THE CONSTITUTIONAL VALIDITY OF CIRCUIT COURT OPINIONS LIMITING THE AMERICAN RIGHT TO SEXUAL PRIVACY

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INTRODUCTION

Recently, a Texan mother of three who works primarily out of her home advised two customers on which products they should select from her business's catalog, and on how these products worked. Then, she filled their order. The products were sex toys, and the customers said they were a young married couple in search of sexual regeneration. Unfortunately for her, however, the "couple" turned out to be undercover police officers.[1] Joanna Webb, the woman in question, was charged with a misdemeanor under Texas obscenity law, which makes it a crime to promote a device "designed or marketed as useful primarily for the stimulation of human genital organs."[2] Nearly identical Anti-Obscenity laws exist in Alabama, Georgia and Mississippi.[3]

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[1] Joanna Grossman, *Is There a Constitutional Right To Promote the Use of Sex Toys?* Find Law's Legal Commentary Writ, *available at* http://writ.news.findlaw.com/grossman/20040127.html (Jan. 27, 2004).

[2] *Id.* Luckily for Joanna Webb the charges against her were dropped. If convicted she could have faced up to a year in prison and a $4,000 fine. She would also probably lose the ability to return to her former career as a grade school teacher. Webb did not apparently violate Texas law because she sold sex toys; she did so because she promoted them—explaining their use and purpose. Adult stores in Texas sell the same kind of products Webb sold. But the stores deem them "novelty items" and provide no information about their intended use. This leads to a paradoxical situation. Employees of adult toy stores may be less vulnerable to prosecution than an individual who gives a prohibited device to a friend, and suggests that she use it. "What we do is not obscene," said Pat Davis, president of Passion Parties, which has 5,000 salespeople nationwide. "We're all about education and freedom. The law in Texas should not exist." Davis said the company had paid part of Webb's legal bills and also hosted her and her husband on a one-week vacation to the San Francisco Bay Area, as a gesture of support. Webb told the Fort Worth Star-Telegram that the legal charges had forced her and her husband to declare bankruptcy and sell their boat and camper. She is still hosting sex toy parties outside Johnson County, which is southwest of Dallas. *See* Steve Rubenstein, *Brisbane,* S.F CHRON., July 30, 2004 at B3.

[3] *See* Jonathan Ringel, *11th Circuit Nixes Sex Toys, Sex Rights,* FULTON COUNTY DAILY

American citizens expect a high degree of freedom from governmental intrusion into the intimate details of their personal lives.[4] Married couples, for example, regard their sex lives as personal and not a matter of government concern.[5] Based on the number of people in the United States who use adult novelty products, it would appear that a significant number of citizens expect freedom from governmental intrusion into this aspect of their personal lives as well. According to the National Sexual Health Survey (NSHS), ten percent of sexually active adults use vibrators and/or other sex toys in partner sex, or 16.3 million adults, if survey findings are projected to the national population.[6] The percentage of adults who use sex toys in solo sex is not available.[7] Sex toys are most widely used in partner sex by adults of 30 to 49 years of age.[8] According to NSHS, thirteen percent of those who are between the ages of 30 and 49 admit they use them, compared with just nine percent of 18- to 29-year-olds and eight percent of 50- to 59-year-olds.[9] Adults age 60 and older are the least likely to bring a sex toy to bed; only four percent of this age

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REPORT, July 29, 2004, Vol. 7 No. 29. Alabama's Anti-Obscenity Enforcement Act prohibits among other things, the commercial distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value," ALA. CODE § 13A-12-200.2 (2004); Georgia's statute makes it an offense to sell, lend, rent, lease, give, or otherwise disseminate "any device designed or marketed as useful primarily for the stimulation of human genital organs," GA. CODE ANN. § 16-12-80 (2004); Mississippi law holds 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," MISS. CODE ANN. § 97-29-105 (2004).

4 *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (exploring "the right to be let alone" and characterizing this as "the most valued by civilized men"); *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 99-103 (Phillips & Bradley eds., 1949) (discussing the importance of liberty and freedom in America); Mark John Kappelhoff, Note, Bowers v. Hardwick*: Is There a Right to Privacy?,* 37 AM. U. L. REV. 487, 487 (1988) (arguing that freedom from government intrusion is an inherent principle of American society); E. Lauren Arnault, Comment, *Status, Conduct, and Forced Disclosure: What Does* Bowers v. Hardwick *Really Say?,* 36 U.C. DAVIS L. REV. 757, 758 (2003) (analyzing the Third and Fourth Circuit split over the right to privacy regarding sexual orientation, concluding that sexual orientation is entitled to privacy protection).

5 Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that states cannot prohibit married couples from using contraceptives in the privacy of their homes); *see also* Arnault, *supra* note 4, at 758. R

6 John Fetto, *Your Questions Answered-Letter to the Editor,* AMERICAN DEMOGRAPHICS, *available at* http://www.findarticles.com/p/articles/mi_m4021/is_2002_May_1/ai_88679446 (May 1, 2002). National Sexual Health Survey is a telephone poll of 7,700 adults ages 18 to 90 (by far the most ambitious representative sex survey to date), conducted in 1995 and 1996 by researchers at the University of California, San Francisco. According to the poll, seventy-eight percent of all respondents said they were sexually active, meaning they had partner sex in the twelve months prior to the survey.

7 *Id.*

8 *Id.*

9 *Id.*

group reported using sex toys during partner sex.[10] Couples with high household incomes are notably more likely to use an adult novelty product than those with low incomes.[11] Marital status is another important factor when considering who is using sex toys.[12] Finally, a Durex 2004 global sex survey showed that the main users of sex toys are women.[13]

Although the Supreme Court has upheld the right to keep certain personal information private, the United States Constitution does not clearly delineate an individual's right to privacy.[14] As a result, the boundaries of an individual's right to privacy are uncertain.[15] Despite this confusion, the Supreme Court has determined that a right to privacy is implicit in the Constitution.[16] The Court has framed this right as fundamental, giving it a heightened degree of constitutional protection.[17] However, determining what is entitled to privacy protection continues to challenge the judiciary.[18] An area of significant

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[10] *Id.*

[11] *See* Fetto, supra note 6. Specifically, thirteen percent of adults with a combined annual income of $60,000 or more report using sex toys, but only seven percent of those with household incomes of less than $20,000 say the same. On a related note, eleven percent of college graduates say they have used a sex toy, compared with eight percent of adults who have not obtained a high school diploma or the equivalent. R

[12] *Id.* Whereas only nine percent of married adults and ten percent of never-married singles admit to using sex toys, one in seven sexually active adults who are separated, divorced, or widowed (fifteen percent) say they use them. According to survey researcher Joe Catania, "[p]eople who are separated, divorced or widowed are throwing off an old self and building a new one." *Id.*

[13] Helen Nugent, *Boots Toys With Idea of Sex on its Shelves,* THE LONDON TIMES, Oct. 23, 2004 at 14.

[14] Arnault, *supra* note 4, at 758; *see also* Lawrence O. Gostin, *Health Information Privacy,* 80 CORNELL L. REV. 451, 495 (1995); Mitchell Lloyd Pearl, Note, *Chipping Away at* Bowers v. Hardwick*: Making the Best of an Unfortunate Decision,* 63 N.Y.U. L. REV. 154, 167 (1988); Melody Torbati, Note, *The Right of Intimate Sexual Relations: Normative and Social Bases for According It "Fundamental Right" Status,* 70 S. CAL. L. REV. 1805, 1816-17 (1997). R

[15] Arnault, *supra* note 4, at 758; *see also* Timothy O. Lenz, *"Rights Talk" About Privacy In State Courts,* 60 ALB. L. REV. 1613, 1613-14 (1997) (examining the controversy over a constitutional right to privacy and the role of judges in attempting to clarify the extent of these rights); Yao Apasu-Gbotsu et al., *Survey on the Law, Survey on the Constitutional Right to Privacy in the context of Homosexual Activity,* 40 U. MIAMI L. REV. 521, 563 (1986) (discussing lack of defined boundaries for right to privacy); Heyward C. Hosch III, Note, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis,* 36 VAND. L. REV. 139, 145-46 (1983) (critiquing lack of clarity pertaining to the extent of individual privacy rights). R

[16] *See* Whalen v. Roe, 429 U.S. 598, 600 (1977); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ; Torbati, *supra* note 14, at 1806; Arnault, *supra* note 4, at 758. R

[17] *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (concluding that personal rights should be deemed fundamental and protected under constitutional guarantee of privacy); Arnault, *supra* note 4, at 758-759;.Torbati, *supra* note 14, at 1806. *See generally* Herbert v. Louisiana, 272 U.S. 312, 316 (1926) (stating that the Due Process Clause requires that state action be consistent with fundamental principles of liberty and justice that lie at the heart of American civil and political institutions). R

[18] Arnault, *supra* note 4, at 759; *see* Lenz, *supra* note 15, at 1614 (examining the difficulty that the judiciary faces when interpreting right to privacy); Apasu-Gbotsu, *supra* R

dispute is the right to sexual privacy.[19]

According to the Eleventh Circuit, Americans do not have a fundamental right to sexual privacy.[20] A split panel has upheld Alabama's Anti-Obscenity Enforcement Act that made the sale of sex toys a crime punishable by up to a year in prison.[21] The Alabama statute prohibits only the sale, but not the use, possession, or gratuitous distribution of sexual devices.[22] The law does not affect the distribution of a number of other sexual products such as ribbed condoms or virility drugs. Nor does it prohibit Alabama residents from purchasing sexual devices out of state and bringing them back into Alabama.[23] Moreover, the statute permits the sale of ordinary vibrators or body massagers that, although useful as sexual aids, are not "designed or marketed . . . primarily" for that particular purpose.[24] Finally, the statute exempts sales of sexual devices "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose.[25]

This note addresses whether the concept of a constitutionally protected right to privacy protects an individual's liberty to purchase sexual devices when intended for lawful, private sexual activity. This note argues that the Eleventh Circuit was incorrect in finding that there is no constitutional right to sexual privacy. The

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note 15, at 563 (noting lack of clarity in the Supreme Court's direction with respect to a right to privacy). R

