional is to place the sale and distribution of sexual devices under the already-existing right protected in the *Carey* line of cases. If the sale and distribution of sexual devices is successfully included within an established fundamental right, the statutes will move beyond a rational basis review and achieve a strict scrutiny review, which will allow courts the opportunity to deem the statutes as too burdensome.

Part I of this Note chronicles the history of sexual devices in America. Part II provides some historical background on the case law and development of the idea of examining “sexual privacy” through the so-called “sexual freedom cases.”¹⁴ Part III gives a brief history of the state case law that has developed around statutes that control the sale of these devices. Part IV discusses the current circuit split among the Fifth and Eleventh circuits and the *Lawrence v. Texas* decision. Part V argues that *Lawrence* is not the proper case for analyzing the constitutionality of sexual device statutes, due to the commercial activity dealt with in this topic, but that the real support lies in *Griswold* and its progeny.

I. THE HISTORY OF SEXUAL DEVICES IN THE UNITED STATES

A. *The Vibrator: Pre-1920*

The end of the nineteenth century brought the development of the first vibrator as an electromechanical medical instrument.¹⁵ Prior to the development of the vibrator, physicians and midwives would manually massage their female patients to orgasm as a cure

12. *1568 Montgomery Highway, Inc.*, 45 So. 3d at 340.

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

14. Angela Holt, Comment, *From My Cold Dead Hands: Williams v. Pryor and the Constitutionality of Alabama's Anti-Vibrator Law*, 53 ALA. L. REV. 927, 938 (2002).

15. RACHEL P. MAINES, *THE TECHNOLOGY OF ORGASM* 3 (Merritt Roe Smith eds., 1999). The author would like to note that there is very little written about the history and development of sexual devices in the United States. That is why the predominant source for this part of the background is Maine's book.

for “hysteria.”¹⁶ The invention came as a relief to physicians, who were looking for a way to therapeutically cure these women, but in such a way “that neither fatigued the therapist nor demanded skills that were difficult and time-consuming to acquire.”¹⁷ The efficiency of the mechanical device facilitated a much more productive office, which was necessary owing to frequent repeated visits by hysterical patients.¹⁸ By 1900, there was an increasing variety of vibrators, ranging “from low[er] priced . . . models to the Cadillac of vibrators, the Chattanooga.”¹⁹

Post-1900, there were numerous big incentives for people to purchase these vibrators for “self-treatment,” rather than continually having to go to a doctor’s office every time symptoms occurred.²⁰ It was much cheaper to purchase a home device than to go back for repeated doctor visits.²¹ Additionally, not only was it more cost efficient, but it allowed for use at home alone and as often as was needed or desired.²²

With the increasing popularity and availability of electricity in the home, women became heavy consumers of electrical devices.²³ The vibrator was the fifth home appliance manufactured to run from electricity, preceded only by the sewing machine, the fan, the teakettle, and the toaster.²⁴

16. *Id.* “Massage to orgasm of female patients was a staple of medical practice among some (but certainly not all) Western physicians from the time of Hippocrates until the 1920s, and mechanizing this task significantly increased the number of patients a doctor could treat in a working day.” *Id.* “Hysteria” was literally translated to “womb disease” and was considered to be extremely prevalent in women. *Id.* at 1-3.

17. *Id.* at 11. Maines points out that “[t]here is really no evidence that male physicians enjoyed providing pelvic massage treatments,” and that they would try to delegate the duty to anyone, or anything, they could. *Id.* at 4.

18. *Id.* at 11.

19. *Id.* at 15. The first electromechanical vibrator was designed by Joseph Mortimer Granville in the 1880s. *Id.* It was battery operated and similar to the modern version of the vibrator. *Id.* “At the Paris Exposition in 1900, there were exhibited more than a dozen [v]ibrators.” SAMUEL MONELL, A SYSTEM OF INSTRUCTION IN X-RAY METHODS AND MEDICAL USES OF LIGHT, HOT AIR, VIBRATION AND HIGH FREQUENCY CURRENTS 595 (1902).

20. MAINES, *supra* note 15, at 100.

21. *Id.* The cost of purchasing an at-home vibrator did not cost more than four or five visits to the doctor. *Id.*

22. *Id.* There were also water-powered vibrators, but the battery powered devices were more desirable as they could be used almost anywhere. *Id.*

23. *Id.*

24. *Id.* It is interesting to note that the electrical vibrator actually came before “the electric vacuum cleaner by . . . nine years, the electric iron by ten, and the electric frying pan by more than a decade, possibly reflecting consumer priorities.” *Id.*; see also MALCOLM MACLAREN, THE RISE OF THE ELECTRICAL INDUSTRY DURING THE NINE-

Rachel Maines notes that the first advertising for a vibrator appeared in *McClure's Magazine* in 1899 and was for the "Vibratile."²⁵ There was a brief period in the first two decades of the twentieth century when water-powered vibrators were quite popular, including the "Hydro-Massage," which was advertised in the December 1906 issue of *Modern Women*.²⁶ However, the great majority of advertisements for vibrators in the first three decades of the twentieth century came in the form of those that are still produced today for "home massage."²⁷ Most often, when magazines would have advertisements for vibrators, they were hardly mentioned in any other way throughout the magazine.²⁸ These devices were not just limited to smaller, no-name manufacturers; big names like General Electric took out full-page ads for "The Home Electrical" between the years 1915 and 1917.²⁹ Sears, Roebuck and Company advertised six models of vibrators in their Electrical Goods catalog in 1918.³⁰ Between 1900 and 1920, most of the devices were available by mail order.³¹ Starting in the 1920s some brands, which

TEENTH CENTURY 91, 96 (1943); SIGVARD STRANDH, A HISTORY OF THE MACHINE 225-26 (Turlough Johnston & Kerstin Stålbrand eds., Ann Henning trans., 1979).

25. MAINES, *supra* note 15, at 100. The advertisement claimed that the "Vibratile" was a cure for "neuralgia," "headache," and "wrinkles." *Id.* (quoting MCCLURE'S MAG., Mar. 1899, at 158). Around this time, the sale of "massagers" had begun to increase immensely and the makers of these devices claimed they could cure any variety of diseases. *Id.* It should be noted that none of these ads were explicitly sexual, but they all had an underlying tone of sexuality. For example, one ad for a vibrator stated, "The most perfect woman is she whose blood pulses and oscillates in unison with the natural law of being." *Id.* at 101 (quoting *To Women I Address My Message of Health and Beauty*, NAT'L HOME J., Apr. 1908, at 17 (advertisement from Bebout Vibrator Company)). An ad in *Woman's Home Companion* in 1906 used language that would lead a reader today to wonder: "The number and strength of the movements that can be applied by hand are extremely limited; the perfectly adjusted American Vibrator runs indefinitely and is susceptible of a variety and rapidity of movements utterly impossible of human attainment." MAINES, *supra* note 15, at 103 (emphasis omitted).

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26. MAINES, *supra* note 15, at 101-02 (referring to an advertisement for the Werner Motor Company's water-powered "Hydro-massage" appearing in MODERN WOMEN, Dec. 1906, at 190).

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27. *Id.* at 102.

28. *Id.* at 103. There are apparently two exceptions to this rule: (1) in June 1908, a "Review of Reviews" cautioned readers against using the devices in excess, and (2) in 1916, a "Good Housekeeping" review that stated the vibrators were "soothing to the skin." *Id.*

29. *Id.* at 104; see also GENERAL ELECTRIC COMPANY, A GENERAL ELECTRIC SCRAPBOOK HISTORY, WITH COMMENTARY 22 (n.d.) (scrapbook distributed by General Electric that includes advertisements of the "The Home Electrical").

30. MAINES, *supra* note 15, at 104 (emphasis omitted). Along with the vibrators, the catalog included advertisements for everyday appliances like "coffee urns, toasters, irons, heaters, [and] hair dryers." *Id.*

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31. *Id.*

could be purchased at retail stores, were specifically advertised to men as great gift ideas for women.³² The most widely advertised of the brands were the White Cross Electric Vibrators.³³ The ads for these vibrators appeared “in *Needlecraft*, *Home Needlework Magazine*, *American Magazine*, *Modern Priscilla*, the *National Home Journal*, and *Hearst’s*.”³⁴

B. *The Vibrator-Post 1920-Present*

After about 1928, advertisements for vibrators essentially disappeared until the re-emergence of “the modern vibrator . . . in the 1960s as a frankly sexual toy.”³⁵ Historian Roger Blake has deemed the “vibrator [] the ‘oldest sex gadget of the twentieth century.’”³⁶ Blake adds to his observation by noting that there was a prominent display of a vibrator in a 1920s movie entitled “Widow’s Delight.”³⁷ The movie showed a woman using a vibrator in an overtly sexual way, essentially making visible what many had chosen to ignore with regards to vibrators, and removing the veil of the vibrator as simply a home or medical device.³⁸ Maines postulates

32. *Id.*

33. *Id.* at 104-05; *see also* DAVID J. PIVAR, *PURITY CRUSADE: SEXUAL MORALITY AND SOCIAL CONTROL, 1868-1900* 110-17 (1973). “The brand, White Cross, was drawn from the name of an Episcopalian sexual purity organization that flourished in Britain in the late 1880s.” MAINES, *supra* note 15, at 107. This particular “society was introduced to America by . . . the Women’s Christian Temperance Union; its name on the . . . vibrator must have been intended to suggest virtue and chastity.” *Id.*

34. MAINES, *supra* note 15, at 107. The ads stated:

“You can relieve pain, stiffness and weakness, and you can make the body plump and build it up with thrilling, refreshing vibration and electricity. Just a few minutes’ use of the wonderful vibrator and the red blood tingles through your veins and arteries and you feel vigorous, strong and well. With our Electric Vibrator and special attachments you can convert *any chair* into a perfect vibrating chair without extra cost, getting the genuine Swedish Movement and wonderfully refreshing effects, the same treatment for which you would have to pay at least \$2.00 each in a physician’s office.”

