

COMMENT

SHOULD TEXAS'S FORMER BAN ON OBSCENE-DEVICE PROMOTION PASS CONSTITUTIONAL MUSTER UNDER A MURKY *LAWRENCE*?

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I. INTRODUCTION

“Here we go raising the price of dildos again,” observed a Houston appellate judge upholding Texas’s then-prohibition on promoting obscene devices.¹ Underscoring the ban’s silliness, an Austin appellate judge questioned the use of limited law enforcement and prosecutorial resources in carrying out the prohibition.² And now, a squabble has emerged among federal circuit courts over the existence of a right to buy, sell, and distribute sex toys—or, in statutory parlance, obscene devices.³

1. *Regalado v. State*, 872 S.W.2d 7, 11 (Tex. App.—Houston [14th Dist.] 1994, pet. ref’d) (Brown, J., concurring).

2. *Webber v. State*, 21 S.W.3d 726, 732 (Tex. App.—Austin 2000, pet. ref’d) (Smith, J., concurring).

3. *Compare* *Reliable Consultants, Inc. v. Earle* (*Reliable I*), 517 F.3d 738, 740–41 (5th Cir.) (using “obscene device” to mean “any device ‘designed or marketed as useful primarily for’ sexual stimulation), *reh’g denied*, 538 F.3d 355 (5th Cir. 2008), *with* *Williams v. Morgan* (*Williams VI*), 478 F.3d 1316, 1318 n.2 (11th Cir. 2007) (using “sexual device” as a shorthand for the statutory phrase “any device designed or marketed as useful primarily for” sexual stimulation).

Promoting obscene material or devices was a criminal offense under a Texas statute the Fifth Circuit struck down last year. TEX. PENAL CODE ANN. § 43.23(a), (c) (Vernon 2003 & Supp. 2008), *held unconstitutional* by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), *reh’g denied* 538 F.3d 355 (5th Cir. 2008); *see also* TEX. PENAL CODE ANN. §§ 43.21(a)(5), (7) (Vernon 2003) (defining “promote” in the Texas obscenity statute to mean “to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same” and defining “obscene device” as equipment such as dildos or artificial vaginas “designed or marketed as useful primarily for the stimulation of human genital organs”), *held unconstitutional* by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), *reh’g denied*, 538 F.3d 355 (5th Cir. 2008). In Alabama, distributing and producing obscene material and devices “designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value” is a criminal offense. ALA. CODE § 13A-12-200.2(a)(1)–(3) (LexisNexis 2005). The Eleventh Circuit has upheld this statute. *Williams VI*, 478 F.3d at 1318; *Williams v. Att’y Gen. of Ala.* (*Williams IV*), 378 F.3d 1232, 1233 (11th Cir. 2004).

A wave of legislation regulating possession and distribution of vibrators and other sex toys arose late in the twentieth century, despite the passage of a century since the invention of the vibrator. Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326, 327, 330 (2006). Initially employed by physicians to treat women suffering “hysteria,” vibrators grew into a bustling mail-order business until the late 1920s, when their “increasingly overt role in the sex industry” and advancing medical knowledge shattered vibrators’ “purely-medical veneer.” *Id.* at 328–29.

Lindemann finds contemporary court rulings have “essentially illegitimated” purely recreational use of sex toys and, by concentrating on medical and psychological purposes, returned to Victorian ideas about sexual devices “cloaked . . . in the shroud of medicine.” *Id.* at 339, 341, 346. Moreover, focusing on medical needs “reinforces a male-centered view of female sexuality,” ignoring the many benefits sex toys provide to “normal,

When the Fifth Circuit freed Texans to promote and distribute sexual devices without with the criminal penalty,⁴ it created a split with the Eleventh Circuit's decision upholding Alabama's ban on production and distribution of sexual devices.⁵ Both courts based their rulings on the U.S. Supreme Court's decision in *Lawrence v. Texas*,⁶ which invalidated Texas's statute banning homosexual sodomy.⁷ In upholding Alabama's sex-toy statute in 2007, the Eleventh Circuit, in *Williams v. Morgan*,⁸ found no fundamental right to sexual privacy under *Lawrence*⁹ and that public morality was a sufficient rational basis for the statute.¹⁰ The court distinguished *Lawrence*, which dealt with a prohibition on private conduct rather than public, commercial activity.¹¹ It narrowly interpreted *Lawrence* as recognizing a personal, private liberty interest that did not extend to public and/or commercial activity.¹²

The Fifth Circuit read *Lawrence* more broadly, finding in *Reliable Consultants, Inc. v. Earle*¹³ that a Texas statute, which banned giving, lending, selling, advertising, and distributing sex toys, infringed the due process rights of sex-toy users to engage in private sexual activity by restricting their access to the devices.¹⁴ The court decided that because public morality did not justify the

functional" women. Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285, 303 (2005). Bans on sex-toy promotion are an "institutionalized form of controlling female sexuality" because most sex-toy users are women. Kim Shayo Buchanan, Lawrence v. Geduldig: *Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1249 (2007).

4. See *Reliable I*, 517 F.3d at 743 (holding unconstitutional Texas's ban on promoting obscene devices).

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

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

7. *Id.* at 578.

8. *Williams VI*, 478 F.3d 1316.

9. See *id.* at 1320 (reciting the court's previous statement that *Lawrence* did not "recognize a fundamental right to sexual privacy").

10. *Id.* at 1322–23.

11. See *id.* at 1322 (distinguishing the Alabama statute, which regulated public, commercial activity, and concluding *Lawrence* does not apply to Alabama's sex-toy statute because of *Lawrence*'s narrowly drawn personal liberty interest).

12. See *id.* (stating *Lawrence* applies only to laws regulating "conduct that is both private and non-commercial").

13. *Reliable Consultants, Inc. v. Earle (Reliable I)*, 517 F.3d 738 (5th Cir.), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008).

14. See *id.* at 744 (striking down the Texas statute based upon a determination that the inability to buy a device in Texas "heavily burdens a constitutional right" of individuals "to engage in private intimate conduct of [one's] choosing").

regulation of private, intimate sexual activity in *Lawrence*, it cannot justify the sex-toy statute's regulation of private, intimate sexual activity.¹⁵

Whether the activity in question is public or private, commercial or intimate, it has generated billions of dollars in sales just during the lifetimes of the *Williams* and *Reliable* litigation.¹⁶ Reports estimate sales of sex toys, or "adult novelties," at \$1.5 billion to \$2 billion per year.¹⁷ In-home product demonstrations and sales also are a booming business. Passion Parties, perhaps the best-known company that throws these "Tupperware parties with a twist," probably sells about \$100 million in sex-related products per year.¹⁸ One such party generally hauls in \$500 to \$1,000 in sales,¹⁹

15. *Id.* at 745.

16. See Angus Loten, *Why Sex Sells More Than Ever*, INC., Jan. 2008, <http://www.inc.com/articles/2008/01/sex.html> (reporting adult industry sales of sex toys generate up to \$2 billion each year); see also Lessley Anderson, *Sex Toy Story*, BUS. 2.0, May 2006, at 136, 137 (reporting the adult novelty market generates \$1.5 billion in sales each year). Pollsters struggle to get an accurate count of sex-toy users; one survey estimated ten percent of adults use sex toys with partners but failed to count those who use sex toys on their own. Shelly Elimelekh, Note, *The Constitutional Validity of Circuit Court Opinions Limiting the American Right to Sexual Privacy*, 24 CARDOZO ARTS & ENT. L.J. 261, 262 (2006).

17. Angus Loten, *Why Sex Sells More Than Ever*, INC., Jan. 2008, <http://www.inc.com/articles/2008/01/sex.html>; Lessley Anderson, *Sex Toy Story*, BUS. 2.0, May 2006, at 136, 137. Vendors skirt sex-toy promotion bans by calling their merchandise "novelty items" and giving "no information about their intended use." Joanna Grossman, *Is There a Constitutional Right to Promote the Use of Sex Toys? A Texas Arrest Raises the Question*, FINDLAW'S WRIT, Jan. 27, 2004, <http://writ.news.findlaw.com/grossman/20040127.html>; see also National Association for Sexual Awareness & Empowerment, Commentary on Joanne Webb, <http://nasae.org/joanne-webb.htm> (last visited Nov. 15, 2009) (reporting that one lawyer summarized the Texas statute as being "about how you represent what the product is for . . . [A]s long as I call it a 'novelty,' I can sell it all day long. If I educate you on how to use it, it's illegal").

Because sex toys are classified legally as "obscene devices" and called "novelties," they also suffer a dearth of health-related regulations. Zach Biesanz, *Dildos, Artificial Vaginas, and Phthalates: How Toxic Sex Toys Illustrate a Broader Problem for Consumer Protection*, 25 LAW & INEQ. 203, 205-07 (2007). The label "For Novelty Use Only" thus has implications beyond obscenity and privacy law, as consumers of sex toys generally do not enjoy the protection of quality and safety regulations of medical devices. See *id.* at 215-16 (asserting manufacturers use the "novelty" label to dodge consumer complaints by portraying their products as mere gag gifts). The soft plastic materials of which many sex toys are composed often contain very high levels of toxic chemicals that pose a cancer risk. *Id.* at 206-09. *Contra* Shelly Elimelekh, Note, *The Constitutional Validity of Circuit Court Opinions Limiting the American Right to Sexual Privacy*, 24 CARDOZO ARTS & ENT. L.J. 261, 289 (2006) (contending "unlike abortion, there are no health concerns" implicated in decisions on whether to have sex or on the type of sexual activity in which to engage).

18. Brian Alexander, *Tupperware Parties with a Twist*, MSNBC, Oct. 15, 2006,

and the company puts on more than 128,000 parties per year.²⁰

While there is a hefty amount of money to be made promoting, advertising, selling, and making dildos, vibrators, and other such sexual devices, the circuit split raises the question of whether the liberty interest protected by *Lawrence* extends to sex-toy sales. Do the Texas and Alabama statutes impermissibly burden a broader *Lawrence* right to private sexual activity by unconstitutionally restricting individuals' access to sex toys?²¹ Or do the statutes merely regulate public, commercial activity unprotected by the personal, private liberty interest in *Lawrence*?²² The answer hinges on whether *Lawrence* is interpreted broadly or confined to its specific facts and holding. The statutes do not prohibit use and possession of the devices, which are private activities; they prohibit selling, promoting, and advertising the devices, which are activities in the commercial realm.²³ *Lawrence* dealt with a statute that criminalized private sexual behavior, not public or commercial conduct.²⁴ Under the laws the Fifth Circuit invalidated, Texans could still buy sexual devices in another state, and they could possess fewer than six such items and use them in Texas.²⁵ The Texas and Alabama statutes even allow for affirmative defenses in case someone has a legitimate medical, legislative, judicial, or law enforcement need for a dildo or other device.²⁶ Thus, despite the Fifth Circuit's ruling to the contrary,

<http://www.msnbc.msn.com/id/14061667/>.

19. Angus Loten, *Why Sex Sells More Than Ever*, INC., Jan. 2008, <http://www.inc.com/articles/2008/01/sex.html>.

20. Brian Alexander, *Tupperware Parties with a Twist*, MSNBC, Oct. 15, 2006, <http://www.msnbc.msn.com/id/14061667/>.

21. See *Reliable Consultants, Inc. v. Earle (Reliable I)*, 517 F.3d 738, 744 (5th Cir.) (ruling that the Texas ban on promoting obscene devices violates a constitutional right to private, intimate conduct free from government interference), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008).

22. See *Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1322 (11th Cir. 2007) (stating only regulation of "conduct that is both private and non-commercial" is unconstitutional under *Lawrence*).

23. See TEX. PENAL CODE ANN. § 43.23 (Vernon 2003 & Supp. 2008) (criminalizing promotion of obscene materials and devices and possession of six or more obscene devices), *held unconstitutional* by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008); see also ALA. CODE § 13A-12-200.2 (LexisNexis 2005) (criminalizing distribution, possession with intent to distribute, and production of obscene materials and devices and offers or agreements to do any of those acts).

24. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

25. *Reliable I*, 517 F.3d at 741.

26. TEX. PENAL CODE ANN. § 43.23(g) (Vernon 2003 & Supp. 2008), *held*

the former Texas ban appears constitutional under the rubric of *Lawrence*.²⁷

In Part II, this Comment will summarize the cases and statutes involved in the sex-toy promotion circuit split. Part III will discuss other courts' holdings on similar issues. Part IV will analyze relevant U.S. Supreme Court holdings and Texas cases, apply *Lawrence* to the Texas and Alabama statutes, and examine whether the Texas statute might be changed to pass constitutional muster. While the murkiness of *Lawrence* has spawned a great deal of scholarship on whether it is a fundamental rights analysis or a rational basis analysis, this Comment will focus on the private-versus-commercial right aspect of the debate. This Comment will conclude with a discussion of what a possible U.S. Supreme Court clarification of *Lawrence* might hold.