19 *See* Williams v. Attorney General of Alabama, 378 F.3d 1232 (11th Cir. 2004). In *Williams*, the defendant, Attorney General of Alabama, challenged a decision of the United States District Court for the Northern District of Alabama, which granted summary judgment to plaintiff, a civil liberties organization, and declared that Alabama's Anti-Obscenity Enforcement Act, which prohibited the sale of "sex-toys," was an impermissible burden on a fundamental right to sexual privacy under the Due Process Clause; *see* Arnault, *supra* note 4, at 759; Cass R. Sunstein, *Homosexuality and the Constitution,* 70 IND. L. J. 1, 2 (1992) (highlighting confusion left in the wake of *Bowers v. Hardwick* on rights regarding sexual privacy); Claudia Tuchman, Note, *Does Privacy Have Four Walls? Salvaging* Stanley v. Georgia, 94 COLUM. L. REV. 2267, 2288 (1994) (explaining that the Supreme Court has left the issue of privacy unanswered regarding sexual orientation). R

20 As decided by a 2-1 decision of the Eleventh Circuit Court of Appeals on July 28, 2004; *see Williams*, 378 F.3d 1232; Ringel, *supra* note 3. R

21 *Williams*, 378 F.3d at 1233. The decision extends an emerging division in the court over sexual rights, with Judges Stanley F. Birch Jr, and Rosemary Barkett leading opposing factions. Birch maintains that although the U.S Supreme Court has struck down a Texas law criminalizing homosexual sodomy, Lawrence v. Texas, 539 U.S. 833 (2003), the justices have not decided fully that sexual privacy is a fundamental right protected by the Constitution. Barkett claims that the court is refusing to apply the sodomy decision to laws that violate people's right "to be left alone in the privacy of their bedrooms." *See* Ringel, *supra* note 3. R

22 *Williams*, 378 F.3d at 1233. In fact, the users involved in this litigation acknowledge that they already possessed multiple sex toys.

23 *Id.*

24 *Id.*

25 *Id.* This raises the issue of whether the reason for use should affect the validity of sex toys.

unconstitutionality of statutes criminalizing homosexual sodomy and past Supreme Court decisions dealing with sexuality should serve as precedent.[26]

Part I of this Note summarizes *Williams v. Attorney General of Alabama*. Part II affirmatively answers whether there is a fundamental right to sexual privacy/intimacy. Part III analyzes whether the purchase of sex toys falls within that fundamental right. Finally, Part IV analyzes the validity of the sale of sex toys, concluding that the sale of sex toys is constitutionally protected.

I. *WILLIAMS V. ATTORNEY GENERAL OF ALABAMA*[27]

In *Williams*, the United States Court of Appeals for the Eleventh Circuit refused to recognize a fundamental right to sexual privacy under the Constitution.[28] It was asked to declare Alabama's statute prohibiting the sale of "sex toys" to be an impermissible burden on this right.[29] However, instead the court agreed with Alabama that the statute exercises a time-honored use of state police power—"restricting the sale of sex."[30] Alabama's Anti-Obscenity Enforcement Act prohibits, among other things, the commercial distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value.[31]

The issue addressed by the court was whether the statute, as applied to the involved users and vendors, violates any fundamental right protected under the Constitution.[32] The proper analysis for evaluating this question turns on whether the right asserted by the ACLU falls within the parameters of any presently recognized fundamental right or whether it requires the court to recognize an unarticulated fundamental right.[33] The court began its opinion by reasoning that no Supreme Court precedents, including the recent decision in *Lawrence v. Texas*,[34] are determinative on the question of the existence of such a right.[35] Finding that the ACLU was asking the court to recognize a new fundamental right, the court then applied the analysis

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[26] *See* Lawrence v. Texas, 539 U.S. 833 (2003) (striking down a Texas law making homosexual sodomy a crime in a landmark decision).
[27] 378 F.3d 1232 (11th Cir. 2004).
[28] *Id.*
[29] *Id.* at 1233.
[30] *Id.*
[31] *Id*; *see also* ALA. CODE § 13A-12-200.2 (Supp. 2003).
[32] *Williams*, 378 F.3d at 1234.
[33] *Id.*
[34] 539 U.S. 558 (2003).
[35] *Williams*, 378 F.3d at 1235.

required by *Washington v. Glucksberg*.[36] The court concluded that the asserted right does not clear the *Glucksberg* bar.[37]

In its fundamental rights analysis, the court rejected the ACLU's argument that the use of sexual devices is among those activities that, although not enumerated in the Constitution, are protected under the concept of substantive due process.[38] The court reasoned that while many fundamental rights recognized by Supreme Court precedent implicate matters of personal autonomy and privacy, such rights have been denominated "fundamental" not simply because they implicate deeply personal and private considerations, but because they are "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."[39] Furthermore, it found that the Supreme Court has been presented with repeated opportunities to identify a fundamental right to sexual privacy, but has invariably refrained from doing so.[40]

The court then focused on the Supreme Court's most recent opportunity to recognize a fundamental right to sexual privacy in *Lawrence v. Texas*, and found that the *Lawrence* Court had declined the invitation to recognize such a right. In a recent Eleventh

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[36] 521 U.S. 702 (1997).

[37] *Williams*, 378 F.3d at 1235.

[38] *Williams*, 378 F.3d at 1235; *see* Williams v. Pryor, 41 F. Supp. 2d 1257, 1261 (D. Ala. 1999) [hereinafter *Williams II*] (quoting the ACLU's amended complaint). The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of the law." The most familiar function of this Clause is to guarantee procedural fairness in the context of any deprivation of life, liberty, or property by the State. The users and vendors here did not claim to have been denied procedural due process, instead they relied on the Due Process Clause's substantive component, which courts have long recognized as providing "heightened protection against government interference with certain fundamental rights and liberty interests." *Williams*, 378 F.3d at 1235. According to the ACLU, the State of Alabama, through its prohibition on the commercial distribution of sex toys, intruded into the most intimate places—the bedrooms of its citizens—and the lawful sexual conduct that occurs therein. The ACLU's theory was that while the statute's reach does not directly proscribe the sexual conduct in question, it places, without justification, a substantial and undue burden on the ability of the plaintiffs to obtain devices regulated by the statute. And by restricting sales of these devices to plaintiffs, Alabama acted in violation of 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. *Williams II*, 41 F. Supp. 2d at 1261.

[39] *Williams*, 378 F.3d at 1235.

[40] *Id*; *see, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (noting that the Court "has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults . . . ." *Carey*, 431 U.S. at 694 n.17.). The *Williams* court reasoned that while many of the Court's "privacy" decisions have implicated sexual matters, the Court has never indicated that the mere fact that an activity is sexual and private entitles it to the protection as a fundamental right.

Circuit decision, *Lofton v. Sec. of Dept of Children and Family Servs.*,[41] the court had addressed in some detail the "question of whether *Lawrence* identified a new fundamental right to private sexual intimacy."[42] The *Williams* court concluded that, although *Lawrence* clearly established the unconstitutionality of criminal prohibitions on consensual adult sodomy, "it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right—whether to homosexual sodomy specifically or, more broadly, to all forms of sexual intimacy."[43] In particular, it noted that the *Lawrence* opinion did not employ fundamental-rights analysis and that it ultimately applied rational-basis review, rather than strict scrutiny, to the challenged statute.[44]

Furthermore, the court refused to accept that *Lawrence* recognized a substantive due process right of consenting adults to engage in private intimate sexual conduct, because they were not prepared to infer a new fundamental right from an opinion that never employed the usual *Glucksberg* analysis for identifying such rights.[45] The dissent argued that the right recognized in *Lawrence* was a longstanding right that preexisted Lawrence, thus obviating the need for any *Glucksberg*-type fundamental rights analysis.[46] The

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41 358 F.3d 804 (11th Cir. 2004).

42 *Id.* at 815.

43 *Williams*, 378 F.3d at 1236; s*ee* Lofton v. Sec. of Dept. of Children and Family Servs., 358 F.3d 804, 817 (11th Cir. 2004).

44 *Williams*, 378 F.3d at 1236; *see Lofton*, 358 F.3d at 816-17. *Lofton* stated:

> We are particularly hesitant to infer a new fundamental liberty interest from an opinion whose language and reasoning are inconsistent with standard fundamental-rights analysis. The Court has noted that it must "exercise the utmost care whenever [it is] asked to break new ground" in the field of fundamental rights, . . . which is precisely what the *Lawrence* petitioners and their *amici curiae* had asked the Court to do. That the Court declined the invitation is apparent from the absence of the "two primary features" of fundamental-rights analysis in its opinion . . . First, the *Lawrence* opinion contains virtually no inquiry into the question of whether the petitioners' asserted right is one of "those fundamental rights and liberties which are, objectively, 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." . . . Second, the opinion notably never provides the "'careful description' of the asserted fundamental liberty interest" that is to accompany fundamental-rights analysis . . . Rather, the constitutional liberty interests on which the Court relied, were involved, not with "careful description," but with sweeping generality . . . Most significant, however, is the fact that the *Lawrence* Court never applied strict scrutiny, the proper standard when fundamental rights are implicated, but instead invalidated the Texas statute on rational-basis grounds, holding that it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." . . . .

Id.

45 *Williams*, 378 F.3d at 1236-37 (internal citations omitted).

46 *Id.* at 1237. The majority argues that although the precedents cited by the dissent (*Griswold*, *Eisenstadt*, *Roe*, and *Carey*) recognize various substantive rights closely related to

court declined to extrapolate from *Lawrence* and its dicta a right to sexual privacy that would trigger strict scrutiny.[47] It felt that to do so would impose a fundamental-rights interpretation on a decision that rested on rational-basis grounds, that never engaged in *Glucksberg* analysis, and that never invoked strict scrutiny.[48] Moreover, it did not want to answer questions that the *Lawrence* Court appeared to have left for another day.[49]

The Court then proceeded through the *Glucksberg* analysis because the ACLU was seeking recognition of a right "neither mentioned in the Constitution nor encompassed within the reach of the Supreme Court's existing fundamental-right precedents."[50] Ultimately, the issue in question was framed as whether there is a fundamental right to sexual privacy.[51] The Court reasoned that as formulated, the right potentially encompasses a great universe of sexual activities, including many that historically have been, and continue to be, prohibited.[52] The court held that the "mere fact that a product is used within the privacy of the bedroom, or that it enhances intimate conduct, does not in itself bring the use of that article within the right to privacy."[53] The court proceeded to

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sexual intimacy, none of them recognize the overarching right to sexual privacy asserted here.

