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The Pursuit of Happiness (and Sexual Freedom): *Lawrence v. Texas*, Morality Legislation & the Sandy Springs Obscenity Statute

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Comment

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I. INTRODUCTION

In their private lives, individuals engage in a variety of activities. Historically, particular activities have been labeled as immoral, including interracial marriages, the ability to have an abortion, and same-sex relationships.[1] Also included in this list is the sale of "sexual

1. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (prior to the Court's decision in *Loving*, many states prohibited marriage between blacks and whites, because interracial relations were considered improper. The landmark decision invalidated anti-miscegenation laws throughout the country, which during the time, were in place in seventeen states.); Roe v. Wade, 410 U.S. 113 (1973) (a seminal case in American jurisprudence, where the Supreme Court held that women possess the right to decide whether to have an abortion. Abortion has been a heavily debated topic in the United States, with proponents arguing that women have the right to choose and their opponents arguing that the right lacks constitutional foundation.); United States v. Windsor, 133 S. Ct. 2675 (2013) (although the landmark decision did not explicitly declare bans on same-sex marriages as unconstitutional, the Court held that restricting U.S. federal interpretation of the term "marriage" to apply to only heterosexual marriages was unconstitutional under the Due Process Clause.).

devices," which have routinely been defined as material used primarily for the stimulation of human genital organs.[2] Such definitions have been utilized in both state statutes and city-wide ordinances throughout the country, where laws have been enacted to prohibit the sale, lease, trade, and, in some cases, possession of sexual devices.[3]

Unsurprisingly, a number of individuals and vendors who engage in activities distributing and using sexual devices in certain states and municipalities have challenged such prohibitions, claiming that the prohibitions violate their constitutional rights.[4] As challenges against such laws differ on a case-by-case basis, state and federal court decisions vary widely in determining whether to uphold the laws in question, and, currently, there is a split between the United States Court of Appeals for the Fifth and Eleventh Circuits on the constitutionality of such prohibitions.[5] The leading cause of this split, as well as the ensuing confusion, is the United States Supreme Court's 2003 decision in *Lawrence v. Texas*,[6] where the Court struck down a Texas statute that prohibited certain homosexual acts.[7] The *Lawrence* decision has been applied to both state-wide and city-wide obscenity laws throughout the

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2. In many statutes, both state- and city-wide, sexual devices are defined as "obscene" material. The term "obscene" has a very specific meaning within jurisprudence and will be used minimally in this Comment. *See* Miller v. California, 413 U.S. 15, 39 (1973) (Douglas, J., dissenting) (establishing a 3-prong test for defining obscene material: determining "(a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The Author questions whether sexual devices fall within the parameters of the test.

3. As of October 21, 2014, Alabama is the only state that has an all-out ban on the sale of sex toys. *See These States still Ban Cohabitation, Sex Toys . . . And Gay Marriage*, HUFFINGTON POST (Mar. 6, 2014), http://www.huffingtonpost.com/2014/03/06/gay-marriage-bans-_n_4907115.html. However, several counties and cities within states also prohibit the sale of sex toys.

4. *See* Complaint, Flanigan's Enterprises, Inc. v. City of Sandy Springs, GA, 13-cv-3573 (filed Oct. 29, 2013) [hereinafter Complaint]; Williams v. Morgan, 478 F.3d 1316 (2007) (*Williams II*).

5. *See* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008); Williams v. AG of Alabama, 378 F.3d 1232 (11th Cir. 2004) (*Williams I*); *see also* PHE, Inc. v. State, 877 So. 2d 1244 (Miss. 2004) (case brought before the Supreme Court of Mississippi by vendors and users of sexual devices challenging a local statute. The supreme court found in favor of the ordinance, holding that the prohibition was in valid furtherance of the government's interests); Yorko v. State, 690 S.W.2d 260 (Tex. Crim. App. 1985) (court found in favor of the state, holding that it had the right to prohibit the sale of sexual devices).

6. 539 U.S. 558 (2003).

7. *Id.* at 578-79.

country.[8] As a result, both state and federal courts' attempts to apply *Lawrence* have been strenuous and vary widely.

While some courts and commentators argue that *Lawrence* created a fundamental right to privacy should be applicable to obscenity statutes, others argue that the decision in *Lawrence* should not be applied to such matters because the decision did not create a fundamental right to privacy, let alone a fundamental right to sexual privacy. For example, some courts, like the Fifth Circuit in *Reliable Consultants, Inc. v. Earle*,[9] have interpreted the decision in *Lawrence* to have created a right to privacy, including private sexual activity.[10] On the other hand, other courts, like the Eleventh Circuit in *Williams v. AG of Alabama* (*Williams I*),[11] contend that the scope of *Lawrence* is limited and that the Court was very careful and methodical in the language it used in its opinion, purportedly supporting the notion that the High Court did not intend to create a new fundamental right.[12] These differing decisions have caused confusion regarding whether obscenity statutes should be deemed valid or invalid.

When the state of Alabama enacted a law that prohibited the sale, transfer, and lease of sexual devices, the Eleventh Circuit upheld the statute as constitutional.[13] Despite this ruling, a case has been filed in the United States District Court for the Northern District of Georgia challenging the constitutionality of a Sandy Springs, Georgia obscenity statute (Ordinance), brought by several companies and joined by two Georgia citizens (Plaintiffs).[14] After reviewing the matter on the merits, the district court granted the defendant's motion for summary judgment, bound by the Eleventh Circuit's prior decision.[15] The Plaintiffs have appealed the district court's decision, and the matter is currently pending before the Eleventh Circuit, and it will be interesting to see whether the court will affirm its previous findings or take

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8. *See, e.g., Reliable Consultants, Inc.*, 517 F.3d 738; *Williams I*, 378 F.3d 1232; Complaint, *supra* note 4.

9. 517 F.3d 738 (5th Cir. 2008).

10. *Id.* at 747.

11. 378 F.3d 1232 (11th Cir. 2004).

12. *Id.* at 1237.

13. *Id.* at 1250.

14. *See* Complaint, *supra* note 4; *see also* Intervenor Complaint, Flanigan's Enterprises, Inc. v. City of Sandy Springs, GA, No. 13-CV-03473-RLV (N.D. Ga. Apr. 16, 2014) [hereinafter Intervenor Complaint]. Intervenor Complaint was dismissed and consolidated with the Complaint.

15. *See* Flanigan's Enterprises, Inc. v. City of Sandy Springs, No. 1:13-CV-03573-HLM, 2014 U.S. Dist. LEXIS 180429, at *45 (N.D. Ga. Oct. 20, 2014).

advantage of the opportunity to overrule its previous decision and follow suit with the Fifth Circuit.[16]

Part IA of this comment will begin with a recitation of the historical use of sexual devices and their treatment by governments. Part IB will first lay out the Ordinance and the consequences that potential violators of the law face. A related ordinance supporting the enactment of legislation controlling the zoning and operation of adult establishments provides some insight into the city's purpose in enacting its obscenity statute. The findings provision appears to contemplate challenges as it cites cases relating to the city's "substantial government interest in preventing the negative secondary effects of establishments" that sell such material.[17] Part IB will go on to discuss the suit that was filed, as well as the district court's subsequent decision to uphold the current law.

Part IIA will briefly provide background of the rights that have commonly been raised in obscenity statute cases throughout the country. Part IIB will discuss the Supreme Court case of *Lawrence v. Texas* which has resulted in the split between the Fifth and Eleventh Circuits and the Court's reasoning behind its holding.

Lawrence has created an interpretation conundrum, which has led to the split between the Fifth and Eleventh Circuits (not to mention many different interpretations within and among the states). Part IIIA will discuss the Fifth Circuit's interpretation of this daunting case, while Part IIIB will discuss the Eleventh Circuit's interpretation. Part IIIC will go through interpretations and suggestions posed by scholars in the field, evidencing that it is not only the courts that have found this a difficult issue to deal with.

Part IV will analyze the Ordinance under the framework commonly believed to have come out of *Lawrence* and contrast that with the framework the district court based its holding on. Part IVB will discuss whether morals should be considered during the legislative process and whether they have a place in the legislature. The section will close out with a brief discussion of the harsh punishments often found in morals-based laws. A brief conclusion will follow.

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16. Flanigan's Enterprises, Inc. v. City of Sandy Springs, GA, No. 1:13-CV-03573-HLM, 2014 U.S. Dist. LEXIS 180429, *appeal docketed*, No. 14-15499 (11th Cir. Jan. 21, 2015).

17. Sandy Springs, Ga. Ordinance No. 2009-04-24, *codified at* SANDY SPRINGS, GA. CODE § 38-120. Although not found in the Sandy Springs Code, Ordinance No. 2009-04-24 can be found by conducting a search through a search engine.