II. A BRIEF LOOK AT THE CASES AND STATUTES AT ISSUE

A. *Lawrence v. Texas*

In *Lawrence*, the underpinning of the Fifth and Eleventh Circuits' decisions, the U.S. Supreme Court held unconstitutional the Texas statute criminalizing the act of two people of the same sex engaging in certain intimate contact in the privacy of their

unconstitutional by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008); ALA. CODE § 13A-12-200.4 (LexisNexis 2005). To assert a medical exception to the Texas statute, an individual might have shown, for example, he or she received a referral from a medical professional such as a sex therapist to acquire a sexual device for therapeutic use. *Bonner v. State*, No. C14-93-00375-CR, 1995 WL 144347, at *2 (Tex. App.—Houston [14th Dist.] Mar. 30, 1995, no pet.) (not designated for publication). It is not clear from case law what would have constituted a legislative, judicial, or law enforcement need for an obscene device. However, the Fort Worth Court of Appeals decided the law enforcement exception did not protect an adult-store employee on duty when police executed a search warrant. *Myers v. State*, 781 S.W.2d 730, 734 (Tex. App.—Fort Worth 1989, pet. ref'd). The court found the Legislature intended the law enforcement exception to cover officials “go[ing] about their duties gathering evidence and performing prosecution using obscene materials as evidence.” *Id.* at 734. The court rejected the employee’s claim that he was protected by the exception because he was in possession of obscene devices during the execution of the search warrant, a law enforcement activity. *Id.*

27. See *Reliable Consultants, Inc. v. Earle (Reliable II)*, 538 F.3d 355, 356–57 (5th Cir. 2008) (Jones, C.J., dissenting) (criticizing the *Reliable* majority for “exploit[ing] [*Lawrence*’s] broad and vague statements about liberty” and doubting the U.S. Supreme Court meant to place the Texas sex-toy promotion ban beyond “public debate and legislative action”); see also *id.* at 360 (Garza, J., dissenting) (opining that the Texas obscene-device statute posed no *Lawrence* problem).

home.²⁸ Emphasizing both personal autonomy and the private nature of the proscribed activity, the Court recognized a protected liberty interest to choose to engage in this type of relationship with another person.²⁹ In doing so, the Court rejected the conclusion of *Bowers v. Hardwick*³⁰ that there was a longstanding historical tradition of laws regulating homosexual acts.³¹ In a key passage defining the limits of *Lawrence*, the Court wrote:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.³²

The reach of *Lawrence* is a hot topic.³³ Dueling interpretations read *Lawrence* as either narrowly striking down laws banning homosexual sodomy or broadly granting a right to sexual privacy.³⁴ The vast differences in perception of the Supreme

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

29. See *id.* at 567 (explaining statutes that proscribe homosexual acts reach into “the most private human conduct, sexual behavior, and in the most private of places, the home,” and ruling the Constitution protects individuals’ choices in intimate conduct).

30. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

31. See *Lawrence*, 539 U.S. at 568 (refusing “to reach a definitive historical judgment” but noting “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter”). *Bowers* had failed to garner the respect usually afforded U.S. Supreme Court decisions among both state courts and later U.S. Supreme Court decisions. William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 675.

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

33. E.g., John G. Culhane, “Lawrence-ium”: *The Densest Known Substance?*, 11 WIDENER L. REV. 259, 259 (2005) (remarking on the “cottage industry” that has sprung up from varied interpretations of *Lawrence*); see also Arthur S. Leonard, *What Does Lawrence v. Texas Mean? Another Circuit Heard From . . .*, June 11, 2008, <http://newyorklawschool.typepad.com/leonardlink/2008/06/what-does-lawre.html> (arguing for the Fifth Circuit’s interpretation of *Lawrence*, but discussing the variety of views emerging from different circuits on *Lawrence*-related issues).

34. E.g., John G. Culhane, “Lawrence-ium”: *The Densest Known Substance?*, 11

WIDENER L. REV. 259, 261 (2005) (expressing the “duality” of *Lawrence* in terms of the decision’s “narrow compass (roughly, ‘privacy’) and a broad one (roughly, ‘liberty’)”); see also Arthur S. Leonard, *What Does Lawrence v. Texas Mean? Another Circuit Heard From . . .*, June 11, 2008, <http://newyorklawschool.typepad.com/leonardlink/2008/06/what-does-lawre.html> (posing the question of whether *Lawrence* established a broad fundamental right or a more narrow liberty interest). While this Comment focuses on *Lawrence* as it relates to the sex-toy statutes, for the most part, the *Lawrence* battleground involves the rights of homosexuals, particularly same-sex marriage. Peter G. Renstrom, *Lawrence v. Texas*, in THE PUBLIC DEBATE OVER CONTROVERSIAL SUPREME COURT DECISIONS 367, 369 (Melvin I. Urofsky ed., 2006).

Commentators blame the broad-versus-narrow debate on *Lawrence*’s failure to employ an analysis of fundamental rights as set out in *Washington v. Glucksberg*, 521 U.S. 702 (1997). E.g., Michael J. Hooi, Comment, *Substantive Due Process: Sex Toys After Lawrence*, 60 FLA. L. REV. 507, 511 (2008) (stating *Lawrence* “did not apply *Glucksberg*’s fundamental-rights analysis”); see also Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1925 (2004) (listing the “core questions” raised by *Glucksberg* that *Lawrence* failed to answer). Contra Shelly Elimelekh, Note, *The Constitutional Validity of Circuit Court Opinions Limiting the American Right to Sexual Privacy*, 24 CARDOZO ARTS & ENT. L.J. 261, 293 (2006) (claiming a *Glucksberg* analysis was unnecessary in *Lawrence* because “the right to sexual privacy pre-dated *Lawrence*”). The *Glucksberg* test, to summarize, echoes *Bowers* and involves analyzing whether the argued-for right is “deeply rooted in this Nation’s history and tradition” and drawing a “careful description” of the argued-for right. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); see also Brian Hawkins, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 410 (2006) (“*Glucksberg* shared *Bowers*’s narrow view of the Due Process Clauses and its similarly restricted approach to interpreting them.”). Hooi contends under *Glucksberg*, states’ traditional police powers still would be an adequate reason to uphold Alabama’s sex-toy statute. Michael J. Hooi, Comment, *Substantive Due Process: Sex Toys After Lawrence*, 60 FLA. L. REV. 507, 515 (2008). However, Hawkins figures “the aspersions *Lawrence* cast on *Bowers* inevitably fell with equal force on *Glucksberg*” to the extent “one might reasonably wonder whether *Lawrence* intended implicitly to repudiate *Glucksberg* through its explicit repudiation of *Bowers*.” Brian Hawkins, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 410–11 (2006).

But courts have failed to receive (or heed) such a message, based on some empirical analysis of courts’ applications of *Glucksberg* and *Lawrence*. See *id.* at 411 (reporting surveys of cases applying *Glucksberg* since *Lawrence* and applying *Lawrence* without *Glucksberg* indicate the *Glucksberg* analysis “has flourished” while the *Lawrence* analysis “has languished”). But see Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women’s Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285, 304 (2005) (viewing *Lawrence* as signaling a return to broader privacy rights exemplified in the Supreme Court’s early privacy cases and as a break from the Supreme Court’s more recent privacy cases that “had been contracting [substantive due process rights] in scope and breadth”). Hawkins finds pragmatic reasons courts have continued employing *Glucksberg* at the expense of *Lawrence* after “discern[ing] no procedural or doctrinal explanation” for favoring *Glucksberg*. Brian Hawkins, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 435 (2006). These reasons are: the lack of clarity as to “what *Lawrence* would require in *Glucksberg*’s stead,” courts’ desire to avoid misinterpreting *Lawrence*’s “social philosophy,” and judicial expedience in that *Glucksberg* offers “a convenient template for dismissing” sometimes

Court's meaning have sparked calls for the Court to revisit the case and explain what exactly it meant.³⁵

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

Meanwhile, sexual device retailers have waged battles against statutes in Texas and Alabama banning commercial distribution of obscene devices.³⁶ Before the Fifth Circuit held the Texas ban unconstitutional, the state prohibited promotion of obscene devices and possession of obscene devices with intent to promote them.³⁷ It defined "promote" to encompass the following acts: "manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same."³⁸ In *Reliable*, an operator of San Antonio and Austin

silly constitutional claims because *Lawrence* "would require much more." *Id.* at 439–43.

Another commentator reads *Glucksberg* as "explicitly reject[ing]" the "philosophical exercise" the Court conducted in *Lawrence*, which "appears to [argue] simply that because sodomy is an aspect of homosexual persons' exercise of personal autonomy, it deserves broader protection under the Due Process Clause." Edward C. Lyons, *Reason's Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157, 212 (2007). Hawkins writes *Lawrence* might have doomed itself by failing to provide lower courts enough guidance to apply it, even if those lower courts received *Lawrence*'s "social and political message." Brian Hawkins, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 443 (2006).

35. E.g., Michael J. Hooi, Comment, *Substantive Due Process: Sex Toys After Lawrence*, 60 FLA. L. REV. 507, 518 (2008) (imploping the Supreme Court to clarify *Lawrence* soon "to promote uniformity"). Arthur Leonard would prefer the Supreme Court to clearly articulate the constitutional analysis in *Lawrence*, rather than "hide the doctrinal ball," because of "the mechanistic jurisprudential tendencies of lower federal judges." Arthur S. Leonard, *What Does Lawrence v. Texas Mean? Another Circuit Heard From . . .*, June 11, 2008, <http://newyorklawschool.typepad.com/leonardlink/2008/06/what-does-lawre.html>; see also Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1217653450.shtml> (Aug. 2, 2008, CST) (predicting the U.S. Supreme Court will agree to hear the sex-toy cases and find the statutes constitutional by at least a 6–3 margin).

36. Compare *Reliable Consultants, Inc. v. Earle (Reliable I)*, 517 F.3d 738, 747 (5th Cir.) (holding unconstitutional the Texas statute forbidding sex-toy promotion), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008), with *Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1318 (11th Cir. 2007) (holding constitutional the Alabama statute forbidding commercial distribution of sex toys).

37. TEX. PENAL CODE ANN. § 43.23(a), (c) (Vernon 2003 & Supp. 2008), *held unconstitutional* by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008).

38. *Id.* § 43.21(a)(5) (Vernon 2003 & Supp. 2008), *held unconstitutional* by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008).

retail stores selling sex toys and an Internet and mail-order retailer of sex toys challenged the Texas statute on First and Fourteenth Amendment grounds.³⁹ The state did not prosecute the retailers; rather, the retailers pursued a declaratory judgment barring enforcement of the sex-toy promotion ban.⁴⁰ Officials had rarely enforced the ban, anyway.⁴¹ The district court in Austin found the Constitution does not protect any right to promote obscene devices and dismissed the retailers' suit.⁴² But the Fifth Circuit ruled the statute infringed a Fourteenth Amendment right to be free from government interference with private, intimate activity.⁴³

The court read *Lawrence* as defining "the contours of the substantive due process right to sexual intimacy."⁴⁴ According to the panel, *Lawrence* required the issue to be framed as "whether the Texas statute impermissibly burden[ed] the individual's substantive due process right to engage in private intimate conduct of his or her choosing," holding the statute indeed burdened this right.⁴⁵ However, a dissenting judge pointed out the statute's specific "proscribed conduct [was] *not* private sexual conduct."⁴⁶

39. *Reliable I*, 517 F.3d at 741–42. A consultant to adult stores said he had expected the Fifth Circuit's ruling "for some time." Allan Turner, *Ruling on Sex Toys Favors Adult Stores: 35-Year-Old Texas Law That Banned the Items Overturned by Appeals Court*, HOUSTON CHRON., Feb. 14, 2008, at B5.

40. Steven Kreytak, *Court Overturns Sex Toy Ban*, AUSTIN AMERICAN-STATESMAN, Feb. 14, 2008, at B1.

41. *See id.* (reporting the statute "is seldom enforced" and Travis County had not charged anyone "in at least the past seven years, and probably much longer"). *But see* National Association for Sexual Awareness & Empowerment, Commentary on Joanne Webb, <http://nasae.org/joanne-webb.htm> (last visited Nov. 15, 2009) (expressing outrage at the 2003 arrest of Passion Parties saleswoman Joanne Webb of Burleson). Police arrested Joanne Webb after undercover officers responding to a sign publicizing her business bought some obscene devices, which Webb explained how to use. National Association for Sexual Awareness & Empowerment Commentary on Joanne Webb, <http://nasae.org/joanne-webb.htm> (last visited Nov. 15, 2009).

42. Steven Kreytak, *Court Overturns Sex Toy Ban*, AUSTIN AMERICAN-STATESMAN, Feb. 14, 2008, at B1.

43. *Reliable I*, 517 F.3d at 742–43. However, the court left unscathed Texas's statutory provision criminalizing the intentional or knowing display or distribution of obscene material when one does so with reckless disregard for whether it will offend or alarm someone else present. TEX. PENAL CODE ANN. § 43.22(a) (Vernon 2003).

44. *Reliable I*, 517 F.3d at 744 (reciting the U.S. Supreme Court's recognition of a "substantive due process right to engage in consensual intimate conduct in the home free from government intrusion").

