

# HOW BROAD IS THE FUNDAMENTAL RIGHT TO PRIVACY AND PERSONAL AUTONOMY? – ON WHAT GROUNDS SHOULD THE BAN ON THE SALE OF SEXUALLY STIMULATING DEVICES BE CONSIDERED UNCONSTITUTIONAL?

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## INTRODUCTION

Recently, Alabama and Louisiana state courts issued permanent injunctions against laws that banned the sale of sexual devices used primarily for the stimulation of human genital organs.<sup>1</sup> Both state courts issued injunctions for the same reason; the statutes did not pass mere rational basis review.<sup>2</sup> These cases were not the first of their kind. The state courts in Georgia, Texas, Colorado, and Kansas also evaluated arguments on the constitutionality of comparably worded statutes.<sup>3</sup> Like the Alabama and Louisiana statutes, the

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1. See *Williams v. Pryor*, 41 F. Supp. 2d 1257 (N.D. Ala. 1999), *rev'd in part and remanded in part*, 240 F.3d 944 (11th Cir. 2001); *Louisiana v. Brennan*, 739 So. 2d 368 (1st Cir. 1999).

2. See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (holding that the right to assisted suicide is not a fundamental right and therefore the ban on it only needs to be rationally related to a legitimate government interest); *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (outlining the process of analysis for claims alleging a violation of the due process clause and holding that the due process clause only requires that a law not be “unreasonable, arbitrary or capricious, and that the means selected shall have real and substantial relation to the object sought to be attained.”). Rational review is used when there is no fundamental right or suspect class in question. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

3. See, e.g., *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985); *Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348 (Colo. 1985); *Sewell v. State*, 233 S.E.2d 187, 188 (Ga. 1977); *State v. Hughes*, 792 P.2d 1023 (Kan. 1990) (addressing the constitutionality of a state obscenity statute which bans the sale of genital stimulating devices).

Colorado and Kansas statutes were found unconstitutional.<sup>4</sup> However, the courts in Colorado<sup>5</sup> and Kansas<sup>6</sup> based their decisions on the fundamental right to privacy.

This Comment argues that although all four state courts correctly held the statutes unconstitutional, the Alabama and Louisiana courts based their holdings on an incorrect legal foundation and should ground their decision under a fundamental right to privacy framework. The Comment focuses on the right of individuals, particularly women, to use these devices in the privacy of their home, a right that is inextricably denied when the sale of such devices is banned. These arguments that invoke the Fourteenth Amendment right to sexual privacy are based on the Supreme Court cases that involve the fundamental rights associated with the “personal intimacies of the home, the family, marriage, motherhood, [and] procreation.”<sup>7</sup>

Part I briefly traces the history and attitude towards women and their sexuality. Part II presents the Constitutional framework for evaluating claims of substantive due process violations. Part III argues that the fundamental right to privacy necessarily includes the right to sexual privacy. Part IV addresses the state’s attempts to use “obscenity” to justify the ban on the sale of genital stimulating devices. Part V addresses the factual and legislative history behind each case and explains why the Alabama and Louisiana state courts made correct decisions, but applied deficient legal reasoning. Part V also asserts that the analysis offered by the courts in Colorado and Kansas is the correct way to determine what kind of protection the statutes deserve, by recognizing the breadth and importance of a fundamental right to privacy. Part VI is a reanalysis of the courts decision in *Williams v. Pryor* in light of the Eleventh Circuit holding that reverses and remands the lower court’s decision.<sup>8</sup> Finally, the conclusion recommends that the Court use the undue burden test<sup>9</sup> to

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4. See COLO. REV. STAT. § 18-7-101(2) (1999) (criminalizing the promotion or intent to promote any obscene device, including a dildo or artificial vagina designed to stimulate the human genital organs); KAN. STAT. ANN. § 21-4301 (1995) (criminalizing and defining the promotion or sale of obscene devices, such as a dildo or artificial vagina used primarily for the stimulation of human genitals).

5. See *Tooley*, 697 P.2d at 370 (holding that broad proscription on the sale of sexually stimulating devices impermissibly burdens the right of privacy).

6. See *Hughes*, 792 P.2d at 618 (holding that the statute impermissibly infringes on the constitutional right to privacy in one’s home and in his or her doctor’s or therapist’s office).

7. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-66 (1973).

8. See 240 F.3d 944 (11th Cir. 2001).

9. See *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (holding that a statute that imposes an undue burden on a woman’s ability to decide whether to have an abortion violates

expand the existing fundamental right of privacy to include the right to sexual privacy, thereby including the right to obtain and use genital stimulating devices.

### I. HISTORY OF SEXUAL VIEWS IN AMERICA

For women, sex has always been a political issue,<sup>10</sup> and as a result women have always been censored in their efforts to gain sexual freedom.<sup>11</sup> This discussion examines the way our nation historically and currently perceives female sexuality. Additionally, this section explains why statutes that ban the sale of sexual devices invade the fundamental right to privacy, and perpetuate the sexual repression of women.<sup>12</sup>

Historically, sex was considered an act solely engaged in for the purpose of procreation.<sup>13</sup> Men and women alike subscribed to the idea that “female purity was an asset for a family that wanted to rise in the world.”<sup>14</sup> Ministers even persuaded women that the only way to remain “pure and pious” was through sexual restraint.<sup>15</sup>

Since the late 1800s, government-imposed restrictions have

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her fundamental right of liberty under Due Process). This is a lower level of scrutiny than strict scrutiny. *See id.*

10. *See* Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1147 (1994) (discussing the censorship of women in their effort to gain sexual and reproductive freedom). Because women's sexual and reproductive choices have become increasingly subject to medical, legal, and corporate control, their bodies are becoming political battlegrounds. *Id.* *See also* GARY F. KELLY, *SEXUALITY TODAY* 104 (3d ed. 1992) (discussing Margaret Sanger, an activist and nurse, who pioneered the contraceptive rights movement for women and founded the National Birth Control League).

11. *See* Meyer, *supra* note 10, at 1147 (arguing that women are defined by their sexuality and reproductive capacity); DOROTHY MCBRIDE STETSON, *WOMEN'S RIGHTS IN THE U.S.A.: POLICY DEBATES AND GENDER ROLES* 69 (asserting that although reproductive issues have been in the public arena for the past two hundred years, efforts to establish public policy for reproductive freedom is relatively recent); *see also* E.J. GRAFF, *WHAT IS MARRIAGE FOR? THE STRANGE HISTORY OF OUR MOST INTIMATE INSTITUTION* 79 (1999) (detailing Margaret Sanger's arrest and the closure of her contraception clinic due to its “obscene” nature).

12. *See* HAROLD I. KAPLAN ET AL., *SYNOPSIS OF PSYCHIATRY: BEHAVIORAL SCIENCES CLINICAL PSYCHIATRY* 656 (7th ed. 1994) (stating that masturbation is the most frequently discussed, condemned, and practiced form of sexual activity, nearly all men and seventy-five percent of women masturbate sometime during their lives).

13. *See* GRAFF, *supra* note 11, at 53 (stating that for many centuries the “crime against nature” included any sex that attempted to prevent conception. Husbands and wives who tried to prevent pregnancy were thought of as harlots and adulterers.).

14. SUSAN WOLOCH, *WOMEN AND THE AMERICAN EXPERIENCE* 123 (1984) (asserting sexual restraint appeared to enhance a woman's power within the home while at the same time, serving the family's goals).

15. *See id.* at 122 (explaining how ministers and doctors alike emphasized the debilitating effect of sexual indulgence and promoted not only infrequent intercourse, but actually confirmed female asexuality). “Passionlessness was an innate and commendable female characteristic.” *Id.*

impeded women's efforts to gain equality both socially and sexually.<sup>16</sup> Male control of female sexuality assures male control over "the very sphere, which had originally been one source of female power and charisma."<sup>17</sup> For example, in 1873 Congress passed the Comstock Laws,<sup>18</sup> barring the use of the U.S. mail for the distribution of obscene materials and articles regarding contraceptive devices.<sup>19</sup> Women were aware that the way to gain equal footing with men was by freeing themselves from the constant constraint of motherhood.<sup>20</sup> In 1931, when the New York Academy of Sciences declared that contraception was safe, and marriage was for more than just making babies,<sup>21</sup> women achieved the first step toward equality.<sup>22</sup> Ultimately, it was not until 1965 that women won their freedom and the right to control their bodies and to decide whether to engage in sex for procreation or pleasure.<sup>23</sup> *Griswold v. Connecticut*<sup>24</sup> was the spark that set the Supreme Court in motion for its future decisions involving personal rights in the realm of sexual activity.<sup>25</sup> This decision began an era of decisions that recognized the right to female sexual autonomy.<sup>26</sup>

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16. See Lynn S. Chancer, *Feminist Offensives: Defending Pornography and the Splitting of Sex from Sexism*, 48 STAN. L. REV. 739, 749 (1996) (reviewing NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (1995)) (stating that from the 1870s to the 1930s, the federal government used antiobscenity laws to prevent the spread of information about birth control and sexual health).

17. ADRIENNE RICH, *OF WOMEN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 55, 129 (1976) (proposing that control over female sexuality is justified by the need to sustain a patriarchal society that is dependant on mothers).

18. See STETSON, *supra* note 11, at 72 (discussing how Anthony Comstock successfully lobbied in Congress to keep "smut" out of the U.S. Postal Service). Comstock equated contraceptives with hard-core pornography. See *id.*

19. See *id.* (stating that by the beginning of the 1900s half of the States had versions of the Comstock Act in place).

20. See GRAFF, *supra* note 11, at 78 (discussing the fact that use of contraceptive devices was the only way for women to take their rightful place socially and sexually); see also Casey, 505 U.S. at 835 (stating that women's ability to control their reproductive lives facilitates their participation in the economic and social realm of the nation).

21. See GRAFF, *supra* note 11, at 81; see also *United States v. One Package*, 86 F.2d 737, 738 (1936) (holding that contraception was not obscene, therefore making the Comstock laws obsolete).

22. See GRAFF, *supra* note 11, at 80-81 (asserting that the right to use birth control was as natural as women's right to vote or own their own property).