II. THE HISTORICAL TREATMENT OF SEXUAL DEVICES & THE SANDY SPRINGS ORDINANCE

A. *The Origins of Sexual Devices*

The origins of the use of sexual devices in the United States began with medical treatment, where vibrators were often used by physicians to treat hysteria in their patients (who, historically, were women).[18] Eventually, the exclusive use of vibrators at the doctor's office grew to include use in the homes of the patients.[19] By being able to purchase vibrators on their own, patients were able to self-treat at a lower cost as well as maintain their privacy.[20] In the early twentieth century, vibrators began to be advertised in magazines and were often advertised as "massagers."[21]

Vibrators in the United States are still utilized for medical purposes, so much so that the Food and Drug Administration (FDA) recognizes and categorizes certain vibrators as a Class III device.[22] Class III devices are "those that support or sustain human life, are of substantial importance in preventing impairment of human health, or which present a potential, unreasonable risk of illness or injury."[23] This classification of vibrators evidences an acknowledgment of the commonality and

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18. RACHEL P. MAINES, THE TECHNOLOGY OF ORGASM: "HYSTERIA," THE VIBRATOR, AND WOMEN'S SEXUAL SATISFACTION 2 (1999). Prior to the late twentieth century, hysteria was viewed to be a mental condition suffered only by women. The vibrator was invented as a replacement for doctors and nurses, who traditionally used their hands to perform treatment for hysteria. At the time, such touching was strictly viewed as medical, and there was no sexual connotation associated with it. *Id.* at 3.

19. *See* Michael Castleman, *"Hysteria" and the Strange History of Vibrators*, PSYCHOL. TODAY (Mar. 1, 2013), http://www.psychologytoday.com/blog/all-about-sex/201303/hysteria-and-the-strange-history-vibrators.

20. *See id.*

21. *Id.*; *see also* Richard Glover, *Can't Buy a Thrill:? Substantive Due Process, Equal Protection, and Criminalizing Sex Toys*, 100 J. CRIM. L. & CRIMINOLOGY 555, 560 (2010).

22. 21 C.F.R. § 884.5940 (2010); *see* Julie McKenna, *Substantive Due Process/Privacy – Stay Calm, Don't Get Hysterical: A User's Guide to Arguing the Unconstitutionality of Anti-Vibrator Statutes*, 33 W. NEW ENG. L. REV. 211, 217-18 (2011); *see also* Alana Chazan, *Good Vibrations: Liberating Sexuality from the Commercial Regulation of Sexual Devices*, 18 TEX. J. WOMEN & L. 263, 293 (2009) (stating that the FDA's definition has been used by the Eleventh Circuit to assert that the medical exemption found in many obscenity statutes are sufficient to sustain their availability for medical purposes).

23. *See* McKenna, *supra* note 22, at 217 (quoting U.S. Food and Drug Admin., *Premarket Approval (PMA)*, FDA, http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/HowtoMarketYourDevice/premarketsubmissions/premarketapprovalpma/Default.thm (last updated June 19, 2014).

necessity of sexual devices in certain circumstances.[24] Despite this classification, many jurisdictions have opted to ban the use and sale of such devices, usually based upon moral feelings. But, on the other hand, the FDA's medical classification has also been used to serve as a justification of the morals-based laws banning the sale of them. For example, many obscenity statutes include a provision allowing an exemption for the sale of sexual devices if they serve a medical need.[25]

Although vibrators historically have a medical background, the accessibility and popularity of sexual devices has grown exponentially since their arrival in the commercial market. It is reported that approximately 52.5% of women have used a vibrator in their past.[26] Furthermore, the market, although predominately directed towards women, has grown to include men as well. The acceptability of the use of sexual devices continues to grow as both men and women turn to such devices to enhance their intimate lives.

B. Sandy Springs, Georgia and Its Prohibition

1. The Statute. Sandy Springs Municipal Code Section 38-120[27] (the Ordinance) prohibits the sale, rental, or lease of specifically defined obscene material. The Ordinance states:

> (a) A person commits the offense of distributing obscene material when the following occurs:
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> (1) He sells, rents, or leases to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so . . .
>
> . . .
>
> (b) Material is obscene if:
>
> (1) To the average person applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion.
>
> (2) The material, taken as a whole, lacks serious literary, artistic, political, or scientific value . . .
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> . . .

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24. *See id.*

25. *See, e.g.*, SANDY SPRINGS, GA. CODE § 38-120(d); ALA. CODE § 13A-12-200.4 (Supp. 2003).

26. Debra Herbenick et al., *Prevalence and Characteristics of Vibrator Use by Women in the United States: Results from a Nationally Representative Study*, 6 J. SEX. MED. 1857, 1860 (2009).

27. SANDY SPRINGS, GA. CODE § 38-120.

> (c) Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section . . . .[28]

The ordinance does include exclusions and an affirmative defense, excluding from its definition of obscene devices those that are primarily intended to prevent pregnancy or the spread of sexually transmitted diseases.[29] Accordingly, certain vendors are still able to stock and sell different types of contraceptives, and consumers are still able to purchase them. Additionally, under certain circumstances, if prescribed by a medical physician, an individual may obtain a specific sexual device from the physician.[30] Although the transfer of devices that are defined by the ordinance as obscene is prohibited, if the device was prescribed by a medical physician "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose," alleged violators may assert an affirmative defense.[31]

Those who are found to have violated the Ordinance face the possibility of serving jail time, among other things.[32] Section 38-120(e) of the code states that a person who commits one of the listed offenses contained therein will be found guilty of violating the code.[33] Although that specific section of the Ordinance does not state what a violation of the code entails, Sandy Springs Municipal Code § 1-10[34] sets the penalties to be imposed for violating the entire code.[35] Those convicted for violating the code will be "punished by a fine not exceeding $1,000.-00, imprisonment for a term not exceeding six months, confinement at labor for a period of time not to exceed 30 days, or any combination thereof."[36] Violations of the obscenity statute are included within the enforcement of this statute; thus, violators of the obscenity statute will be subject to the punishments therein listed.[37]

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28. SANDY SPRINGS, GA. CODE § 38-120(a)(1), (b)(1-2), (c). The ordinance also defines obscene material as depicting acts of masturbation, material indicating sadomasochism, and "lewd exhibition of the genitals." SANDY SPRINGS, GA. CODE § 38-120(b)(3).

29. SANDY SPRINGS, GA. CODE § 38-120(c).

30. SANDY SPRINGS, GA. CODE § 38-120(d).

31. *Id.*

32. SANDY SPRINGS, GA. CODE § 1-10(c); *see also* Emily Shire, *The Town Where Your Sex Toy Could Land You in Jail*, DAILY BEAST (May 30, 2014), *available at* http://www.thedailybeast.com/articles/2014/05/30/the-town-where-your-sex-toy-could-land-you-in-jail.html.

33. SANDY SPRINGS, GA. CODE § 38-120(e).

34. SANDY SPRINGS, GA. CODE § 1-10.

35. *Id.*

36. SANDY SPRINGS, GA. CODE § 1-10(c).

37. *See id.*

2. Challenging the Sandy Springs Statute. In 2013, several business establishments with locations within Sandy Springs city limits filed suit against the city (the Complaint) in the United States District Court for the Northern District of Georgia.[38] All of the establishments have existed and operated as adult entertainment facilities since before 1997.[39] The Complaint sought relief under 42 U.S.C. § 1983,[40] alleging the Ordinance violates their First and Fourteenth Amendment[41] rights.[42] The Complaint further alleged that the city council failed to provide evidence of how its restrictions furthered a legitimate governmental interest or evidence of secondary effects that have resulted from the presence of adult-oriented establishments.[43] Under their Due Process argument, the Plaintiffs allege that through the Ordinance, the city deprived them of their "property rights and liberty interests," because the Ordinance, "is vague as . . . to the [establishment that sold sexual devices] because it is unclear whose intent matters regarding the purpose or intended use of the device" and that the affirmative defense section of the Ordinance was also vague.[44] The Complaint went on to allege the Ordinance violated the Plaintiffs' First Amendment rights because they engage in activities that are thereunder protected.[45]

Two Georgia residents joined the lawsuit filed against the city by filing an intervenor suit also challenging the validity and constitutionality of the Ordinance (Intervenor Complaint).[46] The first intervenor plaintiff, Melissa Davenport, is a woman stricken with the debilitating inflammatory disease multiple sclerosis, and she claimed that utilizing sexual devices in her and her husband's intimate lives has assisted in restoring their intimacy.[47] Because the disease strikes the nervous system and "can damage nerve pathways to the sexual organs," Davenport and her husband began to use sexual devices.[48] Davenport, through her attorney, argued that the Ordinance violates her right to privacy under

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38. Complaint, *supra* note 4, at 2-3. Plaintiffs include Flanigan's Enterprises, Inc., which operates a bar that "offer[s] nude dance entertainment,"; Flashers, which offers similar entertainment to Flanigan's; Inserection, which operates a retail store selling both non-obscene material and what is held by the code as obscene material. *Id.*

39. *Id.* at 3.

40. 42 U.S.C. § 1983.

41. U.S. CONST. amend I; U.S. CONST. amend XIV.

42. Complaint, *supra* note 4, at 39, 44, 48.

43. *Id.* at 35, 37-38.

44. *Id.* at 40, 42-43.