Id. (quoting from a magazine advertisement appearing in: *MODERN PRISCILLA*, Dec. 1910, at 27). A similar ad read:

“Vibration is life. It will chase away the years like magic. Every nerve, every fibre of your whole body will tingle with force of your own awakened powers. All the keen relish, the pleasures of youth, will throb within you. Rich, red blood will be sent coursing through your veins and you will realize thoroughly the joy of living. Your self-respect, even, will be increased a hundredfold.”

Id. at 108 (quoting from a magazine advertisement appearing in: *AM. MAG.*, Jan. 1913).

35. *Id.* There were some ads in the 1950s for massagers, but not for the vibrator.

Id.

36. *Id.* (quoting ROGER BLAKE, *SEX GADGETS* 33-34, 46 (1968)).

37. *Id.*

38. *Id.*

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that this type of exposure might have contributed to the vibrator being far less accepted in the home market since it no longer had the “social camouflage” provided by respectable home and medical uses.³⁹

While vibrators were not as heavily advertised between 1930 and 1970, it appears they were still available.⁴⁰ Starting in the latter half of the twentieth century and continuing until today, “the vibrator has become an overtly sexual device.”⁴¹ Additionally, therapists often use it for treating women that are having difficulty reaching orgasm through other sexual activity.⁴²

The use of vibrators for medical and health purposes is still fairly prevalent today. The Food and Drug Administration (FDA) has recognized the use of “‘powered vaginal muscle stimulators’ and ‘genital vibrators’ for the treatment of sexual dysfunction or as an adjunct to Kegel’s exercise (tightening of the muscles of the pelvic floor to increase muscle tone).”⁴³ The FDA requires that a premarket approval application (PMA) be filed “for any powered vaginal muscle stimulator” that is in commercial distribution.⁴⁴ These types of regulations also demonstrate that the federal government recognizes, at least medically, the utility of such devices.⁴⁵ The FDA categorizes the powered-vaginal-muscle stimulator, as a Class III device.⁴⁶

The FDA describes devices in Class III as “those that support or sustain human life, are of substantial importance in preventing impairment of human health, or which present a potential, unreasonable risk of illness or injury.”⁴⁷ Section 884 of the federal regulations classifies devices categorized as “obstetrical and

39. *Id.*

40. *Id.* at 109. Maines draws this conclusion because several authors in that time referenced vibrators and massagers with little explanation, presumably meaning they were still around and that knowledge about them remained well known. *Id.*

41. *Id.* at 121.

42. *Id.* at 122.

43. *State v. Brenan*, 772 So. 2d 64, 75 (La. 2000); *see also* 21 C.F.R. §§ 884.5940-.5960 (2010).

44. § 884.5940; *see also* U.S. FOOD AND DRUG ADMIN., DEVICE CLASSIFICATION, <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/ClassifyYourDevice/default.htm> (last updated Apr. 27, 2009).

45. *Brenan*, 772 So. 2d at 75.

46. § 884.5940.

47. U.S. FOOD AND DRUG ADMIN., PREMARKET APPROVAL (PMA), <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/HowtoMarketYourDevice/PreMarketSubmissions/PremarketApprovalPMA/ucm2007514.htm> (last updated Sept. 3, 2010). “PMA is the most stringent type of device marketing application required by FDA.” *Id.*

gynecological,”⁴⁸ some of which are included under the Class III egorization. Other Class III devices include “contraceptive intrauterine device (IUD) and introducer” and “contraceptive tubal occlusion device (TOD) and introducer.”⁴⁹

Presently, the vibrator is experiencing a renaissance of sorts and “the days of trying to buy a vibrator at a XXX porn shop out by the airport are long gone.”⁵⁰ Not only are those days gone, but the days of vibrators taking center stage are *literally* here. Playwright Sarah Ruhl wrote a play that has done just this.⁵¹ The play, entitled “In the Next Room or the vibrator play,” is set in the 1880s and revolves around “a doctor in upstate New York who uses a vibrator to treat ‘hysteria’ in women, [and] explores the conflicted territory of sex and intimacy in the moral climate of the Victorian Age.”⁵² The play is partially inspired by Rachel Maine’s *The Technology of Orgasm: Hysteria, the Vibrator and Women’s Sexual Satisfaction*.⁵³ This play, written with an eye toward Broadway, might appear to indicate a movement toward more openness about the subject of sexual devices. There are several instances in the play where the audience sees “depictions of two women and a man using vibrators.”⁵⁴ During one of the performances, a man in the audience left the theater and explained to his wife that this was a play for women.⁵⁵ In another instance, a husband stood up during a vibrator scene and moved ten seats away from his wife.⁵⁶ One person associated with the play, explained how he tends to downplay the word “vibrator,” because he finds the word effectively scares people away before they even know what the play is really about.⁵⁷

The play, though considered by some as a play for women, reached a new level in the world of theater. The play was nomi-

48. See 21 C.F.R. §§ 884.1-.5970; see also U.S. FOOD AND DRUG ADMIN., DEVICE CLASSIFICATION PANELS, <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/ClassifyYourDevice/ucm051530.htm> (last updated May 13, 2009).

49. § 884.5360; see also § 884.5380.

50. Neelanjana Banerjee, *Plug it In: The Many Joys of Sex Toys Takes it to the Next Level*, NAT’L SEXUALITY RESOURCE CTR. (Jan. 10, 2004), http://nsrc.sfsu.edu/article/plug_it_many_joysex_toys_takes_it_next_level.

51. Ellen Gamerman, *Blushes Over Broadway*, WALL ST. J. (Nov. 13, 2009), http://online.wsj.com/article/SB10001424052748704402404574529691155408608.html?mod=WSJ_hpp_MIDDLENexttoWhatsNewsThird.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

nated for several Tony Awards.⁵⁸ “In the Next Room or the vibrator play” was recognized in three categories: Best Play, Best Performance by a Featured Actress in a Play, and Best Costume Design of a Play.⁵⁹ It appears as though America, however, was not ready for the play to win a 2010 Tony.⁶⁰

So, while the days of purchasing sexual devices by the airport might be gone, the word “vibrator” and the subject matter is still seen as somewhat taboo. Even in a time when both men and women have starred in and purchased tickets to a play depicting the use of vibrators, it is still thought of as a subject affecting mostly women.

II. THE DEVELOPMENT OF “SEXUAL PRIVACY” IN THE SUPREME COURT: THE “SEXUAL FREEDOM CASES”

A. *Griswold v. Connecticut*

The first case in the line of the so-called “sexual freedom cases” is *Griswold v. Connecticut*.⁶¹ The appellant, Griswold, was the Executive Director of the Planned Parenthood League of Connecticut.⁶² The League would often educate married couples about contraceptives, including “information, instruction, and medical advice.”⁶³ Griswold and several colleagues “were found guilty as accessories” for violating two Connecticut statutes.⁶⁴ The Supreme Court ruled that the appellants had standing to sue and raise the constitutional rights of the married people they worked with.⁶⁵ Furthermore, the Court explained that the laws directly affected “an intimate relation of husband and wife and their physician’s role in one aspect of that relation.”⁶⁶ By finding support in its First Amendment jurisprudence, the Court stated that the rights enu-

58. *Who’s Nominated?*, TONY AWARDS (June 13, 2010), http://www.tonyawards.com/en_US/nominees/index.html.

59. *Id.*

60. *Id.*

61. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

62. *Id.* at 480.

63. *Id.*

64. *Id.* The first statute stated, “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” *Id.* (quoting CONN. GEN. STAT. § 53-32 (repealed 1969)). The second statute read, “Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” *Id.* (quoting CONN. GEN. STAT. § 54-196 (repealed 1969)).

65. *Id.* at 481.

66. *Id.* at 482.

merated “in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁶⁷ Accordingly, the Court concluded that there are various “zones of privacy” that are found throughout the Bill of Rights.⁶⁸ The Court held that the marital relationship is one that lies within this zone of privacy.⁶⁹ In finding the Connecticut statutes unconstitutional, the Court recognized that marital privacy was particularly rooted in the past, and therefore it would be particularly problematic to intrude on such a relationship.⁷⁰

B. Eisenstadt v. Baird

Seven years later, the Supreme Court once again addressed the constitutionality of a statute regulating the distribution of birth control, but this time the statute in question was aimed at single persons.⁷¹ In *Eisenstadt v. Baird*, the plaintiff was convicted of violating a Massachusetts statute forbidding the distribution of contraceptives to a person who did not fall within the married person exception of the statute.⁷² The Court found the statute’s “goals of deterring premarital sex and regulating the distribution of potentially harmful articles” not legitimate and “violate[d] the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.”⁷³ Unlike the statutes at issue in *Griswold*, these statutes prohibited the distribution, but not the use, of contraceptives

67. *Id.* at 484.

68. *Id.* The Court pointed to the right to association in the First Amendment; the right to be free from soldiers invading the home when at peace and the right to be free from searches and seizures in the Fourth Amendment; the right to not self-incriminate in the Fifth Amendment; and the Ninth Amendment’s guarantee that simply because there are rights listed, does not mean they are exhaustive, as showing that the Constitution itself protects these “zones of privacy.” *Id.*

69. *Id.* at 485.

70. *See id.* at 486.

71. *Eisenstadt v. Baird*, 405 U.S. 438, 440-42 (1972). After a speech at Boston University, the defendant, who became the appellee, gave a woman Emko vaginal foam. *Id.* at 440.

