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Michael Maselli
Seton Hall Law

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The War On Sex Toys

Michael Maselli

Marc Poirier

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Michael Maselli
Law and Sexuality
The Validity of Laws Prohibiting the Sale of Sex Toys
May 7, 2010

I. Introduction

The use of sexual devices has been a source of contention in the United States for nearly a century. Religious fundamentalists believe that the use of such devices is morally reprehensible. A significant part of the country subscribes to traditional Christian ideals that promote sex between a man and a woman for the purpose of procreation, any manipulation is often met with resistance. Before *Lawrence*, and a couple other relevant landmark cases, it was much easier for this group to impose its will on the general public through anti-obscenity statutes. After *Lawrence*, I argue that a right to sexual privacy was established that substantially limited a legislature's ability to encroach on an individual's bedroom behavior. *Lawrence* is to be interpreted as the law may not criminalize sexual behavior of any individual in the privacy of his home. Thus, the right to sexual privacy must extend to one's use of sex toys. Nevertheless, in light of *Lawrence*, a few states have still enacted anti-obscenity statutes that infringe on one's right to use sex toys. While it is hard to imagine a statute standing up to constitutional scrutiny involving the private use of sex toys, the outcome is far less clear regarding laws prohibiting the sale of sex toys. In order to uphold such statutes, states have set forth several arguments regarding the sale of these devices. In these instances, states argue that the statutes should be upheld based on a public morality position. Essentially, a government determines that certain values should be preserved through laws that can limit what is perceived to be generally unacceptable behavior. More effective though has been an argument grounded on the "secondary effects doctrine" that has allowed states to effectively ban the sale of sex toys through zoning

laws. Under this rationale, a government may contend that the operation of certain businesses can lead to an offshoot of negative effects that harm the surrounding areas. Thus, it is asserted that the government has a legitimate interest in combating these effects through legislation. My paper will first examine *Lawrence* to argue that it established a right to sexual privacy that encompasses the use of sex toys. In doing so, I will examine the split between the 5th Circuit and the 11th Circuit. Additionally, I will address the public morality argument in favor of anti-obscenity statute, pointing out its failures. Lastly, the paper aims to highlight how states do not need to explicitly ban the sale of sex toys because the secondary effects doctrine and zoning laws accomplish the same goal.

II. *Lawrence* as a Starting Point.

Any discussion of anti-obscenity statutes and their relation to the use and sale of sex toys starts with an analysis of *Lawrence*.¹ The case involved a state statute that effectively prohibited sexual conduct between homosexual men by criminalizing certain sexual conduct between two individuals of the same sex.² Two men were charged with violating the statute.³ They challenged the constitutionality of the statute and lost at the state and appellate level.⁴ The Supreme Court eventually overturned the appellate division.⁵

The opinion in *Lawrence* enumerated a few key points that support the idea that one possesses a right to sexual privacy. The court concluded that engaging in same sex intercourse is

¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

² *Id.* at 562.

³ *Id.* at 563.

⁴ *Id.*

⁵ *Id.* at 564.

an exercise of a personal liberty guaranteed by the constitution.⁶ Additionally, the court stated that moral disapproval cannot be viewed as a legitimate state interest for rational basis purposes.⁷ The court held that the statute unfairly attacks same sex couples.⁸ One must assume that same sex male couples engage in some form of sexual intercourse that is deemed sodomy under the statute. Furthermore, the court held that the presumption of criminal behavior of all same sex couples greatly ostracizes them.⁹

A. An Intermediate Level of Review.

To make any sense of this issue, it is imperative to understand the standard of review employed by the court in *Lawrence* to establish a right to sexual privacy. Previously, courts either applied strict scrutiny or a rational basis review to address challenged state statutes. Strict scrutiny requires that the law be narrowly tailored to serve a compelling government interest.¹⁰ Under this high level of review, the usual presumption of constitutionality is lost and the government is provided little leeway to construct a statute that reaches beyond its stated purpose.¹¹ Conversely, a rational basis review requires that the challenging party prove that the stated government interest is not rationally related to the relevant law.¹² In this case, there is a high presumption of constitutionality and provides governments with incredible flexibility.¹³ Finding these two standards difficult to work with in certain contexts, the Supreme Court

⁶ *Id.* at 578.

⁷ *Id.* at 577-78.

⁸ *Id.*

⁹ *Id.* at 575.

¹⁰ Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers are Created Equal*, 10 Fl. Coastal L. Rev. 421, 434 (2009).

¹¹ *Id.*

¹² *Id.* at 436.

¹³ *Id.*

developed a third standard of review that falls somewhere in between the two aforementioned standards.

Often referred to as intermediate scrutiny, the standard requires that the law exhibit a substantial relation to an important government interest.¹⁴ In one of the clearest expressions of this hybrid test, the court in *Craig v. Boren* invalidated a statute that prohibited the sale of beer with a certain level of alcohol content to males under the age of 21 and females under the age of 18.¹⁵ The government interest to be furthered by the law was public protection on the roadways as the government believed that statistics showed males were more likely to cause traffic accidents associated with alcohol use.¹⁶ In analyzing the constitutionality of the law, the court merely stated that classifications that distinguish males and females are subject to “scrutiny,” without committing to strict scrutiny.¹⁷ The court then explained this modified standard citing precedent and stated that, “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”¹⁸ A version of the intermediate scrutiny standard was applied in *Lawrence* as well.