45. *Id.* at 47-48.

46. *See* Intervenor Complaint, *supra* note 14, at 1,2.

47. *Id.* at 3-4.

48. *Id.*

the Fourteenth Amendment's Due Process Clause. Davenport has not been able to receive a medical prescription for use of the sexual devices, and accordingly, she does not fall within the parameters of the Ordinance that would allow her to assert an affirmative defense. However, even if Davenport had a prescription for sexual devices, she argued that the affirmative defenses available to her are unsatisfactory and would not provide an outright right to purchase the devices within city limits–she would be limited to obtaining the devices from her attending medical physician.[49]

The second intervenor plaintiff, Marshall Henry, sought to purchase sexual devices for personal use in Sandy Springs but was unable to do so. As an artist, Henry has used sexual devices in his art exhibitions and intends to continue to do so in the future, specifically in Sandy Springs. However, because of the Ordinance, Henry alleged that he is prevented from displaying his art or even purchasing particular materials for his displays. The interveor Complaint reiterates that even if Davenport and Henry could obtain the sexual devices in an approved manner, they would still be in violation of the Ordinance and would be forced to claim an affirmative defense–in other words, they would still be prohibited from selling the devices, displaying them for artistic purposes, or even prohibited from purchasing them from non-physician vendors within city limits.[50]

Collectively, the plaintiffs from both complaints alleged that the ordinance violated their right to privacy under the Due Process Clause of the Fourteenth Amendment. The Plaintiffs contend that the ordinance does not serve a compelling state interest. Other arguments raised by the Plaintiffs include infringement of First Amendment rights, violation of the Equal Protection Clause of the Fourteenth Amendment, overbreadth, and vagueness.[51] These particular arguments will not be discussed because they are beyond the scope of this Comment.

The district court swiftly dismissed all claims brought by the Plaintiffs.[52] The court warned that "[c]ourts must exercise great caution in labeling a right as fundamental . . . ."[53] Accepting the Eleventh Circuit's previous decisions in the *Williams* line of cases, the court refused to acknowledge that the right to privacy included a general right to sexual privacy.[54] Because the court found that there was no

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49. *Id.* at 3, 4, 8.
50. *Id.* at 4-6, 7.
51. *Id.* at 9, 11, 12; *see also* Complaint, *supra* note 4, at 42-43, 44, 47-48.
52. *See generally Flanigan's Enters., Inc.*, 2014 U.S. Dist. LEXIS 180429.
53. *Id.* at *20.
54. *Id.* at *21-22.

fundamental right at stake in the matter, the court upheld the Ordinance as constitutionally valid after conducting a rational-basis review.[55]

III. SEXUAL PRIVACY: FUNDAMENTAL RIGHT OR NOT?

An issue with obscenity statutes and bans on sexual devices is that courts have had trouble determining whether there is a fundamental right to sexual privacy. The consequences resulting from the creation of a new fundamental right are not taken lightly by the Supreme Court, and such rights are established with serious caution. *Lawrence* created a divide among courts and scholars alike on whether the Supreme Court articulated a new fundamental right to sexual privacy.

A. The Fourteenth Amendment & Fundamental Rights

The 1997 case of *Washington v. Glucksberg*[56] articulated the process for determining whether a law should be upheld even though it violates a fundamental right. Fundamental rights are rights so important that they warrant protection against governmental infringement unless strict scrutiny analysis is met.[57] The trouble, however, is that the majority of rights that have been deemed fundamental by the Court are not actually mentioned in the Constitution.[58] If a right is determined to be so important that it needs to be recognized as a fundamental one, the Court will utilize strict-scrutiny analysis.[59]

Once the Court determines that a right is fundamental and it has been infringed upon, the Court will look at the government's justification for infringing upon that right.[60] At that point, the government must present a compelling interest to justify an infringement and prove that its goals could not be achieved by less restrictive means.[61] A few fundamental rights currently recognized are the right for family

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55. *Id.* at *13.

56. 521 U.S. 702 (1997).

57. *See id.* at 720-21 (fundamental rights are those "deeply rooted in this Nation's history and tradition.").

58. The Bill of Rights to the Constitution specifically lists rights that United States citizens enjoy. The remainder of rights recognized by the Court, including the right to interstate travel, right to privacy, and the freedom to marry, are not specifically mentioned in the Constitution.

59. *See generally Glucksberg*, 521 U.S. at 720-21.

60. *See id.* at 721.

61. *Id.* Alternatively, if the right is deemed to not be fundamental, the government simply must present a legitimate purpose in order for the law to be upheld (called rational-basis scrutiny). *See* United States v. Lopez, 514 U.S. 549, 607 (1995).

autonomy (the right to marry[62] and the right to keep the family together[63]), reproductive autonomy,[64] and the right to travel.[65]

In *Lawrence*, the court did not apply strict-scrutiny analysis.[66] In fact, at a bare minimum, it appears that the Court applied rational-basis review, and although the government's threshold for meeting the burden is relatively low, the Court still determined that the statute in question was unconstitutional.[67] Rational basis is the lowest level of scrutiny used by courts and requires very little for a law to pass as constitutional.[68] Different from strict and intermediate scrutiny, the individual challenging the law has the burden of proof.[69] In challenging the law, the individual must prove either that the government has no legitimate interest in the law or policy or that there is no reasonable, rational link between that interest and the challenged law.[70]

B. Causing Trouble – Lawrence v. Texas

The Supreme Court's decision in *Lawrence v. Texas* has been interpreted in conflicting ways, causing a circuit split on whether there is a constitutional right to buy sexual devices. Some circuits have held that *Lawrence* created a new fundamental right in sexual privacy, while others have argued contrarily. In *Lawrence*, the Supreme Court stated:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our, tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and *certain intimate conduct.*[71]

In its opinion, the Court overruled its previous decision in *Bowers v. Hardwick*,[72] where it had upheld a Georgia law that criminalized

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62. *Loving*, 388 U.S. at 1, 2.
63. Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977).
64. Skinner v. Oklahoma, 316 U.S. 535, 536 (1942); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); *Roe*, 410 U.S. at 154.
65. United States v. Guest, 383 U.S. 745, 757 (1966).
66. *See Lawrence*, 539 U.S. at 578.
67. *Id.*
68. *See* United States v. Carolene Prods. Co., 304 U.S. 114, 152 n.4 (1938).
69. Mabey Bridge & Short, Inc. v. Schooch, 666 F.3d 862, 876 (3d Cir. 2012).
70. Williams v. Pryor (*Williams III*), 240 F.3d 944, 948-49 (11th Cir. 2001).
71. *Lawrence*, 539 U.S. at 562 (emphasis added).
72. Bowers v. Hardwick, 478 U.S. 186 (1986).

sodomy.[73] It held that the statutes in both *Bowers* and *Lawrence* were attempts by the state to interfere with the personal relationships of people, finding that "[t]he liberty protected by the Constitution allows" individuals to make their own choices about their personal relationships.[74] Instead, the Court accepted Justice Stevens' dissent in *Bowers*, which contended that a state's view of a particular practice as immoral does not constitute adequate justification to uphold a law prohibiting that practice.[75]

The statute challenged in *Lawrence*–like the one in *Bowers*–criminalized homosexual sodomy.[76] Responding to a weapons disturbance call, the Harris County Police Department entered the residence of one of the petitioners and witnessed the petitioner engaging in a sexual act with another man. The two men were arrested, charged, and convicted before a Justice of the Peace. The petitioners argued that the criminal statute violated the Equal Protection Clause of the Fourteenth Amendment; however, those contentions were dismissed at trial.[77]

Upon certiorari, the Supreme Court instead chose to analyze the matter as violating the Fourteenth Amendment's Due Process Clause, deciding that if they held the Texas statute invalid under the Equal Protection Clause, "some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[78] It held that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests," and that individuals have the right to engage in sexual conduct without

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73. *Id.* at 188-89; *see also Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring). Justice O'Connor did not join in overruling *Bowers*. Justice O'Connor expressed her view that the matter before the Court should have been resolved using the Fourteenth Amendment's Equal Protection Clause. *Id.* Such a statute, she stated, could have been struck down using the rational-basis test, because objectives that consist of a "'bare . . . desire to harm a politically unpopular group,' are not legitimate state interests." *Id.* at 580 (quoting Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).

74. *Lawrence*, 539 U.S. at 566-67.

75. *Id.* at 578. The Court was sure to note that the *Bowers* Court, in its decision, made the point that homosexual conduct had been viewed as immoral for centuries. *Id.* at 571. While the *Lawrence* court did not discount the public's morals and convictions regarding homosexuality, it questioned whether "the majority [could] use the power of the State to enforce [its] views on the whole society though operation of the criminal law." *Id.*

76. *Id.* at 562.

77. *Id.* at 562-63.