47 *Id.* at 1238.

48 *Id.*

49 *Id.* The court further reasoned that the Supreme Court may in due course expand *Lawrence's* precedent in the direction anticipated by the dissent, but did not want to take that step because it would exceed its mandate as a lower court.

50 *Williams*, 378 F.3d at 1239. First, in analyzing a request for recognition of a new fundamental right, or extension of an old one, the court "must begin with a careful description of the asserted right." Second, the court must determine whether this asserted right, carefully described, is one of "those fundamental rights and liberties which are, objectively, 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." *Id.* The Court stressed that this analysis must proceed with the "'utmost care' because of the dangers inherent in the process of elevating extra-textual rights to constitutional status, thereby removing them from the democratic field of play." *Id.* The Court noted that the district court's initial opinion properly "narrowly framed the analysis as the question whether the concept of a constitutionally protected right to privacy protects an individual's liberty to use sexual devices when engaging in lawful, private, sexual activity." *Id.*

51 *Id.*

52 *Id.* at 1239-40. "If we accept the invitation to recognize a right to sexual intimacy, this right would theoretically encompass such activities as prostitution, obscenity, and adult incest—even if we were to limit the right to consenting adults." *Id.* The Court did not want to subject all infringements on such activities to strict scrutiny.

53 *Id.* at 1242. The court felt that if it were otherwise, "individuals whose sexual gratification requires other types of material or instrumentalities—perhaps hallucinogenic substances, depictions of child pornography or bestiality, or the services of a willing prostitute—likewise would have a colorable argument that prohibitions on such activities and materials interfere with their privacy in the bedchamber." *Id.* Under this theory, all sexual-enhancement paraphernalia (as long as it was used only in consensual encounters between adults) would also be encompassed within the right to privacy and subject to strict scrutiny. *Id.*

explain that the putative right at issue is the right to sell and purchase sexual devices, so residents of Alabama are burdened only by inconvenient access.[54] However, for purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item.[55]

Finally, the court found that the right to sexual privacy failed the second prong of the fundamental rights inquiry.[56] The court concluded that "once elevated to constitutional status, a right is effectively removed from the hands of the people and placed into the guardianship of unelected judges."[57] The court reasoned that if the people of Alabama in time decide that a prohibition on sex toys is "misguided, or ineffective, or just plain silly, they can repeal the law and be finished with the matter."[58] On the other hand, the court reasoned that if it crafted a new fundamental right by which to invalidate the law today, it would be bound to give that right full force and effect in all future cases.[59]

II. Fundamental Right to Sexual Privacy/Intimacy

Although the Constitution does not demarcate a specific right to privacy, case law holds that certain unenumerated fundamental rights exist.[60] These rights have a tradition of protection that long

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[54] *Id.* The court reasons that the legislation at issue bans by its express terms only the unsavory advertising and sale of sexual devices that the majority of the people of Alabama may very well find morally offensive.

[55] *Id.*; *see Glucksberg*, 521 U.S. at 723 (analyzing a ban on providing suicide as a burden on the right to receive suicide assistance); *Carey*, 431 U.S. at 688 (analyzing prohibitions on the sale of contraceptives as burdens on the use of contraceptives).

[56] *Williams*, 378 F.3d at 1242. The inquiry under this prong is whether the right to use sexual devices when engaging in lawful, private sexual activity is (1) "objectively, deeply rooted in this Nation's history and tradition" and (2) "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if [it] were sacrificed." *Id.* The court found that while the district court never addressed the second part of this inquiry, it wrongly answered the "history and tradition" question in the affirmative. It found that the district court, in reaching this conclusion, erred on four levels. The first error was that the district court's history and tradition analysis consisted largely of an irrelevant exploration of history of sex in America. Second, the court found that this analysis placed too much weight on contemporary practice and attitudes with respect to sexual conduct and sexual devices. Third, rather than look for a history and tradition of protection of the asserted right the district court asked whether there was a history and tradition of state non interference with the right. Finally, the court found the district court's uncritical reliance on certain expert declarations in interpreting the historical record was flawed and that its reliance on certain putative "concessions" was unfounded. *Id.*

[57] *Id.* at 1250.

[58] *Id.*

[59] *Id.* The court was alluding to those cases involving, for example, adult incest, prostitution, obscenity etc.

[60] *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (noting individual interest in avoiding disclosure of personal matters); Roe v. Wade, 410 U.S. 113, 154 (1973) (establishing woman's right to privacy with regard to abortions); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (establishing right to privacy with respect to contraception for

predates the signing of the Constitution.[61] However, the Constitution's silence on the right to privacy has left courts struggling to frame this right.[62] The Court has talked about liberty under the Fourteenth Amendment and attempted to identify fundamental American traditions.[63] The Court found that incorporated in the meaning of liberty is some set of unenumerated rights that reflect the basic traditions and commitment underlying American society.[64] Privacy as autonomy was found to be part of American tradition and this right to privacy covers certain sexual relations and activities.[65] The Court has examined issues of reproduction,[66] pornography,[67] and homosexual sodomy.[68] Taking these decisions together, it is clear that the right to privacy protects some forms of private, adult, consensual sexual behavior from governmental intrusion, leading to my conclusion that these past cases have created a right to sexual privacy.

Griswold v. Connecticut recognized a right to privacy in the marital bedroom.[69] The Court noted that the statute at issue "operated on an intimate relation of husband and wife," but recognized that neither the Constitution nor the Bill of Rights directly addressed the privacy of intimate association.[70] The Court then listed numerous earlier cases where it had acknowledged a variety of rights under the Constitution that were not specifically

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unmarried); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (establishing right to privacy within marital relationship); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535-36 (1925) (establishing liberty interest in upbringing and education of children); *see also* Arnault, *supra* note 4, at 760. R

61 *See Griswold*, 381 U.S. at 493-94 (Goldberg, J., concurring) (stating the right to privacy is rooted in tradition and conscience of society); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (summarizing principles underlying constitutional right to privacy); *see also* Arnault, *supra* note 4, at 760. R

62 *See* Gostin, *supra* note 14, at 495 (explaining Constitution's silence on right to privacy); ; *see also* Arnault, *supra* note 4, at 760; Torbati, *supra* note 14, at 1816-17 (discussing lack of clarity in this area of law due to lack of constitutional guidance). R

63 *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (Harlan, J., concurring, asking what it is that Americans have an undeniable societal consensus about).

64 *Id.*

65 *Id.*

66 *Id.* (finding unconstitutional a statute that prohibited married persons from using contraceptives).

67 Stanley v. Georgia, 394 U.S. 557 (1969) (acknowledging a constitutional right to possess and use pornographic materials in private).

68 Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that the Constitution does not confer any fundamental right on homosexuals to engage in acts of consensual sodomy, even if the conduct occurred in the privacy of their own homes) *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

69 381 U.S. 479 (1965).

70 Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ; Anne C. Hydorn, Note, *Does the Constitutional Right to Privacy Protect Forced Disclosure of Sexual Orientation?*, 30 HASTINGS CONST. L.Q. 237, 242 (2003).

delineated.[71] For example, the "freedom to associate and privacy in one's association," was one peripheral First Amendment right.[72] The Court felt that "without those peripheral rights the specific rights would be less secure." Finally, the Court held that "specific guarantees in the Bill of Rights have penumbras . . . various guarantees [that] create zones of privacy."[73] Writing for the majority, Justice Douglas reasoned that taken collectively, the First,[74] Third,[75] Fourth,[76] Fifth,[77] and Ninth Amendments establish a zone in which an individual's right to privacy is protected by the Bill of Rights.[78] Finding the marital relationship to be within this zone of privacy, the Court struck down the Connecticut statute.[79] In his concurrence, Justin Harlan stated that the "statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.' "[80]

In determining the scope of this right to privacy, the Court considered the history and tradition of protecting such a right.[81] The Court concluded that the right to privacy within the marital relationship is a right that societies have protected throughout history.[82] For this reason, the right to privacy within a marriage is a

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71 Hydorn, *supra* note 70, at 242; *Griswold*, 381 U.S. at 482-84. **R**

72 *Griswold*, 381 U.S. at 482.

73 *Id.* at 483.

74 U.S. CONST. amend. I.

75 The Third Amendment says that during peacetime the government cannot require persons to board a soldier. *See* U.S. CONST. amend. III.

76 The Fourth Amendment provides for the right of people to be secure in their houses against unreasonable searches and seizures. *See* U.S. CONST. amend. IV.

77 The Fifth Amendment provides for the right against self-incrimination, which creates some freedom from government interference because people cannot be compelled to say certain things. *See* U.S. CONST. amend. V.

78 *Griswold*, 381 U.S. at 484; Arnault, *supra* note 4, at 763. **R**

79 *Griswold*, 381 U.S. at 485-186; Arnault, *supra* note 4, at 763. The other Justices in the majority all add the Fourteenth Amendment to their decisions, because part of what is involved here is liberty. Even Douglas is relying on the Fourteenth Amendment though he does not say it explicitly, because the penumbras and enumerations only apply via the Fourteenth Amendment. Strictly speaking, Douglas' opinion is an interpretation of the word "liberty." **R**

80 *Griswold*, 381 U.S. at 500 (Harlan, J., concurring), quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937). Justice Harlan asked what the fundamental traditions are or what it is that Americans have an undeniable societal consensus about. He believed that part of liberty is some set of unenumerated rights that reflect the basic traditions and commitment of American society.

81 Arnault, *supra* note 4, at 763. This examination provided insight into the possible intent of the Framers of the Constitution. *Griswold*, 381 U.S. at 500. **R**

82 *Griswold*, 381 U.S. at 500. The Court stated "[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty not commercial or social projects." *Id.*, at 486.

fundamental right.[83] After concluding that a fundamental right to privacy in marriage exists, the Court considered whether any state interests necessitated the statute.[84] The Court determined that Connecticut did not have a legitimate interest to balance against criminalizing contraceptive use.[85]

The *Griswold* holding is narrow.[86] It established constitutional protections for certain personal choices made within the context of the traditional family.[87] However, this case signaled the beginning of the Supreme Court's development of the right to sexual privacy.[88] The right to privacy quickly began to expand following *Griswold*.[89] Seven years later, the Supreme Court held, based on the Equal Protection Clause, that the right to privacy in the bedroom extends to unmarried couples as well.[90] While the Court called this right "the right to privacy in the bedroom," presumably it was referring to some sort of sexual privacy. Although the Court may have been concerned with the right to sleep, watch television or read in the privacy of one's own bedroom, it was primarily focused on a type of sexual activity in the bedroom. The sexual activity or, more specifically, the right to use contraceptives while engaging in sexual activity, was the reason why the case was brought and decided. Moreover, this right to privacy regarding sexual activity in the bedroom presumably extends outside of the bedroom to the entire home.[91] In other words, this right should be read conceptually as opposed to literally.