72. *Id.* at 440. The relevant part of the statute reads, in relevant part, “‘whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception,’ except as authorized in s[ection] 21A.” *Id.* at 440-41 (first and second alterations in original) (quoting MASS. GEN. LAWS ch. 272, § 21A (1966)). The exception discussed in section 21A reads, in relevant part, “‘A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.’” *Id.* at 441 (quoting MASS. GEN. LAWS ch. 272, § 21A).

73. *Id.* at 443.

by single persons.⁷⁴ The Court went on to say, “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁷⁵

C. Roe v. Wade

The next year, the landmark case of *Roe v. Wade* was decided.⁷⁶ At issue were Texas statutes that criminalized abortion.⁷⁷ The statutes made it illegal to “procure an abortion,” unless it was “procured or attempted by medical advice for the purpose of saving the life of the mother.”⁷⁸ After surveying the history of abortion,⁷⁹ the Court noted that though the Constitution does not specifically say anything about a right to privacy, there is much in the case law to support a right of personal privacy within “certain areas or zones of privacy.”⁸⁰ This right to privacy, wherever it is derived from,⁸¹ is large enough to protect a woman’s choice to end her pregnancy.⁸² This right, however, is not

74. *Id.* at 446.

75. *Id.* at 453 (emphasis omitted).

76. *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe v. Wade*, the unmarried and pregnant plaintiff sought an abortion by a “licensed physician, under safe, clinical conditions,” but was prohibited from doing so by the Texas statutes in question. *Id.* at 120 (internal quotation marks omitted).

77. *Id.* at 116.

78. *Id.* at 117-18. An abortion was defined as “mean[ing] that the life of the fetus or embryo shall be destroyed in the woman’s womb or that a premature birth thereof be caused.” *Id.* at 117 n.1. Further:

“If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years.”

Id. (quoting TEX. PENAL CODE ANN. § 1191).

79. *Id.* at 129-52.

80. *Id.* at 152.

81. The Court did not purport to say precisely or definitively where this right of privacy came from, only that it exists “whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people.” *Id.* at 153.

82. *Id.* The Court noted that “additional offspring” can have a great impact on the life of a woman, including the psychological, mental, and physical-health aspects of requiring a woman to carry a pregnancy to term. *Id.* This is particularly true when that woman is not in a condition to care for the child. *Id.*

absolute.⁸³ The right of personal privacy must be balanced with a state's valid interests in regulating the sphere of abortion,⁸⁴ but those state interests must be compelling and narrowly tailored to such an interest.⁸⁵

D. *Carey v. Population Services International*

In 1977, the Supreme Court had the opportunity yet again to hear a case concerning the sale and distribution of contraceptives.⁸⁶ In *Carey v. Population Services International*, the appellee was a company that had its main office in North Carolina, but regularly sold and advertised contraceptives, by mail, to the residents of New York.⁸⁷ The company filled contraceptive orders with no concern as to the recipient's age.⁸⁸ After receiving several letters from New York officials alleging they were in violation of New York law, the company brought suit challenging the statute.⁸⁹ Again, the Court stated that there were "certain areas or zones of privacy" that were protected from government interference.⁹⁰ The Court explained, "the decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."⁹¹ The Court believed that the decision to actually conceive, or to prevent such from occurring, is one that is particularly personal.⁹² However, this right is not absolute, and there could in

83. *Id.* at 154 ("[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.").

84. *Id.* In the end, the determined "compelling point" was at the end of the women's first trimester, and prior to that, it should be left up to the woman and her doctor to decide, without state interference, whether or not to terminate a pregnancy. *Id.* at 163. Prior to determining this compelling point, the Court went into significant detail and discussion about when life actually begins, and whether the Fourteenth Amendment included an unborn fetus in the definition of a "person." *Id.* at 159-63.

85. *Id.* at 155.

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

87. *Id.* at 682.

88. *Id.*

89. *Id.* at 682-84. The New York statute reviewed by the court stated, in relevant part, that it was a crime "(1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone other than a licensed pharmacist, to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives." *Id.* at 681.

90. *Id.* at 684 (quoting *Roe*, 410 U.S. at 152). While the Court noted "that the outer limits of" a person being able to make certain decisions had not been decided, there were certain inclusions of personal decisions that already existed "relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* at 684-85 (citations omitted) (quoting *Roe*, 410 U.S. at 152-53).

91. *Id.* at 685.

92. *Id.*

theory be constitutionally permitted regulation of the production and sale of contraceptives.⁹³

New York attempted to argue that previous case law regarding the use of contraceptives should not apply because the statutes at issue in this case regulated the sale and distribution of contraceptives; the other cases should not affect the State's power to limit such sales.⁹⁴ "The fatal fallacy" with this defense was that it did not grasp "the underlying premise of" the previous decisions.⁹⁵ That underlying premise was that the Constitution protects an individual's right to decide whether to conceive or not to conceive.⁹⁶ The Court recognized that there was no "independent fundamental 'right of access to contraceptives,' but" that this access was inextricably intertwined with the right to decide whether or not to bear or beget a child, which is where the fundamental right lies.⁹⁷ The restriction on the attainment of contraceptives too severely burdened this right.⁹⁸ This was the true reasoning behind the three previous cases decided by the Court.⁹⁹ The limitation that the New York statute placed on contraceptives was a heavy burden on those who wanted to use them.¹⁰⁰ The narrow provision allowing physicians to

93. *Id.* at 685-86. The Court noted that "even a burdensome regulation may be validated by a sufficiently compelling state interest . . . [and as in abortion,] the right is not absolute, and . . . certain state interests" might be compelling enough to govern the abortion decision. *Id.* at 686.

94. *Id.* at 686-87.

95. *Id.* at 687.

96. *Id.*

97. *Id.* at 688.

98. *Id.* at 687.

99. *Id.* at 689.

100. *Id.* The Court noted that the burden in this case was not as great as if there had been a complete ban of distribution, but that reducing the number of "retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition." *Id.* (citations omitted). Additionally, the Court believed that *Doe v. Bolton* was particularly relevant in this discussion, as the Court there ruled unconstitutional "a statute requiring that abortions be performed only in accredited hospitals." *Id.* (citing *Doe v. Bolton*, 410 U.S. 179, 193-95 (1973)).

In defense of the provision that prohibited the sale of contraceptives to those under sixteen years old, the appellants argued that it was an attempt to further the State's policy of preventing "promiscuous sexual intercourse among the young." *Id.* at 692. The Court initially struggled with this provision, as they were somewhat bothered by the fact that this particular conduct, when done by adults, was constitutionally protected and previous cases had noted that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.* (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)). The Court found unpersuasive the appellants' argument that providing unlimited access to contraceptives to minors would increase their sexual activity. *Id.* at 694-95. There was reason to question whether not

prescribe contraceptives to minors did not make the statute constitutional.¹⁰¹ Finally, the provision prohibiting advertising contraceptives was also deemed unconstitutional.¹⁰² The Court noted that, in general, a burden placed on a fundamental right, such as to bear or beget a child, could only be supported by “compelling state interests” at are “narrowly drawn to express only those interests.”¹⁰³

Some believe that the above decisions show an underlying “right to engage in sexual activities for purposes other than reproduction,” or the “right to sex” view.¹⁰⁴ Proponents of this view argue that these cases create a right to sexual autonomy.¹⁰⁵

III. DEVELOPMENT OF CASE LAW IN THE STATE COURTS PRE-LAWRENCE: STATE STATUTES

There are currently three states that have statutes prohibiting the sale and distribution of sexual devices.¹⁰⁶ These three states are

allowing unlimited access would actually encourage minors to be less sexually active. *Id.* at 695. While the Court claimed that any studies showing the high rate of sexual activity and the consequences of such activity among minors did not play any part in their decision, one has to wonder how true that actually was. *Id.* at 696.

101. *Id.* at 697.

102. *Id.* at 701-02. Appellants claimed that the advertising of contraceptives “would be offensive and embarrassing to those exposed to them, and that permitting them would legitimize sexual activity of young people.” *Id.* at 701. The Court rejected this argument and found none of the advertisements encouraged the young people to partake in sexual activities. *Id.*

103. *Id.* at 686.

104. David B. Cruz, “*The Sexual Freedom Cases*”? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 315 (2000); see also Val D. Ricks, *Marriage and the Constitutional Right to Free Sex: The State Marriage Amendments as Response*, 7 FLA. COASTAL L. REV. 271, 271 (2005) (“A few judges in the United States have established in their thinking—and in some cases in their jurisdictions—a constitutional right to ‘free sex.’”). *But see* Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 50 EMORY L.J. 809, 819 (2010) (stating that the right to sex view is “overly optimistic about the Supreme Court’s view of these ‘sex cases’”).

105. Cruz, *supra* note 104, at 317-18.

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

Mississippi,¹⁰⁷ Alabama,¹⁰⁸ and Virginia,¹⁰⁹ as the Fifth Circuit noted in *Reliable Consultants, Inc.*¹¹⁰ The Supreme Court of Alabama recently upheld the Alabama statute in March 2010.¹¹¹ The Supreme Courts of Kansas,¹¹² Louisiana,¹¹³ and Colorado¹¹⁴ have all ruled their respective state statutes banning the sale of sex toys

107. MISS. CODE ANN. § 97-29-105 (1999) states, in relevant part, that

[a] person commits the offense of distributing unlawful sexual devices when he knowingly sells, advertises, publishes or exhibits to any person any three-dimensional device designed or marketed as useful primarily for the stimulation of human genital organs, or offers to do so, or possesses such devices with the intent to do so. A person commits the offense of wholesale distributing unlawful sexual devices when he distributes for the purpose of resale any three dimensional device designed or marketed as useful primarily for the stimulation of human genital organs, or offers to do so, or possesses such devices with the intent to do so.