45. *Id.*

46. *Id.* at 749 (Barksdale, J., concurring in part and dissenting in part). Judge

Rather, the statute forbade selling or otherwise promoting sex toys.⁴⁷ But the majority of the panel found the inability to obtain a sex toy legally in Texas unconstitutionally encumbered the “right to engage in private intimate conduct in the home free from government intrusion.”⁴⁸ The majority wrote this argument “undercuts any argument that the statute only affects public conduct.”⁴⁹

The panel’s decision was not the end of the road for *Reliable*. The court, sitting en banc, denied a rehearing.⁵⁰ But notably, several judges strongly dissented from the denial of a rehearing en banc, claiming the *Reliable* majority extended *Lawrence* much too far.⁵¹ Judge Emilio Garza wrote:

[H]aving misunderstood the *personal* liberty interest announced in *Lawrence*, [the majority] created a *commercial* right *ex nihilo* to promote sexual devices. The *Lawrence* Court announced a narrow liberty interest protecting “two adults who, with full and mutual consent from each other, engage[] in sexual practices,” “in the confines of their homes.” Nothing more.⁵²

Echoing the dissent in the circuit’s original *Reliable* decision, Garza found the statute “does not prohibit sexual conduct, private or otherwise. Nor does it impermissibly burden any personal right. It prohibits only *commercial* conduct Moreover, the statute prohibits only *commercial* acts in the State of Texas.”⁵³ Thus, the statute steered clear of personal liberty interests because it did not prohibit use or possession of a device and it did not prohibit buying devices elsewhere and bringing them into Texas.⁵⁴

Barksdale disagreed with the majority’s conclusion that the statute violated a substantive due process right. *Id.* at 748.

47. *Id.*

48. *Reliable I*, 517 F.3d at 744 (majority opinion).

49. *Reliable Consultants, Inc., v. Earle (Reliable I)*, 517 F.3d 738, 744 (5th Cir.), *reh’g denied*, 538 F.3d 355 (5th Cir. 2008). The panel observed the statute even precludes a person from obtaining a device by way of someone else lending or giving it to that person. *Id.*

50. *Reliable Consultants, Inc. v. Earle (Reliable II)*, 538 F.3d 355, 356 (5th Cir. 2008).

51. *Id.* (Jones, C.J., dissenting); *id.* at 358 (Garza, J., dissenting).

52. *Reliable II*, 538 F.3d at 359 (Garza, J., dissenting) (citations omitted).

53. *Id.* at 360 (citations omitted).

54. *Id.* at 359–61.

C. *The Alabama Statute and Williams v. Morgan*

Like the *Reliable* dissenters who followed them, the Eleventh Circuit panels considering a challenge to Alabama's obscene device statute found the ban constitutional.⁵⁵ Alabama's statute bans distribution, possession with intent to distribute, and offering or agreeing to distribute "any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value."⁵⁶ It also bans production of such materials and devices and offering or agreeing to produce them.⁵⁷ In the *Williams* saga, the Eleventh Circuit decided this case three times,⁵⁸ and three federal district court opinions were published.⁵⁹ However, the U.S. Supreme Court denied certiorari.⁶⁰

In 2004, the Eleventh Circuit stated that while *Lawrence* struck down statutes prohibiting consensual homosexual activity, it did not announce a fundamental right to sexual privacy.⁶¹ Therefore, because there is no fundamental, substantive due process right to sexual privacy, there is no such right to use sex toys.⁶² In 2007, a different panel from the circuit distinguished the statute held unconstitutional in *Lawrence*, which prohibited private conduct.⁶³ Instead, the Alabama statute at issue regulates public, commercial activity.⁶⁴ The court found *Lawrence* inapplicable to Alabama's

55. *Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1323 (11th Cir. 2007); *Williams v. Att'y Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1250 (11th Cir. 2004); *Williams v. Pryor (Williams II)*, 240 F.3d 944, 950 (11th Cir. 2001).

56. ALA. CODE § 13A-12-200.2(a)(1), (2) (LexisNexis 2005).

57. *Id.* § 13A-12-200.2(a)(3) (LexisNexis 2005).

58. *Williams VI*, 478 F.3d 1316; *Williams IV*, 378 F.3d 1232; *Williams II*, 240 F.3d 944.

59. *Williams v. King (Williams V)*, 420 F. Supp. 2d 1224 (N.D. Ala. 2006); *Williams v. Pryor (Williams III)*, 220 F. Supp. 2d 1257 (N.D. Ala. 2002); *Williams v. Pryor (Williams I)*, 41 F. Supp. 2d 1257 (N.D. Ala. 1999).

60. *Williams v. King (Williams VII)*, 552 U.S. 814, *denying cert. to* 478 F.3d 1316 (11th Cir. 2007). *But cf.* Shelly Elimelekh, Note, *The Constitutional Validity of Circuit Court Opinions Limiting the American Right to Sexual Privacy*, 24 CARDOZO ARTS & ENT. L.J. 261 (2006) (arguing the Supreme Court should have taken the case and invalidated Alabama's statute).

61. *Williams IV*, 378 F.3d at 1236.

62. *See id.* at 1241-42 (framing "the putative right at issue" as "the right to sell and purchase sexual devices," yet contemplating an extension of the issue in the sense that "restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item").

63. *Williams VI*, 478 F.3d at 1322.

64. *See id.* ("To the extent *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is *both* private

sex-toy statute because of *Lawrence*'s narrowly drawn personal liberty interest.⁶⁵

III. OTHER COURTS' HOLDINGS ON SIMILAR QUESTIONS

A. Pre-*Lawrence* Texas Cases

Predating *Lawrence* by eighteen years, the Texas Court of Criminal Appeals in *Yorko v. State*⁶⁶ found that an earlier version of the statute in *Reliable* did not unconstitutionally violate "any fundamental right to use obscene devices"⁶⁷ or a "right to use and dispose of [one's] property as [one] pleases."⁶⁸ The court differentiated between sex toys and contraceptives, finding their uses determinative of whether access to them might be constitutionally protected.⁶⁹ Access to contraceptives is protected because "[c]ontraceptives are used to implement the [constitutionally protected] decision not to beget a child."⁷⁰ But access to sex toys is not protected because sex toys "[are] used for sexual stimulation and gratification," implicating no constitutionally protected decision or activity.⁷¹ The case also pointed out that the

and non-commercial.").

65. See *id.* ("Unlike *Lawrence*, the activity regulated here is *neither* private *nor* non-commercial.").

66. *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985).

67. *Id.* at 265. Earlier Texas cases were decided on obscenity grounds. See *Goodwin v. State*, 514 S.W.2d 942, 944 (Tex. Crim. App. 1974) (stating the zone "of 'privacy in the home'" fails to cover "the purveyor and consumer of obscene materials"); see also *Locke v. State*, 516 S.W.2d 949, 956 (Tex. Civ. App.—Texarkana 1974, no writ) (citing U.S. Supreme Court precedent to support its conclusion that rights to private possession or receipt of obscene materials do not lead to a right to import, transport or distribute these materials).

68. *Yorko*, 690 S.W.2d at 266.

69. *Id.* at 265.

70. *Id.*

71. *Id.* In 2000, an appellate court facing a question of sufficiency of evidence considered whether a dildo fit the proscribed category of devices intended for sexual gratification. *Webber v. State*, 21 S.W.3d 726, 728–29 (Tex. App.—Austin 2000, pet. ref'd). The undercover deputy sheriff who bought a dildo testified on cross-examination that while a dildo might make a serviceable doorstop or paperweight, she would not use one in that manner. *Id.* at 729. A dildo, though not specifically mentioned in the statute, nevertheless fit into the category of banned devices because it was designed and/or marketed mainly for sexual gratification. *Id.* Thus, the problem with the devices is their use and/or marketing scheme. Cf. 2,174 *Obscene Devices v. State*, 33 S.W.3d 904, 906 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (stating that mere possession of an obscene device is not illegal, as "[n]o device, sitting passively on the shelf, is a criminal instrument" (quoting *Janjua v. State*, 991 S.W.2d 419, 426 (Tex. App.—Houston [14th

prohibition of the sale and exhibition of obscene material is properly within states' regulatory powers.⁷²

Texas's other appellate courts also upheld the ban in the years leading up to *Lawrence*. In 1982, the Second Court of Appeals in Fort Worth refused to rule the statute was an unconstitutional violation of a right to privacy, quoting an earlier Court of Criminal Appeals opinion: "This concept (privacy in the home) cannot be equated with a 'zone' of privacy which would surround the purveyor and consumer of obscene materials."⁷³ In 1994, the Fourteenth Court of Appeals in Houston found that because there was no fundamental right to sexual privacy and "no fundamental right to use obscene devices," the statute restricting promotion of these devices did not violate a fundamental right.⁷⁴ In this case, Justice Brown made his astute observation, "Here we go raising the price of dildos again. Since this appears to be the law in Texas I must concur."⁷⁵

B. *The Trend in Texas Cases Since Lawrence*

Even after *Lawrence*, Texas appellate courts have clung to the validity of the sex-toy promotion ban, albeit in varying degrees. In 2005, in *State v. Acosta*,⁷⁶ the Eighth Court of Appeals in El Paso acknowledged a "constitutionally protected zone of privacy."⁷⁷ However, the court held the statute did not violate that

Dist.] 1999, no pet.)).

72. *Yorko*, 690 S.W.2d at 264.

73. *Coberly v. State*, 640 S.W.2d 428, 430 (Tex. App.—Fort Worth 1982) (quoting *Goodwin v. State*, 514 S.W.2d 942, 944 (Tex. Crim. App. 1974)), *pet. ref'd*, 644 S.W.2d 734 (Tex. Crim. App. 1983).

74. *Regalado v. State*, 872 S.W.2d 7, 9 (Tex. App.—Houston [14th Dist.] 1994, *pet. ref'd*); *accord T.K.'s Video, Inc. v. State*, 891 S.W.2d 287, 289 (Tex. App.—Fort Worth 1994, *pet. ref'd*) (stating "the purveyor and consumer of obscene materials" is not covered by the privacy right to possess obscenity in one's home); *Dietz v. State*, No. 05-92-01467-CR, 1994 WL 15084, at *4 (Tex. App.—Dallas Jan. 24, 1994, *pet. ref'd*) (not designated for publication) (referring to *Yorko* as rejecting the proposition that "it is unconstitutional to ban the sale of" obscene items because the possession of such items is protected); *Carrillo v. State*, Nos. 01-92-01181-CR, 01-92-01182-CR, 1993 WL 433995, at *2 (Tex. App.—Houston [1st Dist.] Oct. 28, 1993, no pet.) (not designated for publication) (asserting the Texas statute does not ban the use of obscene devices in one's home and thus does not violate any rights).

75. *Regalado*, 872 S.W.2d at 11 (Brown, J., concurring).

76. *State v. Acosta*, No. 08-04-00312-CR, 2005 WL 2095290 (Tex. App.—El Paso Aug. 31, 2005, *pet. ref'd*) (not designated for publication).

77. *Id.* at *2.

constitutional right to privacy.⁷⁸ The court noted the statute did not prohibit the use of sex toys and the ban on promotion of sex toys did not infringe a right to use them in one's home.⁷⁹ The court read *Lawrence* narrowly, finding "the Supreme Court specifically excluded from its analysis any aspect of public conduct or prostitution (citation omitted); rather, the holding applied to private sexual conduct."⁸⁰ The U.S. Supreme Court denied certiorari in this case.⁸¹

The Second Court of Appeals in Fort Worth likewise found *Lawrence* "completely inapposite" in determining whether the Fourteenth Amendment protects a merchant's right to peddle obscene videos.⁸² The court referred to U.S. Supreme Court obscenity precedent, concluding "the constitutionally-protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to sell or give it to others, nor does it require the courts to fashion or recognize a right to distribute such material."⁸³ And because *Lawrence* had nothing to do with selling or distributing obscene material, *Lawrence* did not apply in that case.⁸⁴ The court even concluded that *Lawrence* directly contradicted the reasoning for the argued-for right, given that *Lawrence* itself said the right it recognized "does not involve public conduct."⁸⁵ The U.S. Supreme Court also denied certiorari in this case.⁸⁶

Not only have Texas appellate courts refused to apply *Lawrence* to invalidate the sex-toy promotion ban, some Texas courts have refused to apply *Reliable* to overturn the ban. In May 2008, the

78. *Id.* at *3.

79. *Id.*

80. *Id.*

81. *Acosta v. Texas*, 549 U.S. 821 (2006), *denying cert. to* No. 08-04-00312-CR, 2005 WL 2095290 (Tex. App.—El Paso Aug. 31, 2005, pet. ref'd) (not designated for publication).

82. *Ex parte Dave*, 220 S.W.3d 154, 159 (Tex. App.—Fort Worth 2007, pet. ref'd).

83. *Id.* at 156–57.

84. *Id.* at 159.

85. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)). Texas appellate courts also have declined to find "a fundamental privacy right to consensual sexual conduct between adults." *Berkovsky v. State*, 209 S.W.3d 252, 254 (Tex. App.—Waco 2006, pet. ref'd); cf. *Ex parte Morales*, 212 S.W.3d 483, 492 (Tex. App.—Austin 2006, pet. ref'd) (rejecting the assertion that *Lawrence* recognized a fundamental right "to engage in sexual conduct (. . . derive[d] from privacy and intimate association rights)").