The Supreme Court dealt with contraceptives again in *Carey v. Population Services International*,[92] where it recognized a right to make individual decisions in matters of childbearing without intrusion by the state.[93] The Court noted that although the

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[83] *Griswold*, 381 U.S. at 486.

[84] *Id.*

[85] *Id.*

[86] Arnault, *supra* note 4, at 763; *see* Apasu-Gbotsu, *supra* note 15, at 555-57 (explaining holding in *Griswold*). R

[87] Arnault, *supra* note 4, at 763; *see* Daniel O. Conkle, *The Second Death of Substantive Due Process,* 62 IND. L.J. 215, 220 (1987) (noting *Griswold's* extension of rights within traditional family relationships); Apasu-Gbotsu, *supra* note 15, at 567 (noting *Griswold's* affect on rights within family). R R

[88] Arnault, *supra* note 4, at 763; *see* Apasu-Gbotsu, *supra* note 15, at 555 (noting Court's emphasis on effect of statute on intimate relationship between married couple). R

[89] Arnault, *supra* note 4, at 763; *see* Daniel O. Conckle, *The Second Death of Substantive Due Process,* 62 IND. L.J. 215, 220 (1997) (noting rapid expansion of right to privacy post-*Griswold*). R

[90] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[91] If the complainants in *Griswold* had challenged the statute prohibiting the sale of contraceptives, the Court most likely would have come to the same decision even if there was evidence to show that the sexual activity took place in another room of their home.

[92] 431 U.S. 678 (1977).

[93] *See id.* Sellers of contraceptives and others, challenged N.Y. EDUC. LAW § 6811 (1972)

Constitution does not explicitly mention any right of privacy, the Court has recognized one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right to personal privacy, or guarantee of certain areas or zones of privacy."[94] This right of privacy includes "the interest in independence in making certain kinds of important decisions."[95] Examining the history of this right, the Court found that the "decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."[96] Finally, the Court concluded that the State's interest in discouraging sexual activity of minors was not compelling enough to justify the "statute's incursion into constitutionally protected rights."[97] The decision on whether to beget a child, necessarily implicates some sort of sexual privacy.

In further developing a right to sexual privacy, the Supreme Court in *Stanley v. Georgia*, acknowledged a constitutional right to possess and use pornographic material in private even if the materials are banned from sale.[98] The Court recognized a "valid

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prohibiting sales of contraceptives to minors, and advertisements or displays of contraceptives, and providing that only pharmacists could sell contraceptives to adults. *See id.*

94 *Id.* at 684.

95 *Id.*

96 *Id.* at 684-85. "That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives," *Griswold v. Connecticut*, 381 U.S. 479 (1965), and most prominently indicated in recent years in the contexts of contraception, *Id.*, Eisenstadt v. Baird, 381 U.S. 479 (1965), and abortion, Roe v. Wade, 410 U.S. 113, Doe v. Bolton, 410 U.S. 179 (1973), Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

97 *Carey*, 431 U.S. at 690. The Court further held that in any event the statute is obviously not substantially related to any goal of preventing young people from selling contraceptives:

> Nor is the statute designed to serve as a quality control device because nothing in the record suggested that pharmacists are particularly qualified to give advice on the merits of different non-medical contraceptives, or that such advice is more necessary to the purchaser of contraceptive products than to consumers of other nonprescription items.

Id. at 691.

98 394 U.S. 557 (1969). An investigation of Stanley's alleged bookmaking activities led to the issuance of a search warrant for Stanley's home. *Id.* at 558. While looking through his house, the officers found three reels of eight-millimeter film, concluded they were obscene and seized them. *Id.* Stanley was indicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of Georgia law. *Id.*

> Any person who shall knowingly bring or cause to be brought into this State for sale of exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably

governmental interest in dealing with obscenity,"[99] but found it outweighed by the First Amendment and the privacy rights at stake.[100] The Court based its decision on the First Amendment and the right to privacy.[101] With respect to the right to privacy, the Court determined that the right to privacy protects against government scrutiny of an individual's activities in the home.[102]

The *Stanley* Court also articulated a balancing test that is relevant today.[103] This test precludes a state from banning obscenity unless the state interest outweighs the intrusion on the individual's right to privacy.[104] The right in *Stanley* was the right to possess and use pornography in private.[105] The Court characterized the state interest of regulating the commercial distribution of obscene material in *Stanley* as weak when compared to the strong right to be free from government scrutiny.[106] *Stanley* sets a high burden that the government must overcome if it is going to intrude into the personal lives of individuals.[107]

In *Miller v. California*,[108] the Supreme Court took the right a step further when it defined the standards that were to be used to identify obscene material that the state might regulate without

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> should know of the obscene nature of such matter, be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years: Provided, however, in the event the jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion.

GA. CODE ANN. § 26-6301 (Supp. 1968).

99 *Stanley*, 394 U.S. at 558.

100 The Court once again considered the history of this right. It concluded that:

> [t]he makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling and of his intellect. They knew that only part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

Id. at 564 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

101 Arnault, *supra* note 4, at 765; *Stanley*, 394 U.S. at 564-565. R

102 Arnault, *supra* note 4, at 765. *Stanley*, 394 U.S. at 564. R

103 Arnault, *supra* note 4, at 765; *see* Apasu-Gbotsu, *supra* note 15, at 583 (highlighting balancing test that Court established). R

104 Arnault, *supra* note 4; *see* Apasu-Gbotsu, *supra* note 15, at 583. R

105 Arnault, *supra* note 4; *see* Apasu-Gbotsu, *supra* note 15, at 583. R

106 Arnault, *supra* note 4; *Stanley*, 694 U.S. at 565. R

107 Arnault, *supra* note 4; *see Stanley*, 694 U.S. at 565; Apasu-Gbotsu, *supra* note 15, at 583 (clarifying *Stanley* balancing test and elaborating on hurdles it created). R

108 412 U.S. 15 (1973). (Defendant mailed brochures that contained pictures of sexually explicit activities to individuals who had not requested the material, and the individuals notified the police. After a trial, defendant was convicted of violating CAL. PENAL CODE §311.2(a) by knowingly distributing obscene matter.).

violating the First Amendment.[109] The Court noted that the "States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or exposure to juveniles."[110]

The Court held that the standard to determine whether the material was obscene was whether the average person, applying contemporary community standards, not national standards, would find that the work appealed to the prurient interest, whether the work depicted sexual conduct defined by state law, and whether the work lacked serious, literary, artistic, or scientific value.[111] Under the holding announced in *Miller*, individuals will not be subject to prosecution for the sale or exposure of obscene materials unless the materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed.[112] Presumably, the Court would not have taken the time to define the standards of obscenity if it did not believe that some right to sexual privacy exists.

In *Roe v. Wade*,[113] the Supreme Court held that abortion was

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109 *See* Miller v. California, 412 U.S. 15 (1973).

110 *Id.* at 18.

111 *Id.* at 24-25. The Court noted that it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. *Id.* at 33. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. *Id.*

112 *Id.* at 27. Obscene material is not protected by the First Amendment; such material can be regulated by the States, subject to the specific safeguards enunciated in *Miller*, without a showing that the material is "utterly without redeeming social value," and obscenity is to be determined by applying "contemporary community standards," not "national standards." *Id.* at 36-37.

113 410 U.S. 113 (1973). Jane Roe, a single woman residing in Dallas, Texas, instituted an action against the District Attorney of her county, seeking a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes. *Id.* at 120. The Texas statutes that were of concern here were Arts. 1191-1194 and 1196 of the State's Penal code. These statutes made it a crime to "procure an abortion," or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes were in existence in a majority of the states. *Id.* at 117. Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. *Id.* at 120. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Ninth, and Fourteenth Amendments. *Id.* By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated. James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many

within the scope of the concept of personal liberty guaranteed by the Fourteenth Amendment of the U.S. Constitution, but recognized that the State had a compelling interest in both the safety of the mother and the welfare of the fetus post viability.[114] The Court reasoned that while the Constitution does not explicitly mention any right of privacy, it has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.[115] It concluded that this right of privacy, whether found in the Fourteenth Amendment's concept of personal liberty and restrictions upon State action, or in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision of whether to terminate her pregnancy.[116] Drawing on the social, medical, and legal history of abortion, the Court found two

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cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.* at 120-121. John and Mary Doe, a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as a defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated." *Id.* at 121.

114 *See id.* The Court held that abortion was guaranteed not by the Ninth Amendment of the U.S. Constitution, but by the Due Process Clause of the Fourteenth Amendment. This right was not absolute, however, and it was subject to regulation by narrowly drawn legislation aimed at vindicating legitimate, compelling state interests.

115 *Id.* at 152. In varying contexts, the Court or individual Justices have found at least the roots of a right of personal privacy: in the First Amendment; Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616 (1886); in the penumbra of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) ; in the Ninth Amendment, *id.* at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See Roe*, 410 U.S. at 152. These decisions make clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 235 (1937), are included in this guarantee of personal privacy. They also make clear that the right has some extension to some activities relating to marriage, Loving v. Virginia, 338 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); contraception, Eisenstadt v. Baird, 405 U.S. at 453-54; *id.* at 463-65 (White, J., concurring in the result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). *See Roe*, 410 U.S. at 152-53.