Whereas the court *Boren* was far more deliberate in its articulation of a hybrid level of scrutiny, the standard of review used by the *Lawrence* court is far more unclear. The court held that the challenged statute, “furthered no legitimate state interest which can justify its intrusion into the personal and private life of an individual.”¹⁹ Immediately preceding this statement though, the court went on to provide a list of conduct that the court seems to imply would justify an intrusion of personal liberty.²⁰ Thus, the court did not necessarily deem such an intrusion

¹⁴ *Id.* at 435.

¹⁵ *Craig v. Boren*, 429 U.S. 190, 192-193 (1976).

¹⁶ *Id.* at 200-201.

¹⁷ *Id.* at 197.

¹⁸ *Id.*

¹⁹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁰ *Id.*

completely off-limits. Instead the court attacked the importance of the state interest in relation to the significance of the government's intrusion. By using an intermediate scrutiny standard, the court utilized a balancing approach that weighed the reasonableness of the state interests against the individual right that is sought to be protected. As a result, the court established a right to sexual privacy that does not require the strict scrutiny standard of review that attaches to matters of enumerated, fundamental rights.

B. How *Lawrence* Carves Out a Right to Sexual Privacy.

Whether done purposefully or not, the court is quite vague on the extent that its opinion should extend to other issues pertaining to sexual behavior. As a result, litigators either argue for a broad or narrow interpretation of the opinion depending upon their vantage point.²¹ Under a narrow view, the argument follows that *Lawrence* addressed a limited factual scenario that involved same-sexual sexual intercourse.²² Proponents of this view contend that had *Lawrence* meant to encompass a larger right, the court would have employed a *Glucksberg* analysis.²³ The analysis used in *Glucksberg* to identify a right or liberty that falls within the protection of substantive due process requires a court to consider two factors; (1) whether the alleged right is deeply rooted in the tradition and history of the nation, and (2) a careful description of the asserted fundamental right.²⁴ In *Glucksberg*, the court narrowly defined the asserted right as one allowing an individual to assist another in committing suicide, differentiating it from what some

²¹ Laura M. Clark, Comment, *Should Texas's Former Ban on Obscene-Device Promotion Pass Constitutional Muster Under a Murky Lawrence?*, 41 ST. MARY'S L. J. 177, 183 (2009).

²² *Id.* at 179.

²³ *Id.*

²⁴ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

asserted was a "right to die."²⁵ The court noted a history of statutes banning assisted suicides and concluded that, as a result, there is not a fundamental right to assist someone who wishes to kill himself.²⁶ The *Glucksberg* court set forth a clear test for evaluating whether the issue is one regarding a fundamental right, and in the absence of such analysis, it can be argued that clearly the court is not dealing with a fundamental right. The result is that the statute needs only to be rationally related to the state interest.²⁷

Conversely, a broad interpretation of the statute proposes that the opinion has further-reaching implications. Proponents of this view contend that the court established a right to sexual privacy that largely protects an individual's actions within the confines of his bedroom.²⁸ Under this view, the interpretation of the statute is not whether two men possess a fundamental right to engage in sexual intercourse with each other but instead whether two individuals are free to behave as they please in the privacy of their bedroom. I argue that the latter interpretation is correct and that one is afforded the right to use sex toys in private.

In its rejection of the Texas statute prohibiting sodomy, the court focused specifically on the idea of liberty. The court viewed an impediment to one's right to engage in private, intimate behavior as an infringement on that individual's personal liberty.²⁹ The court concluded that Texas had not communicated a legitimate state interest that warranted limiting one's liberty in the proposed capacity.³⁰ The court noted that the state's insistence that it had an obligation to uphold a certain level of public morality failed on several levels. For one, there was a growing sentiment in the United States that citizens should be afforded a significant level of privacy

²⁵ *Id.* at 723

²⁶ *Id.* at 728.

²⁷ *Id.*

²⁸ Clark, *supra* note 21, at 199-200.

²⁹ Lawrence v. Texas, 539 U.S. 558, 578 (2003).

³⁰ *Id.*

concerning bedroom behavior.³¹ Additionally, the argument that a right to sexual privacy was created is embedded in the majority's discussion as to the behavior at stake. The court rejected the notion that the liberty at issue was simply the right for homosexuals to engage in sodomy in the privacy of their bedrooms.³² While the fact pattern concerned simply that, the contended right was something more. Justice Kennedy argued that the relevant right at issue was one's ability to engage in private sexual conduct without the government intrusion.³³ In doing so, the majority quickly dismissed any notion that there is a clear line of history and tradition that bans such conduct.