86. *Dave v. Texas*, 128 S. Ct. 628 (mem.), *denying cert. to* 220 S.W.3d 154 (Tex. App.—Fort Worth 2007, pet. ref'd).

Eighth Court of Appeals in El Paso declined to follow *Reliable* because *Reliable* ignored the line of U.S. Supreme Court cases “holding that [a] constitutionally-protected right to possess obscene material in the privacy of one’s home does not give rise to a correlative right to receive the materials or to sell or give it to others.”⁸⁷ The court did “not read *Lawrence* as overruling this line of authority.”⁸⁸ The court also found that *Lawrence* did not control because *Lawrence* “did not involve the promotion of obscene materials.”⁸⁹ It read *Lawrence* as protecting only a narrow liberty interest in “private, consensual sexual conduct between homosexuals.”⁹⁰ Then, in July 2008, the Thirteenth Court of Appeals in Corpus Christi asserted that in the situation at hand, because a state appellate court is not bound by a lower federal appellate court’s ruling, *Reliable* is not binding and state appellate courts must follow the Court of Criminal Appeals’ holding in *Yorko*.⁹¹ However, the court noted its agreement with the reasoning in *Reliable* but regretted that *Yorko* forced its hand in this case.⁹²

C. Additional Federal Circuit Court Rulings on the Issue

As Chief Judge Jones and Judge Garza pointed out in their dissents, *Reliable* was not the first time the Fifth Circuit ruled on the Texas statute.⁹³ In *Red Bluff Drive-In, Inc. v. Vance*⁹⁴ in 1981,

87. Varkonyi v. State, 276 S.W.3d 27, 38 (Tex. App.—El Paso 2008, pet. ref’d).

88. *Id.*

89. *Id.* at 39.

90. *Id.* at 38.

91. Villarreal v. State, 267 S.W.3d 204, 208–09 (Tex. App.—Corpus Christi 2008, no pet.).

92. *See id.* at 207 (noting the court “embrace[d] the Fifth Circuit’s [*Reliable*] decision” but was “unfortunately constrained from following it”).

93. *Reliable Consultants, Inc. v. Earle (Reliable II)*, 538 F.3d 355, 356 (5th Cir. 2008) (Jones, C.J., dissenting); *id.* at 360 n.5 (Garza, J., dissenting). Over the years, other states have wrestled with sex-device statutes as well, but definitively categorizing various statutes is a difficult task because of frequent revisions and “spotty enforcement” of such laws. Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326, 330 (2006).

In 1985, the Colorado Supreme Court invalidated a state statute forbidding promotion of obscene devices, as it was overly broad. *People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 370 (Colo. 1985) (en banc). The court found the statute “impermissibly burden[ed] the right of privacy of those seeking to make legitimate medical or therapeutic use of [sexual] devices.” *Id.* This “constitutionally protected privacy . . . encompasses the intimate medical problems associated with sexual activity.” *Id.* at 368 n.26. Ambiguous statutory language raised an issue as to whether sexual devices

preceding the Texas Court of Criminal Appeals' *Yorko* decision, the Fifth Circuit faced the question of whether the sex-toy statute violated "fundamental rights of expression and personal autonomy" or "denie[d] equal protection of the laws to handicapped persons dependent on these items for sexual

were indeed "obscene" under the statute at that time, and the court left unanswered the question of whether these devices constitutionally can be defined and their sale and use regulated. *Id.* 370 n.28. As it is now written, Colorado's obscenity statute specifically excludes "actual three-dimensional obscene device[s]" from the definition of prohibited "material." COLO. REV. STAT. § 18-7-101(1) (2008). Furthermore, the statute defines "obscene device" as something "designed or marketed as useful primarily for" sexual stimulation, "including a dildo or artificial vagina." *Id.* § 18-7-101(3). However, the statute criminalizes promotion of *only* obscene materials, not obscene devices. *Id.* §§ 18-7-102(1)(a), 18-7-102(1.5)(a). The statute also exempts otherwise illegal conduct if it is related to law enforcement or it occurs within one's residence. *Id.* §§ 18-7-102(5), (6). The statute specifically does *not* exempt such conduct within one's home if it consists of promoting obscene material, making no mention of obscene devices. *Id.* § 18-7-102(6).

While Colorado's statute appears to allow promotion of obscene devices, Louisiana's statute clearly forbids it. *Compare* COLO. REV. STAT. § 18-7-101(1) (defining obscene material to exclude obscene devices), *and id.* §§ 18-7-102(1)(a), 18-7-102(1.5)(a) (characterizing promotion of obscene material, not obscene devices, as an offense), *with* LA. REV. STAT. ANN. § 14:106.1 (2004) (criminalizing knowing, intentional promotion of obscene devices). In 2000, the Louisiana Supreme Court refused to "extend constitutional protection in the way of privacy to the promotion of sexual devices." *State v. Brennan*, 772 So. 2d 64, 72 (La. 2000). However the court found the statute failed the rational basis test because it did not make exceptions for medical personnel and therapeutic uses of sexual devices. *Id.* at 76. Yet the Louisiana statute "remains on the books" despite the *Brennan* decision. Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326, 333 (2006).

Like the Louisiana Supreme Court, the Kansas Supreme Court called for a medical exception to the Kansas ban on promoting obscene devices. *State v. Hughes*, 792 P.2d 1023, 1031-32 (Kan. 1990). The court agreed with the Colorado Supreme Court's *Seven Thirty-Five* holding on overbreadth that violates "a constitutionally protected zone of privacy." *Id.* at 1030-31. As the Kansas statute is now written, it allows an exception for obscene devices "disseminated or promoted for the purpose of medical or psychological therapy." KAN. STAT. ANN. § 21-4301(c)(3) (2007).

The Georgia Supreme Court takes a more narrow view of an individual's zone of privacy. *See Morrison v. State*, 526 S.E.2d 336, 338 (Ga. 2000) (emphasizing U.S. Supreme Court precedent claiming "the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others" (quoting *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 128 (1973))). While acknowledging privacy rights are more expansive under the Georgia constitution than under the U.S. Constitution, the court cut privacy rights short of protecting one's purchase of obscene materials. *Id.* at 338. Correspondingly, privacy rights do not include distribution of obscene material. *Id.* Similar to other state statutes, the Georgia statute as it is now written includes an affirmative defense for people acquiring obscene material, including devices, with written authorization "by a licensed medical practitioner or psychiatrist." GA. CODE ANN. § 16-12-80(e)(2) (2007).

94. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir. Unit A June 1981).

gratification.”⁹⁵ The court upheld the constitutionality of the statute, but expressed concern about certain provisions, including the definition of “promote.”⁹⁶ The Fifth Circuit suggested that a literal reading of the statute might run into an overbreadth problem, ensnaring innocent conversations about the devices.⁹⁷ But the judges left Texas state courts to appropriately narrow the statute’s reach by carving out exceptions.⁹⁸ Sure enough, by the time the *Reliable* panel struck down the Texas statute decades later, the law included affirmative defenses limiting the statute’s application.⁹⁹

The Eleventh Circuit, too, ruled previously on a state statute banning sex-toy promotion and commercial distribution in *This That & The Other Gift & Tobacco, Inc. v. Cobb County*.¹⁰⁰ But that case focused on a First Amendment challenge to Georgia’s ban on advertising obscene devices.¹⁰¹ The Eleventh Circuit held the advertising ban unconstitutional because of its vast reach.¹⁰² Because vendors legally may sell sexual devices to people who have legitimate medical, psychiatric, and educational needs, vendors must be allowed to advertise their products to those people.¹⁰³

Elsewhere, in *United States v. Extreme Associates*,¹⁰⁴ the Third Circuit enthusiastically upheld federal statutes regulating distribution of obscenity,¹⁰⁵ finding the statutes do not infringe “any constitutional right to privacy.”¹⁰⁶ The court reversed the

95. *Id.* at 1026.

96. *Id.* at 1027.

97. *Id.* at 1029–30.

98. *Id.* at 1030.

99. See TEX. PENAL CODE ANN. § 43.23(g) (Vernon 2003 & Supp. 2008) (exempting anyone who has a “bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose” to possess or promote otherwise banned items), *held unconstitutional* by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008).

100. *This That & The Other Gift & Tobacco, Inc. v. Cobb County*, 439 F.3d 1275 (11th Cir. 2006).

101. *Id.* at 1278.

102. *Id.* at 1284–85.

103. *Id.* at 1284.

104. *United States v. Extreme Assocs., Inc.*, 431 F.3d 150 (3d Cir. 2005).

105. See *id.* at 156 (finding the U.S. Supreme Court’s “explicit[] and repeated[]” obscenity holdings “[i]n the broadest and most obvious sense” support the validity of federal obscenity statutes).

106. *Id.* at 161. *But cf.* *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 998 (7th Cir. 2002) (remanding consideration of a potential invasion of privacy rights by a city ordinance regulating sexually-oriented businesses and noting other jurisdictions’

district court's finding that *Lawrence* undermined the Supreme Court's obscenity precedent.¹⁰⁷ Notably, the panel further admonished its sister circuits and lower courts that precedent approving federal regulations of distribution of obscene materials "dictates the result in analogous cases unless and until the Supreme Court expressly overrules the substance of its decision. *Lawrence v. Texas* represents no such definitive step by the Court."¹⁰⁸ The Supreme Court denied certiorari in this case.¹⁰⁹

IV. ANALYSIS: IS THERE A PRIVACY RIGHT TO SEX TOYS?

A. *The Constitutional Framework*

A brief look back at *Bowers* will further illuminate *Lawrence* as it relates to the sex-toy statutes, because *Lawrence* expressly overruled *Bowers* and adopted Justice Stevens's dissenting

conflicting holdings on the issue). The Seventh Circuit panel acknowledged the validity of using sexual devices under certain circumstances, noting federal Food and Drug Administration regulations "conclusively establish the therapeutic and medical value of certain sexual devices." *Id.* at 997. Two decades earlier, the Eighth Circuit invalidated a city ordinance restricting sales of "sex-inciting devices," among other items. *Postscript Enters., Inc. v. Whaley*, 658 F.2d 1249, 1251 (8th Cir. 1981). The ordinance failed to provide law enforcement officers an adequate standard by which to judge the purpose of a device. *Id.* at 1255. Police had no guidance; for example, in evaluating whether a woman might buy a vibrator for non-sex-inciting purposes, such as to improve pelvic muscle tone. *Id.* Local ordinances regulating sexually-oriented businesses, such as those in *Pleasureland* and *Postscript*, are an "emerging problem," according to an interview with a First Amendment lawyer. Mark Kernes, *Sex Toy Sales Now Completely Legal in Fifth Circuit*, AVN BUS., Nov. 2, 2008, <http://business.avn.com/articles/33144.html>. The lawyer concedes the First Amendment does not protect sex toys, or "novelties," and it is unclear how *Reliable* will impact local ordinances regulating businesses that sell novelties. *Id.*

107. *Extreme Assocs., Inc.*, 431 F.3d at 156.

108. *Id.* at 161; see also Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 610–11 (2006) (finding lower federal courts have continued to follow the conservative, limited approach to fundamental rights rather than adopting "*Lawrence*'s broad definitions of . . . liberty interests"). Goldman observes "the conservative approach appears to remain dominant," referring to a series of Supreme Court privacy cases preceding *Lawrence* that "transmogrif[ied] fundamental rights/privacy doctrine" from the Court's earlier more expansive view of privacy rights. Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 609, 611 (2006). Another commentator agrees, noting "state and lower federal courts addressing state-imposed penalties on private, consensual, noncommercial sex between adults have restricted *Lawrence* due process sexual liberty to its narrowest possible reading." Kim Shayo Buchanan, *Lawrence v. Guduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1276 (2007).

109. *Extreme Assocs., Inc. v. United States*, 547 U.S. 1143 (2006) (mem.), *denying cert. to* 431 F.3d 150 (3d Cir. 2005).

opinion.¹¹⁰ *Bowers* revolved around a man accused of violating Georgia's anti-sodomy statute with another man, with the Court focusing on private, consensual sexual conduct between two people.¹¹¹ While recognizing privacy rights in certain instances,¹¹² the *Bowers* majority upheld the anti-sodomy statute, refusing to find "a fundamental right to engage in homosexual sodomy."¹¹³ Such a right, according to the Court, was neither "implicit in the concept of ordered liberty[]" nor "deeply rooted in this Nation's history and tradition."¹¹⁴

Justice Stevens's dissent, on the other hand, emphasized privacy and liberty in individuals' choices concerning such physical relationships and expressions of affection.¹¹⁵ Stevens labeled as "essential" the liberty giving rise to the fundamental rights that the Supreme Court recognized in earlier cases.¹¹⁶ But while Stevens found every individual, whether homosexual or heterosexual, claims "the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions," he did not specifically characterize the right to homosexual relationships as "fundamental."¹¹⁷ Thus *Lawrence*, which deemed Stevens's

110. *Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003).

111. *Bowers v. Hardwick*, 478 U.S. 186, 187–91 (1986).

112. *Id.* at 190.

113. *Id.* at 191.