108. ALA. CODE § 13A-12-200.2 (LexisNexis 2005) states in relevant part:

(a)(1) It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. . . .

(2) It shall be unlawful for any person, being a wholesaler, to knowingly distribute, possess with intent to distribute, or offer or agree to distribute, for the purpose of resale or commercial distribution at retail, any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. . . .

(3) It shall be unlawful for any person to knowingly produce, or offer or agree to produce, any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value.

109. VA. CODE ANN. § 18.2-374 (2009). The statute makes it unlawful to knowingly

- (1) Prepare any obscene item for the purposes of sale or distribution; or
- (2) Print, copy, manufacture, produce, or reproduce any obscene item for purposes of sale or distribution; or
- (3) Publish, sell, rent, lend, transport in intrastate commerce, or distribute or exhibit any obscene item, or offer to do any of these things; or
- (4) Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item. Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section.

Id. “Obscene” items in the statute include: “Any obscene figure, object, article, instrument, novelty device, or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words or sounds” *Id.* § 18.2-373.

110. *Reliable Consultants, Inc.*, 517 F.3d at 741.

111. 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319, 346 (Ala. 2010).

112. *State v. Hughes*, 792 P.2d 1023, 1032 (Kan. 1990).

113. *State v. Brenan*, 772 So. 2d 64, 76 (La. 2000).

114. *People v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 372-73 (Colo. 1985) (en banc).

unconstitutional. All these rulings took place before the Supreme Court's decision in *Lawrence*.

The Colorado Supreme Court found the Colorado anti-vibrator statute unconstitutional, reasoning that it "impermissibly burdens the right of privacy of those seeking to make legitimate medical or therapeutic use of such devices. The effect of the statute as now written is to equate sex with obscenity."¹¹⁵ Furthermore, the state had offered no legitimate interest in prohibiting the use of the devices in these ways, and therefore the statute was deemed unconstitutional.¹¹⁶

The Kansas Supreme Court struck down Kansas's statute due to its overbroad reach, finding that it "impermissibly infringe[d] on the constitutional right to privacy in one's home and in one's doctor's or therapist's office."¹¹⁷ The Kansas Supreme Court focused on the medical uses of the devices.¹¹⁸ It additionally noted that another court held that "the consumers' privacy right in the use of the devices was inextricably bound with the vendors' supply of the devices,"¹¹⁹ meaning that preventing vendors from selling certain items affects consumers' rights.¹²⁰ The court additionally went on to state that "[a] therapist or a third person purchasing such a device for a woman at her request would nevertheless be subject to criminal prosecution."¹²¹ Dr. Mould, one of the doctors who testified at the trial, stated that "he often direct[ed] his patients to adult bookstores to find dildo vibrators suitable for their therapy treatment and that he" was of the "opinion that if [these devices] were to become not readily available to the general public, anorgasmic women would be 'substantially impacted.'"¹²²

In *State v. Brenan*, Louisiana's highest court struck down Louisiana's obscenity statute because the statute lacked a rational connection to the legislature's intent.¹²³ The legislation stated that the

115. *Id.* at 370 (citation omitted).

116. *Id.*

117. *Hughes*, 792 P.2d at 1032.

118. *Id.* at 1025-26.

119. *Id.* at 1029. When discussing the standing of the vendors to sue on behalf of individual users, the Kansas Supreme Court noted that "where personal privacy is involved, potential purchasers may hesitate to assert their own rights because of a desire to protect that privacy from the publicity caused by a legal action." *Id.*

120. *Id.* at 1029-30.

121. *Id.* at 1031.

122. *Id.* at 1025. Dr. Mould noted that the public absence of the sexual devices would seriously impact the treatment of these women. *Id.*

123. *State v. Brenan*, 772 So. 2d 64, 75-76 (La. 2000). The Louisiana statute had banned "the promotion or wholesale promotion of obscene devices." *Id.* at 67. The

ban on the sale and distribution of the sexual devices was for “the protection of minors and unconsenting adults.”¹²⁴ The Louisiana court believed the real motive of the legislation was to wage war on obscenity rather than protect minors.¹²⁵ However, Louisiana refused to extend a new fundamental right to the use of sexual devices, narrowly reading the substantive due process cases that had been decided by the United States Supreme Court.¹²⁶ The court was aware that if they “extend[ed] constitutional protection to an asserted right or liberty interest, the courts have, to a great extent, placed the ‘right’ outside the arena of public debate.”¹²⁷ This was something that the Louisiana court was not willing to do, and instead it applied rational basis review to overturn the statute.¹²⁸ The court additionally recognized the history of the devices and mentioned the Rachel Maines book.¹²⁹

IV. LAWRENCE V. TEXAS AND THE CIRCUIT SPLIT

A. Lawrence v. Texas

Though Texas, like Colorado, Kansas, and Louisiana, also had a statute banning the sale and distribution of sexual devices,¹³⁰ it was their statute that banned actual sexual activity that made its way to the Supreme Court. On June 26, 2003 the United States Supreme Court decided *Lawrence v. Texas*,¹³¹ a principle decision

statute defined “obscene devices” as “‘device[s], including an artificial penis or artificial vagina, which [are] designed or marketed as useful primarily for the stimulation of human genital organs.’” *Id.* (quoting LA. REV. STAT. ANN. § 14:106.1 (2010), *invalidated by Brenan*, 772 So. 2d 64). It is important to note that though invalidated by the Louisiana Supreme Court, the invalidated section has still not been removed from the statute. LA. REV. STAT. ANN. § 14:106.1. In 2006, a couple was arrested and charged under this invalidated portion of the obscenity statute. *Ruling Could Negate Sex Shop Busts*, THE OUACHITA CITIZEN, Sept. 8, 2006, available at <http://www.ouachitacitizen.com/print.php?story=354>. Later, the district attorney dropped the charges under section 14:106.1, due to the fact the Louisiana Supreme Court had invalidated that portion of the statute. *Attorney: Sex Shop Material Not Obscene*, THE OUACHITA CITIZEN, Sept. 21, 2006, available at <http://www.ouachitacitizen.com/news.php?id=377>. The couple was, however, charged under section 14:106 of the statute for selling obscene videos. *Id.*

124. *Brenan*, 772 So. 2d at 68.

125. *Id.* at 72-73.

126. *Id.* at 73.

127. *Id.* at 71.

128. *Id.* at 70-71, 76.

129. *Id.* at 76.

130. TEX. PENAL CODE ANN. §§ 43.21-23 (West 2003), *invalidated by* *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008).

131. *Lawrence v. Texas*, 539 U.S. 558, 562-79 (2003).

in favor of the gay rights movement. The Court decided whether Texas could continue to prohibit persons of the same sex from engaging in certain sexual conduct.¹³² The Texas statute made it a crime to partake in any “deviate sexual intercourse.”¹³³ Texas police officers arrived at the residence of John Geddes Lawrence and found him engaged in sexual activity with Tyron Garner, activity that was prohibited by the Texas statute.¹³⁴ The two men were arrested, charged, and convicted of violating the statute.¹³⁵ They “challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution.”¹³⁶ This challenge was rejected both at the County Criminal Court and the Court of Appeals for the Texas Fourteenth District.¹³⁷ The Court of Appeals followed the United States Supreme Court’s ruling in *Bowers v. Hardwick*.¹³⁸ Certiorari was granted by the Supreme Court to determine whether the convictions violated the Fourteenth Amendment’s guarantee of equal protection and due process—in other words, whether to overturn *Bowers*.¹³⁹

“History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”¹⁴⁰ Therefore, the Court proceeded to examine any historical attempts to regulate homosexual conduct to determine if the *Bowers* case was incorrect in determining that there was a long history of prohibiting homosexual conduct.¹⁴¹ The Court concluded “that there is no longstanding history in this country of laws directed at

132. *Id.* at 562.

133. *Id.* at 563. The Texas statute provided: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” *Id.* (quoting TEX. PENAL CODE ANN. § 21.06(a) (West 2003), *invalidated by Lawrence*, 539 U.S. 558. “Deviate sexual intercourse” was defined as: “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” *Id.* (quoting TEX. PENAL CODE ANN. § 21.01(1) (West 2003)).

134. *Id.* at 562-63.

135. *Id.* at 563.

136. *Id.*

137. *Id.*

138. *Id.*; *see Bowers v. Hardwick*, 478 U.S. 186, 192-96 (1986) (holding that there was no Constitutional right to engage in homosexual sodomy, thereby upholding a Georgia statute that criminalized sodomy), *overruled by Lawrence*, 539 U.S. 558.

139. *Lawrence*, 539 U.S. at 564.

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

141. *Id.* at 567-68.

homosexual conduct as a distinct matter.”¹⁴² Furthermore, prosecutions of sodomy in the nineteenth century generally did not target “consenting adults in private,” but rather other non-consensual relationships.”¹⁴³ The Court concluded that the “laws and traditions in the past half century are of most relevance here.”¹⁴⁴

The Court refused to strike down the Texas statute on Equal Protection grounds, because it anticipated Texas would simply amend the statute to apply to both homosexual and heterosexual acts, thereby curing the equal protection problem.¹⁴⁵ Instead, the Court decided it was best to overrule *Bowers*.¹⁴⁶ *Lawrence* did “not involve minors,” or others that could be easily taken advantage of.¹⁴⁷ Instead, *Lawrence* involved consenting adults who “are entitled to respect for their private lives.”¹⁴⁸ The Court recognized that the right to this consensual relationship is derived from the Due Process Clause and, as the Court noted, there was “no legitimate state interest which can justify [the] intrusion into the personal and private life of the individual.”¹⁴⁹ Additionally, the simple act of criminalizing homosexual conduct under state law invites discrimination against the gay population.¹⁵⁰ Over half of the *Lawrence* opinion was devoted to an explanation of why it was necessary to overturn *Bowers*.¹⁵¹ Rightfully so, as *stare decisis* is an important jurisprudential doctrine.¹⁵²

142. *Id.* at 568. The Court stated, “The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century.” *Id.*

143. *Id.* at 569. The Court further noted that “laws targeting same-sex couples did not develop until the last third of the 20th century” and that “[i]t was not until the 1970’s that any State singled out same-sex relations for criminal prosecution.” *Id.* at 570.