Past cases have furthered the notion that individuals have a right to be left alone within the confines of their bedrooms. In *Stanley v. Georgia*, the Court held a Georgia statute to be unconstitutional that made it illegal to possess obscene materials.³⁴ Acting on a search warrant, police arrived at a Georgia man's home and confiscated film that they deemed to be obscene.³⁵ The man was then convicted under the statute.³⁶ In its opinion, the court stated that the First and Fourteenth Amendments made it constitutionally impermissible to make illegal possession of obscene materials.³⁷ The court succinctly concluded that the Constitution protects one's right to possess information and ideas, regardless of their social worth, and that government action contrary to that ideal was an unwarranted intrusion of an individual's privacy.³⁸

A second case, while a state Supreme Court decision, reinforced the notion of privacy rights and was followed by a series of decisions in other jurisdictions in accordance with this rationale.

In *Commonwealth v. Wasson*, the Court struck down a statute that made consensual sodomy

³¹ *Id.* at 576.

³² *Id.* at 578.

³³ *Id.* at 577-78.

³⁴ *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

³⁵ *Id.* at 558.

³⁶ *Id.* at 559.

³⁷ *Id.* at 568.

³⁸ *Id.* at 565.

between homosexual partners illegal.³⁹ In an undercover operation initiated by state police, undercover agents solicited sex from men, including Jeffery Wasson.⁴⁰ Eventually, investigators were able to get Mr. Wasson to incriminate himself after he suggested engaging in certain sexual acts that violated the Kentucky sodomy statute.⁴¹ He challenged his eventual conviction on the grounds that it was unconstitutional because the law violated his privacy rights.⁴² In invalidating the statute, the Court noted that the state had a history of discouraging government intrusion in similar attacks on privacy rights.⁴³ The decision in *Lawrence*, coupled with previous federal and state court precedent makes it clear that the government has no place in our bedrooms.

C. The Right to Privacy Extends to the Use of Sex Toys.

While the court declined to consider how its decision affects future sexual conduct issues, it did carve out a right to engage in private and intimate behavior. Furthermore, the court made it clear that such a right cannot be infringed upon on the basis of public morality. An individual who uses a device for sexual stimulation in private is equally expressing the liberty the court protected in *Lawrence*. The similarities make any other conclusion irrational. Both forms of sexual behavior are performed in private. Additionally, the two examples are of acts that fall outside of the traditional view of sexual intercourse for the purpose of procreation. Moreover, neither private homosexual conduct, nor private sex toy use harms third parties. Lastly, there is no aspect of sex toy use that makes it nonconsensual. Thus, it clearly cannot be stated that private possession and use of sex toys falls outside of the scope of sexual privacy established in

³⁹ Commonwealth v. Wasson. 842 S.W.2d 487, 502 (Ky. 1992).

⁴⁰ *Id.* at 489.

⁴¹ *Id.*

⁴² *Id.* at 488.

⁴³ *Id.* at 497.

Lawrence. As a result, the primary manner to ban the use of sex toys is to block their sale.

Accordingly, the relevant discussion turns to whether anti-obscenity statutes that prohibit the sale of sex toys should be constitutionally invalidated after Lawrence.

II. Legislators Get Creative to Block the Use of Sex Toys.

In accordance with the rationale mentioned above, no state possesses legislation that bans the possession or use of sex toys in private.⁴⁴ Additionally, only three states enacted a law that limits the sale of these devices.⁴⁵ Consequently, it is clear that the discussion is squarely centers on whether a state may constitutionally create such a barrier to a sex toy.

In all three cases, the sale of sex toys is banned under state anti-obscenity statutes. Alabama⁴⁶, Mississippi⁴⁷ and Virginia⁴⁸ have all established devices used for sexual enhancement as obscene. The obvious result is that it makes the use of such devices nearly

⁴⁴ William Charles Hayes, *Rabbit Hunting in the Supreme Court: The Constitutionality of State Prohibitions of Sex Toy Sales Following Lawrence v. Texas*, 44 GA. L. REV. 245, 252 (2009).

⁴⁵ *Id.*

⁴⁶ CODE OF ALA. § 13A-12-200.2 (2010) states:

It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal.

⁴⁷ MISS. CODE ANN. § 97-29-105 (2010) states:

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

⁴⁸ VA. CODE ANN. § 18.2-374 (2010) states:

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

impossible without actually making it illegal to possess sex toys. In the context of Lawrence, the issue is whether barring the sale of sex toys infringes upon one's liberty without satisfying the requirement of meeting a legitimate state interest. Two recent cases in the United State Court of Appeals have considered the constitutionality of this legislation and have come to conflicting conclusions.

A. A Battle of Interpretation: The 5th Circuit v. The 11th Circuit.

The split between the 5th and 11th Circuit Court of Appeals marks two different interpretations of the Lawrence decision and its application to anti-obscenity statutes that block the sale of sex toys. Moreover, the split highlights the likelihood that Lawrence will be applied inconsistently because of its vague language. Since only a handful of states possess statutes relevant to this discussion, and very few courts have addressed their constitutionality, it is imperative to consider these two cases before moving forward.