114. *Id.* at 191–92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977)).

115. *Id.* at 216–17 (Stevens, J., dissenting). Perhaps foreshadowing the *Lawrence* decision, an early 5–4 vote on *Bowers* among the Supreme Court justices would have found Georgia's anti-sodomy statute infringed fundamental privacy rights. See generally HOWARD BALL, THE SUPREME COURT IN THE INTIMATE LIVES OF AMERICANS: BIRTH, SEX, MARRIAGE, CHILDREARING, AND DEATH 24–25 (2002) (reporting the justices initially voted after oral argument to affirm the Eleventh Circuit's holding that the statute violated privacy rights). The justices' vote later reversed to a 5–4 majority upholding the statute. *Bowers*, 478 U.S. at 189. Dissenting, Justice Blackmun found the statute violated protected privacy interests. *Id.* at 202 (Blackmun, J., dissenting). He characterized the case as being "about . . . the right to be let alone." *Id.* at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). A year before the *Lawrence* decision, writer Howard Ball observed the Supreme Court generally limited the reach of sexual privacy rights and listed a hierarchy "of protected and unprotected sexual activities," including "[m]asturbation in one's home" among protected acts. HOWARD BALL, THE SUPREME COURT IN THE INTIMATE LIVES OF AMERICANS: BIRTH, SEX, MARRIAGE, CHILDREARING, AND DEATH 29 (2002).

116. *Bowers*, 478 U.S. at 218 (Stevens, J., dissenting).

117. *Bowers v. Hardwick*, 478 U.S. 186, 218–19 (1986) (Stevens, J., dissenting).

dissent in *Bowers* as controlling, leaves open the question whether the right *Lawrence* recognizes is a fundamental one, particularly in the absence of any express reference to it as a fundamental right.¹¹⁸

Bowers and *Lawrence* both reflected on privacy precedent, tracing the evolution and extent of liberty interests in certain conduct and decision-making.¹¹⁹ In *Griswold v. Connecticut*,¹²⁰ in 1965, the Supreme Court struck down a state law criminalizing contraceptive use and acknowledged that the Bill of Rights gives rise to zones of privacy protecting spousal relations occurring in marital bedrooms.¹²¹ The Court extended this right to unmarried people a few years later in *Eisenstadt v. Baird*.¹²² The state law invalidated in *Eisenstadt* criminalized distribution of contraceptives except to married people fulfilling a registered physician's prescription with a registered pharmacist.¹²³ *Eisenstadt* extended the right to privacy to single people making childbearing decisions.¹²⁴ The Supreme Court's next step was to confer privacy protection on a woman's decision to obtain an abortion.¹²⁵

118. Compare *Williams v. Att'y Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1236 (11th Cir. 2004) (noting that *Lawrence* did not announce a fundamental right to sexual privacy because *Lawrence* did not complete a fundamental-rights analysis under *Glucksberg*), with *Reliable Consultants, Inc. v. Earle (Reliable I)*, 517 F.3d 738, 744 (5th Cir.) (noting that *Lawrence* announced "the individual's substantive due process right to engage in private intimate conduct of his or her choosing"), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008).

119. *Lawrence v. Texas*, 539 U.S. 558, 564–66 (2003); *Bowers*, 478 U.S. at 190–91.

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

121. *Id.* at 485–86. Author John W. Johnson points out the U.S. Constitution does not use the word "privacy," a term "finally brought . . . under the aegis of the federal constitution" with *Griswold*. John W. Johnson, *Griswold v. Connecticut*, in *THE PUBLIC DEBATE OVER CONTROVERSIAL SUPREME COURT DECISIONS* 235, 235 (Melvin I. Urofsky ed., 2006). Johnson marks *Griswold* as "the primary legal precedent in the creation and expansion" of privacy rights and lauds *Griswold's* "principal significance" as "its resonance since the mid-1960s as a rationale for extending the constitutional right of privacy to all Americans." *Id.* at 243. The focus on *Griswold* during "every Supreme Court confirmation hearing since the mid-1980s" illustrates the decision's significance, with nominees, aside from Robert Bork, generally recognizing "a constitutional right of privacy." *Id.* at 242. Foreshadowing today's debate over what the *Lawrence* privacy right means, Bork, who lost the confirmation vote, testified to the Senate Judiciary Committee regarding the unclear privacy right in *Griswold*: "[W]e do not know what it is. We do not know what it covers. It can strike at random." See *id.* at 243 (recalling Bork also characterized the *Griswold* privacy right as "created, generalized, and undefined").

122. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

123. *Id.* at 441–42.

124. *Id.* at 453.

125. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Among the backlash to the *Roe*

Following that move, the Court reiterated a personal privacy right to the use and distribution of contraceptives when it invalidated a state law barring minors' access to contraceptives.¹²⁶ The Court stated decisions relating to conceiving and bearing children lie "at the very heart" of the choices falling under the umbrella of constitutional privacy protection.¹²⁷ In addition, the Court has found that the liberty protected under the Due Process Clause covers the rights to marry, to decide how to educate and rear one's children, and to turn down life-saving medical treatment.¹²⁸

decision, some critics complained it created rights that did not exist in the Constitution, and others asserted the matter should have been left to the states to regulate. James Z. Schwartz, *Roe v. Wade*, in *THE PUBLIC DEBATE OVER CONTROVERSIAL SUPREME COURT DECISIONS* 299, 303, 305–07 (Melvin I. Urofsky ed., 2006).

126. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 718–19 (1977).

127. *Id.* at 685; see also Angela Holt, Commentary, *From My Cold Dead Hands: Williams v. Pryor and the Constitutionality of Alabama's Anti-Vibrator Law*, 53 ALA. L. REV. 927, 939–40 (2002) (analyzing *Griswold*, *Eisenstadt*, and *Carey* as establishing a "constitutional right to sex," but admitting *Glucksberg* ruled the Constitution does not protect every personal decision). Holt lobbies for a "right to sex" view because states have no "legitimate interest in deterring people" from having sex, which is why the Supreme Court struck the anti-contraceptive laws. Angela Holt, Commentary, *From My Cold Dead Hands: Williams v. Pryor and the Constitutionality of Alabama's Anti-Vibrator Law*, 53 ALA. L. REV. 927, 940–41 (2002); see also Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 29 (2004) (predicting *Lawrence* will fuel greater emphasis on a "right to sex" view of the law "that focuses on the pleasure of the act rather than a procreative purpose"). Still, Holt concedes that the "right to sex" view, if correct, does not guarantee a fundamental right to a sex toy; because the Alabama statute forbids distribution of sex toys, the right to distribute will be fundamental only if the right to use sex toys is fundamental, which remains undetermined. Angela Holt, Commentary, *From My Cold Dead Hands: Williams v. Pryor and the Constitutionality of Alabama's Anti-Vibrator Law*, 53 ALA. L. REV. 927, 941 (2002).

128. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). A commentator notes the Texas statute was but one of "a variety of laws in a sort of legal limbo" after *Lawrence*, which "suggested they may be unconstitutional." Joanna Grossman, *Is There a Constitutional Right to Promote the Use of Sex Toys? A Texas Arrest Raises the Question*, FINDLAW'S WRIT, Jan. 27, 2004, <http://writ.news.findlaw.com/grossman/20040127.html>. Grossman suggests consensual adult relationships protected under *Lawrence* should include the use of sexual devices. *Id.* Other proponents of such *Lawrence* protection blasted the statute as contradictory for allowing Texans to own sex toys but forbidding Texans to buy them. National Association for Sexual Awareness & Empowerment, Commentary on Joanne Webb, <http://nasae.org/joanne-webb.htm> (last visited Nov. 15, 2009). The *Reliable* majority opinion likewise concluded the ban on sex-toy promotion infringed Texans' right to use sex toys, a right encompassed by *Lawrence's* protection of voluntary, consensual intimate conduct. *Reliable Consultants, Inc. v. Earle (Reliable I)*, 517 F.3d 738, 744 (5th Cir.), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008). *Contra Reliable Consultants, Inc. v. Earle (Reliable II)*, 538 F.3d 355, 360 (5th Cir. 2008) (Garza, J., dissenting) (stating that the Texas statute "does not prohibit sexual conduct, private or

Besides due process privacy and liberty, obscenity holdings provide another avenue for analysis of the sex-toy statutes, although *Williams* and *Reliable* do not dwell on obscenity. *Stanley v. Georgia*¹²⁹ established a First and Fourteenth Amendment right to possess obscene material in the privacy of one's home while reserving states' power to regulate obscenity otherwise.¹³⁰ In *United States v. Reidel*,¹³¹ the Court refused to extend the personal right under *Stanley* to possess and use obscene materials in one's home to include sales and distribution of obscenity, in this case through the mail.¹³² Nor did the Court extend the *Stanley* right to protect interstate commerce in obscene material and importation of obscene material from another country.¹³³ In addition, *Paris Adult Theatre I v. Slaton*¹³⁴ reiterated states' power to regulate local commerce in and exhibition of obscene materials.¹³⁵

B. *Picking Apart* Lawrence

Though the *Reliable* and *Williams* decisions dealt with obscenity statutes regulating statewide commerce, they hinged on *Lawrence*, a sodomy statute decision. In *Reliable*, the Fifth Circuit gave *Lawrence* a broad reading, finding the Supreme Court "recognized . . . a right to be free from governmental intrusion regarding 'the most private human contact, sexual behavior.'"¹³⁶ This reading might be justified by select passages in the Court's decision, such

otherwise," but rather "prohibits only *commercial* conduct").

129. *Stanley v. Georgia*, 394 U.S. 557 (1969).

130. *Id.* at 568.

131. *United States v. Reidel*, 402 U.S. 351 (1971).

132. *Id.* at 355.

133. *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 128 (1973).

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

135. *Id.* at 69 (1973). A commentator disagrees with the view that sex toys deserve less constitutional protection than other obscene materials, such as images and publications, because sex toys "are understood to lack expressive content." Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1253 (2007). "If lap dancing can convey meaning, it is at least arguable that the use of sex toys does as well." *Id.* at 1253.

136. *Reliable Consultants, Inc. v. Earle (Reliable I)*, 517 F.3d 738, 744 (5th Cir.) (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008); see also Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 38 (2004) (applauding *Lawrence's* "expansive reading of liberty" in "ignor[ing] the restrictive *Glucksberg*" test).

as sweeping references to liberty and autonomy.¹³⁷ In addition, one basis of the Court's overruling of *Bowers* was "an emerging awareness" reflected in the past half-century's laws and traditions "that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."¹³⁸

However, throughout *Lawrence*, the Court chiefly addressed the issue in much narrower terms, as the Eleventh Circuit noted in its *Williams* decisions.¹³⁹ The Eleventh Circuit found only a "strained and ultimately incorrect reading of *Lawrence*" would lead to the conclusion that the Court had established a fundamental right to sexual privacy.¹⁴⁰ Beyond the above-quoted passage where the Court sketched the outer limits of its decision, the majority also framed the question more tightly in terms of the specific activity prohibited by the Texas homosexual sodomy statute.¹⁴¹ The *Lawrence* Court dissected and debunked the *Bowers* Court's premise that laws against consensual sodomy were embedded in history, finding *Bowers* harmed homosexuals' dignity

137. *Lawrence v. Texas*, 539 U.S. 558, 562, 567, 572, 574 (2003).

138. *Id.* at 572.

139. *Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1322 (11th Cir. 2007); *Williams v. Att'y Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1236 (11th Cir. 2004).

140. *Williams IV*, 378 F.3d at 1236; see also Douglas E. Nauman, Casenote, *Where Sexual Privacy Meets Public Morality: How Williams v. King Is Instructive for the Fourth Circuit in Applying Public Morality As a Legitimate State Interest After Lawrence v. Texas*, 29 N.C. CENT. L.J. 127, 145 (2006) (asserting the district court decision in *Williams v. King (Williams V)*, 420 F. Supp. 2d 1224 (N.D. Ala. 2006), *aff'd*, 478 F.3d 1316 (11th Cir. 2007), "demonstrates that a constitutional right of privacy has not been extended to every form of private sexual conduct or every private sexual relationship to the extent that morality is no longer a valid state interest"). Nauman finds that beyond the specific intimate interpersonal relationship *Lawrence* protects, states may "regulate the boundaries of sexual conduct." Douglas E. Nauman, Casenote, *Where Sexual Privacy Meets Public Morality: How Williams v. King Is Instructive for the Fourth Circuit in Applying Public Morality As a Legitimate State Interest After Lawrence v. Texas*, 29 N.C. CENT. L.J. 127, 146 (2006). *Contra* Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 33-34 (2004) (finding the use of sex toys meets most of the elements of the protected *Lawrence* right, differing "only in the nature of the private sexual act," and thus should be protected too).