78. *Id.* at 564, 575.

government intrusion.[79] The Court felt that the ramifications of a statute criminalizing "protected conduct" would remain if it were not examined for substantial validity–even if it was not enforceable for equal protection reasons.[80] According to the Court, statutes such as Texas' invited discrimination against homosexuals both publicly and privately.[81] The Court determined that the Due Process Clause gave the plaintiffs–and other same-sex couples–the right to "engage in their conduct without intervention of the government."[82]

In *Lawrence*, the Supreme Court also established the type of governmental interests that were considered constitutionally insufficient to sustain a law that infringes on a substantive due process right.[83] For example, morality based justifications were insufficient to serve as a rational basis on a ban on sexual devices.[84]

In her concurrence, Justice O'Connor stated that she would have struck down the law on equal protection grounds, rather than due process, because only homosexual sodomy was prohibited by the Texas statute, whereas opposite-sex sodomy was not.[85] Justice O'Connor argued that rational-basis review has been applied to hold laws that inhibit personal relationships unconstitutional and opined that deciding the case under equal protection would have been sufficiently effective, and *Bowers* did not have to be overruled.[86]

Justices Scalia and Thomas dissented.[87] Justice Scalia, joined by Justice Thomas, noted the majority's statement that the "emerging awareness" regarding sexual activity was sufficient to meet the "deeply rooted in [the] Nation's history and traditions" test for acknowledging a fundamental right was false.[88] Emerging awareness, he argued, is not synonymous to "deeply rooted in the Nation's history and traditions."[89]

Regarding the majority's holding that there was no rational basis that justified the enactment of the sodomy statute, Justice Scalia summarily dismissed it.[90] The statute, he said, was similar to criminal laws that

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79. *Id.* at 575, 578.
80. *Id.* at 575.
81. *Id.*
82. *Id.* at 578.
83. *Id.* at 577-78; *see also Reliable Consultants,* 517 F.3d at 745.
84. *Lawrence,* 539 U.S. at 577-78; *see also Reliable Consultants,* 517 F.3d at 745.
85. *Lawrence*, 539 U.S. at 579, 581 (O'Connor, J., concurring); *Reliable Consultants,* 517 F.3d at 744.
86. 539 U.S. at 579, 580 (O'Connor, J., concurring).
87. *Id.* at 586-606 (Scalia, J., and Thomas, J., dissenting).
88. *Id.* at 598.
89. *Id.*
90. *Id.* at 599.

prohibited bigamy, adultery, adult incest, and bestiality, and they were all based on the public's belief that certain behavior was immoral.[91] In Justice Scalia's opinion, the majority's ruling "effectively decree[d] the end of all morals legislation," and laws prohibiting the activities aforementioned would survive rational-basis review.[92]

Justice Thomas, in his own dissent, stated that he would rather have the legislature overturn the "uncommonly silly" statute.[93] Regardless, Justice Thomas stated that it was his duty to decide cases in accordance to the Constitution, and because he could not find any language in the Bill of Rights or other part of the Constitution creating a general right to privacy, he agreed that the right should not be recognized.[94]

IV. WHAT DOES *LAWRENCE* MEAN? COMMON ARGUMENTS AGAINST OBSCENITY STATUTES AND THE *LAWRENCE* FRAMEWORK

The Fifth and Eleventh Circuits have interpreted the ruling in *Lawrence* in different ways. The Fifth Circuit, in *Reliable Consultants, Inc. v. Earle*, ruled that a Texas obscenity statute that prohibited the transfer (by sale, gift, or lending) of sexual devices unconstitutional.[95] To the contrary, the Eleventh Circuit, in *Williams I*, ruled that a statute prohibiting the commercial sale of sexual devices for pecuniary value was constitutional.[96] These interpretations are not exclusive, as many scholars have tried to decode the meaning behind *Lawrence* as well.

A. Obscenity Statutes Are Unconstitutional – The Fifth Circuit

Several states have decreed certain obscenity laws to be unconstitutional. Whether an obscenity statute is deemed unconstitutional appears to turn on how the deciding court interprets the Supreme Court's ruling in *Lawrence*. When researching courts that have ruled obscenity statutes unconstitutional, the Fifth Circuit is notorious. The Fifth Circuit determined that a state-wide prohibition on the sale of sexual devices was unconstitutional.[97] Additionally, other states' supreme courts have also determined similar prohibitions to be unconstitutional, including Louisiana, Kansas, and Colorado.[98]

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91. *Id.*
92. *Id.*
93. *Id.* at 605 (Thomas, J., dissenting).
94. *Id.* at 605-06.
95. *Reliable Consultants*, 517 F.3d at 740, 747.
96. *Williams I*, 378 F.3d at 1250.
97. *Reliable Consultants*, 517 F.3d at 747.
98. *Id.* at 741 (it should be noted that these were each of the noted states' supreme courts).

Texas Penal Code Annotated §§ 43.21[99] and 43.23[100] made it illegal to sell, advertise, give, or lend devices used for sexual stimulation unless the defendant had a legitimate, statutorily-approved purpose.[101] The statute did not, however, make it illegal to use or possess sexual devices.[102] The suit that challenged the Texas statute and ultimately led to its demise was *Reliable Consultants, Inc.*, in which the plaintiff retailers argued that their customers had the right, under the Fourteenth Amendment, "to engage in private intimate conduct in the home without government intrusion."[103] The Fifth Circuit determined that the interests asserted by the Texas government for establishing the ban did not meet the standards set forth for justifying the enactment by the Supreme Court in *Lawrence*.[104]

The *Lawrence* Court, the Fifth Circuit argued, recognized that the right individuals possessed under the Fourteenth Amendment "was not simply a right to engage in [] sexual" activity, but was actually "a right to be free from governmental intrusion 'regarding the most private human contact, sexual behavior.'"[105] The Fifth Circuit determined that because of the *Lawrence* ruling, the issue before it was 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."[106] Accordingly, if the *Lawrence* Court held public morality as insufficient justification for a law that restricted consensual adult intimacy, such a justification could not serve as rational basis for the Texas statute.[107]

The Fifth Circuit acknowledged that the Supreme Court did not explicitly create a new fundamental right, and instead held the right to be implicit in the language used in the *Lawrence* decision.[108] The Fifth Circuit found that explicitly declaring a new fundamental right was unnecessary because the Supreme Court stated that "individual

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99. TEX. PENAL CODE ANN. § 43.21 (West 2013).

100. TEX. PENAL CODE ANN. § 43.23 (West 2013).

101. *Reliable Consultants*, 517 F.3d at 741.

102. *Id.*

103. *Id.* at 742-43.

104. *Id.* at 743.

105. *Id.* at 744. The court argued that the Supreme Court recognized this as a constitutional right because it chose to answer the question presented in the affirmative by stating "[w]e granted certiorari . . . [to resolve whether] petitioners' criminal convictions for *adult consensual sexual intimacy* in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment." *Id.* (quoting *Lawrence*, 538 U.S. at 564 (alterations in original)).

106. *Id.*

107. *Id.* at 745.

108. *Id.* at 744.

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."[109]

Rebutting the State's argument, the Fifth Circuit also determined that the sale of sexual devices was not synonymous with the sale of sex.[110] The court decided to focus on the burden placed on "the individual's right to make private decisions about consensual intimate conduct."[111] The Fifth Circuit was very clear; it stated that the matter was about the state attempting to control what people do in the privacy of their own homes based on the State's moral opposition to a particular type of sexual behavior.[112] Issuing a final blow, the Fifth Circuit determined that the State's purpose in enacting the statute was morality-based.[113] Interpreting the language used in *Lawrence* regarding morality-based laws broadly, the Fifth Circuit struck down the state statute.[114] The State argued that it had a more compelling state interest, which was to protect minors and disinterested adults from unwanted exposure to sexual devices.[115] The Fifth Circuit dismissed this argument and struck down the law, finding that the justification was too generalized for such a harsh restriction.[116]

B. The Complete Opposite– The Eleventh Circuit

Contrary to the Firth Circuit's determination that *Lawrence* established a fundamental right,[117] the Eleventh Circuit argued that *Lawrence* did not create such a right.[118] In *Williams I*, the court held that there was no fundamental right for sexual privacy.[119] In direct contrast to the Fifth Circuit, the Eleventh Circuit held that statutes prohibiting the sale of sexual devices are constitutional under the due

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109. *Id.* at 744-45 (quoting *Lawrence*, 539 U.S. at 578).

110. *Id.* at 746. The court noted that "there are justifications for criminalizing prostitution other than public morality, including promoting public safety and preventing injury and coercion." *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 745.

114. *Id.*

115. *Id.* at 746.

116. *Id.*

117. *Id.* at 744.

118. *Williams I*, 378 F.3d at 1233, 1235.