In 2008, the 5th Circuit Court of Appeals considered the sale of sex toys in *Reliable Consultants, Inc v. Earle*. Addresses a Texas statute that makes it a crime to promote or sell sex toys.⁴⁹ The statute in this case banned public and commercial things, unlike the private, non-commercial aspect of Lawrence.⁵⁰ The court found that the right to engage in private intimate conduct outweighed a public morality argument.⁵¹ It should be noted that one provision of the statute made it illegal to lend a sexual device to another person.⁵² Justice Reavley found that

⁴⁹ *Reliable Consultants, Inc v. Earle*, 517 F.3d 738, 740 (5th Cir. 2008).

⁵⁰ *Id.* at 741.

⁵¹ *Id.* at 746.

⁵² *Id.* at 741.

Lawrence had indeed established that a right to sexual privacy exists.⁵³ He further found that the use of sex toys falls within the scope of a right to sexual privacy.⁵⁴ Therefore, it was his position that it is now the job of the courts to simply uphold this right.⁵⁵ The argument for upholding the ban on sex toys was a public morality argument, and Justice Reavley felt that justification was not enough to permit the government to infringe to one's right to sexual privacy.⁵⁶ Justice Reavley appears to acknowledge that the Supreme Court in *Lawrence* does not use strict scrutiny or rational basis analysis, but instead some sort of hybrid.

Conversely a case before the 11th Circuit Court of Appeals yielded a different opinion on a related matter. In *Williams v. Att'y Gen. of Ala.*, Alabama's Anti-Obscenity Enforcement Act was challenged as a violation of due process.⁵⁷ The law prohibited the sale of sex toys in the state.⁵⁸ In the case, the idea of a fundamental right to sexual privacy was explored. It also addressed *Lawrence* and the subsequent reach of privacy protections. Justice Birch upheld the ban on the sale of sex toys based on a few justifications. First, Justice Birch argued that *Lawrence* did not create a fundamental right to sexual privacy.⁵⁹ Had a fundamental right been created, Justice Birch argued that a *Glucksberg* analysis would have had to occurred (was the right deeply rooted in the nation's history and implicit in the concept of ordered liberty).⁶⁰ Birch limited the right (sale of sex toys) and clearly found it failed the *Glucksberg* test, thus a fundamental right had not been established.⁶¹ Without a fundamental right of sexual privacy,

⁵³ *Id.* at 744.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 746.

⁵⁷ *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1233 (11th Cir. 2004).

⁵⁸ *Id.*

⁵⁹ *Id.* at 1238.

⁶⁰ *Id.*

⁶¹ *Id.*

Justice Birch concluded that the rational basis test must have been used in *Lawrence*.⁶² He then stated that the facts in this case are distinguishable from *Lawrence*, thus even if public morality was removed as a justification, the *Lawrence* decision did not apply in this case because this case involved something beyond the “private, consensual and non-commercial “ conduct in *Lawrence*.⁶³ The ban here involves public and commercial things.

III. The Government Believes Banning Sex Toys is Necessary to Protect the Moral Fiber of Its People

A common justification for prohibiting the sale of sex toys is founded on the notion of public morality. Laws based on a public morality argument generally involve conduct that cuts against the values society wishes to maintain.⁶⁴ Included under the umbrella of laws of public morality are laws against polygamy, incest, public nudity, and in some states, laws against the sale of sex toys. After *Lawrence*, it is clear that public morality cannot be used as valid justification to uphold statutes that ban sexual behavior.

The attorneys representing both Alabama and Texas in the recent sex toy cases made the argument that *Lawrence* still permitted states to enact legislation for the purpose of protected public morality. In *Williams*, the Alabama Attorney General (“Alabama AG”) argued that *Lawrence* did not extend to commercial regulation of obscene products.⁶⁵ In doing so, counsel

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Christopher Wolfe, *Forum on Public Morality: Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65 (2000). In this article, the author distinguishes public morality laws from the morality implicitly associated with heinous crimes such as murder and from basic laws that protect citizens from their government such as laws against bribery and extortion.

⁶⁵ Brief for the Respondent in Opposition, 2005 WL 154044 (U.S., Jan. 20, 2005) *Williams v. Attorney General of Alabama*.

likened the ban on the sale of sex toys to a ban on prostitution.⁶⁶ The Alabama AG argued, “this court has long upheld restrictions on the commercial trafficking of obscenity notwithstanding its recognition of the right to possess obscene materials in the privacy of one’s home.”⁶⁷ This proposition of course hinges on the argument that stopping the sale of sex toys somehow is not an invasion of one’s private sexual choice. The Texas Attorney General (“Texas AG”) reiterated many of the same claims mentioned above. Like the Alabama AG, the Texas AG shaped the issue as one regarding the sale of sex.⁶⁸ The Consequently, the Texas AG also argued that allowing the sale of sex toys opens the door to invalidated similar public morals legislation like laws against prostitution.⁶⁹ The argument again denied that the statute effectively prohibited one’s ability to use sex toys referring to the fact that the statute did not contain language of the sort.⁷⁰ While public morality may be rationally related to certain public state interests, the right at stake with sex toy issues is one of a private matter. Both the Alabama AG and Texas AG mischaracterized the issue.