141. *Lawrence*, 539 U.S. at 562, 564, 578. The *Lawrence* Court, however, did note the *Bowers* Court's "failure to appreciate the extent of the liberty at stake." *Id.* at 567. In *Bowers*, the Court did not recognize the "far-reaching consequences" of the Georgia sodomy law. *Id.* But those consequences involved "private human conduct" and "the most private of places, the home," in an effort to prevent individuals' relationships that they were free to enter. *Id.*

and autonomy in choosing personal relationships.¹⁴² Time and again, the Court referred to the issue as the private nature of private conduct in a private place.¹⁴³

C. *Applying Lawrence to the Texas and Alabama Statutes*

The dueling questions facing Texas courts and the Fifth and Eleventh Circuits are: Do the Texas and Alabama statutes impermissibly burden the broader right in *Lawrence* to private sexual activity by unconstitutionally restricting individuals' access to sex toys?¹⁴⁴ Or do they merely regulate public, commercial activity unprotected by the personal, private liberty interest in *Lawrence*?¹⁴⁵ As both circuits recognize, the statutes do not

142. *Id.* at 567–74. A commentator thoroughly rejects “the view that fundamental substantive due process liberty rights—in keeping with a concept of political fairness—must be founded upon a notion of personal autonomy that may only be restricted under principles that all rational persons could in principle accept.” Edward C. Lyons, *Reason's Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157, 231 (2007). Lyons concludes this broad “public reason” viewpoint fails because of the sheer impossibility in a pluralistic society of “distill[ing] a set of principles . . . that can be assented to by all rational citizens” because of the inevitable existence of “reasonable but irreconcilable views . . . about all fundamental values . . .” *Id.* *Glucksberg* thus provides a mode of analysis preferable to *Lawrence* because *Glucksberg* requires a careful description of the fundamental liberty at issue. *Id.* at 232–33. A careful description of a truly fundamental liberty, rather than a generic concept of order such as autonomy that is open to myriad interpretations, will better ensure a particular liberty is part of “freedom” and “order” as understood in a community’s habits, traditions, and practices. *Id.*

143. *Lawrence*, 539 U.S. at 562, 564, 567, 570, 572.

144. See *Reliable Consultants, Inc. v. Earle (Reliable I)*, 517 F.3d 738, 738 (5th Cir.) (stating “[b]ecause of *Lawrence*, the issue before us is whether the Texas statute impermissibly burdens the individual’s substantive due process right to engage in private intimate conduct of his or her choosing”), *reh’g denied*, 538 F.3d 355 (5th Cir. 2008).

145. See *Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1322 (11th Cir. 2007) (distinguishing Alabama’s sex-toy statute banning “public, commercial activity” from Texas’s homosexual sodomy statute in *Lawrence* banning “private sexual conduct”). How the question is framed can be outcome-determinative, leading some commentators to criticize the Eleventh Circuit for “link[ing] a sacred constitutional precept with the more profane vibrators, dildos, and beads” and “replac[ing] sexual privacy, an abstract concept that many might find a positive, with particular sexual devices, specific applications that may have fewer adherents among the general populace.” Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women’s Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285, 306–07 (2005). Along these lines, commentators fault the Eleventh Circuit for finding *Lawrence* inapplicable to the sex-toy promotion ban. *E.g., id.* at 305–06 (asserting the Eleventh Circuit “rationalized that *Lawrence* was limited to its facts” because the panel otherwise “could not make *Lawrence* fit consistently with its conception of substantive due process”).

Even before *Lawrence*, the phrasing of the question in *Bowers* drew criticism for its non-neutrality. William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L.

prohibit use and possession of the devices,¹⁴⁶ which are private activities. The statutes prohibit selling and marketing the devices,¹⁴⁷ which are activities in the commercial realm. *Lawrence* dealt with a statute criminalizing a particular private sexual activity, not public or commercial conduct.¹⁴⁸

REV. 631, 683 (1999). Laurence Tribe, who argued unsuccessfully for Michael Hardwick before the U.S. Supreme Court, seeking to overturn Georgia's anti-sodomy law, later wrote, "[T]he core contribution of *Lawrence* comes from the manner in which the Court framed the question of how best to provide content to substantive due process rights." Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1900 (2004). In *Lawrence*, Tribe says the Court focused not on the constitutionality of a particular act, a misguided mode of analysis, but on "the relationships and self-governing commitments out of which those acts arise." *Id.* at 1931, 1955. Tribe's analysis lends itself to the "relational right" view of what *Lawrence* means, discussed later in this Comment. See Posting of Dale Carpenter to The Volokh Conspiracy, http://volokh.com/archives/archive_2008_07_27-2008_08_02.shtml#1217696454 (Aug. 2, 2008, 13:00 CST) (suggesting *Lawrence* might be read as protecting "a 'relational right' (not a general right to adult sexual autonomy) in the sense that it is based on protecting intimate sexual activity that may lead to a more enduring bond between two people"); see also Douglas E. Nauman, Casenote, *Where Sexual Privacy Meets Public Morality: How Williams v. King Is Instructive for the Fourth Circuit in Applying Public Morality As a Legitimate State Interest After Lawrence v. Texas*, 29 N.C. CENT. L.J. 127, 144 (2006) (stating "*Lawrence* was decided based on the recognition that Texas law infringed upon a personal relationship").

146. *Reliable I*, 517 F.3d at 741; *Williams VI*, 478 F.3d at 1322.

147. ALA. CODE §§ 13A-12-200.1(7), 13A-12-200.2(a)(1)-(2) (LexisNexis 2005); TEX. PENAL CODE ANN. §§ 43.21(5), 43.23(a), (c) (Vernon 2003 & Supp. 2008), held unconstitutional by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), reh'g denied, 538 F.3d 355 (5th Cir. 2008).

148. *Lawrence*, 539 U.S. at 562-63; see *Reliable Consultants, Inc. v. Earle (Reliable II)*, 538 F.3d 355, 360 (5th Cir. 2008) (Garza, J., dissenting) (stating the Texas sex-toy statute did not forbid any sort of sexual activity, "only commercial conduct" within the state); see also *Williams VI*, 478 F.3d at 1322 (stating sex-toy commerce is "an inherently public activity" wherever it happens). On a previous consideration of the *Williams* case, the Eleventh Circuit contrasted the Texas homosexual sodomy statute in *Lawrence* with the Alabama sex-toy statute and pointed out "[t]here is nothing 'private' or 'consensual' about the advertising and sale of a dildo." *Williams v. Att'y Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1237 n.8 (11th Cir. 2004). But see *Reliable I*, 517 F.3d at 744 (concluding the Texas prohibition on promotion of obscene devices necessarily and impermissibly burdens one's constitutional "right to engage in private intimate conduct of his or her choosing").

Another view would allow sex-toy promotion bans to stand, despite endorsing a "right to be let alone" philosophy. Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 618, 642 (2006). Goldman proposes the government should act only in those areas it belongs: "when it provides government benefits, regulates commercial activity and activity in public areas, and seeks to prevent harm to others." Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 620 (2006). Commercial activity would not enjoy any privacy rights because "[i]t is engaged in with others and does not by itself involve any sense of intimacy." *Id.* at 621. According to Goldman, a sex-toy promotion ban has an insignificant effect on most individuals, who can order devices from

Reliable and *Williams* each read the holding of *Lawrence* as relating to private conduct.¹⁴⁹ But *Williams* left it at that: “To the extent *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is *both* private *and* non-commercial,” and Alabama’s ban on sex-toy sales targets only public, commercial conduct.¹⁵⁰ When the circuit heard the case in 2004, the majority argued a fundamental right to private sexual conduct could be cobbled together only with pieces of *Lawrence* dicta.¹⁵¹ The Eleventh Circuit appears to have taken *Lawrence* at face value, even quoting *Lawrence*’s statement that the sodomy statute “does not involve public conduct.”¹⁵² The court concluded that because the sex-toy statute regulates public, commercial conduct, the reasoning in *Lawrence* cannot apply.¹⁵³

other states or resort to other means of sexual stimulation. *Id.* at 642–43. Yet Goldman would invalidate a ban on use of sex toys, though it is a “minor infringement of privacy rights.” Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 643 (2006).

149. See *Reliable I*, 517 F.3d at 744, 745 n.33 (claiming *Lawrence* recognized a constitutional right to sexual intimacy, and stating the holding of *Lawrence* as the inability of public morality to “justify a law that regulates an individual’s private sexual conduct and does not relate to . . . public conduct”); see also *Williams VI*, 478 F.3d at 1321–22 (concluding *Lawrence* held “no legitimate state interest . . . can justify [the sodomy statute’s] intrusion into the personal and private life of the individual”). The Eleventh Circuit’s next most recent characterization of *Lawrence* in the *Williams* line of cases found “*Lawrence* clearly established the unconstitutionality of criminal prohibitions on consensual adult sodomy.” *Williams IV*, 378 F.3d at 1236.

150. *Williams VI*, 478 F.3d at 1322. *Contra* Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1415 (2008) (declaring the *Lawrence* opinion “jumps off the pages on which it was penned” and “encompass[es] wide spatial, liberal, moral, and cultural dimensions,” bolstering a broad interpretation of *Lawrence*).

151. *Williams IV*, 378 F.3d at 1236–37 & n.7. *But see* William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 684 (1999) (arguing in the wake of *Bowers* that a “twentieth-century post-Freudian culture” values allowing individuals to develop their sexuality as much as it values “property rights, [the] right to earn a living, and contract rights valued by the Framers”).

152. See *Williams VI*, 478 F.3d at 1322 (quoting *Lawrence* and making the public-versus-private activity distinction).

153. See *id.* at 1322–23 (“While public morality was an insufficient government interest to sustain the Texas sodomy statute, because the challenged statute in this case does not target private activity, but public, commercial activity, the state’s interest in promoting and preserving public morality remains a sufficient rational basis.”). *But see Williams IV*, 378 F.3d at 1251 n.2 (Barkett, J., dissenting) (pointing out “there is no constitutional distinction between a ban on the private use of sex toys and a ban on the sale of sex toys”). This dissenting opinion in the circuit’s 2004 consideration of the case further admonished that Alabama must not be allowed “to accomplish indirectly what it is not constitutionally permitted to do directly.” *Id.* at 1251 n.2. A commentator scolded the

Readily admitting its disagreement with *Williams*, the Fifth Circuit, in *Reliable*, found the Texas statute regulating commerce in sex toys unconstitutional under its reading of *Lawrence* as acknowledging a right to sexual privacy.¹⁵⁴ The Fifth Circuit reasoned the statute infringed the right to private sexual conduct because it restricted Texans' access to sex toys.¹⁵⁵ While conceding *Lawrence* did not elevate the right to sexual privacy to fundamental right status, the court said the Texas statute failed anyway because under *Lawrence* morality no longer suffices to justify any restriction on sexual privacy.¹⁵⁶ However, according to Judge Garza, "*Lawrence* recognized only a narrow liberty interest worthy of rational basis review" in two individuals' right to consensual sexual activity.¹⁵⁷ As Garza explained, the panel still erroneously broadened this personal liberty in *Lawrence* to concoct a commercial right.¹⁵⁸

The *Williams-Reliable* dichotomy highlights the glaring question as to the breadth of the right in *Lawrence*. One way to reconcile *Williams-Reliable* with *Lawrence* is to read *Lawrence* as recognizing a "relational right," involving interpersonal relationships and the bonds people establish between themselves.¹⁵⁹ This

Eleventh Circuit for refusing to apply *Lawrence* to Alabama's statute thusly: *Lawrence* reiterated prior protection of individuals' decisions in the bedroom "concerning the intimacies of a physical relationship," forcing "the conclusion that the Due Process Clause protects a right to sexual privacy that encompasses the sale and use of sexual devices." Shelly Elimelekh, Note, *The Constitutional Validity of Circuit Court Opinions Limiting the American Right to Sexual Privacy*, 24 CARDOZO ARTS & ENT. L.J. 261, 293-94 (2006). By discounting *Lawrence*, another commentator wrote, the Eleventh Circuit has "managed to almost completely eviscerate *Lawrence* of any impact at all." John G. Culhane, "Lawrence-ium": *The Densest Known Substance?*, 11 WIDENER L. REV. 259, 270 (2005).

154. *Reliable I*, 517 F.3d at 743-45 & n.3.

155. *Id.* at 744; cf. John G. Culhane, "Lawrence-ium": *The Densest Known Substance?*, 11 WIDENER L. REV. 259, 271-73 (2005) (arguing upholding a ban on sex-toy promotion neglects to consider *Lawrence*'s protection of "decisional autonomy in the most intimate of settings" and recognizing the *Williams* plaintiffs' move toward this decisional autonomy in their invocation of medical needs for sexual devices).

156. *Reliable I*, 517 F.3d at 745 & n.32.

157. *Reliable Consultants, Inc. v. Earle (Reliable II)*, 538 F.3d 355, 359 (5th Cir. 2008) (Garza, J., dissenting).

158. *Id.* at 359-60.