23. See LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 199-200 (1998) (asserting that the decision set forth in *Griswold v. Connecticut* ended the belief that marriage was for procreation and instead, that "people might now marry for the explicit purpose of having more and pleasurable sex.").

24. 381 U.S. 479 (1965).

25. See *id.* at 486 (holding that a law forbidding the use of contraceptives by married people was an unconstitutional invasion of privacy).

26. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (making women's right to privacy fundamental by allowing women to decide whether to have an abortion); *Planned Parenthood*, 505 U.S. at 869 (reasserting that *Roe's* holding that a woman's right to terminate her pregnancy

Today, society openly acknowledges that a woman's sexual pleasure is not solely linked to procreation.<sup>27</sup> By making the right to use contraceptives fundamental,<sup>28</sup> the Supreme Court necessarily makes the right to sexual privacy fundamental. Therefore, there is no justification for limiting the privacy right to use sexual devices.<sup>29</sup> Sexually stimulating devices are simply an alternative way of achieving sexual pleasure, either alone or with a partner in the privacy of one's own bedroom.<sup>30</sup>

## II. CONSTITUTIONAL FRAMEWORK FOR SUBSTANTIVE DUE PROCESS CLAIMS

### A. *What is a fundamental right?*

Under the substantive due process clause of the Fourteenth Amendment,<sup>31</sup> a fundamental right is a constitutionally protected right that deserves a heightened level of judicial scrutiny.<sup>32</sup> The Supreme Court has set forth two standards to determine whether an asserted right is fundamental.<sup>33</sup> The first standard states that "the Due Process Clause specially protects those fundamental rights and liberties which are objectively, deeply rooted in this Nation's history and tradition, . . . and are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."<sup>34</sup> The second standard states, "'substantive due process'

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is a rule of law and a component of liberty).

27. See Meyer, *supra* note 10, at 1149 (arguing that the increase in information and newly developed technology is making it possible for women to define a new sexual identity).

28. See *Griswold*, 381 U.S. at 485 (making the right to use contraceptives by married couples fundamental); see also *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (extending the right to contraceptives to unmarried people, as well as married people).

29. But see *Williams*, 41 F. Supp. 2d at 1279 (invoking the *Glucksberg*, 521 U.S. at 720, description of fundamental rights, such that the due process clause does not warrant sweeping protection for all important, intimate, and personal decisions).

30. See Juli A. Morris, *Challenging Sodomy Statutes: State Constitutional Protections for Sexual Privacy*, 66 IND. L.J. 609, 624 (1991) (concluding that it is time for courts to recognize that private, adult, consensual sexual activity only affects the individuals involved and should not concern the public).

31. U.S. CONST. amend. XIV, § 1.

32. See *Roe*, 410 U.S. at 155 (explaining that strict scrutiny is applied to any legislation that interferes with a fundamental right). Specifically, the governmental actor must prove that the action is justified by a compelling state interest and that the statute in question is narrowly tailored to achieve the compelling interest, through the least restrictive means available. See *id.*

33. See *Glucksberg*, 521 U.S. at 720 (asserting that history and legal tradition guide the use of these standards); see also Traci Shallbetter Stratton, *No More Messing Around: Substantive Due Process Challenges to Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 769 (1998) (discussing how the use of common law may be used to deem a right fundamental even if there is no history surrounding it).

34. *Glucksberg*, 521 U.S. at 720 (asserting that history and legal tradition guide the use of

analysis must begin with a careful description of the asserted right . . . .<sup>35</sup>

When a law's constitutionality is challenged, a court must determine whether a fundamental right is involved.<sup>36</sup> If a fundamental right is involved, the court applies a strict level of judicial scrutiny corresponding to the disputed right.<sup>37</sup> Statutes evaluated under this standard rarely survive judicial review.<sup>38</sup> When the court is unable to find that the asserted substantive due process violation involves a fundamental right, the challenged law will either be evaluated under intermediate review<sup>39</sup> or rational review.<sup>40</sup>

### B. *The Fundamental Right to Privacy*

The right of citizens to be free from unwarranted governmental intrusion is inherent in American society.<sup>41</sup> Justice Brandeis' dissent in *Olmstead v. United States*<sup>42</sup> laid the foundation for the Supreme

these standards); *see, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (establishing that the Constitution protects the sanctity of the family because it is an institution that is so deeply rooted in history and tradition); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (holding the constitutional right of parents to be the primary decision makers for their children because this is a strong Western Society tradition).

35. *Reno v. Flores*, 507 U.S. 292, 302 (1993) (stating that the Fourteenth Amendment prevents the government from invading a fundamental interest unless the interest is narrowly tailored to serve a compelling state interest).

36. *See United States v. Virginia*, 518 U.S. 515, 533 (1993) (stating that strict scrutiny is applied to the deprivation of whatever right the court deems fundamental, and that fundamental rights are not limited to those that were traditionally protected); *Williams*, 41 F. Supp. 2d at 1274 (asserting that a critical inquiry in substantive due process claims involves a determination of the type of right involved).

37. *See Reno*, 507 U.S. at 302 (asserting that the government cannot infringe on a fundamental right unless the infringement is narrowly tailored to serve a compelling state interest).

38. *See Virginia*, 518 U.S. at 567 (stating that strict scrutiny is reserved for state classifications that affect fundamental rights); *Casey*, 505 U.S. at 839 (referring to the strict scrutiny analysis in *Roe v. Wade*, used to determine the constitutionality of state regulations on abortion).

39. *See Virginia*, 518 U.S. at 567 (asserting that there is no established criterion for applying intermediate scrutiny, but that it has been applied to restrictions that place an incidental burden on freedom of speech, illegitimacy, and discrimination based on gender).

40. *See Glucksberg*, 521 U.S. at 727 (stating that where the asserted right is not considered fundamental, the statute in question only needs to be rationally related to a legitimate state interest); *see also Stratton*, *supra* note 33, at 772 (stating that under minimal rational review, the court defers heavily to the legislature and allows a statute to stand if "the legislation has some minimally plausible, even if unproven and unlikely, relation to a permissible legislative purpose.").

41. *See Roe*, 410 U.S. at 153 (holding that the right to be free from unwarranted governmental intrusion involves the right to decide whether to bear a child); *Eisenstadt*, 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion . . .").

42. 277 U.S. 438 (1928) (addressing the issue of privacy and wiretapping of phone conversations).

Court's recognition of the constitutionally protected right to privacy.<sup>43</sup> Justice Brandeis stressed that the right to be let alone is the most comprehensive right of individuals, one that should not be penetrable by the government.<sup>44</sup>

The right to privacy is fundamental.<sup>45</sup> Even though it is not specifically set forth in the Constitution, it is provided through the penumbras or "protective shadows" of the Bill of Rights.<sup>46</sup> Specifically, the penumbras surrounding the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments create zones of privacy recognized by the courts.<sup>47</sup> Several Supreme Court decisions regarding privacy rights addressed issues of sex and sexual conduct.<sup>48</sup> Although there is no clear boundary or limit to the right of privacy, it is clear that personal decisions regarding marriage,<sup>49</sup> marital privacy,<sup>50</sup> procreation,<sup>51</sup> contraception,<sup>52</sup> and abortion<sup>53</sup> are among those

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43. See *id.* at 478 ("The makers of our Constitution . . . 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 . . .").

44. See *id.* (noting that a governmental violation of one's privacy is a Fourth Amendment violation).

45. See *Casey*, 505 U.S. at 926 (recognizing a fundamental right to privacy in cases involving "procreation, childrearing, marriage, and contraceptive choice."); see also *Arizona v. Evans*, 514 U.S. 1, 20 (1995) (stating that the Fourth Amendment provides a check on official invasions of the fundamental right to privacy).

46. See *Griswold*, 381 U.S. at 482-84 (concluding that the long history of Supreme Court cases analyzed provides a substantial basis to find a right of privacy in the Bill of Rights).

47. See *id.* at 494-95 (describing how the penumbras of the specific Amendments provide a right to privacy); see also U.S. CONST. amend. I (providing privacy through free association); U.S. CONST. amend. III (providing protection of privacy by prohibiting the quartering of soldiers in any house during peacetime without consent of the owner); U.S. CONST. amend. IV (stating the right of people to be secure in their persons, houses, papers, and effects from unreasonable searches and seizures); U.S. CONST. amend. V (creating a zone of privacy through the self-incrimination clause by protecting citizens from forcing their own detriment); U.S. CONST. amend. IX (acting as a general, catchall phrase stating that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. CONST. amend. XIV (providing a right to privacy through the liberty interest of its Due Process Clause).

48. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding the constitutionality of a statute, which criminalized consensual homosexual sodomy); see also *Roe*, 410 U.S. at 153 (providing women with a limited right to decide whether to have an abortion based on the competing interests of the state and the unborn child).

49. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

50. See *Griswold*, 381 U.S. at 485-86 (asserting that any law requiring an invasion into the "sacred precincts of marital bedrooms . . . is repulsive to the notions of privacy surrounding the marriage relationship.").

51. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (protecting the right to have children by stating that "[m]arriage and procreation are fundamental to the very existence and survival of the race.").

52. See *Eisenstadt*, 405 U.S. at 453 (extending the holding in *Griswold* to non-married couples who want to use birth control).

protected from unjustified governmental intrusion.<sup>54</sup>

### III. HOW THE FUNDAMENTAL RIGHT TO PRIVACY NECESSARILY EXTENDS TO CONSENSUAL SEXUAL ACTIVITIES AMONG HETEROSEXUAL ADULTS

Throughout history, the Supreme Court has faced a variety of issues regarding the fundamental right to privacy, from child rearing and family life to the right to bear or beget a child, and homosexual sodomy.<sup>55</sup> Early on, the Court limited the right of privacy to issues concerning marriage and procreation.<sup>56</sup> Five years after the Court refused to address a Connecticut statute criminalizing the use of contraceptives by married couples,<sup>57</sup> the Court adopted the reasoning of Justice Douglas' dissent in *Poe v. Ullman*<sup>58</sup> in *Griswold v. Connecticut*<sup>59</sup> and held the same Connecticut statute unconstitutional. This decision opened the door to the issue of sexual autonomy and privacy.<sup>60</sup> Although some may argue that *Griswold* represented a right to marital privacy<sup>61</sup> and not a right to individual privacy, the Supreme

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53. See *Casey*, 505 U.S. at 839 (upholding abortion as a fundamental right).