116 *Roe*, 410 U.S. at 153. The Court found it detrimental that the State would impose upon the pregnant woman by altogether denying her this choice. Specific and direct harm, medically diagnosable, even in early pregnancy, may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, the additional difficulties and continuing stigma of unwed motherhood may be involved. *Id.*

compelling state interests that supported regulation: protection of the health of the mother and the potentiality of human life.[117]

Two valuable pieces of information should be taken from *Roe*.[118] A woman's rights pertaining to abortion affect her sexuality and thus are entitled to privacy protection.[119] Second, through the advent of the trimester system, the Court built upon the *Stanley* balancing test.[120] *Roe* symbolizes a continuing trend within the Court to allow people to be free from government intrusion in the personal and intimate spheres of their lives.[121]

The Court's willingness to broaden this type of right to privacy came to a sudden end in 1986 when it addressed the issue of homosexual sodomy in *Bowers v. Hardwick*.[122] *Bowers* involved the constitutionality of a Georgia statute that criminalized the act of sodomy.[123] In a 5-4 decision, the Court disagreed with the

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[117] *See id.* at 163. The Court held that the former is compelling, and thus grounds for regulation, after the first trimester of pregnancy, beyond which the state could regulate the abortion procedure to preserve and protect maternal health. *Id.* The Court held that the latter becomes compelling at viability, after which a state could proscribe abortion except to preserve the life and health of the mother. *Id.* at 163-64. In 1992, the Court reaffirmed *Roe v. Wade's* essential holding, which has three parts:

> First, is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without interference from the state. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second, is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another.

Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

[118] *Roe*, 410 U.S. at 155.

[119] *See* Apasu-Gbotsu, *supra* note 15, at 586-87 (noting the connection between right to abortion and right to sexual privacy). Apasu-Gbotsu reasons that *Roe* "reaffirmed consensual sharing of the right to privacy," because "a woman's right to end her pregnancy confers an implied protection on those rights indispensable to effectuating that decision." *Id.* at 587-88. Apasu-Gbotsu notes that this right, like many sexual practices, is not public. *Id.* at 188. **R**

[120] *See Roe*, 410 U.S. at 163-64. The trimester framework was overruled in *Planned Parenthood v. Casey*, but the court kept the distinction of pre-viable and post-viable fetuses. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992). In *Planned Parenthood*, the Court weighed the rights of the mother against the state health concerns and established the trimester system in attempt to balance those rights. *Id.*

[121] *See Roe*, 410 U.S. at 155, Kappelhoff, *supra* note 4, at 505 (mentioning Court's consistent broadening of right to privacy). **R**

[122] *See* 478 U.S. 186 (1986).

[123] *See id.* Police arrested Hardwick for committing the crime of sodomy in the bedroom of his home. An Atlanta police officer showed up to Hardwick's house claiming to have a warrant for his arrest and found Hardwick in his bedroom having sex with another man. Both men were arrested. Hardwick challenged the constitutionality of the statute. *Id.* at 188. The Eleventh Circuit held that the statute violated Hardwick's fundamental rights because "homosexual activity is a private and intimate association" protected by the Constitution. *Id.* at 189 (citing Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985)). Other Courts of Appeals have arrived at judgments contrary to that of the Eleventh Circuit.

Eleventh Circuit's conclusion that "prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case."[124] The Court reasoned that none of the cases regarding marriage and procreation stood for "the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[125] The Court rejected the argument that based on *Stanley v. Georgia*, the result should be different where the homosexual conduct occurs in the privacy of the home.[126] The Court emphasized that illegal conduct in the home is not protected just because it occurs in the privacy of one's home.[127] The Court distinguished the rights sought here as having no similar support in the text of the Constitution, and as not qualifying for recognition under the prevailing principles for construing the Fourteenth Amendment.[128] The Court expressed concern over a slippery slope, reasoning that if homosexual conduct is criminal, yet protected in the home, that could be interpreted to mean that the same would hold true for incest and other sexual crimes.[129] Finally, the Court rejected Hardwick's

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See Baker v. Wade, 769 F.2d 289, *reh'g denied*, 774 F.2d 1285 (5th Cir. 1985); Dronenburg v. Zech, 239 F.2d 1388, *reh'g denied*, 746 F.2d. 1579 (D.C. Cir. 1984).

[124] *Id.* The reach of this line of cases was sketched in Carey v. Population Serv. Int'l, 431 U.S. 678, 685 (1977), Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923), were described as dealing with child rearing and education; Prince v. Massachusetts, 321 U.S. 158 (1944), with family relationships; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), with procreation; Loving v. Virginia, 388 U.S. 1 (1967), with marriage; Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972), with contraception; and Roe v. Wade, 410 U.S. 113 (1973), with abortion. *Bowers*, 478 U.S. at 190. It is important to note that Justice Powell later said that he voted the wrong way.

[125] *Bowers*, 478 U.S. at 191. Writing for the majority, Justice White demonstrated how laws against sodomy are deeply rooted in our history. *Id. See generally* Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986).

> Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws . . . . [U]ntil 1961, all 50 states outlawed sodomy, and today [1986], 24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.

Bowers, 478 U.S. at 192-193.

[126] *Bowers*, 478 U.S. at 195.

[127] *Id.* "*Stanley* did not protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment." *Id.* The Court reasoned that "[v]ictimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods." *Id.* at 195.

[128] *Id.*

[129] *Id.* at 196.

argument that because the electorate fashioned the law on its belief that homosexual sodomy is "immoral and unacceptable", it was not, even under rational basis review, enough to declare all state laws criminalizing sodomy illegal, because moral sentiments underlie all kinds of laws.[130] The Court reasoned that if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy.[131]

Justice Blackmun, joined by three other Justices, sharply dissented, disagreeing with the majority about what the fundamental right at issue was.[132] According to Blackmun, *Hardwick* was about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."[133] Justice Blackmun believed that the claim should be analyzed in the light of the values that underlie the constitutional right to privacy.[134] Blackmun stated that certain rights are protected " . . . "because they form so central a part of an individual's life."[135] He emphasized that past cases have recognized that the Constitution creates "a certain private sphere of individual liberty [that] will be kept largely beyond the reach of the government."[136] Justice Blackmun pointed out that these cases extend past the boundary of being characterized by their connection to protection of the family.[137] He concluded that "[o]nly the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.' "[138]

Justice Blackmun later emphasized that while the Court claimed only to refuse to recognize a fundamental right to engage in homosexual sodomy, it "really has refused to recognize . . . the fundamental interest all individuals have in controlling the nature of their intimate associations with others."[139] Blackmun asserted

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130 *Id.* at 196; *see* Hydorn, *supra* note 70, at 248. **R**

131 *Bowers*, 478 U.S. at 196.

132 *Bowers*, 478 U.S. at 199 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

133 *Id.* Justice Blackmun felt that the statute denied individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity.

134 *Id.* Justice Blackmun stated that "if that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they made is an 'abominable crime not fit to be named among Christians." *Id.*

135 *Bowers*, 478 U.S. at 204; Hydorn, *supra* note 70, at 70. **R**

136 *Bowers*, 478 U.S. at 203.

137 *Id.*

138 *Id.* (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

139 *Bowers*, 478 U.S. at 206; Hydorn, *supra* note 70, at 249. **R**

that depriving individuals' right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity ever could.[140] Because of this, the Court's decision betrayed values deeply rooted in American history.[141]

Bowers involved a fundamental disagreement between the majority and dissent about methodology and the nature of unenumerated rights. The majority held that there was no right to homosexual sodomy, while Blackmun argued that the case was not about whether there is a right to homosexual sodomy, but rather whether there was a right to privacy. The majority focused on the specifics, while the dissent focused on a higher level of generality.

The Blackmun approach triumphed in *Lawrence v. Texas*,[142] which overruled *Bowers*. *Lawrence* supports the theory that there is some sort of right to sexual privacy. In *Lawrence*, the question before the Court was the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.[143] The Court concluded that "the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to

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> Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. In a variety of circumstances the Court has recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.

Bowers, 478 U.S. at 206.

140 *Bowers*, 478 U.S. at 214.

141 *Id.*; *see also* Hydorn, *supra* note 70, at 249. **R**

142 539 U.S. 558 (2003).

143 *Id.* at 562. In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided (the right of the police to enter did not seem to have been questioned) and observed Lawrence and another man, Tyron Garner, engaging in a sexual act. *Id.* at 563. The two were arrested, held in custody over night, and charged and convicted before a justice of peace. *Id.* The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man). *Id.* The applicable state law was TEX. PENAL CODE ANN. § 21.06 (a) (2003). It provided: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "deviate sexual intercourse" 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." TEX. PENAL CODE ANN. § 21.01(1) (2003).

the Constitution."[144]

First, the Court examined the substantive reach of liberty under the Due Process Clause in earlier cases.[145] The Court concluded that the *Bowers* Court failed to appreciate the extent of the liberty at stake: "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[146] Second, the Court concluded that the historical record relied upon in *Bowers* is more complex than the majority opinion and the concurring opinion indicate.[147] Also, two principal cases decided after *Bowers* cast its holding into even more doubt.[148] The Court further noted that to the extent *Bowers* relied on values we share as a broader civilization, the reasoning and

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144 *Lawrence*, 539 U.S. at 564. For this inquiry the Court deemed it necessary to reconsider its holding in *Bowers*.

145 *Id.* at 564-565.

146 *Lawrence*, 539 U.S. at 567. The Court reasoned that the laws involved in *Bowers* and here were statutes that "purport to do no more than prohibit a particular sexual act." *Id.* These laws' penalties and purposes had more far reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. *Id.* The statutes sought to control a personal relationship that whether or not entitled to formal recognition in the law, was within the liberty of persons to choose without being punished as criminals. *Id.*

147 *Id.* at 571. ("Their historical premises are not without doubt and, at the very least, are overstated."). The *Bowers* Court was making the point that for centuries there have been powerful voices condemning homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. However, the Court finds that its obligation is to define the liberty of all, not to mandate their own moral code. The Court went on to explain that in the years following the *Bowers* decision its deficiencies became even more apparent. The twenty-five states with laws prohibiting sodomy were now reduced to thirteen, of which four enforce their laws only against homosexual conduct. *Id.* at 573. In those states where sodomy was still banned, whether for same-sex or heterosexual conduct, there was a pattern of non-enforcement with respect to consenting adults acting in private. In fact, in 1994, Texas admitted that as of that date it had not prosecuted anyone under those circumstances.