To understand why the sale of sex toys is protected by Lawrence, it is important to clarify the specific right that the relevant anti-obscenity statutes infringe upon. Barring the sale of sex toys produces the obvious result that individuals cannot purchase sex toys. Without the ability to purchase sex toys, that individual has been prohibited from engaging in private sexual conduct. The sale of sex toys does not result in the use of sex toys in public. The sale of sex toys is different from the sale of sex (i.e. prostitution) because sex toys involve either personal use, or

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Texas Attorney General Greg Abbott's Appellee's Brief, 2007 WL 6048303 (C.A.5, Jan. 25, 2007) RELIABLE CONSULTANTS INC., Doing Business As Dreamers and Le Rouge Boutique, Plaintiff-Appellant, v. TEXAS ATTORNEY GENERAL GREG ABBOTT

⁶⁹ *Id.*

⁷⁰ *Id.*

use with a consenting partner. Consequently, sex toys involve private, intimate sexual conduct that is protected under *Lawrence* against public morality justifications.

Whereas certain aspects of *Lawrence* appear vague, what is clear is that a government may not infringe upon one's right to private sexual conduct on public morality grounds. The court in *Lawrence* was clear when it stated:

“In his dissenting opinion in *Bowers* Justice Stevens concluded that the fact a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice, and individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of “liberty” protected by due process. That analysis should have controlled *Bowers*, and it controls here.⁷¹

Again, one's use of sex toys is private sexual conduct, and while they may be morally reprehensible to some in government, precedent is clear that government's moral values may not impede one's expression of personal liberty. The court did set forth certain instances where public morality arguments could withstand constitutional review though. The court specifically mentioned laws pertaining to minors, people who can be easily coerced, people who may not easily refuse consent, public conduct, or prostitution as potentially valid.⁷² Prohibiting the sale of sex toys does not further the deterrence of any of these concerns.⁷³ Accordingly, the 11th Circuit Court of Appeals erroneously upheld a statute based on morals legislation. Even eliminating public morality as a legitimate state interest warranting infringement on this type of liberty,

⁷¹ *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003).

⁷² *Id.* at 578.

⁷³ *Reliable Consultants, Inc v. Earle*, 517 F.3d 738, 746 (5th Cir. Tex. 2008). The 5th Circuit Court of Appeals eloquently reiterated this point arguing the following: The state here wants to use its laws to enforce a public moral code by restricting private intimate conduct,' the appeals judges wrote. 'The case is not about public sex. It is not about controlling commerce in sex. It is about controlling what people do in the privacy of their own homes because the state is morally opposed to a certain type of consensual private intimate conduct. This is an insufficient justification after *Lawrence*.

governments possess an alternative strategy that can have the comparable effect of furthering morals legislation without specifically banning certain conduct.

IV. Secondary Effects Doctrine and Sex Toys.

States have additional methods to block the sale of sex toys without specifically prohibiting their possession, sale or use. While only a few states actually have legislation to make the sale of a sexual enhancement device illegal, many have utilized a twist on the public morality argument to maintain a level of separation between the consumer of sex toys and the vendors. Known as the secondary effects doctrine, municipalities have justified crippling limitations on stores adult businesses (mostly adult entertainment) on the basis that these establishments allegedly create adverse effects that are not in the interest of the public. The most notable secondary effects are increases in crime, decreases in property values, and other consequences that adversely impact neighborhoods.⁷⁴ The secondary effects doctrine is justified based on the rationale that governments have a substantial interest in ensuring its establishments do not create negative secondary effects as a consequence of their existence.⁷⁵ A government can argue that a law is necessary to protect the public against such effects, providing it a substantial amount a power to limit the operations of certain businesses.

As a result of secondary effects legislation, the true intentions of the government are inevitably called into question. On the basis of alleged negative consequences that accompany certain establishments, a government can impose its view of morality and regulate the sale of

⁷⁴ Daniel Linz, Bryant Paul and Bradley J. Shafer, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL'Y 355, 356 (2001).

⁷⁵ *Id.*

certain items that are otherwise legal. Of course, a law cannot withstand judicial scrutiny without some basis for contending that an adult business is causing negative secondary effects.⁷⁶ Thus, studies and statistics are often presented by a government to solidify their stance.⁷⁷

City regulations that prohibit the sale of adult products can be challenged as a violation of expressive conduct under First Amendment protections. While the First Amendment creates a right to free speech, it is important to understand that speech encompasses something greater than verbal communication. A right to free speech includes a freedom of expression.⁷⁸ For the purposes of this paper, the speech I argue is suppressed through anti-obscenity statutes that bar the sale of sex toys is the freedom of sexual expression.