54. See *id.* at 851 (finding that decisions involving marriage, procreation, contraception, and family relationships involve "the most intimate personal choices a person may make in a lifetime.").

55. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the Fourteenth Amendment establishes the right of an individual "to marry, establish a home, and bring up children."); see also *Bowers*, 478 U.S. at 196 (upholding the constitutionality of a statute that criminalizes homosexual sodomy); *Roe*, 410 U.S. at 154 (holding that a state law which required children to go to public school unreasonably interfered with the liberty of parents to raise their children as they see fit); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (holding that a state law which required children to go to public school unreasonably interfered with the liberty of parents to raise their children as they see fit).

56. See *Skinner*, 316 U.S. at 541 (holding that the state statute authorizing sterilization for certain criminals violated the equal protection clause of the Fourteenth Amendment because marriage and procreation are fundamental to the existence of the human race); Daniel Leonard Pulter, Note, *Constitutional Line Drawing: Abortion Versus Homosexuality - Why the Difference?*, 12 OKLA. CITY U.L. REV. 865, 898 (1987) (noting that the decisions which framed the constitutional right to privacy surrounded the marital union and procreation); see also *Poe v. Ullman*, 367 U.S. 497, 520 (1961) (Douglas, J., dissenting) (disagreeing with the dismissal of the case and arguing that making the use of contraceptives a crime violates the sanctity of a man and wife).

57. See *Ullman*, 367 U.S. at 509 (dismissing the case for lack of a justiciable question).

58. *Id.* at 520-21 (Douglas, J., dissenting) (asserting that the criminalization of "use" contraceptive methods allows the state to enter and inquire in the privacy of the marital bedroom).

59. 381 U.S. at 485-86 (making the right to use contraceptives fundamental under the rubric of privacy).

60. See George W.M. Thomas, Note, *Privacy: Right or Privilege: An Examination of Privacy After Bowers v. Hardwick*, 39 SYRACUSE L. REV. 875, 880 (1988) (asserting that the *Griswold* decision defeated the Court's reluctance to address the issue of sexual autonomy, and thereby created a right to privacy that protected concepts related, but not confined to marriage and family).

61. See *Griswold*, 381 U.S. at 486 (acknowledging that the right of marital privacy is

Court clarified its intention seven years later in *Eisenstadt v. Baird*.<sup>62</sup>

In *Eisenstadt*, the Court's holding clarifies the nexus between the right to privacy and personal autonomy.<sup>63</sup> In *Eisenstadt*, the Court accepted its first opportunity of many opportunities to expand the fundamental right of privacy beyond the confines of marriage and procreation.<sup>64</sup> Justice Brennan declared the right to contraception an "individual right," one that is not specifically related to marital status.<sup>65</sup> Although *Eisenstadt* proved that the constitutional right to privacy was not limited to married couples, the Supreme Court's next decision was more important because it expanded the right of privacy beyond an individual's home.<sup>66</sup> *Roe v. Wade*<sup>67</sup> extended the right of privacy to include a women's right to terminate her pregnancy.<sup>68</sup> The Court continued making decisions that broadened an individual's fundamental right to privacy.<sup>69</sup>

The Supreme Court insists that its decisions involving the "right to privacy" cases have not "definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior."<sup>70</sup> The line of cases from *Skinner* to *Roe*, and their progeny, however, expand and establish the fundamental right to privacy<sup>71</sup> enough so that the

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supported by numerous decisions of the court, as well as the history of the Ninth Amendment, even though it is not specifically mentioned in the Bill of Rights).

62. 405 U.S. at 449 (finding unconstitutional the Massachusetts statute that banned the right of single non-married persons to obtain contraceptives to prevent pregnancy because the statute violated the equal protection clause).

63. *Id.*

64. *See id.* (insisting that the fundamental right to privacy inheres in the individual and has nothing to do with a married couple's interest in procreation).

65. *See id.* at 453 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion . . .").

66. *See Pulter, supra* note 56, at 887 (stating that *Roe v. Wade* was a "quantum leap from past privacy analysis.").

67. 410 U.S. at 153.

68. *See id.* (stating that the right to an abortion is founded in the right to personal autonomy and bodily integrity).

69. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (extending the holding in *Danforth*, by providing the fundamental right to minors to obtain contraceptives); *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (giving minors the right to an abortion by invalidating a statute requiring parental consent).

70. *Carey*, 431 U.S. at 689 n.5 (observing that the Court declines to specifically delineate what adult sexual behavior is constitutionally prohibited).

71. *See* Mark John Kappelhoff, Note, *Bowers v. Hardwick: Is there a Right to Privacy?*, 37 AM. U. L. REV. 487, 496 (1988) (citing *Poe v. Ullman*, 367 U.S. 497 (1961)) (asserting that the zone of privacy found in the due process clause of the fourteenth amendment cannot be determined by any formula or code; instead it is something that changes over time in response to changes in values and mores). The right to privacy can only be limited by the basic values that underlie our society; allowing a right to sexual privacy is one of these rights. *See id.*

recognition of a fundamental right to sexual privacy is the next logical step.<sup>72</sup>

In 1986, the Supreme Court took a step backward when it concluded that the statutory prohibition of consensual homosexual conduct was constitutional.<sup>73</sup> *Bowers v. Hardwick* was a departure from the Court's previous holdings regarding the right to privacy.<sup>74</sup> Essentially, the holding narrowed the right to privacy so much that it actually reshaped the right to its earlier form, where it only protected personal decisions involving marriage, procreation, and family.<sup>75</sup> Although the line of cases from *Griswold* to *Roe* strengthened the protection of privacy as it related to marriage, procreation, and family, the cases also recognized that the fundamental right to privacy inheres in the individual.<sup>76</sup> Thus, the Supreme Court's decision in *Bowers* conflicted with prior and subsequent case law.<sup>77</sup>

As previously noted, *Eisenstadt* is the link that solidified the fundamental right to sexual privacy for all individuals.<sup>78</sup> By extending the fundamental right of privacy to decisions involving contraception and procreation, the Supreme Court necessarily extends the fundamental right of privacy to sexual conduct and intimacy.<sup>79</sup>

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72. See *id.* ("Recognizing private, consensual sexual behavior as a fundamental right . . . is therefore a logical progression in a long history of cases.")

73. See *Bowers*, 478 U.S. at 195-96 (upholding a Georgia statute criminalizing sodomy).

74. See Daniel Joseph Langin, *Bowers v. Hardwick: The Right of Privacy and the Question of Intimate Relations*, 72 IOWA L. REV. 1443, 1443 (1987) (asserting that the *Bowers* decision was an "anomaly," because over the last two decades the Supreme Court expanded the scope of activities protected under the fundamental right of privacy).

75. See *Bowers*, 478 U.S. at 189 (stating that there is no connection between family, marriage, or procreation and homosexual sodomy).

76. See *Roe*, 410 U.S. at 153 (finding that the right of a woman to terminate her pregnancy is protected, regardless of whether she is married or single); *Eisenstadt*, 405 U.S. at 449 (asserting that although the decision in *Griswold* inhered in the marital relationship, the marital couple is made up of two individuals who separately have the right to be free from governmental intrusion); see also *Skinner*, 316 U.S. at 540 (holding that procreation is a personal fundamental right).

77. See *Roe*, 410 U.S. at 153 (granting the constitutionally protected right to have an abortion); *Eisenstadt*, 405 U.S. at 439 (extending the holding in *Griswold* to provide unmarried couples the fundamental right to use contraception). See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming that a woman's right to have an abortion is constitutionally protected); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (providing married couples with the fundamental right to use contraception).

78. See Claudia Tuchman, Note, *Does Privacy Have Four Walls? Salvaging Stanley v. Georgia*, 94 COLUM. L. REV. 2267, 2286 (1994) (quoting Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 200 (2000)) ("[*Eisenstadt*] unmasks *Griswold* as based on the idea of sexual liberty . . ."). Other commentators note that the protection given to sexual autonomy is not limited to procreation, but extends to include "recreational" sexual behavior. *Id.*

79. See William C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 776 (1995) (asserting that *Griswold* and *Eisenstadt* were not only about personal life, but specifically a married couple's right to seek sexual pleasure through the use of contraception); see also

Basically, the use of contraceptives by non-married heterosexual couples during consensual sexual activity is a non-procreative act that is protected by the Constitution.<sup>80</sup> Therefore, consensual homosexual activity, which is also non-procreative, deserves the same level of protection. The State should not interfere with consenting adults engaging in an intimate and private sexual relationship.<sup>81</sup>

Even if the Supreme Court is not willing to find an express fundamental right to sexual privacy, the right to sexual privacy may still be protected, as it is incidental to other fundamental rights.<sup>82</sup> In *Carey v. Population Services International*, the Court considered a statute that restricted access to contraceptive devices.<sup>83</sup> Citing its decisions in *Planned Parenthood v. Danforth*<sup>84</sup> and *Doe v. Bolton*,<sup>85</sup> the Supreme Court held that state regulations that limit access to contraception are subject to the same strict scrutiny standard as statutes that completely prohibit access.<sup>86</sup> The Court explained that although there is not an

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*Eisenstadt*, 405 U.S. at 453 (asserting that the decision of whether to bear or beget a child necessarily presupposes the right of consensual, heterosexual partners to engage in sex); *Yorko*, 690 S.W.2d at 268 (Clinton, J., dissenting) (asserting that the constitutional protection to decide whether to bear or beget a child necessarily means that the same protection is given to the decision whether to engage in sex at all); *Tooley*, 697 P.2d at 370 n.28 (holding that the duty of the legislature is to adopt statutes compatible with a person's right to engage in sexual activities "to the extent" that the right falls under the fundamental right to privacy).