119. *Id.* at 1235.

process clause of the *Washington v. Glucksberg* analysis.[120] The statute at issue in *Williams I* was Ala. Code § 13A-12-200.2,[121] which prohibited the commercial distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value."[122] According to the Eleventh Circuit, the statute's breadth was narrow; it only prohibited the sale of sexual devices and did not criminalize the "use, possession, or gratuitous distribution" of sexual devices.[123] Residents of Alabama could, if they chose, purchase sexual devices outside of the state and bring them back for use, and furthermore, the statute exempted the sale of sexual devices used for "'bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose.'"[124]

The Fourteenth Amendment's Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[125] The plaintiffs in *Williams II* focused on the Due Process Clause's substantive component, which provides a "heightened protection against government interference with certain fundamental rights and liberty interests."[126] In particular, the plaintiffs argued that the use of sexual devices was among the activities protected under substantive due process, even though it was not explicitly listed in the Constitution.[127] The plaintiffs argued that through the prohibition, Alabama acted "'in violation of the fundamental rights of privacy and personal autonomy that protect an individual's lawful sexual practices . . . .'"[128]

The court applied the standard established in *Washington v. Glucksberg* because the ACLU wished it to recognize a new fundamental right.[129] In *Glucksberg*, the Supreme Court set a standard for analyzing whether a new fundamental right should be recognized.[130] First, the court begins with a "careful description of the asserted right."[131] Next, the court must determine if that carefully described right is one of those fundamental rights and liberties that are deeply rooted in the

120. *Id.* at 1233, 1235.
121. ALA. CODE § 13A-12-200.2 (Supp. 2003).
122. *Id.*
123. *Williams I*, 378 F.3d at 1233.
124. *Id.* (quoting ALA. CODE § 13A-12-200.4).
125. U.S. CONST. amend. XIV.
126. *Williams I*, 378 F.3d at 1235 (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)).
127. *Id.*
128. *Id.* (quoting Williams v. Pryor, 220 F. Supp. 2d 1257, 1261 (N.D. Ala. 2002)).
129. *Id.*
130. *Washington*, 521 U.S. at 720-21; *Williams I*, 378 F.3d at 1235.
131. *Williams I*, 378 F.3d at 1239 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

Nation's history and tradition "and 'implicit in the concept of ordered liberty', such that 'neither liberty nor justice would exist if they were sacrificed.'"[132] Applying this test to Alabama's statute, the Eleventh Circuit held that the district court erred and it should have looked to whether there was a history and tradition of protection of the right.[133]

According to the Eleventh Circuit, strong evidence that the Supreme Court did not recognize a new fundamental right in *Lawrence* was that the High Court did not use the *Glucksberg* analysis in its ruling, which is typically the analysis used in creating a new fundamental right.[134] The court refused to assume that the Supreme Court implicitly overruled *Glucksberg*, and noted that the precedential case was never mentioned in the *Lawrence* opinion.[135]

Interpreting the holding in *Lawrence*, the Eleventh Circuit held that any interpretation of the Supreme Court case that stated a new fundamental right was recognized was "strained and ultimately incorrect."[136] The court refused to interpret the *Lawrence* Court's ruling and what it considered dicta as creating right to sexual privacy.[137] It held that such an interpretation would place a fundamental-rights interpretation "on a decision that rested on rational-basis grounds, that never engaged in *Glucksberg* analysis, and that never invoked strict scrutiny."[138] Furthermore, the Eleventh Circuit determined that it would be incorrect to "impose a fundamental rights interpretation on a decision that rested on rational-basis grounds . . . that never invoked strict scrutiny."[139]

The Eleventh Circuit refused to accept the plaintiffs' assertion that a fundamental right was violated by the enactment of the statute.[140] It determined that fundamental rights were not considered fundamental "simply because they implicate deeply personal and private considerations," but instead because they had deep roots in the nation's history and tradition, and because of such, "neither liberty nor justice would exist if they were sacrificed."[141] The court determined that the Su-

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132. *Washington*, 521 U.S. at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

133. *Williams II*, 378 F.3d at 1242.

134. *Id.* at 1237.

135. *Id.*

136. *Id.* at 1236 (quoting Lofton v. Sec. of Dep't of Children & Family Servs., 358 F.3d 804, 817 (2004)).

137. *Id.* at 1238.

138. *Id.*

139. *Id.* at 1237.

140. *Id.* at 1233.

141. *Id.* at 1235 (quoting *Glucksberg*, 521 U.S. at 721).

preme Court has repeatedly refused to recognize a fundamental right in sexual privacy.[142]

Interestingly, the court held that restrictions on the ability to purchase an item are "tantamount to restrictions on the use of that item."[143] Because of this, the court acknowledged that it must determine whether the Constitution not only protected the right to sell sexual devices, but also protected the right to use them.[144] The court held in favor of the statute and found that it was a constitutionally valid exercise of state power.[145]

In *Williams v. Morgan* (*Williams II*),[146] the Eleventh Circuit, again finding in favor of an obscenity statute, differentiated between the sexual device prohibition that was at issue and the statute that was at issue in *Lawrence*.[147] In particular, the Alabama statute in question in *Williams II* prohibited public, commercial activity. This was distinguishable from the statute at issue in *Lawrence* because the sodomy statute prohibited private and non-commercial activity.[148] The Eleventh Circuit held that a state has the right to regulate commercial activity if it finds such activity harmful to the public.[149] Similar to the Ordinance, the statute did not prohibit the "use, possession, or gratuitous distribution of sexual devices."[150] The court determined that the statute did not target private conduct, *per se*, but rather it targeted commercial activity, and accordingly, the government's interest or purpose in maintaining public morality is sufficient under rational-basis scrutiny.[151] The Eleventh Circuit further held that *Lawrence* did not render public morality as an invalid purpose under rational basis and argued that the Supreme Court continues to uphold laws based on public morality.[152]

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142. *Id.* at 1235.

143. *Id.* at 1242. The court compared such matters to the one present in *Glucksberg*, where, it stated, the ban on providing suicide assistance thereby burdened the right to receive suicide assistance. *Id.*

144. *Id.*

145. *Id.* at 1250.

146. 478 F.3d 1316 (2007). The Eleventh Circuit's opinion in *Williams v. Morgan* is the third separate opinion for the matter, which initially began with *Williams v. Pryor* (*Williams III*) in 2001. 240 F.3d 944 (11th Cir. 2001). In issuing all three opinions, the Eleventh Circuit has consistently upheld the Alabama obscenity statute as constitutional. *See id*; *Williams I*, 378 F.3d at 1232, 1250; *Williams II*, 478 F.3d at 1316, 1318.

147. *Williams II*, 478 F.3d at 1322-23.

148. *Id.*

149. *Id.* at 1322.

150. *Id.* at 1318.

151. *Id.* at 1322-23.

152. *Id.* at 1323.

The Eleventh Circuit is not alone in finding that the language used in *Lawrence* does not extend to a right of intimacy, or creates a right of intimacy. In *Burr v. Biden*,[153] the United States District Court for the District of Delaware explained that the *Lawrence* Court did not create a general right to privacy, nor did it state that the right to privacy is a fundamental one.[154] The court went on to explain the fact that the Supreme Court only addressed the term "fundamental right" when it was discussing *Bowers*, and that the Court did not use other key terms such as "strict scrutiny" or "compelling state interest" in the opinion at all, supports the proposition that it did not intend to create a new right.[155] The language used in the *Lawrence* opinion stating that the anti-sodomy statute did not further a legitimate state interest was "consistent with the rational basis test."[156]

Additionally, the Eleventh Circuit is not the only court that has ruled an obscenity statute to be constitutional. In Mississippi, a statute prohibiting the sale, lease, and distribution of sexual devices was also found to be constitutional when it was challenged by vendors.[157] In *PHE, Inc. v. State*,[158] the Supreme Court of Mississippi held that there was no fundamental right to sell or purchase sexual devices.[159] The court did acknowledge that individuals have a right to sexual autonomy and that the right to privacy "is so personal that its protection does not require the giving of a reason for its exercise. That one is a person, unique and individual, is enough."[160] Distinguishing this right to personal or bodily integrity, the Supreme Court of Mississippi still determined that there is no fundamental right of access to purchase sexual devices, comparing it to the Supreme Court's refusal to recognize an independent right of access to purchase contraceptives.[161]

The court stated that if individuals were "sexually dysfunctional" and were unable to achieve sexual satisfaction without the assistance of a sexual device, those individuals should seek medical assistance or treatment from a physician or psychologist.[162] In such instances, the court concluded, such individuals would be able to purchase a sexual

153. No. 13-810-GMS, 2014 U.S. Dist. LEXIS 106156 (D. Del. Aug. 1, 2014).
154. *Id.* at *12.
155. *Id.* at *12-13.
156. *Id.* at *13.
157. PHE, Inc. v. State, 877 So. 2d 1244, 1249 (2004).
158. 877 So. 2d 1244 (2004).
159. *Id.* at 1249.
160. *Id.* at 1248 (quoting *In re* Brown, 478 So. 2d 1033, 1040 (Miss. 1985)).
161. *Id.*
162. *Id.*

device from their medical provider and therefore not be in violation of the statute.[163]

With states across the country at odds in determining what effect, if any, *Lawrence* has on obscenity laws, scholars also continue to contemplate what *Lawrence* means for morals-based legislation, in particular legislation concerning sexual privacy.