144. *Id.* at 571-72. This decision is significant to the gay rights and sexual privacy movements in general, as there has been an increasing acceptance of both in the past fifty years. *Id.* at 571-73. Likewise, *Lawrence* would be highly pertinent in any attempt to establish a new fundamental right, as it guides attorneys to focus on the past fifty years.

145. *Id.* at 575.

146. *Id.* at 575-78.

147. *Id.* at 578.

148. *Id.*

149. *Id.* The Court also stated that this statute essentially demeaned the existence of homosexuals and “control[led] their destiny by making their private sexual conduct a crime.” *Id.*

150. *Id.* at 575.

151. *Id.* at 563-78.

152. *Id.* at 577.

B. *The Fifth and Eleventh Circuit Split*

In *Williams v. Attorney General* the American Civil Liberties Union (ACLU) brought suit on behalf of both sellers and users of sexual devices in Alabama.¹⁵³ As stated above,¹⁵⁴ the statute did not prohibit the use or possession of sexual devices, and it also did not prohibit the sale of “other sexual products such as ribbed condoms or virility drugs.”¹⁵⁵ Rather, the question presented to the Eleventh Circuit was whether the Alabama statute restricted a fundamental right.¹⁵⁶ The court inquired whether the use of these sexual devices fell under an already protected fundamental right or whether it was necessary to create a new fundamental right that would cover the issue presented.¹⁵⁷ The ACLU, representing the plaintiffs, argued that the use of sexual devices fell under the already protected realm of substantive due process.¹⁵⁸ The ACLU claimed that through the Alabama statute, the State had “intruded into the most intimate of places—the bedrooms of its citizens—and the lawful sexual conduct that occurs therein.”¹⁵⁹ Further, they claimed that though the statute did not prohibit the actual use of the devices, it placed a “substantial and undue burden on the ability of the plaintiffs to obtain devices regulated by the statute.”¹⁶⁰ The ACLU thus argued that Alabama violated “the fundamental rights of privacy and personal autonomy that protect an individual’s lawful sexual practices guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution.”¹⁶¹

The Eleventh Circuit rejected the ACLU’s argument, stating that “[t]he ACLU invokes ‘privacy’ and ‘personal autonomy’ as if such phrases were constitutional talismans. In the abstract, however, there is no fundamental right to either.”¹⁶² The Eleventh Circuit noted that simply because a decision is “personal” or

153. *Williams v. Att’y Gen.*, 378 F.3d 1232, 1233 (11th Cir. 2004).

154. *See supra* note 2 and accompanying text.

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

156. *Id.*

157. *Id.* at 1234.

158. *Id.* Substantive due process has been “long recognized as providing ‘heightened protection against government interference with certain fundamental rights and liberty interests.’” *Id.* at 1235 (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000), *rev’d*, 378 F.3d 1232).

159. *Id.* at 1235 (quoting *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1261 (N.D. Ala. 2002)).

160. *Id.* (quoting *Williams*, 220 F. Supp. 2d at 1261).

161. *Id.* (quoting *Williams*, 220 F. Supp. 2d at 1261).

162. *Id.*

“intimate” does not mean that decision is instinctively or automatically protected.¹⁶³ According to the *Williams* court, a fundamental right is one that is “deeply rooted” in the history of the United States.¹⁶⁴

The Eleventh Circuit found nothing in the history of the substantive due process cases decided by the Supreme Court to support a “right to sexual privacy.”¹⁶⁵ Most recently, the circuit noted, the Supreme Court had the opportunity in *Lawrence v. Texas* to assert a broad right to sexual privacy, and the Eleventh Circuit concluded that *Lawrence* provided no such ruling.¹⁶⁶ What *Lawrence* did establish, the Eleventh Circuit ruled, was “the unconstitutionality of criminal prohibitions on consensual adult sodomy.”¹⁶⁷ Because the Supreme Court did not go through the *Washington v. Glucksberg* analysis,¹⁶⁸ the Eleventh Circuit refused to concede that *Lawrence* created any fundamental right, never mind one specifically regarding “sexual privacy.”¹⁶⁹ The Eleventh Circuit, therefore, went into its own *Glucksberg* analysis of the use of sexual devices and ultimately found there to be no fundamental right.¹⁷⁰

Four years later, the Fifth Circuit decided *Reliable Consultants, Inc. v. Earle*, addressing a Texas statute that, like the Alabama stat-

163. *Id.*

164. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). *Glucksberg* specifically stated that a fundamental right was “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Glucksberg*, 521 U.S. at 721 (citation omitted).

165. *Williams*, 378 F.3d at 1235. The Eleventh Circuit found that after several opportunities to do so, the Supreme Court refused to recognize such a right and reiterated that the Supreme Court “has never indicated that the mere fact that an activity is sexual and private entitles it to protection as a fundamental right.” *Id.* at 1235-36.

166. *Id.* at 1236.

167. *Id.*

168. *Glucksberg*, 521 U.S. 702. The Court in *Glucksberg* sought to determine whether a Washington statute’s “prohibition against ‘caus[ing]’ or ‘aid[ing]’ a suicide offends the Fourteenth Amendment to the United States Constitution.” *Id.* at 705-06 (alterations in original). In determining a fundamental right, the analysis has two parts. *Id.* at 720. First, the right at issue must be deeply rooted in the nation’s history. *Id.* at 720-21. Second, the Supreme Court also looks at the description of the asserted right. *Id.* at 721.

169. *Williams*, 378 F.3d at 1236. Specifically, the court stated that it was “not prepared to infer a new fundamental right from an opinion that never employed the usual *Glucksberg* analysis for identifying such rights.” *Id.* at 1237.

170. *Id.* at 1239-44. In the careful description part of the *Glucksberg* analysis, the court decided that the real right at stake in this case was the ability to “sell and purchase sexual devices,” rather than a broad right to sexual privacy. *Id.* at 1241-42.

ute, prohibited the sale and distribution of sexual devices.¹⁷¹ The plaintiffs ran a business that sold “sexual devices by internet and mail, and . . . distribute[d] sexual devices ordered in Texas by mail and common carrier.”¹⁷² They brought a lawsuit challenging the constitutionality of the Texas statute.¹⁷³ The Fifth Circuit agreed with the plaintiffs and rejected Texas’s attempt to frame the right at issue so narrowly as simply a right to stimulate genital organs.¹⁷⁴ While the Eleventh Circuit refused to extend *Lawrence v. Texas* to commercial activity, the Fifth Circuit held that *Lawrence* recognized not just “a right to engage in the sexual act itself, but instead a right to be free from governmental intrusion regarding ‘the most private human contact, sexual behavior.’”¹⁷⁵ The Fifth Circuit found that *Lawrence* required it to decide “whether the Texas statute impermissibly burden[ed] the individual’s substantive due process right to engage in private intimate conduct of his or her choosing.”¹⁷⁶ The court found that because individuals could not purchase sexual devices in the state of Texas, the statute “heavily burden[ed]” the right at issue.¹⁷⁷ This was consistent with the reasoning in *Carey v. Population Services International*¹⁷⁸ and *Griswold v. Connecticut*,¹⁷⁹ “where the [Supreme] Court held that

171. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 740-41 (5th Cir. 2008); see also TEX. PENAL CODE ANN. §§ 43.21-23, *invalidated by Reliable Consultants, Inc.*, 517 F.3d 738. Section 43.21(a)(7) defined “obscene device” as “a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.” *Id.* § 43.21(a)(7). Section 43.23 made it a crime if a person “knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.” *Id.* § 43.23(a).

172. *Reliable Consultants, Inc.*, 517 F.3d at 742. The plaintiffs did not own any businesses in the state of Texas, but wished to increase their presence in the state and were attempting to challenge the statute in an effort to preempt any prosecution for that increased presence. *Id.*

173. *Id.* at 742-43. Texas tried to argue that the plaintiffs did not have standing to bring the lawsuit on behalf of individual users. *Id.* The Fifth Circuit rejected this argument. *Id.* at 743. It noted the line of Supreme Court cases holding that suits claiming that bans on certain commercial activities burden an individual’s due process rights can be brought by those who sell the products. *Id.*

174. *Id.* at 743-44. The plaintiffs framed “the right at stake [as] the individual’s substantive due process right to engage in private intimate conduct free from government intrusion.” *Id.* at 743.

175. *Id.* at 744.

176. *Id.*

177. *Id.*

178. See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-90 (1977); see *supra* notes 86-103 and accompanying text.

179. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); see *supra* notes 61-70 and accompanying text.

restricting commercial transactions unconstitutionally burdened the exercise of individual rights.”¹⁸⁰

V. THE PRE-*LAWRENCE* CASES SHOULD SERVE AS THE GUIDE TO OVERTURNING ANTI-VIBRATOR STATUTES

Creating a new fundamental right is an incredibly difficult endeavor, and courts do not take such a creation lightly. Therefore, rather than attempting to create a fundamental right for the use of sexual devices, this Note argues it is more practical to place the issue within a pre-existing fundamental right. Due to the fact that sexual devices and contraceptives are similar in their history of regulation, this Note will further contend that the utilization of sexual devices can be analogized to the purposes of contraceptives, the use of which has been ruled to be fundamentally protected. By applying the Supreme Court case law prior to *Lawrence*, this Note finds a protected right for the usage of sexual devices. Finally, this Note will explain the difference in review of a statute affecting a fundamental right and the importance of that review.