80. See *Eisenstadt*, 405 U.S. at 453 (giving non-married people the fundamental right to use contraceptives). Essentially, the Court extends the right to privacy beyond the area of procreation and focuses more on an individual's right to be free from governmental intrusion. *Id.*

81. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."); see also *Bowers*, 478 U.S. at 205 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)) ("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.'").

82. See Jeffrey A. Barker, Comment, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?*, 40 UCLA L. REV. 1275, 1331 (1993) (asserting that a right that is not fundamental will still be protected if it is an integral part of an existing fundamental right). For example, the right to choose a sexual partner is inherent in the constitutionally protected right of decision in matters involving childbearing. *Id.* at 1332.

83. See *Carey*, 431 U.S. at 681 (discussing a New York law, which made it illegal for any person to sell or distribute any contraceptive to a person under the age of sixteen).

84. See 428 U.S. at 56-57 (addressing abortion regulation issues such as parental consent that were secondary to the right of abortion set forth in *Roe v. Wade*). Specifically the Court held that requiring spousal and parental consent for abortion is unconstitutional. See *id.* The State does not have the authority to proscribe an abortion and the State also does not have the authority to give someone other than the patient, such as a spouse, that authority. *Id.* In either case, the woman's fundamental right of access to an abortion is limited because her right is subject to the decision of another person. *Id.*

85. 410 U.S. 179, 199 (1973) (holding that a Georgia statute requiring women to have an abortion in an accredited hospital subsequent to the approval of an abortion committee and another physician was unconstitutional).

86. See *Carey*, 431 U.S. at 688-89 (citing *Roe*, 410 U.S. at 155) (delineating the criteria that must be met for a statute to pass strict scrutiny: statutes will only be justified by a compelling

independent, fundamental right of access to contraceptives, “such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*.”<sup>87</sup> It would be paradoxical to conclude that the Constitution extends the right of privacy to protect an individual’s right to obtain contraceptive devices, but does not extend the right to privacy to protect the act that necessitates them.<sup>88</sup>

After the Supreme Court’s expansion of the right to privacy, and its subsequent decision in *Bowers*,<sup>89</sup> its refusal to grant *certiorari* in cases involving private sexual conduct confuses lower courts faced with similar issues.<sup>90</sup> This confusion is evidenced by the fact that some lower courts have applied the Supreme Court’s rationale for issues involving the right of privacy in upholding the right to consensual homosexual and heterosexual privacy.<sup>91</sup> Thus, when the Supreme Court reaffirmed the long recognized right of privacy and bodily integrity<sup>92</sup> in *Planned Parenthood v. Casey*,<sup>93</sup> the Court solidified the assertion that the liberty interest that developed in *Griswold*,<sup>94</sup> *Eisenstadt*,<sup>95</sup> and *Carey*<sup>96</sup> encompassed the right to engage in non-

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state interest that is narrowly drawn to express the legitimate state interest).

87. *Id.* at 688-89.

88. See *Eisenstadt*, 405 U.S. at 446-56 (extending the right of non-married people to obtain contraceptives); *Griswold*, 381 U.S. at 485 (1965) (providing married couples the right to obtain contraceptive devices); Barker, *supra* note 82, at 1332 (applying the same analysis in the limited context of choosing a partner with whom to use the contraceptives).

89. See *Bowers*, 478 U.S. at 188-90 (deciding that sodomy is not protected activity within the penumbra of privacy rights).

90. Compare *Oklahoma v. Post*, 479 U.S. 890 (1986) (addressing the right to select consensual sex partners, married or unmarried, and to engage in abnormal sex acts), and *Henry v. City of Sherman*, 928 S.W.2d 464, 467-68 (Tex. 1996) (addressing the discharge of a police officer for adultery suggests privacy extends to only certain heterosexual acts), with *Tuchman*, *supra* note 78, at 2287 (bolstering the argument that the Supreme Court’s denial of *certiorari* for a case involving heterosexual sodomy in *Post v. State* implicitly endorsed the right of privacy in heterosexual sex, even sex acts deemed abnormal).

91. See generally *Lovisi v. Slayton*, 539 F.2d 349, 351 (4th Cir. 1976) (recognizing that the constitutional right of privacy extends to married people to engage in sodomy in the privacy of their own bedroom); *People v. Onofre*, 415 N.E.2d 936, 940 (N.Y. 1980) (invalidating a state statute criminalizing any act of sodomy between two people). Essentially, it was Supreme Court precedent that provided the force behind these decisions. *Id.*

92. See *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 255 (1891) (recognizing the right of an individual to be free from the restraint or interference of others). This is the earliest case that notes a fundamental interest in the right to personal freedom. *Id.*

93. 505 U.S. 833 (1992) (reaffirming *Roe v. Wade*’s holding recognizing a woman’s right to choose to have an abortion).

94. 381 U.S. at 485 (providing the fundamental right to obtain and use contraception).

95. 405 U.S. at 452 (expanding the fundamental right to obtain contraceptives to non-married individuals).

96. 431 U.S. at 694 (extending the right to obtain and use contraceptive devices to

reproductive sexual conduct.<sup>97</sup>

Although marriage, procreation, abortion, and contraception cases provide the constitutional right of personal autonomy, these cases have not been interpreted to mean that all sexual conduct is beyond state regulation.<sup>98</sup> Every state has the unquestionable authority under its police power to safeguard health, safety, comfort, morals, and general welfare by such laws and statutes that are reasonable and necessary for that purpose.<sup>99</sup> The state law or statute, however, must not invade a constitutionally protected fundamental right.<sup>100</sup>

Notwithstanding the Court's holding in *Bowers v. Hardwick*,<sup>101</sup> a law that makes genital stimulating devices illegal is tantamount to entering the privacy of a person's bedroom to stop them from engaging in sexual activity; a right that arguably has constitutional protection.<sup>102</sup> The holding in *Bowers* recognizes that there are fundamental rights that are not specifically set forth in the constitution.<sup>103</sup> However, the Court qualifies the rights by limiting them to those that are "deeply rooted in the Nation's history and tradition."<sup>104</sup> The right to engage in consensual heterosexual sex

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minors).

97. See *Bowers*, 478 U.S. at 218 (arguing in the dissent that the right of married couples to conduct their intimate relationships outside the eye of the State, includes the right of others to engage in non-reproductive sexual acts regardless of offense taken by others).

98. See Linda Fitts Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEGAL ETHICS 209, 234 (1997) (discussing how the *Bowers v. Hardwick* decision does not make it easier for states to regulate private sexual activity beyond homosexual sodomy).

99. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (setting forth the standard that a state law must be fair, reasonable, and appropriate). Holding that a state statute limiting the number of hours bakers may work unconstitutional because it violates an individual's freedom to contract. See *id.* But see *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 423 (1952) (overruling in part *Lochner* by asserting that a state legislature has the qualified constitutional authority to regulate business in maintaining public welfare).

100. See generally *Olmstead*, 277 U.S. at 478 (addressing how Americans sought protection in their beliefs, thoughts, emotions, and sensations against Government in the right to be let alone – the most comprehensive right and the right most valued by man).

101. 478 U.S. at 196 (upholding the constitutionality of a state law imposing criminal sanctions for homosexual sodomy).

102. See *Eisenstadt*, 405 U.S. at 439 (expanding the right to use contraception in the marital bedroom to use during sexual activity in all bedrooms); *Griswold*, 381 U.S. at 485-86 ("Would we allow the police to search the . . . marital bedroom for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding marriage."). But see *Bowers*, 478 U.S. at 186 (stating there is no connection between the fundamental right to procreate and engaging in homosexual acts in the privacy of one's own bedroom).

103. See Heffernan, *supra* note 79, at 779 ("*Bowers* enunciates a compromise position on unenumerated rights."). The Supreme Court recognizes that the right to use contraceptive devices is an unenumerated right, but justifies the protection of the right to obtain contraception by linking it to marriage and procreation; rights that are deeply rooted in our Nation's history. See *id.*

104. *Bowers*, 478 U.S. at 192 (citing *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937) and

apart from procreation,<sup>105</sup> as well as the right of privacy in one's home,<sup>106</sup> together provide a foundation for expanding the fundamental right of privacy to include the use of genital stimulating devices.

A dildo is defined as an object used for sexual gratification in place of an erect penis, and a vibrator is a battery-operated or electric version.<sup>107</sup> Therefore, if one person is engaging in sexual activity with these devices, they are engaging in activity that is the equivalent of consensual sex that is not for procreation.

#### IV. OBSCENITY LAWS BANNING THE SALE AND PROMOTION OF SEXUALLY STIMULATING DEVICES USED PRIMARILY FOR THE STIMULATION OF HUMAN GENITALS

Kansas and Colorado recognize that the right to use genital stimulating devices comes within the fundamental right to privacy.<sup>108</sup> However, both limit the protection of using the devices to married couples and to people who use the devices for medical or therapeutic purposes;<sup>109</sup> both of which are recognized as fundamental rights.<sup>110</sup> On the other hand, Louisiana, Alabama, Texas, and Georgia deny that there is any fundamental right involved with the use of genital stimulating devices.<sup>111</sup> These statutes fall under the rubric of state

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*Moore*, 431 U.S. at 503) (proposing that fundamental rights are those that are implicit in the concept of liberty and that without them, neither liberty nor justice would survive).

105. See *Carey*, 431 U.S. at 694 (holding that minors have the same constitutional right to contraceptive use as adults); *Eisenstadt*, 405 U.S. at 439 (extending the right to use contraception to nonmarried couples).

106. See *Griswold*, 381 U.S. at 484 (protecting the sanctity of the marital bedroom); *Ullman*, 387 U.S. at 521 (arguing that the state should not be allowed to enter into the sanctity of the home); see also *Stanley*, 394 U.S. at 564 (protecting the right to view pornography in the privacy of one's home).

107. See ALAN RICHTER, *DICTIONARY OF SEXUAL SLANG – WORDS, PHRASES, AND IDIOMS FROM AC/DC TO ZIG-ZIG* 65, 232 (1993).

108. See *Hughes*, 792 P.2d at 1031-32 (holding that the statute impermissibly infringes on the right to privacy in one's home and in a doctor or therapists office); *Tooley*, 697 P.2d at 368 (holding that the statute impermissibly violated a persons right to privacy to use sexually stimulating devices by prohibiting the promotion or sale of such devices).