148 In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." The Court stated:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of the liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. at 851. The decision in *Bowers* would deny persons in a homosexual relationship the right to seek autonomy for these purposes. The second post-*Bowers* case of principle relevance is *Romer v. Evans*, 517 U.S. 620 (1996). The Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause.

holding in *Bowers* have been rejected elsewhere.[149]

The Court found that it was not bound by the doctrine of stare decisis, by reasoning that it is not a command, but rather a "principle of policy and not a mechanical formula of adherence to the latest decision."[150] It concluded that the rationale of *Bowers* did not withstand careful analysis, and believed that Justice Stevens' dissent should have been controlling:

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions, by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.[151]

Therefore, the Court found that *Bowers* was not correct when it was decided, and is not correct today, because the Texas statute furthered no legitimate state interest, which can justify its intrusion into the personal and private life of the individual.[152]

The *Lawrence* opinion almost entirely focused on attacking *Bowers* and explaining why *Bowers* is wrong. Therefore, it is unclear whether *Lawrence* established a constitutional right to sexual

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149 *Lawrence*, 539 U.S. at 576. The European Court of Human Rights has not followed *Bowers* and reached a different decision in *Dudgeon v. United Kingdom*. *See* P.G. & J.H. v. United Kingdom, App. No. 44787/98, P 56 (Eur. Ct. H.R., Sept. 25, 2001); Modinos v. Cyprus, 259 Eur. Ct. H.R. (1993); Norris v Ireland, 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. *See* Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151, at11-12.

150 *Lawrence*, 539 U.S. at 577. In deciding whether to overrule a precedent the court will ask whether the precedent recognizes a constitutional liberty interest and individual or societal reliance on the existence of that liberty. However, the Court found that the holding in *Bowers* had not induced detrimental reliance comparable to some instances where recognized individual rights are involved. "Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance, contradict its central holding.

151 *Id.* at 577-578 (quoting *Bowers v. Hardwick,* 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

152 *Lawrence*, 539 U.S. at 578. The basis for the Court's reasoning is the right to liberty under the Due Process Clause that gives people the right to engage in sexual conduct without intervention of the government. The government cannot make private sexual conduct a crime.

privacy or a "right implicit in the concept of ordered liberty."[153] One can argue that based on the past cases the right was already "deeply rooted in this Nation's history and tradition."[154] If the right at issue is fundamental then the Court should have applied strict scrutiny to the homosexual sodomy law.[155] Strict scrutiny means that for the law to survive, the state must prove both that it had a compelling interest at stake, and that the law at issue was narrowly tailored to achieve that interest.[156] If the right is not fundamental, the court simply applies rational basis review: if the state had a legitimate interest in regulating the conduct, and the law at issue was a rational means of achieving that interest, then the law stands.[157] In *Lawrence*, the Court never expressly labeled the conduct at issue a "fundamental" right.[158] It did, however, say that the Texas law sought to "control a personal relationship that . . . is within the liberty of persons to choose without being punished."[159]

If *Bowers* was incorrectly decided, then presumably there is a fundamental right to sexual privacy. *Bowers* applied mere rational basis review, indicating that there was no fundamental right. *Lawrence* says that the *Bowers* Court completely misunderstood our traditions and history, strengthening the view that there is a fundamental right involved. However, at the end of the opinion, Justice Kennedy uses the language of rational-basis scrutiny when he says that the Texas statute furthers no legitimate state interest.[160] Nevertheless, if all the court is doing is applying rational-basis review, it is hard to see what is so wrong about *Bowers*. Therefore, even though *Lawrence* is unclear on what sort of liberty is at stake in the case, a reading of the case along with past cases makes clear that some sort of right to sexual privacy exists. At the

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153 Joanna Grossman, *The Consequences of* Lawrence v. Texas, Find Law's Legal Commentary Writ, *available at* http://writ.corporate.findlaw.com/grossman/20030708.html (July 8, 2003). Prior to *Lawrence*, the Supreme Court had developed a well-known and sometimes controversial line of cases recognizing a right of privacy surrounding decision making about marriage, family, and procreation. As it evolved, this constitutional right of privacy became tethered to the Due Process Clause of the Fourteenth Amendment- and specifically, to the liberty interest it protects. The thrust of the right is that individuals have the right to make certain decisions, and engage in certain forms of conduct, without interference from the state.

154 *Id.* It is also helpful if an asserted right is similar to rights that have already been declared fundamental in the past.

155 *Id.* Pursuant to Court precedents, fundamental rights include the rights to marry, to use contraceptives, to make decisions about the rearing and education of children, to live with individuals of one's choice, and the right to terminate a pregnancy.

156 *Id.* Most laws fail this analysis.

157 *Id.*

158 *See Lawrence*, 539 U.S. 558.

159 *Lawrence*, 539 U.S. at 567.

160 *Id.* at 578.

very least, it makes clear that there is an absence of any legitimate state interest on what is going on behind closed doors.

III. Sale of Sex Toys Within the Right to Sexual Privacy/Intimacy

Based on past Supreme Court decisions, the right to privacy appears to protect some forms of private, adult, consensual sexual behavior from governmental intrusion. An analysis of these past cases indicates that the sale of sex toys falls within this right.

What is puzzling about Alabama's Anti-Obscenity Law, is that the use of sex toys is permitted, it is only the sale of sex toys that is prohibited.[161] Seemingly then, the State of Alabama does believe that there is some right that protects the use of sex toys. While it is true that laws often prohibit sale, but not use (e.g., cigarettes for minors), limiting the distribution of sex toys to stores out of state clearly imposes a considerable burden on the right of individuals to use sex toys if they choose to do so.[162] Therefore, for purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item.[163] Extending the reasoning of *Griswold*,[164] if the people of Alabama are permitted to use sex toys in their bedrooms, they should be permitted to purchase them in-state as well. Thus, the sale of sex toys should be permitted based on the right to privacy in the bedroom.

Moreover, the *Williams* court completely disregards the history of the right to use sex toys, while the *Griswold* court makes clear in its analysis that the history of the right plays a role. Dating back to the seventeenth century, there is some evidence of certain types of sexual privacy. During the seventeenth century, "even in those places where [deviate, extra-marital] sexual relations were closely regulated by the church/state apparatus, the state did not interfere in private, marital sexual relations."[165] The previously unified seventeenth century attitudes of church and state were followed in the eighteenth century by a decline in the enforcement of laws

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161 *See Williams*, 378 F.3d 1232 (11th Cir. 2004).

162 *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 689 (1977) (holding that "[l]imiting the distribution of nonprescription contraceptives to licensed pharmacists clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so"). In fact, the burden here is even greater than in *Carey* because the Alabama law imposes a total ban on distribution.

163 *Williams*, 378 F.3d at 1240; *see e.g.*, *Glucksberg*, 521 U.S. at 723 (analyzing a ban on assisted suicide); *Carey*, 431 U.S. at 688 (analyzing prohibitions on the sale of contraceptives as burdens on the use of contraceptives).

164 That is, the line of reasoning dealing with the right to privacy in the bedroom.

165 Williams v. Pryor, 220 F. Supp. 2d 1257, 1279 (N.D. Ala. 2002).

proscribing consensual sexual acts.[166] "The result was that, '[g]radually, the regulation of moral behavior was withdrawn from the purview of the communities and lodged in the more informal and amorphous setting of family and neighborhood.'"[167] American attitudes toward adult, consensual sexuality shifted once again at the dawn of the nineteenth century.[168] Sexual devices, contraceptives and abortion became widely available in the nineteenth century, the emergence of which suggests a growing liberalism regarding sexual relationships and sexuality in America.[169] "The popularity, legality, and ease of access to sexual devices like vibrators and dildos further demonstrate that the firm legislative respect for sexual privacy in the marital relationship extended to deliberate non-interference with adults' use of sexual devices within those relationships."[170] In the twentieth century, sexual devices became even more widespread.[171] "No longer were vibrators socially camouflaged as medicinal in nature."[172] During the 1960's, "[f]ree love was the rage [and] [s]ex toy history [became] even more interesting in this era because people could obtain sex toys through special retail outlets and through magazines."[173] Since then, sex toys have become even more numerous and varied.[174]

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166 *Id.* at 1280.

167 *Id.* at 1282.

168 *Id.*

169 *Id.* at 1283. The invention of the electric vibrator was also suggestive of a growing nineteenth century liberalism regarding sexuality and adult sexual conduct. *Id.* Despite the emergence of these electromechanical devices, supporters of the nineteenth century anti-vice movements did not attempt to reform the law, to proscribe their distribution or possession. *Id.* at 1284. There is evidence to show that at least some legislative action in the form of the so-called "Comstock Laws," was prompted by the religious anti-vice crusade of former Postmaster General Anthony Comstock. *Id.* at 1285. However, evidence indicates clearly that enforcement of Comstock Laws were directed against contraceptives, abortion, and sexually oriented writings and pictures. In fact, "vibrators remained legal throughout this period." *Id.* at 1286.

170 *Id.*

171 In 1918, the Sears Roebuck catalog offered a vibrator as a "very satisfactory . . . marital aid that every woman appreciates." A 1921 issue of Hearst's Magazine marketed vibrators to men as Christmas gifts for their wives. During the 1920s, "blue" movies (erotic cinemas) with woman using vibrators as sexual simulators became common. Romanceopedia.com, http://www.romanceopedia.com/I-SexToys.html (last visited February 26, 2006).

172 *Id.* By 1930, they were openly advertised and made available to anyone. Prior to this time, vibrators were often prescribed to women by doctors to treat "hysteria." The term "hysteria" comes from the Greek word "hystera," which means uterus. At the time, it was believed that female psychiatric infirmities had their roots in uterine imbalances reflected in anxiety, irritability and sexual fantasies. *Id.*

173 *Id.*

174 *Id.* With the advent of the internet, the sex toy industry has grown by "leaps and bounds and is still growing." Passion for Pleasure, http://www.passionforpleasure.com/sex_toys_history.htm (last visited February 26, 2006).

The role of state and federal governments in regulating consensual, adult, sexual activity also continued to change into the twentieth century and "by the end of the 1920's . . . the state withdrew almost entirely from the regulation of private, sexual activity."[175] Evidence further reflects that Americans and their legal systems became increasingly liberal regarding adult sexuality and the privacy afforded private, consensual, adult sexual relationships in the twentieth century.[176] This historical data shows that there is a "historical and contemporary trend of legislative and societal liberalization of attitudes toward consensual, adult sexual activity, and, a concomitant avoidance of prosecutions against married and unmarried persons for violations of statutes that proscribe consensual sexual activity."[177] This evidence arguably leads to the conclusion that "the 'deeply rooted' respect for marital privacy shields [married and] unmarried persons from intrusions into their sexual lives and bedrooms . . . ."[178] The *Williams* court mistakenly neglects the history of this right in its analysis.