A. *A Constitutional Right to Sex?*

The so-called “sexual freedom” cases, which include *Griswold*, *Eisenstadt*, and *Carey*, have led some scholars to contemplate whether there is a “right to sex” embodied in these cases,¹⁸¹ which is based on the idea that there is “a right to engage in sexual activities for purposes other than reproduction.”¹⁸² In *Carey*, the Supreme Court stated that “[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices,”¹⁸³ which include such things as “procreation, contraception, family relationships, and child rearing and education.”¹⁸⁴ There is a clear trend in the courts towards recognizing that intimate relationships are no longer, if they ever were, for purely procreative purposes. Scholars have argued that if there was no constitutional right to non-procreative sex, then the Court would not have struck down the anti-contraceptive laws, because these “laws do not really deprive people of procreative control,” as indi-

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

181. See Holt, *supra* note 14, at 939 (citing Cruz, *supra* note 104, at 316).

182. *Id.*

183. *Carey*, 431 U.S. at 685.

184. *Id.* at 684-85 (citations omitted) (quoting *Roe v. Wade*, 410 U.S. 113, 152-53 (1973)).

viduals could just remain abstinent.¹⁸⁵ The Court reaffirmed this trend in the *Lawrence* decision, where it struck down the Texas anti-sodomy law as being unconstitutional.¹⁸⁶

When creating a new fundamental right in the field of constitutional law and privacy, the Supreme Court has stated that they must “‘exercise the utmost care whenever [it is] asked to break new ground in this field.’”¹⁸⁷ Creating a fundamental right can be incredibly difficult; a party must properly frame the right and then demonstrate that it is deeply rooted in the nation’s history. Accordingly, it is perhaps best for those challenging anti-vibrator statutes, like those in Alabama and Texas, to include the sale and purchase of sexual devices in an already existing right.

B. *Why the Regulation of the Sale and Distribution of Vibrators is Like the Regulation of the Sale and Distribution of Contraceptives*

What do sexual devices, birth control pills, and condoms have in common? For one, they all have been, or currently are, regulated by state statutes.¹⁸⁸ Additionally, the statutes that prohibited the sale of contraceptives were very similar to the current statutes that prohibit the sale and distribution of sexual devices. For instance, in the *Eisenstadt* case, the Court evaluated a Massachusetts statute¹⁸⁹ that prohibited the distribution of “any drug, medicine, instrument or article whatever for the prevention of conception.”¹⁹⁰ The statute included an exemption whereby a registered physician was able to prescribe contraceptives to married persons and a pharmacist was allowed to furnish these items with the prescription of a physician.¹⁹¹

The Massachusetts Supreme Judicial Court read the exemption provisions to mean that anyone who was not either a registered physician or a pharmacist would be charged with a felony if they

185. See, e.g., Holt, *supra* note 14, at 940.

186. See *Lawrence v. Texas*, 539 U.S. 558, 572-79 (2003).

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

188. See generally *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (reviewing statutes that regulated the use of birth control in the state of Connecticut); *Williams v. Att’y Gen.*, 378 F.3d 1232, 1233 (11th Cir. 2004) (addressing the regulated sale, and in turn, the use of sexual devices in the state of Alabama).

189. *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972) (discussing MASS. GEN. LAWS ch. 272, § 21).

190. *Id.* at 440-41 (quoting MASS. GEN. LAWS ch. 272, § 21).

191. *Id.* at 441-42.

distributed any article to be used in the prevention of conception.¹⁹² The statute essentially allowed doctors to prescribe contraceptives to married couples to prevent pregnancy, but not to single individuals.¹⁹³ The Supreme Court found the statute unconstitutional on the basis of the Equal Protection clause.¹⁹⁴

The current Alabama statute prohibits any person or business from distributing any device marketed mainly “for the stimulation of human genital organs for any thing of pecuniary value.”¹⁹⁵ A person who violates the statute is guilty of a misdemeanor and, if convicted, could be fined up to \$10,000.¹⁹⁶ Notably, however, the current Alabama statute also has an exemption provision, as did the statute at issue in *Eisenstadt*. The Alabama statute’s exemption provides that “[i]t shall be an affirmative defense to a charge of violating Sections 13A-12-200.2 and 13A-12-200.3 that the act charged was done for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose.”¹⁹⁷

Likewise, in *Carey*, the challenged statute prohibited the sale and distribution of any contraceptive to a person under the age of sixteen;¹⁹⁸ while the statute allowed a “licensed pharmacist” to distribute the contraceptives, they could not “advertise[] or display” contraceptives.¹⁹⁹ The *Carey* statute, which was held unconstitutional, also included a provision that allowed a doctor to prescribe the contraceptives, paralleling the Massachusetts statute in *Eisenstadt*, and the statute prohibiting the sale of sexual devices in Alabama.²⁰⁰

The exemptions provided by the various statutes are an acknowledgment that there is a medical need for both contraceptives and sexual devices, and while both contraceptives and sexual devices are used in non-procreative-sexual activity, they also have legitimate medical purposes.

192. *Id.*

193. *Id.* at 442.

194. *Id.* at 454-55.

195. ALA. CODE § 13A-12-200.2(a)(1) (LexisNexis 2005).

196. *Id.*

197. § 13A-12-200.4.

198. *Carey v. Population Servs. Int’l.*, 431 U.S. 678, 681 n.1 (1977) (discussing N.Y. EDUC. LAW § 6811(8) (McKinney 1972)).

199. *Id.* (quoting § 6811(8)).

200. *Id.* at 678 (discussing N.Y. EDUC. LAW § 6807(b) (McKinney 1972)); see *supra* notes 191, 197 and accompanying text.

1. The Similarities Between Contraceptives and Sexual Devices

The Eleventh and the Fifth Circuits, however, are split on how to apply *Lawrence* to their anti-vibrator statutes. As stated earlier, the Eleventh Circuit, in *Williams v. Attorney General*, declined to extend the ruling in *Lawrence* to the Alabama anti-vibrator statute.²⁰¹ In contrast, the Fifth Circuit, in *Reliable Consultants, Inc. v. Earle*, ruled that *Lawrence* was broad enough to cover the anti-vibrator statute in Texas.²⁰² While the two circuits disagree, both failed to properly make the analogy to the circumstances in *Griswold*, *Eisenstadt*, and *Carey*.

Much like with contraceptives, sexual devices are used by married and un-married persons alike, not exclusively by women.²⁰³ Contraceptives are used for multiple reasons, such as the prevention of pregnancy and sexually transmitted diseases.²⁰⁴ In June 2000, the National Institutes of Health (NIH), along with the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the United States Agency for International Development (USAID), produced a fact sheet stating that “[l]atex condoms, when used consistently and correctly, are highly effective in preventing the sexual transmission of HIV . . . [and can] reduce[] the risk of other sexually transmitted diseases.”²⁰⁵

At the trial level, one of the plaintiffs in *Williams*,²⁰⁶ an owner and operator of “Saucy Lady, Inc.,”²⁰⁷ explained that many of those who attended her sale parties purchased said devices “because they prefer to avoid sexual relations with others, due to prior negative relationships, or the risk of sexually transmitted diseases, or other risks associated with developing an intimate relationship.”²⁰⁸ An-

201. *Williams v. Att’y Gen.* 378 F.3d 1232, 1233 (2004).

202. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (2008); *see supra* notes 175-176.

203. *See* Indiana University, *Vibrator Use Common, Linked to Sexual Health*, SCIENCE DAILY (June 29, 2009), <http://www.sciencedaily.com/releases/2009/06/090629100643.htm>; *see also* Banerjee, *supra* note 50 (reviewing a book written by Anne Semans, where the author’s main purpose was to “remove the stigma of sex toys as the companions of lonely women and introducing them into couple’s [sic] love play”).

204. DEP’T OF HEALTH AND HUMAN SERV., Ctrs. for Disease Control and Prevention, *Condoms and STDs: Fact Sheet for Public Health Personnel 1-3*, http://www.cdc.gov/condomeffectiveness/docs/Condoms_and_STDS.pdf (last visited Oct. 22, 2010).

205. *Id.* at 1.

206. *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1264 (N.D. Ala. 2002), *rev’d*, 378 F.3d 1232.

207. *Id.* at 1264.

208. *Id.* at 1265.

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other plaintiff, Jane Doe, “use[d] the devices to avoid sexually transmitted diseases, while remaining sexually active.”²⁰⁹ Two recent Indiana University studies involving sexual device use among adult American men and women found “that vibrator use is associated with more positive sexual function and being more proactive in caring for one’s sexual health.”²¹⁰

The similarity between sexual devices and contraceptives is not a new or entirely unexplored concept. In 2006, New Delhi, India was undergoing a similar battle regarding anti-vibrator statutes.²¹¹ Sex toys are banned in India, but the market is quite large.²¹² “Sexologists say that the ban in India on these toys is ridiculous, since they are the safest, best and cheapest form of sexual entertainment.”²¹³ Dr. Prakash Kothari, India’s leading advocate for sexual devices, believes that these sexual devices “help in facilitating safe sex thus preventing unwanted pregnancies, controlling population growth and [the] spread of HIV.”²¹⁴ He further finds it ironic that the Indian government actively distributes free condoms, but concurrently bans sexual devices, which similarly help promote safe sex.²¹⁵ Kristin Fasullo, a scholar, notes that “[m]edical experts have also lauded sexual devices as safe alternatives in an era of HIV/AIDS and high incidence of sexually transmitted infections.”²¹⁶

Not only do sexual devices assist in protecting against sexually transmitted diseases, but both sexual devices and certain contraceptives have medical benefits that cannot be overlooked. “Oral contraceptives have been found to reduce incidence of PID (pelvic inflammatory disease) . . . [and] the risk of ectopic pregnancy.”²¹⁷ Additionally, using birth control pills for one or more years can reduce the risk of endometrial cancer.²¹⁸

209. *Id.* at 1266.