109. See COLO. REV. STAT. § 18-7-101(2) (1999); KAN. STAT. ANN. § 21-4301 (1995).

110. See *Paris Adult Theatre I*, 413 U.S. at 66 n.13 (stating that the constitutional right to privacy extends to the home and to one's doctor's or therapist's office).

111. See *Brenan*, 739 So. 2d at 371-72 (following the analysis set forth in *Williams* and refusing to recognize a fundamental right to use genital stimulating devices); *Williams*, 41 F. Supp. 2d at 1284 (following the Supreme Court's reluctance to extend protection under the Due Process clause, thereby refusing to extend the fundamental right of privacy to include the use of genital stimulating devices); *Yorko*, 690 S.W.2d at 265 (failing to find any language in the Constitution or in Supreme Court cases that provides a fundamental right to use genital stimulating devices); *Sewell v. State*, 233 S.E.2d 187, 188 (Ga. 1977) (upholding Georgia statute that "any device

obscenity laws where an “obscene device” is defined as any device used primarily for the stimulation of human genital organs.<sup>112</sup> The fact that each of these statutes is imbedded in the State’s obscenity statute gives weight to the assertion that the legislatures are not willing to address the issue of sexual privacy. Thus, labeling these devices as obscene is the legislature’s attempt to get around the issue of privacy. However, obscenity is not a generic term that can be used to label something that does not fit into the constitutionally mandated framework.<sup>113</sup>

#### A. *Sexual Devices as Obscene Per Se*

The state legislatures in Texas, Georgia, Colorado, Kansas, Alabama and Louisiana all define obscene devices as those used primarily for the stimulation of human genital organs.<sup>114</sup> Because these devices are used to achieve sexual pleasure in essentially the same way as “person to person” sex, the legislatures equate sex and/or sexually stimulating devices as obscene.<sup>115</sup> This regulation is merely an underhanded way to achieve state regulation of otherwise protected private activity.<sup>116</sup> An analysis of the Supreme Court holdings on obscenity shows that the state legislatures incorrectly categorize these sexual devices as obscene.<sup>117</sup>

According to the Supreme Court in *Brockett v. Spokane Arcades*,

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designed or marketed for the stimulation of human genitals is obscene.”).

112. See, e.g., GA. CODE ANN. § 16-12-80(c) (1999) (stating that any device designed primarily for the stimulation of human genital organs is obscene); TEX. PENAL CODE ANN. § 43.21(a)(7) (West 1989) (criminalizing the promotion and possession of obscene devices, including dildos when the primary purpose is for sexual stimulation and gratification); see also COLO. REV. STAT. § 18-7-101(2) (1999); KAN. STAT. ANN. § 21-4301 (1995); LA. REV. STAT. ANN. § 14:106.1; ALA. CODE § 13A-12-200.2(a)(1) (Supp. 1998).

113. See *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing guidelines to determine what type of material is obscene).

114. See sources cited *supra* note 112.

115. *Hughes*, 792 P.2d at 1031 (finding that the term “sexually provocative aspect” in the Kansas Statute impermissibly equates sexuality with obscenity); *Tooley*, 697 P.2d at 370 (holding that the language of the statute equates sex with obscenity). The Colorado legislature labeled all genital stimulating devices as obscene, however the definition of obscene in COLO. REV. STAT. § 18-7-101(1) and (2) (1999) excludes these devices. Thus it is unclear whether the devices are obscene. See *Tooley*, 697 P.2d at 370 n.28 (providing analysis of how legislatures should classify sexual devices).

116. See *Yorko*, 690 S.W.2d at 268 n.5 (Clinton, J., dissenting) (quoting *Roth v. United States*, 354 U.S. 476, 487 (1957)) (“In saying that obscene material and obscene devices are used for the same purpose, surely the majority does not mean to equate lustful thoughts with private sexual activity. If it does, some supporting authority would aid one in comprehending the equation.”).

117. See *Roth*, 354 U.S. at 487-88 (expressly stating that sex and obscenity are not synonymous).

*Inc.*,<sup>118</sup> the traditional explanation of obscenity is material whose “predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion.”<sup>119</sup> In *Miller v. California*,<sup>120</sup> the Supreme Court established a guideline to determine what material is obscene.<sup>121</sup> The guideline focuses on a narrow scope of works that depict or describe sexual conduct.<sup>122</sup> Despite the State’s broad power to regulate obscenity,<sup>123</sup> these devices do not pass the *Miller* three-prong test. As a result, sexually stimulating devices cannot be obscene per se. First, these devices do not depict or describe sexual conduct. Second, they are used in a healthy and private way to achieve sexual pleasure<sup>124</sup> or for therapeutic value.<sup>125</sup> Therefore, the devices cannot be considered prurient.<sup>126</sup> Even if the legislature succeeds in proving that the devices fit into one or more of the standards set forth by *Miller*, the devices are protected under *Stanley v. Georgia*,<sup>127</sup> which held that the mere private possession of obscene material is protected under the First and Fourteenth Amendments.<sup>128</sup>

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118. 472 U.S. 491, 493-94 (1985) (upholding a Washington State moral nuisance statute, which establishes criminal and civil penalties for places dealing in lewd films or publications).

119. *Id.* at 497 (citing MODEL PENAL CODE § 207.10(2)) (Tent. Draft No. 6 1957).

120. 413 U.S. 15 (1973).

121. *See id.* at 24 (setting forth the following test to determine what material is obscene: (1) Whether an average person under contemporary community standards would find the material appealing to prurient interest; (2) Whether the material depicts or describes sex in a patently offensive way; and (3) Whether the material lacks serious literary, artistic, political, or scientific value). Each of these prongs must be satisfied to prove obscenity. *See id.*

122. *But see Hughes*, 792 P.2d at 1031 (asserting that the *Miller* standards do not apply because historically and currently, those “standards were set forth under the general assumption that the obscene item will be a book, movie, or play, rather than a device.”).

123. *See Paris Adult Theatre I*, 413 U.S. at 69 (holding that States may make moral and neutral judgments that material is obscene, but that they only have a legitimate interest in regulating commerce and exhibition of obscene material in places of public accommodation); *see also Roth*, 354 U.S. at 497-98 (asserting that the fact a state can regulate does not mean there are no barriers to that regulation).

124. *See WILLIAM H. MASTERS ET AL., HETEROSEXUALITY* 198 (1994) (stating that vibrators deliver much more focused and intense stimulation).

125. *See* 21 C.F.R. §§ 884.5490 & 5960 (1984) (regulating the sale of general vibrators for therapeutic use in the treatment of sexual dysfunction).

126. *See Miller v. California*, 413 U.S. 15, 25 (1973) (defining prurient interest as patently offensive representations or descriptions of normal or perverted sexual acts or the description of masturbation, excretory functions, or lewd exhibition of the genitals).

127. 394 U.S. 557, 568 (1969).

128. *See id.* (stating that although states do have broad power to regulate obscenity, this does not extend to private possession). The right of an individual to read or observe what he pleases is a fundamental right. *Id.*

## V. FACTUAL AND LEGISLATIVE HISTORY BEHIND THE COURT'S DECISIONS

Over the past twenty-two years, several claims were brought in state courts regarding the constitutionality of statutes that ban the sale or promotion of devices used primarily for the stimulation of human genitals.<sup>129</sup> Georgia<sup>130</sup> and Texas<sup>131</sup> each upheld the constitutionality of their statutes by attributing their existence to state police power.<sup>132</sup> On the other hand, the statutes in Louisiana, Alabama, Kansas, and Colorado, did not survive judicial scrutiny.<sup>133</sup> The Kansas and Colorado courts determined that their statutes were unconstitutional because they violated the fundamental right to privacy.<sup>134</sup> The Alabama and Louisiana courts rejected the privacy argument<sup>135</sup> and issued injunctions because the statutes did not pass rational review.<sup>136</sup>

Based on the assumption that sexually stimulating devices cannot

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129. See *Tooley*, 697 P.2d at 367 (contending that the statutory provisions regulating the sale of obscene devices infringes on the due process rights of purchasers of such products); *Yorko*, 690 S.W.2d at 262 (claiming the statute violates the fundamental right of privacy set forth in *Griswold* and *Roe*); *Sewell v. State*, 233 S.E.2d 187 (Ga. 1977) (claiming the right to sell obscene materials, including an artificial vagina, were rejected by the court). See, e.g., *Williams v. Pryor*, 41 F. Supp. 2d 1257 (N.D. Ala. 1999); *Louisiana v. Brennan*, 739 So. 2d 368 (1st Cir. 1999); *State v. Hughes*, 792 P.2d 1023 (Kan. 1990).

130. See *Sewell*, 233 S.E.2d at 188 (holding that a statute that makes any device used primarily for the stimulation of the human genitals obscene, is not unconstitutionally vague or overbroad).

131. See *Yorko*, 690 S.W.2d at 266 (asserting that the exercise of police power is sufficient rationale to criminalize the promotion of obscene devices used primarily for the stimulation of human genital organs).

132. See *First Nat'l Benefit Soc'y v. Garrison*, 58 F. Supp. 972, 990 (S.D. Cal. 1945) (stating that the *Police Power* has no exact definition, but that it "comes to the rescue of laws of doubtful constitutionality" assuming those laws are enacted to sustain public morality, good order and manners, contribute to public health and safety).

133. See *Brennan*, 739 So. 2d at 371-72 (stating that under rational review, the Louisiana obscenity statute lacked a reasonable, rational relationship to a legitimate state interest); *Williams*, 41 F. Supp. 2d at 1289 (holding that the Alabama obscenity statute fails rational basis review); *Hughes*, 792 P.2d at 1031 (demonstrating the state's failure to prove a sufficiently compelling interest to ban the distribution of genital stimulating devices); *Tooley*, 697 P.2d at 370 (finding that the Texas obscenity statute impermissibly burdens the right to privacy in a doctor or therapist office).