C. *A Scholarly View*

Similar to federal and state courts, scholars are divided in determining the meaning of the majority's ruling in Lawrence and whether it created a new fundamental right. The Court's decision in *Lawrence* has been analogized with its prior decision in *Brown v. Board of Education*[164] because the interpretations of the Fourteenth Amendment for both matters departed greatly from the original understanding of the Amendment.[165] Although the cases bear similarities in the way in which the Court interpreted the Fourteenth Amendment, where *Brown* recognized a right, *Lawrence* all but avoided explicitly establishing a new right.[166]

The issue with the *Lawrence* Court's refusal to apply a higher scrutiny level, it is argued, is that the Court actually found the Texas statute unconstitutional under rational-basis scrutiny, where courts usually give deference to a state's decision.[167] This observation can potentially lead to problems because it is typically very difficult for a law to be struck down under rational-basis review because the threshold is so low. The fact that the *Lawrence* Court struck down the anti-sodomy statute simply based upon the fact it was a morals-based piece of legislation leaves more to be desired. Surely, as has been evidenced by the Eleventh Circuit and Fifth Circuits rulings, applying such a standard to cases implicating privacy can lead to arbitrary and inconsistent results.[168]

Like the Eleventh Circuit, some argue that *Lawrence* did not create a new fundamental right to privacy, purportedly proven by the fact that the Court has been hesitant to create this new right.[169] There is not

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163. *Id.* at 1249.

164. 347 U.S. 483 (1954).

165. *See* Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 437 (2005).

166. *Compare Brown*, 347 U.S. 483 *with Lawrence*, 539 U.S. 598.

167. Klarman, *supra* note 165, at 437.

168. *Compare Williams I*, 378 F.3d 1232 *with Reliable Consultants, Inc.*, 517 F.3d 738.

169. Christen Sproule, *Fifth General Issue of Gender and Sexuality Law: The Pursuit of Happiness and the Right to Sexual Privacy: A Proposal for a Modified Rational Basis Review for Due Process Rights*, 5 GEO. J. GENDER & L. 791, 805 (2004).

a recognized fundamental right to adult, consensual sex, although the right has been implicated in other related recognized rights.[170] Because standard rational-basis review is so lenient and can be easily overcome by states claiming public morality, it has been suggested that courts apply a "modified rational basis standard" or intermediate scrutiny level to these matters.[171] One author suggests that while it appears the *Lawrence* Court used the rational basis test, at the same time the decision suggests the Court acknowledged that certain sexual rights deserve a higher scrutiny level.[172] It has been argued that the "deeply rooted in this Nation's history and tradition" discussion found in the *Lawrence* decision was fundamentally unnecessary because the Court refused to recognize a new fundamental right.[173] By employing *Romer v. Evans* as its precedent, it is suggested that the Court itself employed a modified rational-basis scrutiny level in its decision.[174]

Another argument is that the *Lawrence* court dodged "the traditional tiers of scrutiny altogether."[175] The Court was vague in establishing the liberty interest at stake in the matter, and it never addressed whether it should utilize strict-scrutiny analysis.[176] Accordingly, it is claimed, the Court generalized the right that was suggested in *Lawrence* rather than limited it.[177] Possibly, by generalizing the right suggested, the Court has cleared the way for more "rights" to be recognized, even if not explicitly recognized.

Judge Barkett of the Eleventh Circuit dissented to the *Williams I* decision, contending that the majority's finding "directly conflict[ed] with the Supreme Court's" decision in *Lawrence*.[178] Echoing the opinions of many, Judge Barkett explained that the *Lawrence* Court held that there was indeed a right to sexual privacy, which was included in the right to privacy.[179] Substantive due process requires, according to Judge Barkett, that every law address a legitimate governmental purpose, and accordingly, "any law challenged as violating substantive

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170. *Id* .at 805.

171. *Id.* at 811.

172. *Id.* at 810.

173. *Id.* at 811 (quoting *Glucksberg*, 521 U.S. at 721).

174. *Id.* at 812.

175. Pamela S. Karlan, *Colloquium: The Boundaries of Liberty After Lawrence v. Texas: Foreward: Loving Lawrence*, 102 MICH. L. REV. 1447, 1450 (2004).

176. *Id.* The lack of discussion of strict scrutiny is evidenced by the Court's failure to discuss the strict-scrutiny analysis that came out of *Glucksberg*, which provides steps to determining whether a right is fundamental.

177. *Id.* at 1451.

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

179. *Id.* at 1252-53.

due process right must survive rational-basis review."[180] She argued, however, that laws that affect rights falling within the rights to privacy are only constitutionally valid if the government can meet a higher scrutiny level.[181] In support of her argument that there is a right to sexual privacy, Judge Barkett noted that through the Supreme Court's decisions of *Roe v. Wade*, *Griswold v. Connecticut*,[182] *Eisenstadt v. Baird*,[183] and *Carey v. Population Services International*,[184] the right had already been established.[185]

It has also been noted that the Court often changes its tune once public opinion shifts.[186] As public opinion on particular issues evolves and cases are brought before the High Court, oftentimes the Court will take heed of the newer sentiments within the community and, in some cases, overrule its previous decisions.[187] Regardless, even when the Court follows public sentiment in its decisions, it typically takes a while for an opinion of the Court to take effect.[188]

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180. *Id.* at 1252.

181. *Id. See also* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 627 (1980) ("What the freedom does demand is a serious search for justifications by the state for any significant impairment of the values of intimate association . . . [a]nd . . . it rejects as illegitimate any asserted justification for repression of expressive conduct based on the risk that a competing moral view will come to be accepted.").

182. 381 U.S. 479 (1965).

183. 405 U.S. 438 (1972).

184. 431 U.S. 678 (1977).

185. *Williams I*, 378 F.3d at 1252 & n.4 (Barkett, J., dissenting).

186. *See generally* Klarman, *supra* note 165, at 450-51. For example, when public sentiment regarding segregation in schools turned against the southern states, the court ruled for desegregation in *Brown v. Board of Education*. Similarly, when public opinions shifted in favor of interracial marriages, the Court struck down anti-miscgenation statutes. *See Loving*, 388 U.S. at 2. The effects of *Lawrence* operated effectively the same–the Court's decision came when the public's opinion about same-sex relationships was changing.

187. For example, *Brown* overruled *Plessy v. Ferguson*. 347 U.S. at 495.

188. *See generally* Klarman, *supra* note 165, at 451. After the Supreme Court decision in *Brown*, southern states were slow in putting it into effect. The decision took place in 1954, but a majority of southern schools were not successfully integrated until the 1970s. It has even been argued that the *Brown* decision "retarded progressive racial reform in the South." *Id.* at 453-54. After the Court's decision in *Lawrence*, a fear resonated within the religious circles that the decision would definitely lead to gay marriage rights. *Id.* at 459. It appears that there is a direct correlation: the Court refuses to strike down laws based on public morals until the public's opinions on such matters turn against those laws, but at the same time, such decisions have the tendency to bring out the worst, and even more resistance, from supporters.

V. ANALYSIS OF THE VALIDITY OF THE SANDY SPRINGS STATUTE

A. Does the Sandy Springs Ordinance Fall Within the Scope of the Right Enunciated in Lawrence? If So, Can the State Meet Its Burden of a Compelling State Interest?

As previously stated, it has been suggested that rather than attempting to have the right to sexual privacy recognized as a fundamental one, challenges to obscenity statutes should be subjected to rational basis review.[189] However, it seems more likely that, with *Lawrence* taken into consideration, the Supreme Court did acknowledge at least a smidgen of a right, although not explicitly, to sexual privacy.

> [S]tatutes prohibiting the distribution of sexual devices are subject to the Supreme Court's underdeveloped modified rational basis standard because they infringe not upon a fundamental right, but upon a quasi-fundamental right. Infringement upon such a right warrants a higher degree of review than the traditional rational basis test. Under this modified standard, courts may require a closer fit between the statute's means and ends, and may more closely scrutinize the state's purported interest to ensure that it was the actual motivation of the legislature and not just a motivation concocted for purposes of litigation. As such, the statutes should be struck down under this more stringent review because the states' actual interests are not rationally related to the challenged statutory prohibitions.[190]

Because the Eleventh Circuit has already used the rational-basis test to uphold the Alabama obscenity statute, the district court utilized the same test to conclude the Ordinance is constitutional.[191] Presenting the matter before the Eleventh Circuit, to have the Ordinance struck down as unconstitutional, at bare minimum the Plaintiffs in *Flanigan's* will need to prove that in enacting the law, the Sandy Springs government had no legitimate interest in the law or that there was no reasonable, rational link between the government's interest and the challenged law. The Plaintiffs' main challenge, however, will be convincing the court that its previous interpretation of *Lawrence* was incorrect.

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189. Sproule, *supra* note 169, at 803.

190. *Id.*

191. *See Williams I*, 378 F.3d 1238 (because the *Lawrence* Court utilized the rational-basis test to strike down the Texas sodomy statute, it follows suit that the same test would be utilized in determining the constitutionality of an obscenity statute.); *see also Flanigan's*, 2014 U.S. Dist. LEXIS 180429, at *31.