The Supreme Court established a test in 1968 to evaluate prohibitions on expressive conduct. In *United States v. O'Brien*, the court upheld a law prohibiting destruction of draft cards.⁷⁹ The case involved an individual who burned his draft card at a Boston courthouse.⁸⁰ The man contended that his actions were an expression of his opposition to the Vietnam War.⁸¹ He argued that by prohibiting the destruction of his draft card, the government was infringing on his First Amendment freedom of speech.⁸² Conversely, the government argued that the law was necessary to further its vital interest in creating an effective system for enlisting citizens in the armed services during a time of war.⁸³ In upholding the law, the court set forth a four-part test to evaluate whether a regulation unlawfully impedes on a First Amendment freedom. The regulation is valid if: (1) it is within the constitutional power of the government, (2) it furthers a

⁷⁶ *Id.* at 360.

⁷⁷ *Id.*

⁷⁸ Hudson, David L. Adult Entertainment and the Secondary Effects Doctrine: How a Zoning Regulation May Affect First Amendment Freedoms. *First Reports*. Vol. 2, No. 1. (May 2002).

⁷⁹ *United States v. O'Brien*. 391 U.S. 367, 386 (1968).

⁸⁰ *Id.* at 369.

⁸¹ *Id.* at 375.

⁸² *Id.*

⁸³ *Id.* at 377-78.

substantial government interest, (3) if the government interest is unrelated to the suppression of free expression, and (4) if the incidental restriction on the alleged freedoms is not greater than is essential in furtherance of that interest.⁸⁴ In resulting cases involving adult businesses, governments have successfully argued that suppressing adverse secondary effects that allegedly accompany adult businesses is a sufficient government interest to justify some level of infringement on one's freedom of expression.

The secondary effects doctrine dates back to 1976, in a case decided before the Supreme Court. *In Young v. American Mini Theatres, Inc.*, the court upheld Detroit Ordinances that placed burdensome restrictions on where adult businesses could be located within the city.⁸⁵ The case involved a theater that showed pornographic movies at two locations in Detroit.⁸⁶ In 1972, the city enacted two ordinances, one of which stated that such a theater could not be located within 500 feet of a residential area.⁸⁷ The result was that the theaters were forced to less populated and accessible areas of the city, harming the economic viability of the business. The court ultimately opined that the ordinances did not violate the First Amendment because it did not prohibit showing adult films; it simply dictated where the films could be shown.⁸⁸ The city's interest in regulating the use of property is adequate to support such restraints.⁸⁹ From a footnote from Justice Stevens in this decision, the secondary effects doctrine was born. He stated:

“The Common Council's determination was that a concentration of adult movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances

⁸⁴ *Id.* at 377.

⁸⁵ *Young v. American Mini Theatres, Inc.* 427 U.S. 50, 72-3 (1976).

⁸⁶ *Id.* at 52.

⁸⁷ *Id.*

⁸⁸ *Id.* at 63.

⁸⁹ *Id.*

attempt to avoid, not the dissemination of ‘offensive speech.’”⁹⁰

Moreover, from Justice Powell’s concurrence it can be inferred that the court believed that the ordinances fulfilled the second prong of the *O’Brien* test because their purpose was to curb any deterioration of the city’s neighborhoods.⁹¹ As a result, municipalities that truly believed that these businesses created adverse secondary effects were now armed with judicial precedent to combat the alleged issue through zoning restrictions. Not coincidentally, municipalities that were in favor of pushing certain moral values were also armed with a new tool to limit the sale of adult products like sex toys.

10 years following the decision in *Young*, a second case was before the Supreme Court dealing with the issue of zoning restrictions for adult businesses. In *Renton v. Playtime Theatres*, the court again upheld the constitutionality of zoning ordinances that negatively impacted the business of theatres playing adult movies.⁹² In this instance, the court considered the legality of a law that made it impermissible for an adult business to operate within 1,000 feet of a residential area, church, park or school.⁹³ Again, the court determined that the ordinances were not enacted to regulate the content of the movies but instead, “the secondary effects of such theaters on the surrounding community.”⁹⁴ The court further concluded that sustaining a certain quality of life was a legitimate interest to protect.⁹⁵

In 2002, the Supreme Court again considered a secondary effects case, this time relating to a statute harmful to adult bookstores. Based on a study dating back to 1977 that linked higher crime rates to areas containing adult entertainment establishments, the city of Las Angeles

⁹⁰ *Id.* at 71.

⁹¹ *Id.* at 79-80

⁹² *Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 54-55 (1986).

⁹³ *Id.* at 44.

⁹⁴ *Id.* at 52.

⁹⁵ *Id.* at 54.

enacted a statute that both prohibited adult businesses from being located within 1000 feet of each other and prohibited adult businesses from operating out of the same building.⁹⁶ As a result, two adult book stores sued the city, alleging that the new statute violated their rights under the First Amendment.⁹⁷ Both the District Court and the Court of Appeals invalidated the statute, but on different grounds.⁹⁸ Ultimately, the Court of Appeals invalidated the statute because the 1977 study did not present reliable evidence by which the government could reasonably rely on to show that the statute served the stated government interest.⁹⁹ In reversing the lower court decision, the Supreme Court determined not only that the study convincingly demonstrated a correlation between high crime rates and adult businesses but that the city could reasonably rely on the study to further its interest to curb criminal behavior.¹⁰⁰ The court reiterated its holding in *Renton* that a government may rely on evidence that it believes is reasonably relevant to demonstrating a connection between speech and an independent government interest.¹⁰¹ Obviously, such a low requirement imposes a minimal burden on the city to justify its actions. The court restated that the burden initially rests with the plaintiffs to cast doubt on the rationale of the government either by establishing that the evidence presented by the city does not further the intended government interest, or by offering evidence of its own.¹⁰² Only when the plaintiffs cast doubt on the rationale does the burden shift to defendants.¹⁰³ Here, plaintiffs did neither in the eyes of the court and the statute was upheld.