134. See *Hughes*, 792 P.2d at 1031 (holding that the Kansas statute banning the sale of sexual devices unconstitutionally infringes on the right to privacy); *Tooley*, 697 P.2d at 353 (holding that the Colorado statute banning the sale of obscene sexual devices impermissibly infringed on the plaintiff's fundamental right to privacy).

135. See *Williams*, 41 F. Supp. 2d at 1284 (stating that the Supreme Court placed the "bar too high" to recognize the use of sexually stimulating devices as a fundamental liberty interest).

136. See *id.* at 1288-89 (holding the Alabama statute banning the sale of obscene sexual devices unconstitutional because it lacked a reasonable and rational relationship to a legitimate state interest); see also *Brennan*, 739 So. 2d at 370-72 (following both the reasoning and the holding in *Williams v. Pryor*, thereby concluding that the Louisiana statute could not withstand rational review).

be considered obscene,<sup>137</sup> the state courts in Alabama, Louisiana, Colorado, and Kansas correctly issued injunctions to their existing statutes. Nevertheless, the Alabama and Louisiana courts are at fault for dismissing the issue of privacy.<sup>138</sup> While Colorado and Kansas recognized fundamental rights as the basis for their decision, both of the courts qualified their decisions by limiting the right to a certain group of people, namely those using the devices for medical and therapeutic purposes.<sup>139</sup>

*A. States Upholding Statutes Banning the Sale of Obscene Sexual Devices*

In *Sewell v. State*,<sup>140</sup> the appellant challenged his conviction under the Georgia obscenity statute<sup>141</sup> for selling an artificial vagina to an undercover police officer. The appellant claimed that the statute was unconstitutionally vague or overbroad.<sup>142</sup> Because the Georgia statute construes dildos and artificial vaginas as obscene *per se*, there is no question as to whether they are constitutionally protected.<sup>143</sup> Essentially, the statutory construction allows the Georgia state courts to invade the fundamental right to privacy without broaching the issue of constitutionality.<sup>144</sup>

The Texas obscenity statute banning the sale of obscene sexual devices was modeled after the Georgia obscenity statute.<sup>145</sup> In *Yorko v. State*, Kenneth Alan Yorko was criminally charged with the possession

137. See *supra* Part IV.

138. See *supra* text accompanying note 136.

139. See *Hughes*, 792 P.2d at 1031 (narrowing the scope of protection to those people who use the devices for medical or therapeutic purposes); *Tooley*, 697 P.2d at 370 (stating that the statute impermissibly burdens the right of privacy for those seeking to use the devices for medical or therapeutic reasons).

140. 233 S.E.2d 187 (Ga. 1977).

141. See GA. CODE ANN. § 16-12-80(c) (1999) (stating that any device designed primarily for the stimulation of human genital organs is obscene).

142. See *Sewell*, 233 S.E.2d at 188 (holding that the language of the statute “any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material,” was not unconstitutionally vague or overbroad).

143. See *id.* at 189 (stating that as long as the device in question falls under the statute, it is obscene as a matter of law. Thus, no protected expression is involved); see also *Trotti v. State*, 242 S.E.2d 270, 271 (Ga. Ct. App. 1978) (declaring the *Miller* standards irrelevant to determine whether the devices are obscene).

144. See Randolph N. Wisener, Note, *Criminal Law—Obscenity—State Police Powers Justify the Legislative Proscription and Criminalization of the Sale or Promotion of Devices Which are Designed or Manufactured for the Purpose of Stimulating Human Genital Organs*, 17 ST. MARY'S L.J. 1125, 1135 (1986) (asserting that because the Georgia statute declares the devices obscene *per se*, the state successfully bypasses the *Miller* three-prong test to determine what material is obscene because the devices cannot expect constitutional protection).

145. See *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1027 (5th Cir. 1981) (stating that the Texas statute defining obscene devices, as dildos and artificial vaginas for the stimulation of human genital organs as obscene *per se*, is patterned on the Georgia obscenity statute).

of a dildo with the intent to sell.<sup>146</sup> Although other portions of the Texas obscenity statute have been challenged and declared unconstitutional,<sup>147</sup> the portion of the statute dealing with devices used primarily for the stimulation of human genitals was upheld in every instance.<sup>148</sup> The legislative intent behind this portion of the statute involves state police power.<sup>149</sup> Notwithstanding the fact that the devices are considered obscene *per se*, and therefore, will not receive any constitutional protection, Mr. Yorko recognized and asserted that the State exceeded its police power by depriving him of his right to use his property as he chooses.<sup>150</sup> If the state protects the right to have sex, how can it prohibit the right to obtain devices that are used during sex? Texas law does not ban the possession of obscene devices used to stimulate human genital organs,<sup>151</sup> thus, there is no justifiable explanation for a law that prohibits transfer of the devices from one person to another.<sup>152</sup> The Court in *Yorko* successfully skirted the privacy issue by playing the “police power card.”<sup>153</sup> However, even a state’s police power cannot withstand judicial scrutiny when it impinges on a fundamental right.<sup>154</sup> Texas does not ban the stimulation of the human genitals, or the right to

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146. 690 S.W.2d at 273 (holding that the plaintiff had the right to privacy in the dildo he possessed with intent to sell).

147. See *Davis v. State*, 658 S.W.2d 572, 578 (Tex. Crim. App. 1983) (declaring unconstitutional the portion of the statute that provided a mandatory presumption that the defendant knew that the item he/she was selling was obscene); *Hall v. State*, 646 S.W.2d 489, 491 (Tex. Crim. App. 1982) (holding that the presumption that a person who possesses six or more obscene devices has the intent to sell is unconstitutional).

148. See *Regaldo v. State*, 872 S.W.2d 7, 9 (Tex. Ct. App. 1994) (upholding the notion that there is no fundamental right to use obscene devices, therefore the restriction on them does not burden any fundamental right); *Red Bluff Drive-In*, 648 F.2d at 1027-28 (holding that the Texas statute banning the sale of obscene sexual devices is constitutional and that there is no evidence of a constitutional right to these devices for handicapped individuals).

149. See *Yorko*, 690 S.W.2d at 266 (upholding the State’s authority to ban obscenity under the police power in order to protect “the social interest in order and morality”).

150. See TEX. CONST. art. I, § 19 (providing that “no citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.”).

151. See *Yorko*, 690 S.W.2d at 263 (stating that the Texas obscenity statute does not criminalize the use of obscene devices or the mere possession of them unless there is an intent to promote).

152. See *id.* at 266 (offering the argument that there is no justification for such a law other than to “assuage some purported community outrage directed against . . . a piece of latex.”).

153. See *id.* (justifying the state’s use of police power to protect morality). This protection includes criminalizing the sale or promotion of devices used to stimulate human genital organs.

154. See *Nebbia*, 291 U.S. at 524 (asserting that under a State’s police power, as long as the law is reasonable and substantially related to the object sought to be obtained, and as long as it does not infringe or burden a constitutionally protected right, it will be upheld); see also *Yorko*, 690 S.W.2d at 273 (holding that the appellant had the right to privacy in the device he intended to sell, and therefore, falls outside the State’s zone of police power).

have sex for a reason other than procreation. Therefore, Texas cannot constitutionally ban access to devices, which aid in sexual activity. In light of this analysis, the court in *Yorko* fails to sufficiently support its legitimate state interest in banning the sale of obscene sexual devices.<sup>155</sup>

*B. States That Issued Injunctions Against Statutes Banning the Sale of Obscene Sexual Devices Under Rational Basis Review*

The Northeastern District Court in Alabama<sup>156</sup> issued a permanent injunction against the enforcement of a statute<sup>157</sup> that prohibited the sale of sexual devices used primarily for the stimulation of human genital organs.<sup>158</sup> The plaintiffs, including both vendors and users of sexual devices, argued for injunctive relief on the basis that the statute infringed on their fundamental right to privacy and personal autonomy.<sup>159</sup> Although the Alabama court considered fundamental rights in general, it focused its attention on the Supreme Court's reluctance to expand fundamental rights, and followed their lead by refusing to expand the fundamental right to privacy to include genital stimulating devices.<sup>160</sup>

In Alabama, the district court focused specifically on the right to use the proscribed products, thereby recognizing the inherent argument that the contraception cases must be the controlling precedent.<sup>161</sup> However, the court also heeded the warning that even with the many rights and liberties protected by due process, not all important, intimate, and personal decisions are protected.<sup>162</sup> Once

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155. See Wisener, *supra* note 145, at 1129 (asserting that the Texas Court of Criminal Appeals improperly and summarily dismisses the privacy issue by failing to address whether the right of sexual privacy extends to consenting adults).

156. See *Williams*, 41 F. Supp. 2d at 1293 (granting the plaintiffs request for permanent injunctive relief, and thereby barring the enforcement of the Alabama obscenity code because it lacked a reasonable, rational relationship to a legitimate state interest).

157. See ALA. CODE § 13A-12-200.2(a)(1) (Supp. 1998) (criminalizing the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for anything or pecuniary value.").

158. See *id.* (including devices that depict human genitals such as penis-shaped dildos and artificial vaginas).

159. See *Williams*, 41 F. Supp. 2d at 1274 (seeking the extension of the right to privacy, not the recognition of a new right).

160. See *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 123 (1992) ("The Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.").

161. See *Williams*, 41 F. Supp. 2d at 1281 (holding that although both parties try to distinguish the sale, distribution, and marketing of the products from the use of the products, the court states that the only way to resolve the issue is by focusing on the proscribed use). This is equivalent to the fundamental right to use contraceptive devices. See *supra* Part III.