The council's findings, memorialized in Sandy Springs Municipal Code § 26-21,[192] provide insight into the city's purposes, intentions, and goals sought to be achieved in enacting the Ordinance.[193] Regarding adult establishments, the council desired to protect the morals and integrity of the city by enacting provisions such as the Ordinance as well as other laws that limit the activity of establishments deemed to be "sexually explicit businesses."[194] In Ordinance No. 2009-04-24,[195] which amended Section 38-120, the city claims that it has a substantial governmental interest to protect and maintain the morality of the city and that the "commercial distribution of obscene material is injurious to public order and morality and is not protected by the First Amendment."[196] To justify its actions, the code states that in *Chambers v. Peach County, Georgia*,[197] the Georgia Supreme Court "held that local governments may adopt ordinances designed to combat the undesirable secondary effects of sexually explicit businesses, and further held that a governing authority seeking to regulate adult establishments must have evidence of a relationship between the proposed regulation and the undesirable secondary effects it seeks to control."[198]

To support its claim of negative secondary effects, the findings provision states that the city council received evidence proving the negative impact adult establishments have had on the community.[199] Such evidence included alcohol abuse, prostitution, diminished property values, and the law enforcement's failure to enforce laws governing adult establishments.[200] The council believes that the presence of adult establishments brings undesirable secondary effects, including the promotion of the sex industry.[201] By enacting the Ordinance, the city

192. SANDY SPRINGS, GA. CODE § 26-21.

193. *See id.*

194. SANDY SPRINGS, GA. CODE § 26-21(4).

195. Sandy Springs, Ga. Ordinance No. 2009-04-24.

196. *Id.* The provision goes on to cite a plethora of First Amendment matters, including *Miller*, 413 U.S. 15; Sewell v. Georgia, 238 Ga. 495, 233 S.E.2d 187 (1977); and Chamblee Visuals, LLC v. City of Chamblee, 270 Ga. 33, 506 S.E.2d 113 (1998).

197. 266 Ga. 318, 467 S.E.2d 519 (1996).

198. SANDY SPRINGS, GA. CODE § 26-21 (4).

199. SANDY SPRINGS, GA. CODE § 26-21(7).

200. SANDY SPRINGS, GA. CODE § 26-21(7)(a). The council also received testimony about one adult media outlet containing booths with "glory holes". SANDY SPRINGS, GA. CODE § 26-21(7)(b).

201. *See* Sandy Springs, Ga. Ordinance No. 2009-04-24. The provision states that "the City has a substantial government interest in preventing the negative secondary effects of establishments which trade in indecent and obscene materials." *Id.*

sought to promote itself as an attractive place where commercial businesses can establish themselves in a family-friendly community.[202]

The findings provision also states that in *Chambers* the Georgia Supreme Court held that a city may also use the experience of other municipalities and counties in enacting legislation.[203] To support this, the Council claims to have based its enactment of the law on "the experiences of other municipalities and counties including" Garden Grove, California; Gwinnett County, Georgia; Houston, Texas; and New York, New York.[204] The section cites several cases from the Supreme Court and other states' courts to help justify and support the implications and purpose of the Ordinance.[205]

The § 26-21 findings provision mostly seems to contemplate the secondary effects brought into the city limits by strip clubs.[206] Adult novelty stores are briefly discussed, but the majority of the issues presented are a result of adult-oriented bars where alcohol is served.[207] In one instance of a "glory hole" discovered in an adult novelty store acts as a justification to ban *all* adult novelty stores.[208] The Council acknowledges that "adult businesses are . . . protected under the free speech clause of the First Amendment . . ." and that it only seeks to regulate the operation of such establishments.[209]

The provision being argued by the Flanigan Plaintiffs, however, has no codified findings clause attached to it.[210] The provision can be found in the city code's "Offenses and Miscellaneous Provisions" chapter, under the section entitled "Offenses Involving Public Morals".[211] Because the Ordinance outright criminalizes the sale and distribution of sexual devices, it begs the question: if the city, evidenced by its finding clause in § 26-21, only sought to *regulate* adult businesses in their operating times, why would the city see the need to completely ban the sale of "obscene material"? Surely, if adult establishments selling nudity and alcohol can still operate, those same establishments, or others specifically dedicated to adult novelty material, should be able to the same.

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202. SANDY SPRINGS, GA. CODE § 26-21(1).
203. SANDY SPRINGS, GA. CODE § 26-21(4)-(5).
204. SANDY SPRINGS, GA. CODE § 26-21(8).
205. SANDY SPRINGS, GA. CODE § 26-21.
206. SANDY SPRINGS, GA. CODE § 26-21(7).
207. *Id.*
208. SANDY SPRINGS, GA. CODE § 26-21(7)(b).
209. SANDY SPRINGS, GA. CODE § 26-21(12).
210. *See* SANDY SPRINGS, GA. CODE § 38-120.
211. *Id.*

The only findings attached to § 38-120 are found in Ordinance No. 2009-04-24.[212] The ordinance cites a litany of cases regarding the legislature's ability and power to protect morality and public order.[213] However, citing cases and listing generalized statements pulled from cases does not suffice to show the governmental interest the sale, distribution, or leasing of sexual devices threatens. If taken in whole with the findings provision found in § 26-21, only one instance, stated above, serves as the council's justification for prohibiting the sale of such objects.

In § 26-22, the chapter's definition section, the council defined an "adult bookstore" as an establishment that dedicated at least twenty-five percent of its floor space to the "display, sale, and/or rental of . . . (1) Books, magazines . . . photographs, films . . . CDs, DVDs . . . (2) Instruments, devices, novelties, toys . . . for use in connection with specified sexual activities . . . ."[214] The same type of store or establishment is contemplated in § 38-120, but that particular provision outright criminalizes the sale or distribution of sexual devices.[215] Where § 26-21 purports to simply impose licensing and regulations upon adult establishments, § 38-120 outright bans the sale or distribution of sexual devices, making no mention of the possibility of obtaining a license to sell such materials.[216]

If the city of Sandy Springs intended its obscenity statute to apply only to those who did not obtain a license to sell such material, its provision is unduly vague. Reading the provision in isolation, it would lead one to believe that it serves as a blanket ban on the sale of sexual devices. However, when one turns to the earlier provision regarding adult establishments, confusion ensues. Novelty stores are mentioned in the earlier provision as adult establishments that the city seeks to regulate, and reading that provision in isolation appears to allow the sale of such devices as long as the owners of the establishment comply with the licensing laws set in place. Looked at together, it is difficult to discern whether the two provisions were intended to work together in tandem, or separately.

In Article IV of the code, where § 38-120 is contained, there is no definition section to define who a "person" is–is a "person" *any* individual selling so-called obscene material, including individuals working in adult establishments that sell adult novelties? Or by "person" does the

212. *See* Sandy Springs, Ga. Ordinance No. 2009-04-24.
213. *See id.*
214. SANDY SPRINGS, GA. CODE § 26-22.
215. SANDY SPRINGS, GA. CODE § 38-120(e).
216. *See id.*

provision include individuals who do not work in commercial establishments? Additionally, this particular section of the code does not include a findings provision–the reader has no indication (unless he looks to § 26-21) of what the city sought to do with the enactment of the law. Furthermore, the Ordinance makes no reference whatsoever to § 26-21, but rather appears to be a stand-alone provision, on its own criminalizing the sale of "obscene material".[217]

As far as restricting or regulating adult establishments, the city's finding clause in § 26-21 proposes a legitimate state interest. However, regarding the actual obscenity statute, the city has failed to establish a legitimate interest in prohibiting the sale of obscene materials. If § 26-21 is supposed to apply to § 38-120 as well, simply justifying the outright ban on the distribution of sexual devices based upon one instance of finding a "glory hole" at an establishment does not serve as a legitimate governmental interest. Even so, if the city simply sought to regulate the activity of adult establishments, what purpose would banning the sale of sexual devices serve? In other words, if the city had a legitimate state interest in regulating the existence of such establishments, but still allows them to exist, what legitimate interest does the city have in further regulating or completely banning the sale of sexual devices?

Some commentators argue that bare public morality suffices as a legitimate state interest in enacting obscenity statutes.[218] While in some cases, as discussed above, this may hold true, it does not prove true in this instance. Had the city of Sandy Springs expressly identified a reason for enacting § 38-120, and if it were not in conflict with § 26-21, such a determination would be warranted. However, there is simply not enough evidence provided, nor is there a reconciliation between the two provisions, to come to such a conclusion.

B. Morals Based Legislation – Does it have a place?

Legislation based on morality creates laws that "are specifically aimed at curing so-called immoral behavior, that is, acts that violate a social

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217. In the their complaint, the *Flanigan's* Plaintiffs simply address the council's failure to present evidence supporting the notion that restricting the marketing of obscene material would further a legitimate state interest. *See Flanigan's Enters., Inc.*, 2014 U.S. Dist. LEXIS 180429, at *7.