159. See Posting of Dale Carpenter to The Volokh Conspiracy, http://volokh.com/archives/archive_2008_07_27-2008_08_02.shtml#1217696454 (Aug. 2, 2008, 13:00 CST) (suggesting one possible outcome of consideration of the sex-toy statutes by the Supreme Court would be the Court's recognition of the *Lawrence* right as a narrow but fundamental one, "a 'relational right' (not a general right to adult sexual autonomy) in the sense that it is based on protecting intimate sexual activity that may lead to a more

interpretation would respect the Supreme Court's obscenity holdings that protect individuals' right to possess and use obscene materials in private, but it would allow regulation of commerce in obscene materials.¹⁶⁰ The Court in *Lawrence* indeed zeroed in on intimate conduct between individuals,¹⁶¹ as it did in *Bowers*.¹⁶² In adopting Stevens's *Bowers* dissent, the *Lawrence* Court quoted Stevens's reminder that history and traditional views on morality were an insufficient basis for prohibiting miscegenation.¹⁶³

enduring bond between two people"); see also Douglas E. Nauman, Casenote, *Where Sexual Privacy Meets Public Morality: How Williams v. King Is Instructive for the Fourth Circuit in Applying Public Morality As a Legitimate State Interest After Lawrence v. Texas*, 29 N.C. CENT. L.J. 127, 144 (2006) (stating "*Lawrence* was decided based on the recognition that Texas law infringed upon a personal relationship"); cf. Arthur S. Leonard, *What Does Lawrence v. Texas Mean? Another Circuit Heard From . . .*, June 11, 2008, <http://newyorklawschool.typepad.com/leonardlink/2008/06/what-does-lawre.html> (reading *Lawrence* not as establishing a fundamental right but as including homosexual sodomy within "the scope of a more broadly characterized range of sexual activity subject to due process protection, i.e., consensual sex between adults in private").

Years earlier, in reaction to the *Bowers* decision, a commentator advanced the idea of "the state's obligation to allow [people] space for individual and relational development," including sexual development, found in the Supreme Court's privacy precedent up to the time of *Bowers*. William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 684 (1999). Eskridge derides the *Bowers* Court's account of the history of sodomy and the Court's reliance on "vertical coherence," strict adherence to cases that came before it. *Id.* at 665-71, 683 (1999). Eskridge says the Court must employ "horizontal coherence," taking into account "other rights and rules today." *Id.* at 683.

160. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) (reciting the Court's previous refusals "to equate the privacy of the home relied on in *Stanley* with a 'zone' of 'privacy' that follows a distributor or a consumer of obscene materials").

161. *Lawrence v. Texas*, 539 U.S. 558, 562, 564-65, 567, 569, 571, 573, 575-76 (2003). The Court simply stated what was at stake when it said, "The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle." *Id.* at 578.

162. *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986). Specifically, the Court examined the issue of "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190.

163. *Lawrence*, 539 U.S. at 577-78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)). Justice Stevens wrote:

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

Bowers, 478 U.S. at 216 (Stevens, J., dissenting) (citation omitted).

Whether the *Lawrence* protection of interpersonal relationships extends to rights other than “relational rights” is the key matter left over from *Lawrence* that the Supreme Court has yet to resolve.¹⁶⁴

D. *The Texas Statute Might Be Salvaged*

Resolution of the sex-toy conflict might not be quick, as Texas appears reluctant to take *Reliable* to the U.S. Supreme Court.¹⁶⁵ Texas has informed the U.S. District Court in Austin that it “does not intend” to petition the nation’s highest court for a writ of certiorari in the *Reliable* case.¹⁶⁶ But while *Reliable* seemingly stands in the way of Texas’s enforcement of any ban on sex-toy promotion, proponents of a ban still might find a way to keep such a law on the books if they take a few cues from other states.¹⁶⁷

Ban supporters would concentrate on the private-commercial

164. See *Reliable Consultants, Inc. v. Earle (Reliable II)*, 538 F.3d 355, 356 (5th Cir. 2008) (Jones, C.J., dissenting) (asserting “the *Reliable* majority exploited the [*Lawrence*] decision’s broad and vague statements about liberty” and stating only the U.S. Supreme Court can decide the scope of *Lawrence*); see also *Williams v. Att’y Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1238 (11th Cir. 2004) (“declin[ing] to extrapolate from *Lawrence* and its dicta a right to sexual privacy triggering strict scrutiny” because “[t]o do so . . . would be answering questions that the *Lawrence* Court appears to have left for another day”). Commentators, too, predict at least some likelihood of the Supreme Court considering the sex-toy statutes. See A Stitch in Haste, <http://www.kipesquire.net/2008/02/fifth-circuit-says-lawrence-extends-to-commercial-transactions/> (Feb. 13, 2008) (asserting “[a] clear circuit split on a major constitutional question such as substantive due process is an express lane to Supreme Court review”); see also Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2008_07_27-2008_08_02.shtml (Aug. 2, 2008, 1:04 CST) (predicting better chances of the Supreme Court granting review of sex-toy statutes because seven Fifth Circuit judges dissented from a denial of rehearing en banc in *Reliable*).

165. See Mark Kernes, *Sex Toy Sales Now Completely Legal in Fifth Circuit*, AVN BUSINESS, Nov. 2, 2008, <http://business.avn.com/law/articles/33144.html> (reporting an attorney’s reaction to a district court’s order for a status report in *Reliable*).

166. *Id.* A district court order included this statement: “On October 29, 2008, counsel for the State of Texas informed the Court by telephone that the State does not intend to seek a writ of certiorari in this cause.” *Id.* Kernes points out the “untenable conflict” among federal circuits in the wake of both the U.S. Supreme Court’s decision against hearing the *Williams* case and Texas’s decision not to take *Reliable* to the U.S. Supreme Court. *Id.*

167. See *Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1322 (11th Cir. 2007) (emphasizing in upholding Alabama’s statute its focus on “commerce in sexual devices, an inherently public activity” wherever it takes place, and noting the statute fails to mention “possession, use, or even the gratuitous distribution of sexual devices”); see also *State v. Brennan*, 772 So. 2d 64, 75 (La. 2000) (faulting Louisiana’s statute for failing to provide exceptions for people with legitimate therapeutic needs for sexual devices).

duality. Alabama's statute, which the Eleventh Circuit upheld, differs from the invalidated Texas statute in its explicit requirement that an offender receive "any thing of pecuniary value" in exchange for distributing obscene material or devices.¹⁶⁸ In contrast, under the Texas statute, consideration or payment of any kind was not necessarily a required element of the offense.¹⁶⁹ Thus, Alabama's statute acceptably regulates public, commercial activity because it explicitly calls for the exchange of "any thing of pecuniary value" for obscene material or devices, essentially amounting to a sale.¹⁷⁰ Focusing on commercial transactions also would bring promotion of obscene devices under the U.S. Supreme Court's *Stanley, Reidel*, and *Paris Adult Theatre I* rubric, protecting private use and possession of obscene materials but specifically excluding from protection commerce in obscene materials.¹⁷¹ Amending the language of Texas's definition of "promote" to include the giving of consideration or "any thing of pecuniary value" might bring the statute in line with Alabama's statute by focusing explicitly on commerce in sex toys.¹⁷²

168. ALA. CODE § 13A-12-200.2(a)(1)–(2) (LexisNexis 2005). Types of consideration fulfilling the "for any thing of pecuniary value" requirement include money, debt, credit, and real or personal property. *Id.* § 13A-12-200.1(9) (LexisNexis 2005).

169. TEX. PENAL CODE ANN. § 43.23 (Vernon 2003 & Supp. 2008), *held unconstitutional* by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008); *see also id.* § 43.21(a)(5) (Vernon 2003) (defining "promote" to include "sell" but providing no further explanation of what constitutes "selling"), *held unconstitutional* by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008). *But see* TEX. PENAL CODE ANN. § 43.21(a)(6) (Vernon 2003) (defining "wholesale promote" as a number of actions, including selling, done "for purpose of resale"), *held unconstitutional* by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008).

170. *See Williams VI*, 478 F.3d at 1322 (stressing the public, commercial nature of the prohibited activity).

171. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973). *But see* Shelly Elimelekh, Note, *The Constitutional Validity of Circuit Court Opinions Limiting the American Right to Sexual Privacy*, 24 CARDOZO ARTS & ENT. L.J. 261, 287 (2006) (claiming Alabama fails to overcome *Stanley*'s burden to prove the state's interest beats an individual's privacy right in order to intrude on an individual's private life, even though *Stanley* and its progeny deal with commerce in obscene materials).

172. *See Williams VI*, 478 F.3d at 1322 (upholding Alabama's statute because it regulates public, commercial activity); *see also* TEX. PENAL CODE ANN. § 43.21(a)(5) (Vernon 2003) (including "sell" in the definition of "promote" but failing to mention specifically exchange of consideration or "any thing of pecuniary value" for obscene materials or devices), *held unconstitutional* by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008).

In addition, any revision of Texas's statute must retain affirmative defenses for medical and other therapeutic needs.¹⁷³ These affirmative defenses are in keeping with Chief Judge Jones's and Judge Garza's calls to heed the Fifth Circuit's earlier decision in *Red Bluff*.¹⁷⁴ There, the court required law enforcement officials and state courts to find "marital, medical, and other necessary exceptions" to appropriately narrow the law's scope.¹⁷⁵ The Louisiana Supreme Court also emphasized the need for these exceptions in finding unconstitutional "a blanket ban" on promotion of sex toys, noting even the federal government has acknowledged the therapeutic uses for vibrators.¹⁷⁶

V. CONCLUSION

As long as any revised version of the challenged Texas sex-toy promotion ban explicitly proscribes public, commercial activity and provides affirmative defenses for medical and therapeutic

173. See TEX. PENAL CODE ANN. § 43.23(g) (Vernon 2003 & Supp. 2008) (providing affirmative defenses for promotion of obscene devices "for a bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose"), held unconstitutional by *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir.), reh'g denied, 538 F.3d 355 (5th Cir. 2008); see also *Reliable Consultants, Inc. v. Earle (Reliable II)*, 538 F.3d 355, 360 n.5 (5th Cir. 2008) (Garza, J., dissenting) (criticizing the *Reliable* majority for disregarding Fifth Circuit precedent upholding the challenged Texas statute as long as the statute was applied with exceptions for medical and other necessary conditions). The Alabama statute upheld by the Eleventh Circuit provides affirmative defenses "for [] bona fide medical, scientific, educational, legislative, judicial, or law enforcement" reasons. ALA. CODE § 13A-12-200.4 (LexisNexis 2005). In addition, the statute is inapplicable to public libraries and college or university libraries fulfilling their "legitimate educational purposes." *Id.* § 13A-12-200.10 (LexisNexis 2005). Elsewhere, the Louisiana Supreme Court called for a medical exception to that state's ban. See *State v. Brenan*, 772 So. 2d 64, 74-75 (La. 2000) (observing other obscenity crimes provided medical exceptions, but the state's "blanket ban" on obscene devices did not).

174. See *Reliable II*, 538 F.3d at 356 (Jones, C.J., dissenting) (stating *Reliable* "overrules *sub silentio* a prior controlling decision of this court" in *Red Bluff*); see also *id.* at 360 n.5 (Garza, J., dissenting) (pointing out "[t]he [*Reliable*] majority overruled *sub silentio Red Bluff Drive-In, Inc. v. Vance . . .*"). An earlier Fifth Circuit panel found the Texas statute lawful if officials recognized "necessary exceptions" for marital and medical reasons in their enforcement of the law. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1030 (5th Cir. Unit A June 1981). This earlier panel also approved the statute's definition of "wholesale promote" because it "confines the definition to commercial transactions," perhaps foreshadowing the debate today over the nature of the proscribed activity. See *id.* at 1027 (discovering "no facial constitutional infirmity" in the definition of "wholesale promote" but identifying "overbreadth threats" in the definition of "promote").

175. *Red Bluff Drive-In, Inc.*, 648 F.2d at 1030.

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

needs, it could—and, perhaps, should—fit within the rubric of *Lawrence v. Texas*, the U.S. Supreme Court case upon which opposing federal circuit decisions are based.¹⁷⁷ Expressly overruling *Bowers v. Hardwick*, the *Lawrence* Court struck down Texas's ban on homosexual sodomy and recognized a protected liberty to engage in a particular type of relationship with another person.¹⁷⁸ While some interpretations of *Lawrence* construe it as conferring a broad right of sexual privacy, a plain reading of *Lawrence* does not necessarily lend itself to such a sweeping right.¹⁷⁹

The conflict between the Fifth Circuit and the Eleventh Circuit over the constitutionality of state bans on the promotion of sex toys, or obscene devices, aptly illustrates these dueling modes of interpreting *Lawrence*. Intentionally differing from a sister circuit, the Fifth Circuit in *Reliable Consultants, Inc. v. Earle* struck down a Texas statute prohibiting giving, lending, selling, advertising, and distributing sex toys.¹⁸⁰ It gave *Lawrence* a broad reading, finding the Texas statute restricted sex-toy users' access to the devices, thereby violating a due process right to engage in private sexual activity.¹⁸¹ In contrast, before *Reliable*, the Eleventh Circuit in *Williams v. Morgan* gave *Lawrence* a narrow reading, finding it did not announce a fundamental right to sexual privacy.¹⁸² The court ruled *Lawrence* inapplicable to Alabama's sex-toy promotion ban because *Lawrence's* narrowly drawn personal liberty interest did not extend to public, commercial transactions.¹⁸³

Both before and since *Lawrence*, Texas courts have upheld the

177. See *Reliable Consultants, Inc. v. Earle (Reliable I)*, 517 F.3d 738, 748 (5th Cir.) (Barksdale, J., concurring in part and dissenting in part) (opining the banned activity “is not private sexual conduct,” like the banned activity in *Lawrence*), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008); see also *Reliable II*, 538 F.3d at 360 (Garza, J., dissenting) (concluding the statute “does not infringe any *personal* liberty interest, announced in *Lawrence* or otherwise”).