162. See *Glucksberg*, 521 U.S. at 749-50 (Stevens, J., concurring) (holding that the right to

the court established this argument, the plaintiffs lost their case on the basis of privacy. Because the court did not recognize the use of sexually stimulating devices as a liberty interest “deeply rooted” in our nation’s history and tradition, such that neither liberty nor justice would exist if the right was sacrificed,<sup>163</sup> Alabama’s obscenity statute was automatically given rational review.<sup>164</sup>

The Alabama District Court found that the State had a legitimate interest in banning public displays of obscene material,<sup>165</sup> and as a result it had a legitimate interest in banning the commerce of such devices. The legislature justified this by asserting that public morality may be directly attributed to what is sold without state regulation.<sup>166</sup> The statute did not, however, withstand rational review.<sup>167</sup> First, the court found that protecting children and unwilling adults from obscene material, although legitimate, was too discrete to support the entire statute.<sup>168</sup> Second, the court held that because the statute only banned the commerce of devices used to achieve auto-eroticism and sexual stimulation, it was not sufficient to ban the actual commerce of those activities.<sup>169</sup> Third, because married people use the devices for therapeutic reasons, banning their sale interferes with the right to marriage and procreation.<sup>170</sup> Finally, the devices are void of expression and, therefore, do not merit review under any constitutional standard.<sup>171</sup>

The Alabama District Court responded by issuing an injunction on

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assisted suicide is not a fundamental liberty interest and therefore, *Washington’s* ban was not rationally related to a legitimate state interest).

163. See *Williams*, 41 F. Supp. 2d at 1282 (citing *Glucksberg*, 521 U.S. at 749-50) (stating that the statute escaped strict scrutiny).

164. See *id.* at 1284 (asserting that the Supreme Court placed the bar too high for constitutional protection for sexually stimulating devices).

165. See *id.* at 1286 (describing how Alabama’s interest in a sense of public morality is a legitimate state interest). The purpose of the statute was to protect children and “unwilling” adults from exposure to obscene material. *Id.*

166. See *id.* at 1287-88 (suggesting that the same issues of morality apply with equal weight to a ban on commerce of obscene material).

167. See *id.* at 1284 (asserting that although there was a conceivable state interest at stake, the statute was not reasonably related to that interest); see also *Heller v. Doe*, 509 U.S. 312, 319 (1993) (stating the presumption of validity for challenged legislation that does not involve fundamental rights or uses “suspect lines.”).

168. See *Williams*, 41 F. Supp. 2d at 1288 (holding that while the interest may have been the basis for enacting the Act, it is too discrete to support the prohibition).

169. See *id.* at 1289 (stating that a statute banning prostitution is more likely to achieve its goal).

170. See *id.* (stating that the use of the devices by married couples as an marital aid is proven by expert testimony as well as the Food and Drug Administration).

171. See *id.* at 1291 (holding that the devices cannot be considered obscene under the *Miller* three-prong obscenity test because the test only applies to expressive products).

the obscenity statute, but it did so for the wrong reasons. In its analysis, the court expressly recognized that banning the sale of the devices interferes with the sexual stimulation and auto-eroticism related to the fundamental rights of marriage, procreation, and family relationships.<sup>172</sup> The court emphasized that proscription of the devices affects only married people, and only married people use them for therapeutic purposes.<sup>173</sup> It is irrelevant that the State Legislature refers to these devices as “marital aids” because the decision in *Eisenstadt* placed single people on equal ground with married people in the realm of sexual pleasure and privacy.<sup>174</sup> This assertion undercuts to the legal fallacy behind the decision in the case. The failure to apply strict scrutiny to protect those fundamental rights, necessarily lowered the constitutional bar for state statutes that invade a person’s fundamental right to privacy.<sup>175</sup> Thus, Alabama undermined its own reasoning regarding why obscene sexual devices may not be covered under the fundamental right to privacy.

Not even four months after the Alabama decision, Louisiana relied on Alabama’s precedent to declare its own obscenity statute unconstitutional.<sup>176</sup> Unfortunately, because the Louisiana Circuit Court relied so heavily on the analysis in *Williams*, the Louisiana court did not discuss the fundamental right to privacy.<sup>177</sup> Instead, it analyzed the statute under rational basis review.<sup>178</sup> The State justified the statute as an act of police power to protect children and

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172. See *id.* at 1288 (finding the commerce of sexual stimulation and auto-eroticism for its own sake, outside of marriage and procreation, is obscene and subject to regulation). The court recognized that a general ban on the commerce of these devices prevents married couples from engaging in the genital stimulation and auto-eroticism. However, the court gave married couples constitutional protection to engage in these acts by attributing them to marriage and procreation. See *id.* at 1289.

173. See *Williams*, 41 F. Supp. 2d at 1288 (noting that married couples use the devices as treatment for sexual dysfunction, and specifically focusing on expert testimony geared toward use by married couples).

174. See *Eisenstadt*, 405 U.S. at 452 n.8 (“It is inconceivable that the need for health controls varies with the purpose for which the contraceptive is to be used when *the physical act in all cases is one and the same.*”) (emphasis added). Single people engage in sex for the same reasons as married people especially when neither are trying to procreate. See *id.* at 452. Therefore, all people should have the right to achieve the maximum amount of pleasure either alone, or with their partner, or spouse. *Id.*

175. See *Williams*, 41 F. Supp. 2d at 1290 (justifying the holding with the assertion that the right to marriage and procreation is violated; therefore, the statute must be at least rationally related to the state interest).

176. See *Brenan*, 739 So. 2d at 371-72 (holding that the statute was not a reasonable use of police power and, therefore, violates due process).

177. See *id.* (following the rationale of *Williams v. Pryor* finding that the statute could not withstand rational review).

178. See *id.* (citing *City of Shreveport v. Curry*, 357 So. 2d 1078, 1081 (La. 1978)) (determining that a statute’s reasonableness is based on whether there is a real and substantial relationship between the regulation and the prevention sought).

unconsenting adults from viewing obscene material.<sup>179</sup> The wording of the statute accomplished its goals, and although the court found the regulation of the devices rational, it held that the statute swept too broadly as applied to a commercial vendor.<sup>180</sup> Adults have the ability to avoid things they find offensive, and because children are not permitted to purchase obscene material, the court determined that the state's goals were achievable, but in a much less restrictive way.<sup>181</sup>

Similar to the analysis provided by the courts in *Sewell*, *Yorko*, and *Williams*, the Louisiana Court of Appeal failed to identify the importance of the fundamental right to privacy that is inherent in sexual autonomy. The Louisiana court recognized that the statute was not based on ownership, possession, or use of the devices,<sup>182</sup> and it recognized that a ban surpassed allowable State police power.<sup>183</sup> However, the court did not realize that even with a less restrictive ban on access to genital stimulating devices it would still be interfering in a person's right to privacy.

*C. States That Issued Injunctions Against Statutes Banning the Sale of Obscene Sexual Devices for Violating the Fundamental Right to Privacy*

The Colorado Supreme Court<sup>184</sup> and the Kansas Supreme Court<sup>185</sup> each sustained a challenge to their obscenity statutes and held that the statutes were excessively broad and burdensome on the fundamental right to privacy.<sup>186</sup> These holdings are the closest that any of the state's decisions come to expanding the fundamental right of privacy to include private access and use of genital stimulating device.<sup>187</sup> Both states limited their holdings, however, to individuals

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179. *See id.* (stating that this is what prompted the investigation of the defendant's store and her subsequent arrest).

180. *See id.* at 4.

181. *See Brenan*, 739 So. 2d at 372-73 (suggesting advertising regulations or licensing for dealers of obscene devices).

182. *See id.* (noting that the only way to regulate these activities is through bedroom police).

183. *See id.* (stating that although some regulation of obscene devices is within state power, the statute in question exceeds the limit of the state's legitimate interest in this type of regulation).

184. *See Tooley*, 697 P.2d at 353 (challenging the validity of the Colorado obscenity statute).

185. *See Hughes*, 792 P.2d at 1031-32 (discussing whether the Kansas obscenity statute was unconstitutionally overbroad).

186. *See Tooley*, 697 P.2d at 348 (holding that the right to privacy of purchasers of obscene devices is impermissibly infringed upon by statutes banning the sale of such devices); *Hughes*, 792 P.2d at 1031 (holding that the right to privacy protected by the Fourteenth Amendment is violated by a statute banning the sale of genital stimulating devices, to the extent that the devices are used therapeutically).

187. *See Brenan*, 739 So. 2d at 371-72 (using rational review to hold the statute banning the

who use the devices for therapeutic purposes.<sup>188</sup> For all intents and purposes this puts a majority of individuals, who seek to use genital stimulating devices at a constitutional disadvantage.<sup>189</sup>

The court's analysis in *Tooley* centers on the line of cases involving marriage, procreation, and contraception.<sup>190</sup> Although the court refuses to make a definitive decision on whether the state can regulate genital stimulating devices in general, it does assert that the specific language of the statute is too broad because it indiscriminately bans the sale of all sexual devices.<sup>191</sup> The court finds that certain sexual activities are encompassed within the constitutional right to privacy.<sup>192</sup> In the future, this type of language only strengthens an argument for a right to sexual privacy. However, the court qualifies its decision under the auspice that the statute impermissibly burdens individuals who use genital stimulating devices for medical purposes.<sup>193</sup> The court justifies its decision to limit protection by protecting only the interests that it finds legitimate.<sup>194</sup> Thereby, it proceeds to humiliate the necessities of people who cannot obtain a doctor's order to use a genital stimulating device.

Similarly, the court in *Hughes* grounded its decision in the

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sale of genital stimulating devices unconstitutional); *Yorko*, 690 S.W.2d at 266 (upholding the constitutionality of a statute banning the sale of genital stimulating devices); *Sewell*, 233 S.E.2d at 188 (upholding the constitutionality of a statute banning the sale of genital stimulating devices).

188. See *Hughes*, 792 P.2d at 1031 (agreeing with the holding in *Tooley* that the statute impermissibly violates the privacy of people who use genital stimulating devices for medical or therapeutic reasons); *Tooley*, 697 P.2d at 370 (holding that the statute impermissibly burdens the right of privacy on people who legitimately use the devices for medical or therapeutic purposes).

189. See *Williams*, 41 F. Supp. 2d at 1272 (citing JULIA HEIMAN & JOSEPH CATANIA, NATIONAL SEXUAL HEALTH STUDY (1997)) (stating that current estimates establish that twenty percent of the female population use vibrators). Many women use genital stimulating devices for reasons other than sexual dysfunction. These uses include fear of contracting sexually transmitted disease or lack of a sexual partner. See *id.* at 1263.