While the *Young*, *Renton* and *Alameda Books* decisions suggest that adult businesses that sell sex toys can be easily restricted by zoning laws, a few recent decisions have opened the door

⁹⁶ City of L.A. v. Alameda Books, 535 U.S. 425, 429 (U.S. 2002).

⁹⁷ *Id.* at 430.

⁹⁸ *Id.* at 429.

⁹⁹ *Id.* at 429-30.

¹⁰⁰ *Id.* at 442.

¹⁰¹ *Id.* at 438.

¹⁰² *Id.* at 438-39.

¹⁰³ *Id.*

for challenges to the secondary effects doctrine. In 2000, the Supreme Court took on another adult business case, this time concerning a law that made nude dancing illegal in a Pennsylvania city.¹⁰⁴ The law prohibited dancing completely nude and required that all individuals in public wear a minimum amount of clothing.¹⁰⁵ In *City of Erie v. Pap's A.M.*, the Court again upheld the law.¹⁰⁶ Justice O'Connor found that the ordinance only created a minor impediment to one's freedom of expression and was justified in light of the furtherance of a legitimate public interest (combating secondary effects related to these establishments).¹⁰⁷ The decision was not all bad for adult businesses though as the court stated that the business "had ample opportunity to contest the council's findings about secondary effects before the council itself, throughout the state proceedings, and before this Court."¹⁰⁸ The decision left the door open to potential challenges regarding the sufficiency of secondary effects evidence.

The 11th Circuit Court of Appeals considered a ban on the sale of alcohol at adult businesses on the basis that the combination creates harmful secondary effects. In *Flanigan's Enterprises, Inc. v. Fulton County*, the court called into question the validity of the alleged secondary effects.¹⁰⁹ Citing a police report performed in the county, the court noted that police responded to more alcohol-related incidents at establishments such as bars and restaurants as opposed to adult businesses.¹¹⁰ The court found that there was not enough evidence to support the county's secondary effects argument.¹¹¹

The significance of these two cases should not be underestimated. By requiring a showing of convincing evidence that there actually exist harmful secondary effects adult

¹⁰⁴ *City of Erie v. Pap's A.M.* 529 U.S. 277, 284 (U.S. 2000).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 301-02.

¹⁰⁷ *Id.* at 296.

¹⁰⁸ *Id.* at 298.

¹⁰⁹ *Flanigan's Enters. v. Fulton County*. 242 F.3d 976, 985 (11th Cir. Ga. 2001).

¹¹⁰ *Id.* at 986.

¹¹¹ *Id.*

businesses can challenge the secondary effects doctrine. With that said, there is no indication that there needs to be either a good deal of evidence or a limit to the type of evidence that can be proffered. Therefore, municipalities may be able to justify regulations based on relatively low levels of evidence. Moreover, the scope of secondary effects may be defined broadly to encompass things like crime, property value, and aesthetics. As such, it is likely that municipalities will be able to justify their arguments. Lastly, while requiring a showing of actual adverse secondary effects, the courts still maintain that such evidence is a sufficient government interest to justify these laws. Thus, adult businesses are wholly reliant on challenging the evidence of secondary effects in order to successfully invalidate the laws.

Recently, the secondary effects evidence that governments rely upon for their zoning laws have been called into question.¹¹² A majority of the municipalities rely on a core group of secondary effects studies that appear flawed.¹¹³ In *Alameda Books*, the court was careful to point out that calling these studies into question.¹¹⁴ A government is afforded great power to unilaterally limit businesses simply by alleging a link between the relevant business and some associated negative effect. As such, careful attention should be paid to these studies as it has been shown that their legitimacy can be questionable.

A recent law review article challenged the legitimacy of four secondary effects studies that many cities rely upon to show that adult businesses produce negative effects within the community.¹¹⁵ The studies were of St. Paul, Minnesota, Las Angeles, California, Phoenix, Arizona, and Indianapolis, Indiana respectively, as focused primarily on the methodology.¹¹⁶

¹¹² Daniel Linz, Bryant Paul and Bradley J. Shafer, *supra* note 72, at 366.

¹¹³ *Id.*

¹¹⁴ *City of L.A. v. Alameda Books*, 535 U.S. 425, 438-39 (U.S. 2002).

¹¹⁵ Daniel Linz, Bryant Paul and Bradley J. Shafer, *supra* note 72, at 366

¹¹⁶ *Id.* at 368.

After careful review, there remain serious concerns as to the weight these studies should be afforded as evidence in favor of furthering a substantial government interest.