218. *See* Nathan R. Curtis, *Unraveling Lawrence's Concerns About Legislated Morality: The Constitutionality of Laws Criminalizing the Sale of Obscene Devices*, 2010 B.Y.U.L. REV. 1369, 1380, 1387 (arguing that the sale of sex toys is a public activity rather than a private one and that the Court has repeatedly upheld the ability of legislatures to "legislate morals"). The comment goes on to note that sex-toy statutes have a commercial element to them, one which was not present in *Lawrence*. *Id.* at 1390.

norm or taboo."[219] An alarming issue that comes out of morality legislation is the notion that it seeks to instill "virtue" or morals into society as a whole.[220] In a sense, morals-based legislation goes against the grain of the Constitution's promotion of freedom. Although it is true that the implementation of some moral beliefs into laws is necessary, laws based solely upon morals should be heavily scrutinized. Some argue that because this country is a democracy, "the best arbiter of morality is the majority."[221] However, this approach fails to take into account that members of the minority may (and probably do) find certain behaviors repugnant.

Another difficulty that comes into play with morals-based legislation is how punishment should be issued. Oftentimes, when it comes to the majority determining what is "right" and "wrong," the punishment tends to be harsh towards those who do not follow suit. Historically, morals-based legislation has been enacted against political, religious, gender, and racial minorities, and persists still. One author claims that "facts and evidence are always separated from moral viewpoints by subjective value judgments."[222]

In his dissent in *Lawrence*, Justice Scalia expressed concern that the majority's opinion would lead to the end of all morals legislation.[223] According to Justice Scalia, the majority's opinion would eventually lead to the striking down of laws prohibiting prostitution, incest, bigamy, and other unsavory crimes.[224] However, Justice Scalia's snowball-effect theory is not necessarily valid. Justice Scalia interpreted the majority's adoption of Justice Stevens' dissenting opinion in *Bowers* that a state's view of an act "as immoral is not a sufficient reason for upholding a law prohibiting the practice," to have as a blanket effect over all morals-based legislation.[225] However, the majority's interpretation did not unilaterally condemn all morals-based legislation, but rather laws that have no other basis or proof of damage rather than being morally abhorrent by the local populations.[226]

However, even without recognizing morality as a legitimate state interest, there are other factors and aspects to these prohibitions that

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219. S.I. Strong, *Romer v. Evans and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. 1259, 1261 (1997).

220. *Id.* at 1269-70.

221. *Id.* at 1271.

222. *See* Sarah Braasch, *Morality Has No Place In the Law*, PATHEOS (Jan. 14, 2011), http://www.patheos.com/blogs/daylightatheism/2011/01/morality-has-no-place-in-the-law/.

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

224. *Id.*

225. *Id.* (quoting *Bowers*, 478 U.S. at 216).

226. *See generally Lawrence*, 539 U.S. 558.

would serve a legitimate state interest.[227] For example, when it comes to incest, the chances of such relations resulting in the birth of handicapped children increase greatly due to the close sharing of genetics.[228] Prostitution, in turn, has the potential to pose negative effects upon local areas.[229] In other words, most "morals-based" laws have purposes other than just being morally opposed by the population. Some of the laws mentioned in Justice Scalia's dissent are in place because they have the potential to have negative impacts on the population as whole. Sodomy laws prohibiting sexual behavior among same-sex couples and obscenity laws prohibiting the purchase and sale of sexual devices do not have an impact upon the general population–the activities prohibited by such laws are private in nature.

Interestingly enough, one of the morals-based laws that Justice Scalia feared would be deemed unconstitutional were obscenity laws, whose constitutionality, as this Comment discusses, is being questioned throughout the county.[230] Imposing the majority's morals upon the whole population suggests superiority and favoritism toward a particular group that should not be permitted. According to the Fourteenth Amendment of the Constitution, all are to be treated equal. Laws prohibiting acts that are considered immoral by a portion of the population alone should not exist.

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227. *See id.* at 599 (Scalia, J., dissenting).

228. Some argue that any sexual relationship may lead to having a child with disabilities and that such possibilities should not be the sole purpose for banning incestuous relationships. *See* Tauriq Moosa, *Is Incest Wrong?*, BIG THINK, (n.d.), http://bigthink.com/think-tank/is-incest-wrong. In October 2014, a New York Court of Appeals, in a unanimous ruling, legalized a certain degree of incest – that between a woman and her mother's half-brother. Nguyen v. Holder, 21 N.E.2d 1023, 1024 (N.Y. 2014). The couple's attorney found that relatives with the same relationship as the plaintiffs share about one-eighth of the same DNA, similar to the same amount cousins share with one another. Julia Marsh, *NY State Blesses 'Incest' Marriage Between Uncle, Niece*, N.Y. POST (Oct. 29, 2014), http://nypost.com/2014/10/29/new-york-state-blesses-incest-marriage-between-uncle-niece/. The three incestuous relationships prohibited by the state were: 1. An ancestor or descendent; 2. A brother and sister of half or whole blood; and 3. An uncle and niece and an aunt and nephew. *Nguyen*, 21 N.E.3d at 1025.

229. It has also been argued that legalizing prostitution will open the floodgates to sex trafficking, child prostitution, and more. *See* Janice G. Raymnond, *10 Reasons for Not Legalizing Prostitution, Coalition Against Trafficking in Women International*, COALITION AGAINST TRAFFICKING IN WOMEN, Mar. 25, 2003, www.catwinternational.org/content/images/article262/attachment.pdf. On the other hand, others argue that the legalization of prostitution will keep prostitutes out of dangerous situations and drop STD rates. *See* Jim Norton, *In Defense of Johns*, TIME.COM (Aug. 6, 2014), http://time.com/3087616/defense-johns-legalize-prostitution/.

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

The ramifications of violating a morals-based law are typically harsh. Punishments so harsh for criminalized acts that have no tangible negative effect on the community, such as in Sandy Springs, are a drastic measure. When one violates a morals-based law, a stigma is essentially placed over his or her head and by showing up in criminal records or taking away a piece of supposed violator's dignity. The Texas statute involved in *Lawrence* imposed a class C misdemeanor–which although a minor offense in the state, would still remain on purported violator's records.[231] If such charges remained on offenders' records, the offenders would be subjected to registration laws of at least four states if he or she were to be subjected to their jurisdiction.[232] If an individual was found guilty of violating the statute at issue in *Williams I*, he or she could be found guilty of a misdemeanor and assessed a fine not exceeding $10,000.00 upon conviction.[233] Additionally, violators also face the possibility of being imprisoned in the county jail or sentenced to hard labor for a period not exceeding one year.[234] The Texas statute struck down by the Fifth Circuit in *Reliable* had the potential to place violator in jail up to two years.[235]

Although the Ordinance is not as harsh as the statute in *Williams*,[236] the gravity of the punishment imposed upon violators causes one to pause. Although the statute applies primarily to vendors of sexual devices, it imposes restrictions on purchasers as well, who are unable to purchase the products they want locally. The Ordinance very closely resembles the statute that was at issue in *Williams I*. These statutes impose harsh punishments for activities that individuals typically engage in in the privacy of their own homes, and their main purpose in existing is to promote the majority's morality.[237]

VI. CONCLUSION

The problem with the Ordinance is that it is vague and fails to target other issues related to the sale of sexual devices. If the City wants to prohibit the sale of such devices, it should also seek to prohibit the

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231. *Id.* at 575.
232. *Id.*
233. ALA. CODE § 13A-12-200.2.
234. *Id.*
235. *Reliable Consultants, Inc.* 517 F.3d at 741; TEX. PENAL CODE ANN. § 12.35(a).
236. *See* SANDY SPRINGS, GA. CODE § 1-10.
237. Interestingly enough, however, save for the Supreme Court's opinion in *Lawrence*, the punishments contemplated by these statutes did not contribute to their respective courts' decisions (at least explicitly). *See Lawrence*, 539 U.S. at 575; *see generally Williams I*, 378 F.3d 1232.

advertisement of such devices, because the two are closely related. The fact that the city has failed to do so, however, raises concern and supports the inference that the city strategically set up the statute to withstand a constitutional challenge, because surely if it prohibited the advertisement of such products, its chances of withstanding such challenges would not be as strong.

A prohibition on the sale of sexual devices essentially operates as a prohibition on the use of such devices, because it limits an individual's access to such devices. Obscenity statutes such as the one that exists in Sandy Springs–although it facially does not prohibit the use or possession of sexual devices–pervade and weave themselves into the private lives of citizens residing both inside and outside of the city limits–what individuals choose to do in their private lives is essentially interfered with by the local government.

Because the city has failed to provide concrete evidence pertaining to the secondary effects that the distribution of sexual devices pose on the community, it has failed to meet its burden of proof. Mere claims of secondary effects should not satisfy the legitimate governmental-interest test in these cases. Even more so, bare claims of protecting the public morality, without more, should not survive as sufficient justification. Hopefully the Eleventh Circuit will take advantage of the opportunity presented before it to either strike down the Ordinance, as well as others like it, or articulate a specific body of law, not based upon morality, to justify allowing such statutes to exist.

TOMIYA LEWIS