210. Indiana University, *supra* note 203.

211. Atul Sethi, *Palika a Haven for Adult Toys*, THE TIMES OF INDIA (Nov. 26, 2006), <http://timesofindia.indiatimes.com/city/delhi/Palika-a-haven-for-adult-toys/articleshow/576431.cms>.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. Kristin Fasullo, Note, *Beyond Lawrence v. Texas: Crafting a Fundamental Right to Sexual Privacy*, 77 FORDHAM L. REV. 2997, 3009 (2009).

217. UNIV. OF WIS. UNIV. HEALTH SERV., BENEFITS OF BIRTH CONTROL PILLS, (Aug. 2000), <http://wellness.uwsp.edu/medinfo/handouts/Benefits%20of%20Birth%20Control%20Pills.pdf>.

218. *Id.*

The Food and Drug Administration also acknowledges the medical usefulness of certain sexual devices.²¹⁹ Two of their regulations, entitled “[p]owered vaginal muscle stimulator for therapeutic use”²²⁰ and “[g]enital vibrator for therapeutic use”²²¹ respectively, implicitly recognize that the same sexual devices prohibited by statute in *Williams* and *Reliable Consultants, Inc.* have medicinal value. In *State v. Hughes*, the Kansas Supreme Court heard a doctor’s testimony that the vibrator is incredibly helpful for women who “may be particularly susceptible to pelvic inflammatory diseases, psychological problems, and difficulty in marital relationships.”²²² The trial court in *Williams*²²³ noted that several of the plaintiffs used the banned devices for therapeutic purposes. One woman, for example, had a chronic disability that made it incredibly painful to engage in traditional intercourse with a partner, making the use of the devices a necessary part of her intimate relationships.²²⁴

Such findings do not discount the use of sexual devices purely for purposes of enjoyment. In her article, *Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States*, Danielle Lindemann expresses concern over reducing the value of these devices to purely medical applications, as they were in the past, and not recognizing their use by women for purposes of sexual pleasure.²²⁵ While Ms. Lindemann’s argument is a valid one, it risks pigeonholing the devices by ignoring the fact that they are not used by women alone. As the Indiana University studies show, fifty-three percent of women and forty-five percent of men in the United States reportedly use these devices.²²⁶ The studies found that

219. Powered Vaginal Muscle Stimulator for Therapeutic Use, 21 C.F.R. § 884.5940 (2010); Genital Vibrator Therapeutic Use, 21 C.F.R. § 884.5960.

220. § 884.5940 (identifying that the “device is intended and labeled for therapeutic use in increasing muscular tone and strength in the treatment of sexual dysfunction”).

221. § 884.5960 (identifying the “device as intended and labeled for therapeutic use in the treatment of sexual dysfunction or [as] an adjunct to Kegel’s exercise”).

222. *State v. Hughes*, 792 P.2d 1023, 1025 (Kan. 1990).

223. *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1266 (N.D. Ala., 2002), *rev’d*, 378 F.3d 1232 (11th Cir. 2004).

224. *Id.*

225. Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326, 342 (2006).

226. Indiana University, *supra* note 203 (discussing studies funded by the maker of Trojan brand sexual-health products which looked at the sexual habits of 2,056 women and 1,047 men between the ages of eighteen and sixty). The studies noted that female “[v]ibrator users were significantly more likely to have had a gynecological exam during the past year” and male users “were more likely to report participation in sexual

ninety-one percent of men who used vibrators did so with a female partner.²²⁷ The study tends to support the theory that, like contraceptives, these devices are an integral part of a healthy sexual relationship between two people. It is a legitimate concern for critics to want to ensure that society does not regress back to a time when vibrators were thought to be purely medical devices for curing hysteria.²²⁸ However, it is inaccurate to assume that because the other benefits and uses of sexual devices may be therapeutic—thus validly bringing these devices into the realm of constitutional protection—society is reverting back to paternalism.

2. Applying *Griswold*, *Eisenstadt*, and *Carey*

While the *Lawrence* decision might have reiterated that intimate non-procreative relationships are protected from government intrusion, it did not involve any non-biological devices that were being regulated by the state. Due to the fact that contraceptives and sexual devices have many similarities, in order to show that these anti-vibrator statutes are unconstitutional, a better analysis involves the same rationale applied by the Supreme Court in cases challenging anti-contraceptive laws.

There is a strong conceptual similarity between contraceptives and sexual devices because both are used by married and un-married persons, and there have been various attempts to regulate their sale. With the exception of the statute in *Griswold*, which prohibited the actual use of contraceptives,²²⁹ the other anti-contraceptive statutes attempted to regulate their sale and distribution,²³⁰ much like the current anti-vibrator statutes do.

health promoting behaviors.” *Id.*; see also Romi Lassally, *Sex Toys for Tweens*, Aug. 27, 2009, http://www.huffingtonpost.com/romi-lassally/sex-toys-for-tweens_b_270300.html (a post debating whether mothers of teenage daughters should purchase sex toys for their daughters). The post mentions an *Oprah* segment where a “sexpert” suggested that this might encourage abstinence. Lassally, *supra*. Dr. Karen Rayne weighed in on when a young girl should be exposed to such devices as a vibrator, noting that “the problem with going too young is that it might just scare her off masturbation entirely. In general, I would probably suggest when she turns sixteen. However, with the caveat that some girls will put them to good use younger.” *Id.*

227. Indiana University, *supra* note 203.

228. Lindemann, *supra* note 225, at 343.

229. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (involving a Connecticut statute that made it illegal for a person to use “any drug . . . or instrument for the purpose of preventing conception”).

230. See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 680 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 440-41 (1972); see also *supra* notes 195-200 and accompanying text.

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The Court in *Eisenstadt* found that the Massachusetts law that prohibited the sale of contraceptives would “materially impair the ability of single persons to obtain contraceptives.”²³¹ The statute in question in *Eisenstadt* allowed single persons to purchase contraceptives to prevent diseases, but not conception.²³² This is similar to the anti-vibrator statutes that allow the distribution of sexual devices for therapeutic purposes from a doctor or counselor, but not for other purposes or from a business other than a doctor’s office.²³³ The Court in *Carey* noted that “decisions whether to accomplish or to prevent conception are among the most private and sensitive.”²³⁴ Likewise, sexual devices are used by individuals and couples, and are often used to prevent pregnancy and the transmission of sexually transmitted diseases.²³⁵ *Carey* further held that “[a] total prohibition against [the] sale of contraceptives, for example, would intrude upon individual decisions in matters of *procreation* and contraception as harshly as a direct ban on their use.”²³⁶ Essentially, the Court has recognized that there is a right among individuals to make decisions impacting their sexual activity, including the personal determination of which items, meant to assist or prevent contraception, will be brought into their bedroom. The Court noted that a prohibition on the sale of contraceptives “might have an even more devastating effect upon the freedom to choose contraception.”²³⁷

Likewise, even though the *use* of sexual devices is allowed, the prohibition on their *sale* significantly burdens a person’s right to invite those items into their bedroom for the purposes of sexual intimacy, not for procreative purposes. If persons choose to involve sexual devices in their intimate relationships (or alone) in hopes of preventing the acquisition of sexually transmitted diseases and unwanted pregnancy, the prohibition of their sale, like that of contraceptives, seriously limits the “distribution channels to a small fraction of the total number of possible retail outlets . . . [and] reduces the opportunity for privacy of selection and purchase.”²³⁸

231. *Eisenstadt*, 405 U.S. at 446.

232. *Id.* at 449.

233. *Williams v. Att’y Gen.*, 378 F.3d 1232, 1233 (11th Cir. 2004).

234. *Carey*, 431 U.S. at 685.

235. *See Williams v. Pryor*, 220 F. Supp. 2d 1257, 1266 (N.D. Ala. 2002), *rev’d*, 378 F.3d 1232.

236. *Carey*, 431 U.S. at 687-88 (emphasis added).

237. *Id.* at 688.

238. *Id.* at 689.

The cases pre-*Griswold*, *Eisenstadt*, and *Carey* dealing with contraceptive statutes and their reasoning read very similar to the current court cases refusing to deem anti-vibrator statutes unconstitutional. In 1956, in *State v. Kohn*, the New Jersey Supreme Court upheld a law that prohibited the sale of contraceptives without just cause.²³⁹ The “just cause” in the statute was found to mean cause found by a physician or druggist, perhaps being prescribed to prevent a disease.²⁴⁰ Because the statute had this “just cause” provision, which the court took to mean for medical purposes, the statute was upheld.²⁴¹

Similarly, in *Williams v. Attorney General*, the Eleventh Circuit found it important that the statute provided an exemption for “sales of sexual devices” for medical purposes.²⁴² This reasoning ignores the fact that preventing the in-state sale and distribution severely limits the manner in which people can purchase these devices for purposes allowed under the statute. As the doctor testified in *State v. Hughes*, intra-state unavailability severely impacts an individual’s ability to purchase sexual devices; this is true even with the option of going to another state to purchase them.²⁴³

The variety of uses and purposes of sexual devices, like those of contraceptives, coupled with the introduction of the devices into an intimate relationship, make *Griswold*, *Eisenstadt*, and *Carey* the correct line of cases under which to analyze these anti-vibrator statutes.