190. See *Tooley*, 697 P.2d at 369 (citing the list of Supreme Court cases that made the right to privacy fundamental under the Fourteenth Amendment).

191. *Id.* at 369-70.

192. *Id.* at 370 n.28 (holding that any statutory scheme adopted by the legislature must be compatible with a person's right to engage in sexual activities, to the extent that those activities are encompassed in the right to privacy). The court recognizes that the constitutionally protected right of privacy includes the right to sexual activities. *Id.* It is unfortunate; however, that the court asserts that the right to privacy only encompasses medical problems that are related to sexual activity. *Id.* at 368 n.26.

193. See *United States v. 12,200-Ft. Reels of Super 8 MM Film*, 413 U.S. 123, 128 n.4 (1973) (finding the statute unconstitutional because there is a constitutionally protected right to privacy that encompasses intimate sexual problems).

194. See *Tooley*, 697 P.2d at 368 (legitimizing the use of sexual devices for therapeutic purposes).

language of the overbreadth doctrine.<sup>195</sup> With the application of a strict scrutiny standard,<sup>196</sup> the court found that the wording of the statute invaded a person's fundamental right to privacy, but limited the right to encompass only those people who need the devices for medical or therapeutic reasons.<sup>197</sup> Surprisingly, the court went one step further and provided protection to purchase the devices to doctors, psychologists, and school faculty members, because without such protection, each of these people could become criminally liable for doing their jobs.<sup>198</sup>

The holdings of these two cases arguably affect individuals in the same way that the holding in *Bowers v. Hardwick*<sup>199</sup> affected homosexual individuals. In each of these cases, the plaintiffs sought constitutional protection to engage in sexual acts in the privacy of their homes without government interference.<sup>200</sup> In the *Bowers* case, this right to privacy is denied to individuals engaging in homosexual sodomy.<sup>201</sup> However, there is no explicit limit on a heterosexual's

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195. See *Hughes*, 792 P.2d at 1030 (defining a statute as overbroad when it criminalizes constitutionally protected conduct). The overbreadth doctrine usually applies to First Amendment issues in matters related to conduct. See *id.* The Supreme Court has extended the doctrine when a regulation infringes on the freedoms guaranteed by the Bill of Rights, including the right to privacy and medical matters. *Id.* See generally *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that a statute banning the sale of contraceptive devices was overbroad as a health measure because it prohibited access to all unmarried people, regardless of their medical necessity).

196. See *Hughes*, 792 P.2d at 1032 (asserting that a state regulation must be narrowly tailored and bear a real and substantial relationship to the state's interest when citizens' rights are involved).

197. See *id.* at 1031.

198. See *id.* at 1032 (stating how therapists would not be able to provide the means necessary for therapy of their patients and teachers would be restricted from providing students with a thorough education on such matters).

199. 478 U.S. at 196 (upholding the constitutionality of a statute criminalizing homosexual sodomy).

200. Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (arguing that his fundamental right to privacy in his home was violated by a statute that criminalized private and consensual homosexual sodomy), with *Louisiana v. Brennan*, 739 So. 2d 368 (1st Cir. 1999) (arguing that the statute unconstitutionally interferes with defendant and her customers' right to privacy); *Williams*, 41 F. Supp. 2d at 1273 (claiming that the enforcement of the obscenity statute imposes a burden on the fundamental rights of privacy and personal autonomy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments); *Hughes*, 792 P.2d at 1030 (arguing that the obscenity statute was impermissibly overbroad when it impermissibly burdened the fundamental right to privacy); *Tooley*, 697 P.2d at 353 (claiming that the obscenity statute impermissibly burdened the plaintiffs' constitutional right to privacy); *Yorko*, 690 S.W.2d at 262 (arguing that the statute violated the plaintiff's fundamental right to privacy announced in *Griswold v. Connecticut* and *Roe v. Wade*).

201. See *Bowers*, 478 U.S. at 190 (stating that the issue was whether the constitution confers a fundamental right upon homosexuals to engage in sodomy). The Supreme Court denies this right by holding that sodomy cannot be connected with any of the cases that provide for the fundamental right to privacy. See *id.* These cases involve the right to privacy in marriage, procreation, and family. See *id.*

right to engage in sodomy.<sup>202</sup> Therefore, only select groups of people are entitled to constitutional protection to engage in the same sexual act. In the case of genital stimulating devices, select groups of people are given constitutional protection under the fundamental right to privacy to engage in sexual acts with certain devices.<sup>203</sup> Because the court limited the use of these devices to people with medical needs, the rest of the population seeking to engage in the exact same act are denied constitutional protection.

#### VI. A LOOK BACK – *WILLIAMS V. PRYOR*, REVERSED, AND REMANDED

In January 2001, the Eleventh Circuit heard an appeal of the *Williams v. Pryor* decision, and the small victory the Plaintiffs found at the District Court level was squashed. The Eleventh Circuit held that Alabama's interest in public morality is a legitimate interest and that the statute banning the sale of genital stimulating devices is rationally related to that interest.<sup>204</sup> Further, the Eleventh Circuit upheld the district courts rejection of the plaintiff's facial challenge to the constitutionality of the statute.<sup>205</sup> The mere fact that the statute prevents the sale of sexual devices to minors is enough to allow the statute to withstand rational basis review.<sup>206</sup> However, the Eleventh Circuit remanded the district court's decision on the plaintiff's as-applied challenges to the statute.<sup>207</sup>

The reasoning asserted by the Eleventh Circuit for overturning the lower courts holding strengthens the argument that a stricter standard of review should be applied in cases having to do with sexual privacy. The current state of the law makes it too easy for state legislatures to pass laws that invade people's privacy and their fundamental rights.

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202. See *id.* at 191 (refusing to recognize a fundamental right to homosexual sodomy while obviously neglecting to mention anything about heterosexual sodomy or sexual activity).

203. See *Tooley*, 697 P.2d at 370 (stating that the statute only impermissibly burdens the right of people who want to use the devices for medical or therapeutic reasons); *Hughes*, 792 P.2d at 1029 (agreeing with the court in *Tooley* that the statute burdens the right to privacy for people who want to use the devices for therapeutic or medical reasons). The only other groups of people the court provides protection for are doctors, psychologists, or sex therapists because these people need the devices to do their jobs. *Id.* at 1032.

204. See *Williams*, 240 F.3d at 948 (reemphasizing that a state's police power is an indisputable government interest under rational review).

205. *Id.* at 954 (noting that the court must determine whether the Alabama statute is broad enough to invade on those fundamental rights already recognized by the Supreme Court).

206. *Id.*

207. *Id.* at 955 (holding that the district court did not adequately consider the as-applied fundamental right of sexual privacy for the specific plaintiffs).

## CONCLUSION – A SUGGESTION TO EXPAND THE FUNDAMENTAL RIGHT OF PRIVACY TO INCLUDE SEXUAL PRIVACY

The Supreme Court firmly asserted its unwillingness to recognize new fundamental rights when it upheld a statute criminalizing homosexual conduct.<sup>208</sup> However, this does not preclude the expansion of already existing fundamental rights. In its most recent decision addressing abortion, the Court implemented a new standard of review for statutes that affect already existing fundamental rights.<sup>209</sup> An undue burden analysis is a balancing test between the exercise of a fundamental right or liberty and the effect of making the exercise of that fundamental right more difficult.<sup>210</sup> Because the undue burden test imposes a lower level of scrutiny than a strict scrutiny test,<sup>211</sup> the evaluation of a state regulation under the undue burden test may allow the Supreme Court to expand the existing fundamental right of privacy to include the right to sexual privacy. The right to use contraceptives is constitutionally protected regardless of procreation or marital status,<sup>212</sup> and the right to make the individual decision to have an abortion is constitutionally protected regardless of marital status.<sup>213</sup> Therefore, the right to engage in private consensual sex of any kind must also be protected regardless of procreation or marital status. This assertion will not require that the Court find any new fundamental right, it merely

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208. See *Bowers*, 478 U.S. at 194 (stating that the Court is not inclined to expand the list of already existing fundamental rights imbedded in the due process clause).

209. See *Casey*, 505 U.S. at 874 (stating that a regulation that imposes an undue burden on a woman's ability to make the decision of whether to have an abortion violates the liberty interest protected by the due process clause); see also Kevin Francis O'Neill, *The Road Not Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 1, 20 (1993) (stating that the *Casey* Court established a new undue burden test for determining the constitutionality of abortion regulations such that strict scrutiny will only be applied when there is a "substantial obstacle" in the path of a woman seeking an abortion).

210. See Kevin J. Curnin, Note, *Newborn HIV Screening and New York Assembly Bill No. 6747-B: Privacy and Equal Protection of Pregnant Women*, 21 FORDHAM URB. L.J. 857, 900 (1994) (discussing how the Court in *Planned Parenthood v. Casey* balanced each part of the Pennsylvania statute to determine if that particular obstacle would make it too hard for a woman to choose an abortion).

211. Compare *Roe*, 410 U.S. at 155 (requiring statutes that restrict access to abortion to be narrowly tailored in order to achieve a compelling state interest to survive scrutiny), with *Casey*, 505 U.S. at 877 (1986) (rejecting strict scrutiny analysis for an undue burden test such that a state regulation will be considered unconstitutional if it places substantial obstacles in the path of a woman seeking an abortion).

212. See *Eisenstadt*, 405 U.S. at 453 (extending the right to use contraceptives to unmarried people); *Griswold*, 381 U.S. at 485 (holding that a law forbidding the use of contraceptives by married people was an unconstitutional invasion of privacy).

213. See *Danforth*, 428 U.S. at 69 (holding that a statute requiring a woman to obtain spousal permission before obtaining an abortion is unconstitutional); *Roe*, 410 U.S. at 115 (providing women with the constitutionally protected right to have an abortion).

requires that the protections of the Fourteenth Amendment extend to all aspects of an individual's private sex life,<sup>214</sup> including the use of sexually stimulating devices.

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214. See *Casey*, 505 U.S. at 853 (asserting that due process provides freedom from governmental intrusion for matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.").