Likewise, the *Williams* court was mistaken for two reasons when it argued that if it recognized a right to sexual intimacy, this right would theoretically encompass such activities as prostitution, obscenity and adult incest.[179] First, despite the fact that the Court has never clearly delineated the right, *Griswold's* right to privacy in the bedroom apparently encompasses sexual intimacy. Second, prostitution, obscenity, incest and the like are all illegal activities as prohibited by statute, while the use of sex toys is not. By holding

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175 Williams v. Pryor, 220 F. Supp. 2d 1257, 1289 (N.D. Ala. 2002).

176 *Id.* "Adding to the specter of a twentieth century liberalism that protected the sexual privacy of both married and unmarried adults are the early-and mid-twentieth century decisions of the Supreme Court." *Id.* at 1291; *see e.g. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)* (recognizing the "liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska, 262 U.S. 390 (1923)* (overturning state law prohibiting instruction in schools of language other than English); Skinner v. Oklahoma, 316 U.S. 535 (1942) (overturning a state law that provided for sterilization of criminals); for a right to privacy in the body, see Rochin v. California, 342 U.S. 165 (1952) (overturning state criminal conviction for violation of due process where evidence was forcibly extracted from defendant's mouth and stomach); the right to marital privacy, see Griswold v. Connecticut, 381 U.S. 479 (1965) (overturning state law forbidding use of contraceptives as unconstitutional); the right to marry, see Loving v. Virginia, 388 U.S. 1 (1967) (overturning Virginia anti-miscegenation statute); the right to privacy as incorporating a right to use contraceptives, see Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding unconstitutional a state law prohibiting the distribution of contraceptives to single persons, but not to married persons); and, the right to privacy as incorporating a right to reproductive choice, see Roe v. Wade, 410 U.S. 113 (1973) (overturning a state law that prohibited abortion).

177 Williams v. Pryor, 220 F. Supp. 2d 1257, 1294 (N.D. Ala. 2002).

178 *Id.*

179 *Williams*, 378 F.3d 1232, 1239-40 (11th Cir. 2004).

that there is a right to sexual privacy here, the court would not be holding that all sexual activity is permitted.

In *Stanley v. Georgia*, the Court determined that the right to privacy protects government scrutiny of an individual's activities in the home.[180] The *Stanley* decision was significant in relation to *Williams* for several reasons. First, if *Griswold* only created a right to privacy in the bedroom, contrary to the above theory, *Stanley* clearly creates a right to privacy in the home for certain activities, namely the use of pornographic materials. Second, the *Stanley* Court's balancing test set a high burden that the government must overcome if it is going to intrude into the personal lives of individuals and Alabama does not seem to have overcome the high burden set by *Stanley*.[181] Therefore, the right to purchase sex toys would fall within this right.

Additionally, as stated above, the Court in *Stanley* acknowledged a constitutional right to possess and view pornographic material in private.[182] The *Williams*' court did not differentiate as it should have between sex toys and pornography. In reality, the two are not so different because both are used for novelty purposes. Arguably, pornographic material is more obscene than a sex toy because it portrays sexual acts on its face, while sex toys do not. Furthermore, like pornography, there are no laws prohibiting the sale or use of Viagra and other "sex drugs." Again, it is difficult to demarcate the difference between sex toys and sex drugs, yet the government has clearly drawn this distinction. Because Alabama is under-inclusive in its effort to regulate obscenity, it is difficult to see how Alabama actually overcame the high burden set by *Stanley* if it intends to intrude into the personal lives of its citizens in this way.

Moreover, if there is a right to sexual privacy as argued above, Alabama's law is not narrowly-tailored. The law does provide an exception for sales of sexual devices "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose."[183] There are several implications to this exemption. First, the statute does not provide procedures or instructions for how someone would prove that sales are for a bona fide use, so confusion will necessarily arise. Second, the statute does not

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180 394 U.S. 557 (1969).

181 Arnault, *supra* note 4; s*ee Stanley*, 394 U.S., at 565; Apasu-Gbotsu, *supra* note 15, at 583 (clarifying the *Stanley* balancing test and elaborating on hurdles it created). R

182 *See* 394 U.S. 557 (1969).

183 ALA. CODE § 13A-12-200.2 (2004) (raising the issue of whether the reason for use should affect the validity of sex toys).

explain what constitutes a permissible medical, scientific, educational, legislative, judicial, or law enforcement purpose. As a result of the vagueness of the statute, enforcement cannot be consistent and could be arbitrary, because the law's enforcers will have to distinguish what constitutes a bona fide use.[184] Finally, there is the underlying issue of whether the government should be able to prohibit the sale of anything it deems immoral.[185]

In *Miller v. California*, the Supreme Court noted that the "states have a legitimate interest in prohibiting the dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or juveniles."[186] The Alabama law is not properly tailored to achieve this legitimate interest of protecting the sensibilities of unwilling recipients and juveniles. Instead of prohibiting the sale of all sex toys, Alabama can create an age requirement to purchase, or even enter a store that sells, the products. Additionally, it is unreasonable to believe that unwilling recipients will be exposed to sex toys because only those who actually seek out the products by going into sex toy stores, or having private parties, are exposed. The people who do not have an interest in purchasing the products can choose neither to enter the stores nor to attend the private parties. Finally, it can restrict the manner and place of the advertisements for items, so younger people would be prevented from seeing the toys.

In many ways, the law is counterintuitive. The law only prohibits the sale of sex toys that are sold for the purpose of sexual activity, but not those that are sold for novelty use.[187] First, one can easily argue that almost all sex toys are for novelty purposes. Second, there is a greater risk that unwilling recipients will be exposed to those toys that are sold for novelty use, than if the sale was limited to only certain sex toy stores or private parties. Third, while sellers are subject to the laws, the exemption depends on why the sex toys are used. These issues all go to the argument that the law is not narrowly tailored.

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184 This exemption would seemingly apply to plaintiffs that used sex devices to combat depression or to make intercourse less painful. However, the opinion does not mention this exception as applied to these plaintiffs.

185 *See* Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality,* 40 WM. & MARY L. REV. 927 (1999); Craig L. Carr, *Between Virtue and Vice: The Legal Enforcement of Morals*, 14 KAN. J.L. & PUB. POL'Y 1 (2004); Bernard E. Harcourt, *Criminal Law: The Collapse of the Harm Principle,* 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

186 413 U.S. 15, 18 (1973).

187 The statute permits the sale of ordinary vibrators and body massagers that, although useful as sexual aids, are not "designed or marketed . . . primarily" for that particular purpose. *Williams*, 378 F.3d at 1233.

Moreover, under the holding announced in *Miller*, no one will be subject to prosecution for the sale of or exposing others to obscene materials unless the materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed.[188] Sex toys hardly depict patently offensive "hard core" sexual conduct. Certainly, pornographic movies, magazines and websites depict offensive "hard core" sexual conduct, yet the sale of these products is permitted. Alabama should be required to follow the standards set in *Miller* for regulating obscene material; however, it seems to have created its own standard.

In *Roe v. Wade*, the Court held that abortion was within the scope of the concept of personal liberty guaranteed by the Fourteenth Amendment of the U.S. Constitution.[189] It concluded that this right to privacy, whether it is found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, or in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision of whether to terminate her pregnancy.[190] If the right to privacy is broad enough to encompass a woman's decision of whether to terminate her pregnancy, one can conclude that her sexual activity, the means that got her pregnant in the first place, is also protected.[191] This is so because it could be said that the decision to have an abortion is like the decision to have sex or to have a certain kind of sex; both involve personal and bodily autonomy, control and self definition. Also, unlike abortion, there are no health concerns, and the use of sex toys occurs in the privacy of one's own home. While in the abortion cases, states articulate some rationale for restrictive laws (i.e., protecting the fetus), with sex toy laws, Alabama has expressed only disapproval.

In *Carey v. Population Services International*, the Supreme Court noted that although the Constitution does not explicitly mention any right to privacy, the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right to personal privacy, or a guarantee of certain areas or zones of privacy."[192] Past decisions seem to suggest that the use of sex toys does fall within this aspect of liberty described in *Carey*. In *Carey*, the Court held that the right

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188 *Miller*, 413 U.S. at 27.
189 *See* 410 U.S. 113 (1973).
190 *Id.* at 153.
191 Presumably, the use of sex toys is considered sexual activity.
192 431 U.S. 678 (1977).

to privacy includes "the interest in independence in making certain kinds of important decisions."[193] While the decision whether to use sex toys may not be as important as the decision whether to use contraceptives, as dealt with in *Carey*, the decision should be protected. In fact, the decision should be protected precisely because it is *not* a lofty one. A person's decision concerning the use of sex toys should be of no concern to the government of Alabama. Furthermore, the use of sex toys is clearly a personal decision that affects no one but the user, especially if the sale is prohibited for certain age groups and limited to certain specialty stores.

In *Bowers v. Hardwick*, the Court reasoned that none of the cases regarding marriage and procreation stood for "the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[194] *Bowers* is significant for several reasons. First, because it was overruled, the reasoning in *Bowers* is no longer valid. While this should not necessarily stand to mean that all private sexual conduct between consenting adults is protected, at the very least it should mean that sexual activity that is legal is protected.

Second, even if the reasoning of *Bowers* were retained, it should not apply to the use of sex toys. *Bowers* dealt with homosexual sodomy, which at the time was illegal. *Williams* deals with the sale of sex toys, the use of which has never been illegal.[195] As the court stated:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.[196]

While *Bowers* might stand for the idea that illegal sexual activity will not be protected under the right to privacy, it should not be read to stand for the proposition that there is no right to privacy in all

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193 *Id.* at 684.

194 478 U.S. 186, 191 (1986).

195 I focus on the use of sex toys here because for purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item. *Williams*, 378 F.3d at 1242.