3. Why the Statutes Would Fare Better Under the Type of Review Granted to an Already Existing Fundamental Right

The Due Process Clause “provides heightened protection against government interference with certain fundamental

239. *State v. Kohn*, 127 A.2d 451, 455 (N.J. 1956). The New Jersey statute stated:

“Any person who, without just cause, utters or exposes to the view of another, or possesses with intent to utter or expose to the view of another, or to sell the same, any instrument, medicine or other thing, designed or purporting to be designed for the prevention of conception or the procuring of abortion, or who in any way advertises or aids in advertising the same, or in any manner, whether by recommendation for or against its use or otherwise, gives or causes to be given, or aids in giving any information how or where any such instrument, medicine or other thing may be had, seen, bought or sold, is a disorderly person.”

Id. at 452 (quoting N.J. STAT. ANN. § 2A:170-75 (repealed 1978)).

240. *Id.* at 454-55.

241. *Id.* at 455.

242. *Williams v. Att’y Gen.*, 378 F.3d 1232, 1233 (11th Cir. 2004).

243. *State v. Hughes*, 792 P.2d 1023, 1025 (Kan. 1990).

rights.”²⁴⁴ In *Carey*, the Supreme Court ruled that prohibitions on the sale of contraceptives “may be justified only by a compelling state interest and must be narrowly drawn to express only the legitimate state interests at stake.”²⁴⁵ While this heightened scrutiny applies to statutes affecting fundamental rights, it does not apply to statutes affecting subject matters like economics or tax.²⁴⁶ If a fundamental right is not implicated, the court will apply a more deferential standard to the statute known as “rational basis review.”²⁴⁷ Rational basis review does not require the same level of scrutiny by a reviewing court and only requires that the statute be “rationally related to a legitimate governmental interest.”²⁴⁸ When a statute is examined under rational basis review, the burden is on the challenging party to negate “every conceivable basis which might support it.”²⁴⁹ Under this review, there is a presumption of constitutionality, and judicial review is not a time for the courts to second-guess legislative choices.²⁵⁰ When a statute is reviewed under a high legislative deference standard such as rational basis review, it is rare for a court to hold that statute unconstitutional and the presumption of validity will prevail,²⁵¹ unless it is based on “grounds wholly irrelevant to the achievement of the State’s objectives.”²⁵² This standard lies in vast contrast to the heightened review that a statute affecting a fundamental right will receive. A heightened review standard, while not always reaching strict scrutiny,²⁵³ does not provide the same deference to a state’s justification for a statute as granted under rational basis review. Such heightened scrutiny often involves a balancing of the right asserted and the government purpose for regulating that asserted right.²⁵⁴

244. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

245. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 688 (1977) (quoting *Roe v. Wade*, 410 U.S. 113, 155 (1973)).

246. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985).

247. *Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008).

248. *Id.* at 55.

249. *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

250. *Id.*

251. *Id.*

252. *Cook*, 528 F.3d at 55 (quoting *Heller*, 509 U.S. at 324) (holding that the military’s “Don’t Ask, Don’t Tell” statute did not violate the Due Process Clause).

253. Strict scrutiny requires that a statute be “narrowly tailored to serve a compelling state interest.” *Id.*

254. *Id.* at 55-56; see also *Riggins v. Nevada*, 504 U.S. 127, 135-36 (1992) (balancing the interest of a person rejecting psychotropic drugs against the government’s interest in trying a competent criminal defendant); *Cruzan v. Dir. of Mo. Dep’t of Health*,

The Eleventh and Fifth Circuits both used *Lawrence v. Texas* to rule on the Alabama and Texas statutes respectively.²⁵⁵ Each circuit, using the same Supreme Court case, reached very different conclusions. The proper standard of review to apply to the anti-vibrator statutes has been unclear to lower courts, particularly after *Lawrence v. Texas*.²⁵⁶ The First Circuit noted that several courts read *Lawrence* to have applied a rational basis standard of review,²⁵⁷ others have claimed the Court used strict scrutiny,²⁵⁸ and yet others, including the First Circuit, have read *Lawrence* to be neither rational or strict, but an in-between standard that requires a balancing of interests.²⁵⁹ The difference in outcome when applying these standards can be seen in the current circuit split. When applying rational basis review, the Eleventh Circuit ruled that the Alabama anti-vibrator statute did not violate the Due Process Clause and found public morality sufficed as a legitimate government interest.²⁶⁰ In contrast, when the Fifth Circuit applied a heightened scrutiny test (what it believed to be the proper standard after *Lawrence*), it found the Texas anti-vibrator statute to “impermissibly burden[]” “the right to engage in private intimate conduct of his or her choosing.”²⁶¹

The current circuit split demonstrates the issue with framing the right that these anti-vibrator statutes affect,²⁶² which is a principle reason for arguing that the use of sexual devices falls within the already existing right to contraception. The split additionally high-

497 U.S. 261, 278-79 (1990) (balancing “protected liberty interest” in declining unwanted medical treatment with the government’s interest in promoting life); *Youngberg v. Romeo*, 457 U.S. 307, 320-22 (1982) (balancing right of a person to avoid bodily restraint against the State’s reasons for justifying restraint).

255. See *supra* notes 166-170, 175-180 and accompanying text.

256. See *Cook*, 528 F.3d at 49-52.

257. *Id.* at 51 n.5.

258. *Id.* at 51 n.6.

259. *Id.* at 51 n.7.

260. *Williams v. Morgan*, 478 F.3d 1316, 1318 (11th Cir. 2007).

261. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743-44 (5th Cir. 2008). The Eleventh Circuit used the “impermissibl[y] burdens” test. *Id.* at 743. *Casey* created “the ‘undue burden’ test, which balance[s] the state’s legitimate interest in potential human life against the extent of the imposition on the woman’s liberty interest” in the autonomy of her own body. *Cook*, 528 F.3d at 55 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992)).

262. *Reliable Consultants, Inc.* framed the right at issue as a “right to engage in private intimate conduct of his or her choosing.” *Reliable Consultants, Inc.*, 517 F.3d at 744. *Williams* framed the right as “whether the Constitution protects a right to sell and buy sexual devices, [as well as] a right to use such devices.” *Williams v. Att’y Gen.*, 378 F.3d 1232, 1242 (11th Cir. 2004) (emphasis omitted).

lights the importance of the review standard applied to these statutes. If the use of sexual devices does not receive the form of heightened scrutiny typically afforded a fundamental right, any government interest will suffice in justifying the ban on buying and selling sexual devices, leading to results such as the one seen in the Eleventh Circuit in *Williams*.

When the right to buy and sell sexual devices is placed under the existing right that protects access to contraception, the same standard of review applied in *Carey v. Population Services International* and *Eisenstadt v. Baird* will be applied. In *Carey*, the Supreme Court ruled “that when a State . . . burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.”²⁶³ The Court rejected the State’s rationale for limiting the sale of contraceptives to minors, which the State argued was to stress “the seriousness with which the State views the decision to engage in sexual intercourse.”²⁶⁴ In *Eisenstadt*, the State’s interest in protecting “morals through ‘regulating the private sexual lives of single persons’” was rejected, as the Court believed the actual goal was purely to limit the sale of contraception.²⁶⁵ Texas had similar justifications for its anti-vibrator statute, which were “‘discouraging prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and prohibiting the commercial sale of sex.’”²⁶⁶ In Alabama, the State argued that their interest in protecting public morality was a legitimate government interest surviving rational basis review of the anti-vibrator statute.²⁶⁷ Had the Alabama statute been reviewed under the standard set forth in *Carey*, it is highly unlikely the government interest would have been sufficient justification for the burden on purchasing the sexual devices.

263. *Carey v. Population Serv. Int’l*, 431 U.S. 678, 696 (1977).

264. *Id.* at 697.

265. *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972) (quoting *Sturgis v. Att’y Gen.*, 260 N.E.2d 687, 690 (Mass. 1970)).

266. *Reliable Consultants, Inc.*, 517 F.3d at 745 (quoting the State’s “asserted interests”).

267. *Williams v. Morgan*, 478 F.3d 1316, 1324 (11th Cir. 2007).

CONCLUSION

There is currently an ongoing debate about how to frame the right at issue here.²⁶⁸ However, rather than attempting to try and frame an entirely different fundamental right, this Note has suggested adding the purchase and sale of sexual devices under the umbrella of the right encompassing the purchase and sale of contraceptives. As the Supreme Court noted in *Washington v. Glucksberg*, the addition of another fundamental right is not a task that is to be taken lightly. There appears to be a real hesitation amongst the courts, the lower courts in particular, to add an additional right to the already existing list. The history of sexual devices in the United States, and the current studies on their use, allow sexual devices to be fairly easily compared to contraceptives. The similarities between the uses and the regulation of sexual devices and contraceptives would allow a court to protect the purchase of sexual devices without having to go through the burdensome *Glucksberg* analysis. Additionally, due to the vagueness of the *Lawrence* decision with regards to whether it actually created a new broader fundamental right to privacy, previous cases offer more guidance regarding how to defeat these statutes attempting to regulate the commercial activity at issue. If the courts accept this analogy, they will most likely follow the reasoning put forth in the line of cases overruling the anti-contraceptive statutes, and therefore hold the anti-vibrator statutes unconstitutional.

*Julie McKenna**

268. See Fasullo, *supra* note 216, at 3009 (arguing for a broader fundamental right to sexual privacy); Lindemann, *supra* note 225, at 326 (arguing that framing the right around the medical uses of sexual devices ignores the necessity of a right for a woman to use these devices in whichever way they choose).

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