Each analysis yielded major flaws that attack the weight of the reasonableness of government's reliance on these studies. The St. Paul study revealed that while there was a connection to neighborhood deterioration and establishments that served alcohol, there was not a connection between businesses that specialized in adult entertainment and neighborhood deterioration.¹¹⁷ The Las Angeles study was plagued with skewed evidence as the researchers either came to meekly supported conclusions or did not adhere to proper survey techniques.¹¹⁸ The Phoenix study claimed to show a connection between neighborhood deterioration and adult businesses yet its control and study areas possessed vastly different income levels.¹¹⁹ Lastly, the article noted the following limitations to the Indianapolis study: (1) The control sites were not sufficiently comparable (properly matched) with the study sites, (2) No measurements were taken prior to the establishment of an adult entertainment business to ensure that the study was not merely picking up an already established crime pattern that is independent of the adult businesses in the area, (3) There was a potential confounding effect caused by adult entertainment businesses that supplied both sexually oriented entertainment and alcoholic beverages, (4) The researchers did not adhere to minimum professional standards by failing to conduct a survey study of real estate professionals in accordance with proper survey techniques.¹²⁰

¹¹⁷ *Id.* at 376-77.

¹¹⁸ *Id.* at 377-79. The individuals who conducted the study failed to find a consistent increase in criminal behavior in areas where adult businesses are located, they did not find a trend showing a valid decrease in property value and they did not adhere to minimum professional standards of conduct when they administered public opinion polls.

¹¹⁹ *Id.* at 380. One control area yield median income levels 30% higher than its counterpart study area. Furthermore, this particular study revealed that the control areas saw more instances of violent crimes (murder, assault, robbery, rape, etc...) than its control counterpart.

¹²⁰ *Id.* at 381.

Time and place restrictions create a serious burden on businesses trying to operate on equal ground. One can easily envision how such laws can impede on the viability of a business trying to sell sex toys. Generally, businesses are treated equally as store owners are permitted to open in commercially zoned areas, regulate their own hours, and set their own prices. Time and place regulations generate barriers that can substantially limit an industry's economic viability. A rule that restricts bars from staying open past eight o'clock makes its potential for profit low. Under such regulations, bars will be discouraged from opening, effectively eliminating drinking establishments. Likewise, zoning restrictions on adult businesses have equally troublesome results. Many zoning laws pertaining to adult businesses ensure that these establishments cannot open in residential areas and areas where children are present. While these laws may have a certain level of credibility on paper, in practice, they can effectively eliminate the sale of any product a government wishes. For instance, consider a zoning law that prohibits the sale of sexual devices within 200 feet of a park. Such a regulation may seem minimally intrusive, but in actuality, it can make it nearly impossible for a business of this sort to operate. For instance, a government intent on eliminate the sale of sex toys in a town can place a swing set on every piece of open land it can find and put a sign up labeling it a park. The government can contend that it is improving the aesthetics of the city, creating a family environment, and make other seemingly worthy arguments, but in reality, it may conveniently be pushing adult businesses out of the city.

In the cases mentioned above, the targeted establishments involved either live or video performances of sexual nature and in some instances involved the sale of alcohol. Moreover, the cases above generally involved cases where individuals convene for an extended period of time. Stores that sell sex toys have arguably fewer characteristics that create

problematic secondary effects. A store that sells adult products is hardly unlike a store that sells kid's toys. There is not a sale of secondary products like alcohol that inhibits one's ability to make good decisions, potentially leading to criminal or unruly behavior. The sale of the products is no way physically harmful to a third party. The products can be concealed from people outside the store by prohibiting public display of the products and requiring that upon sale of the product, it must be placed in an opaque bag. Considering all these factors collectively, there are at the very least serious concerns as to the validity of a secondary effects argument.

V. Conclusion

Lawrence clearly articulated a right to sexual privacy. This right encompasses all sexual conduct that occurs within the privacy of one's home. While governments have attempted to prohibit the sale and distribution of sex toys, such action is impermissible. Just as prohibiting the sale of contraceptives infringes on one's right to sexual privacy, so does a ban on the sale of sex toys. Unlike a commercial sale of sex like prostitution, the sale of sex toys is meant purely for private, personal use. *Lawrence* makes it clear that upholding a level of public morals is not sufficient to infringe on bedroom behavior, thus invalidating anti-sex toy statutes. Nevertheless, governments are armed with the secondary effects doctrine that can help them effectively ban these sales. While there may be instances where this interest is legitimate to uphold zoning laws harmful to adult businesses, the credibility of secondary effects evidence should be seriously questioned as this evidence is often misleading and contestable. As more individuals begin to question the evidential grounds for this type of legislation, it has become apparent that much of the information that has formed the basis for secondary effects legislation can be challenged.

Oftentimes, whether secondary effects legislation is valid is often directly related to the actual intent of the government electing to enact such laws. Furthermore, secondary effects arguments appear to be more effective against businesses that either show pornographic material or live nudity. Stores selling sex toys simply solicit business for goods that are used in one's home. Ultimately, there should be little in terms of legal barriers that make it difficult for an individual to exercise his right to sexual privacy by purchasing a sex toy.