178. *Lawrence v. Texas*, 539 U.S. 558, 567, 578 (2003).

179. See Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1418 (2008) (conceding “*Lawrence's* broad interpreter must contend with the obvious objection that to broaden *Lawrence* is to read into the opinion dimensions to which the opinion may have alluded, but that were in fact not occupied by the opinion's plain words”).

180. *Reliable I*, 517 F.3d at 742.

181. *Id.* at 744.

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

183. *Id.* at 1322.

state's ban on promotion of obscene devices.¹⁸⁴ In *Yorko v. State*, the Texas Court of Criminal Appeals found the ban did not violate any right to use obscene devices, so access to obscene devices was not protected.¹⁸⁵ Other Texas appellate courts likewise have found the statute did not implicate any protected privacy rights.¹⁸⁶ Some Texas courts even have refused to apply *Reliable*.¹⁸⁷

These dueling arguments as to the constitutionality of prohibiting promotion of obscene devices boil down to two questions: Do the Texas and Alabama statutes impermissibly burden the broader right in *Lawrence* to private sexual activity by unconstitutionally restricting individuals' access to sex toys?¹⁸⁸ Or do they merely regulate public, commercial activity unprotected by the personal, private liberty interest in *Lawrence*?¹⁸⁹ The Fifth Circuit and Eleventh Circuit both read the holding of *Lawrence* as relating to private conduct.¹⁹⁰ The Eleventh Circuit takes *Lawrence* at face value, concluding because the sex-toy statute regulates public, commercial conduct, the reasoning in *Lawrence*

184. *E.g.*, *Regalado v. State*, 872 S.W.2d 7, 9 (Tex. App.—Houston [14th Dist. 1994, pet. ref'd] (finding “no fundamental right to use obscene devices; therefore, restricting the promotion of such devices does not infringe on any recognized fundamental right”).

185. *Yorko v. State*, 690 S.W.2d 260, 265–66 (Tex. Crim. App. 1985).

186. *E.g.*, *Ex parte Dave*, 220 S.W.3d at 159 (ruling *Lawrence*'s protection “completely inapposite” to a challenge to the sex-toy promotion ban).

187. *E.g.*, *Varkonyi v. State*, 276 S.W.3d 27, 38 (Tex. App.—El Paso 2008, pet. ref'd) (refusing to follow *Reliable* because *Lawrence* did not involve promotion of obscene materials and it did not overrule U.S. Supreme Court precedent holding “the constitutionally-protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to receive the materials or to sell or give it to others”).

188. *See Reliable Consultants, Inc. v. Earle (Reliable I)*, 517 F.3d 738, 744 (5th Cir.) (“Because of *Lawrence*, the issue before us is whether the Texas statute impermissibly burdens the individual's substantive due process right to engage in private intimate conduct of his or her choosing.”), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008).

189. *See Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1322 (11th Cir. 2007) (distinguishing Alabama's sex-toy statute banning “public, commercial activity” from Texas's homosexual sodomy statute in *Lawrence* banning “private sexual conduct”).

190. *See Reliable I*, 517 F.3d at 744, 745 n.33 (indicating *Lawrence* recognized a constitutional right to sexual intimacy and stating the holding of *Lawrence* as the inability of public morality to “justify a law that regulates an individual's private sexual conduct and does not relate to . . . public conduct”); *see also Williams VI*, 478 F.3d at 1321–22 (emphasizing *Lawrence* held “no legitimate state interest . . . can justify [the sodomy statute's] intrusion into the personal and private life of the individual” (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003))). The Eleventh Circuit's next most recent characterization of *Lawrence* in the *Williams* line of cases found it “clearly established the unconstitutionality of criminal prohibitions on consensual adult sodomy.” *Williams v. Att'y Gen. of Ala. (Williams IV)*, 378 F.3d 1232, 1236 (11th Cir. 2004).

cannot apply.¹⁹¹ The Fifth Circuit, on the other hand, takes a more expansive view of *Lawrence*, reasoning the Texas statute infringed a right to private sexual conduct because it restricted Texans' access to sex toys.¹⁹²

While at first this circuit disagreement might seem irreconcilable, it could be resolved by viewing *Lawrence* as recognizing a "relational right," involving interpersonal relationships.¹⁹³ Reading *Lawrence* in this manner would follow the Supreme Court's obscenity holdings and shield individuals' right to possess and use obscene materials in private but allow regulation of commerce in obscene materials.¹⁹⁴ The focused concentration in both *Lawrence* and *Bowers* on individuals' intimate conduct with each other bolsters the "relational right" resolution of what *Lawrence* might mean.¹⁹⁵ The Texas statute likely would be constitutional under such an interpretation,¹⁹⁶

191. See *Williams VI*, 478 F.3d at 1322–23 (“While public morality was an insufficient government interest to sustain the Texas sodomy statute, because the challenged statute in this case does not target private activity, but public, commercial activity, the state’s interest in promoting and preserving public morality remains a sufficient rational basis.”). But see *Williams IV*, 378 F.3d at 1251 n.2 (Barkett, J., dissenting) (contending “there is no constitutional distinction between a ban on the private use of sex toys and a ban on the sale of sex toys”). This dissenting opinion in the circuit’s 2004 consideration of the case further admonished that Alabama must not be allowed “to accomplish indirectly what it is not constitutionally permitted to do directly.” *Id.*

192. *Reliable I*, 517 F.3d at 744.

193. See Posting of Dale Carpenter to The Volokh Conspiracy, http://volokh.com/archives/archive_2008_07_27-2008_08_02.shtml#1217696454 (Aug. 2, 2008, 13:00 CST) (suggesting one possible outcome of consideration of the sex-toy statutes by the Supreme Court would be the Court’s recognition of the *Lawrence* right as a narrow but fundamental one, “a ‘relational right’ (not a general right to adult sexual autonomy) in the sense that it is based on protecting intimate sexual activity that may lead to a more enduring bond between two people”); see also Arthur S. Leonard, *What Does Lawrence v. Texas Mean? Another Circuit Heard From . . .*, June 11, 2008, <http://newyorklawschool.typepad.com/leonardlink/2008/06/what-does-lawre.html> (June 11, 2008) (reading *Lawrence* not as establishing a fundamental right but as including homosexual sodomy within “the scope of a more broadly characterized range of sexual activity subject to due process protection, i.e., consensual sex between adults in private”).

194. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) (reciting the Court’s previous refusals “to equate the privacy of the home relied on in *Stanley* with a ‘zone’ of ‘privacy’ that follows a distributor or a consumer of obscene materials”).

195. See Posting of Dale Carpenter to The Volokh Conspiracy, http://volokh.com/archives/archive_2008_07_27-2008_08_02.shtml#1217696454 (Aug. 2, 2008, 14:00 CST) (describing the “relational right” as “based on protecting intimate sexual activity that may lead to a more enduring bond between two people”).

196. *Id.*

especially if it retained certain affirmative defenses¹⁹⁷ and explicitly covered only commercial transactions in obscene devices.¹⁹⁸ But courts will have to wait until the U.S. Supreme Court clarifies exactly what *Lawrence* holds.¹⁹⁹

In the meantime, commentators have offered predictions as to what this Supreme Court clarification might involve. Even if Texas does not pursue the *Reliable* case any further, commentators suggest if a similar issue arises, the U.S. Supreme Court indeed will take the opportunity to clarify *Lawrence*.²⁰⁰ The existence of the federal circuit split and the widespread debate as to what

197. See, e.g., *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1030 (5th Cir. Unit A June 1981) (calling for “marital, medical, and other necessary exceptions narrowing the scope” of the Texas statute banning the promotion of obscene devices).

198. See *Williams v. Morgan (Williams VI)*, 478 F.3d 1316, 1322 (11th Cir. 2007) (stressing the public, commercial nature of the prohibited activity, promotion of sex toys, which the court approved); see also *Paris Adult Theatre I*, 413 U.S. at 69 (allowing states to regulate commerce of obscene material).

199. See Michael J. Hooi, Comment, *Substantive Due Process: Sex Toys After Lawrence*, 60 FLA. L. REV. 507, 517–18 (2008) (noting in the wake of the Fifth Circuit’s split in *Reliable* from the Eleventh Circuit that “*Lawrence* will likely continue to yield inconsistent outcomes” and “be applied to controversies beyond homosexual sodomy” and calling for the U.S. Supreme Court to clarify *Lawrence*); see also John G. Culhane, “*Lawrence-ium*”: *The Densest Known Substance?*, 11 WIDENER L. REV. 259, 260 (2005) (calling “the agnostic position—it’s impossible to say what *Lawrence* means—[] the easiest and most defensible one to take” amid conflicting interpretations of *Lawrence*).

200. See Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1217653450.shtml> (Aug. 2, 2008, 1:04 CST) (opining the “solid split” between federal circuits means “there’s a decent chance” but “no guarantee” of the U.S. Supreme Court deciding the matter); see also A Stitch in Haste, <http://www.kipesquire.net/2008/02/fifth-circuit-says-lawrence-extends-to-commercial-transactions/> (Feb. 13, 2008) (stating “[a] clear circuit split on a major constitutional question such as [a right to buy, sell, own, and use sex toys] is an express lane” to a Supreme Court ruling). But see Posting of Dale Carpenter to The Volokh Conspiracy, http://volokh.com/archives/archive_2008_07_27-2008_08_02.shtml#1217696454 (Aug. 2, 2008, 14:00 CST) (acknowledging a circuit split makes it more likely the Supreme Court will take up such a case, but “seriously” considering “the possibility that the Court will simply believe the case is beneath its dignity, or is embarrassing, or does not involve an issue of sufficient importance”). Only a few years ago, the Supreme Court refused to consider a Texas case on the state’s sex-toy promotion ban. *Acosta v. Texas*, 549 U.S. 821 (2006) (mem.), *denying cert to No. 08-04-00312-CR*, 2005 WL 2095290 (Tex. App.—El Paso Aug. 31, 2005, pet ref’d) (not designated for publication). At the time, one commentator “wouldn’t have been wholly surprised if the Court had taken it.” Posting of PG to De Novo, <http://www.blogdenovo.org/archives/001441.html> (Oct. 3, 2006). This commentator also stressed the broad reach of the now-invalidated Texas statute and wondered if the Court might “wait until someone gets arrested for loaning (!) a sex toy to a friend” before taking up such a case. Posting of PG to De Novo, <http://www.blogdenovo.org/archives/001441.html> (Oct. 3, 2006).

Lawrence means likely solidify the chances of the Court eventually hearing such a case.²⁰¹ And the strong dissents from the denial of rehearing in *Reliable* further highlight the need for the Supreme Court to step in.²⁰²

Simply put, the possible outcomes of a Supreme Court action are: *Lawrence* announced a broad right and the Texas and Alabama statutes are unconstitutional; or *Lawrence* announced a narrow right and the statutes are constitutional; or, in one commentator's words, "something else entirely."²⁰³ That commentator considers it unlikely the Court will endorse the "relational right" viewpoint because the Court will not want to limit whatever right *Lawrence* confers.²⁰⁴ However, another commentator, admitting there is a chance the Court might find the issue "too undignified-sounding factually to hear," still believes the Court would take the case and would find the Texas statute constitutional.²⁰⁵ This commentator predicts at least six justices would rather reserve the Court's power to confer unenumerated rights to rights "that are more important in most of their exercisers' lives," such as "abortion, contraception, sexual intimacy, parental rights, right to refuse medical treatment, right to live with close family members, and the like."²⁰⁶ What a pity, then, that Texas has chosen to sit out this opportunity to obtain Supreme Court elucidation amid starkly opposed interpretations of *Lawrence*.

201. *E.g.*, A Stitch in Haste, <http://www.kipesquire.net/2008/02/fifth-circuit-says-lawrence-extends-to-commercial-transactions/> (Feb. 13, 2008) (noting that circuit court splits concerning major constitutional rights usually lead to the United States Supreme Court).

202. Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1217653450.shtml> (Aug. 2, 2008, 1:04 CST).

203. Posting of Dale Carpenter to The Volokh Conspiracy, http://volokh.com/archives/archive_2008_07_27-2008_08_02.shtml#1217696454 (Aug. 2, 2008, 14:00 CST).

204. *Id.*

205. Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1217653450.shtml> (Aug. 2, 2008, 1:04 CST).

206. *Id.* Volokh made his prediction based upon the composition of the U.S. Supreme Court at that time, before Justice Souter announced his retirement. An opponent of sex-toy promotion bans concedes statutes viewed as regulation of mere "instrumentalities by which individuals achieve sexual intimacy" and as "mov[ing] away from the core of self-defining conduct . . . [are] likelier to be sustained, at least under [a] reading of *Lawrence*" as protecting decisional autonomy. John G. Culhane, "Lawrence-ium": *The Densest Known Substance?*, 11 WIDENER L. REV. 259, 272-73 (2005).