196 *Williams*, 378 F.3d at 1256 (Barkett, J., dissenting).

sexual activities. Furthermore, if the *Williams* court was merely worried about a slippery slope, then perhaps the slope is not as slippery as the court believed. We can easily distinguish between crimes with victims and victimless crimes; the line can be drawn at some point and it can be drawn here, especially since the law only protects people from that which the legislature believes is immoral. The *Williams* court seems to forget that "often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens."[197]

Justice Blackmun's dissent in *Bowers* expressed the importance of protecting sexual privacy when he stated that "depriving individuals the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."[198] A ban on the sale of sex toys deprives individuals the right to choose for themselves how to conduct their intimate relationships. Now that *Bowers* has been overruled, it seems that this idea, of the state being unable to deprive individuals of this right to choose, rings more true than ever before.

In *Lawrence v. Texas*, the Court concluded that the petitioners were adults who were free to engage in private sexual conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.[199] In resolving this issue of whether the petitioners were "free as adults" to engage "in private [sexual] conduct," the Court retraced its substantive due process jurisprudence by discussing the fundamental rights cases of *Griswold*, *Eisendstadt*, *Roe*, and *Carey*, and emphasized the breadth of their holdings as involving private decisions regarding intimate physical relationships.[200] "Because of the existence of this right to make private decisions regarding sexual conduct, the *Lawrence* court was compelled to overrule the anomaly of *Bowers*, which failed to acknowledge this right in permitting Georgia to criminalize sodomy."[201] The use of sex toys should fall within this right expressed by the Court. The Court argued that "[a]dults may choose to enter upon a personal relationship in the confines of their homes and their own private lives and still retain their dignity

197 Romer v. Evans, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting) (discussing *Bowers*).
198 *Bowers*, 478 U.S. at 214.
199 *See* Lawrence v. Texas, 539 U.S. 558 (2003).
200 *Williams*, 378 F.3d at 1253 (Barkett, J., dissenting).
201 *Id.* at 1254 (Barkett, J., dissenting).

as free persons."[202] The use of sex toys is an aspect of a personal relationship and people's private lives that should be permitted based on the reasoning of the *Lawrence* Court.

Furthermore, the Supreme Court explained that the laws in *Bowers* and in *Lawrence* purport to do no more than prohibit a particular sexual act when in fact "[t]heir penalties and purposes have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private places, the home.[203] Similarly, the *Williams* court discounts the extent of the liberty at stake in this case. "Alabama's law not only restricts the sale of certain sexual devices, but, like the statute in *Lawrence*, burdens adult sexual activity within the home."[204]

Lawrence goes further in saying "[sexual] matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment of the U.S. Constitution."[205] On its face, this statement suggests that the Fourteenth Amendment does provide a right to sexual privacy. Moreover, the Court explains, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice."[206] Since the only reason Alabama offers for the enforcement of this law is morality, it follows that this law should not stand.

Most importantly, the *Williams* court seems to have overlooked that *Lawrence* held that "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process clause of the Fourteenth Amendment of the U.S constitution . . . [t]his protection extends to intimate choices by unmarried as well as married persons."[207] This language clearly states that there is a right to privacy for intimate choices made between both unmarried and married persons. In view of the fact that the choice whether to use sex toys is an intimate decision, the sale of sex toys based on this holding should be permitted.

Given these statements in *Lawrence*, it is hard to understand the *Williams* majority's reliance on a footnote from the Supreme

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202 *Lawrence*, 539 U.S. at 567.
203 *Williams*, 378 F.3d at 1256-57 (Barkett, J., dissenting).
204 *Id.* at 1257.
205 *Lawrence*, 539 U.S. at. 574.
206 *Id.* at 578.
207 *Id.*

Court's decision in *Carey*, where the Court indicated in dicta that it had not "definitively answered" the extent to which the Due Process Clause protects the private sexual conduct of consenting adults.[208] The Court could not have been clearer that the petitioners' right to engage in private sexual conduct has its textual locus in the Due Process Clause.[209] Finally, the *William's* court asserted that *Lawrence* was not a strict scrutiny case because it did not follow the *Glucksberg* analysis. However, since it can be said that the right to sexual privacy pre-dated *Lawrence*, this analysis was unnecessary. As the dissent in *Williams* noted, "[i]gnoring *Lawrence*, the majority turns a reluctance to expand substantive due process into a stubborn unwillingness to consider relevant Supreme Court authority."[210]

IV. Validity of Sale of Sex Toys

"This case is not about sex or sexual devices. It is about the tradition of American citizens from the inception of our democracy to value the constitutionally protected right to be left alone in the privacy of their bedrooms and personal relationships."[211] The *Williams* decision rests on the erroneous foundation that there is no substantive due process right to consensual sexual intimacy in the home and erroneously assumes that the promotion of public morality provides a rational basis to criminally burden such private intimate activity.[212]

However, the *Williams* court's major flaw is that it refused to acknowledge why the Court in *Lawrence* held that criminal prohibitions on consensual sodomy are constitutional. As explained above, it ignored that *Lawrence* reiterated that prior fundamental rights cases protected individual choices "concerning the intimacies of a physical relationship."[213] Applying the analytical framework of *Lawrence* compels the conclusion that the

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208 *Williams*, 378 F.3d at 1254 (Barkett, J., dissenting). Barkett reasons that *Carey* did not resolve in any way the meaning of a case that comes twenty-six years later. Nor does it prevent *Lawrence* from answering the very question posed in *Carey's* footnote. *Lawrence* does precisely this in affirming the right of consenting adults to make private sexual decisions. Moreover, he reasons that this could not have been a new right, because *Carey's* footnote notwithstanding, the *Lawrence* court determined that its pre-*Bowers* decisions had already recognized a right to sexual privacy. *Id.* He bases this on the *Lawrence* Court's statements that *Bowers* was "not correct when it was decided." Moreover, its decisions before *Bowers* had already made "abundantly clear" that adults have a right to make decisions "concerning the intimacies of their physical relationship[s]." *Id.*

209 *Id.*

210 *Id.*

211 *Williams*, 378 F.3d at 1250 (Barkett, J., dissenting).

212 *Id.*

213 *Id.* at 1251.

Due Process Clause protects a right to sexual privacy that encompasses the sale and use of sexual devices.[214]

Also, "[c]ompounding this error, the court ignores *Lawrence's* holding that although history and tradition may be used as a 'starting point,' they are not the 'ending point' of a substantive due process inquiry."[215] The Court has never required that there be a long-standing history of affirmative legal protection of specific conduct before a right can be recognized under the Due Process Clause in cases involving adult consensual sexual privacy.[216] To the contrary, this right has been protected by the Court despite historical, legislative restrictions on private sexual conduct because of the fundamental nature of this liberty interest.[217]

Finally, even under the *Williams* court's interpretation of *Lawrence*, Alabama's law does not survive the most basic level of review: rational basis. As the dissent in *Williams* noted, "[w]hile the court recognizes that *Bowers* has been overruled, it inexplicably fails to offer any explanation whatsoever for why public morality provides a rational basis to criminalize the private sexual activity in this case, when it was clearly not found to be a legitimate state interest in *Lawrence*."[218]

In *Lawrence*, Texas had explicitly relied upon public morality as a rational basis for its sodomy law.[219] "[*Lawrence*] summarily rejected Texas's argument, holding that the sodomy law further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[220] *Williams* cites *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality . . . indisputably is a legitimate government interest under rational basis scrutiny."[221] Since the Supreme Court rejected public morality as a legitimate interest, and that is the only interest that Alabama offers, the law fails rational-basis review.

> Whether Alabama's legislature believes that the use of sex toys may be improper or immoral, the Supreme Court has explained that '[t]hese considerations do not answer the question before us, however. The issue is whether the majority may use the

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214 *Id.*
215 *Id.*
216 *Id.*
217 *Williams*, 378 F.3d at 1251.
218 *Id.* at 1251-2.
219 *Id.* at 1259 (Barkett, J., dissenting).
220 *Id.*
221 *Williams*, 378 F.3d at 1260 (citing Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001).

> power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code.'[222]

CONCLUSION

On February 22, 2005, the Supreme Court declined to review the constitutionality of Alabama's law banning the sale of sex toys, rejecting the appeal that said consumers have a right to sexual privacy.[223] Without comment, the justices let stand the lower court's ruling that allowed Alabama to police the sale of sex toys.[224] The Supreme Court's refusal to hear the case should not be viewed as an endorsement of the Eleventh Circuit's decision. At least outside the Eleventh Circuit, whether there is a right to sexual privacy and whether the sale of sex toys is within that right is still an open issue, one that cannot be determined until the Supreme Court chooses to review it. Nevertheless, the Supreme Court should have granted certiorari to invalidate the Alabama' statute.

Sexual devices are used by individuals to consummate the most private acts, whether they be medically, therapeutically, or sexually motivated.[225] Furthermore, while these devices may be used for masturbatory purposes, masturbation is not now, nor has it ever been, a crime in any state.[226] Moreover, one of the most widely known types of sexual devices, the vibrator, has been legally and widely available since its invention in the mid-nineteenth century.[227] Just as states have deliberately avoided interferences in the sexual relationships of married and unmarried adults, states have deliberately avoided the regulation of these sexual devices.[228] "The fact that history and contemporary practice demonstrate a conscious avoidance of regulation of these devices by the states, along with the fact that such devices are used in the performance of deeply private sexual acts, supports a finding that the right to use these sexual devices is encompassed by plaintiff's right to sexual privacy."[229]

Furthermore, even if we assume first, that there is a right to

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222 *Id.*
223 Williams v. Alabama, 125 S. Ct. 1983 (2005); *see also* Hope Yen, *High Court Won't Review Ban on Sex Toys*, ABC News, http://www.wjla.com/news/stories/0205/208917.html (last visited March 9, 2005).
224 *Id.*
225 Williams v. Pryor, 220 F. Supp. 2d 1257, 1296 (N.D. Ala. 2002).
226 *Id.*
227 *Id.*
228 *Id.*
229 *Id.*

sexual privacy, second, that Alabama's interests rise to the level of compelling and third, that the rationale of First Amendment obscenity case law is applicable, the Alabama statute is not narrowly tailored enough to meet those objectives and, thus, is unconstitutional.[230] Moreover, assuming that there is no right to sexual privacy and this does not fall under strict-scrutiny review, Alabama's statute fails rational-basis review.

For the foregoing reasons, Alabama's statute should be invalidated because it violates a substantive due process right of adults to engage in private consensual sexual activity and because the state's reliance on public morality fails to provide even a rational basis for its law.

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230 *See id.*

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