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TOY STORY: Being Right for the Wrong
Reasons in the Search for a “Greater
Freedom”¹—A Critical Analysis of the
Dissenting En Banc Opinions in *Reliable
Consultants, Inc. v. Earle*

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I. INTRODUCTION

As children, parents would dictate rules for the house; after all, it is their house, their rules. As time endures, a child explores greater freedom and in entering adolescence, questions that freedom. While exploring that autonomy, responsible parents begin to help their child understand this journey, and ultimately attempt to protect the child. Around the time of the “birds and bees” talk, a new rule of the house is implemented: the “open door policy”—when someone of the opposite sex is in your room, the door is kept open. As adolescents struggle to enter adulthood, these rules are bent, modified, and even broken. The bedroom becomes one of the most private places in your life, and the door is closed in order to respect that privacy.

1. The search for “greater freedom” is quoted from Justice Anthony Kennedy in his conclusions in *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003), noting the impact each generation has in determining the validity of laws.

Now, consider the same scenario, except with the government assuming this aforementioned role of the parent, and its citizenry playing the role of the child. As long as the government maintains its role as the parent in this context, it does not seem likely that the child would ever move on to have his or her own bedroom that is strictly under his or her own rules. Under this presumption, what rules would be acceptable then? Would it be appropriate for parents to censor certain things the child buys? Would it be suitable for parents to choose who the child is allowed to bring into the bedroom? The latter question seems to be the more personal one, and thus, the one open to less regulation. In the event that what is purchased, however, directly correlates with what activities take place in the bedroom, the rules controlling those actions become less clear as to which conduct the law is truly regulating—commercial or sexual. Thus, this Note focuses on how sex toys provide an excellent foundation to explore this debate.

This Note begins with a historical overview of United States Supreme Court cases that have prompted the evolution of sexual privacy interests.² It then focuses on the anti-vibrator statute³ that has been struck down in the Fifth Circuit through *Reliable Consultants v. Earle, Inc.*⁴ An analysis of the *Reliable* court's implementation of *Lawrence v. Texas*⁵ follows,⁶ looking specifically at whether or not the Supreme Court acknowledged sexual privacy as a fundamental right, and as a result, whether or not the *Reliable* majority invoked the scope of the *Lawrence* holding properly.⁷ It then critically evaluates the strengths and weaknesses of the three main arguments made in the dissenting opinions to the recent denial for a rehearing en banc, which were published six months subsequent to the original holding of *Reliable*.⁸ Through this examination, the Note specifically addresses the circuit split between the Fifth Circuit's⁹ interpretation of *Lawrence* as an extension of sexual liberty into the commercial realm and the Eleventh Circuit's¹⁰ narrow application of the liberty interest announced in *Lawrence*.¹¹ Although this Note disagrees with the *Reliable* majority's holding,¹² this Note is also in disagreement with the arguments made by the *Reliable* dis-

2. See discussion *infra* Part II.

3. TEX. PENAL CODE ANN. § 43.21 (Vernon 2003).

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

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

6. See discussion *infra* Part IV.

7. See discussion *infra* Parts IV-V.A.

8. See discussion *infra* Part V.

9. *Reliable*, 517 F.3d 738.

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

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

12. See discussion *infra* Part VI.

senting opinions for a rehearing en banc.¹³ Ultimately, this article concludes that the *Reliable* majority misapplied the *Lawrence* holding, and as a result, improperly extended *Lawrence*'s sexual liberty interest into the commercial realm.¹⁴

II. THE BEGINNING OF "PRIVACY" RIGHTS

The purpose of this Part is to briefly introduce a few, not all, United States Supreme Court cases that can be traced to the evolution of sexual privacy or sexual liberty rights in constitutional jurisprudence.¹⁵ As a starting point that deals with purchases made specifically for sexual conduct, the case of *Griswold v. Connecticut* dealt with a Connecticut statute¹⁶ that prohibited the use of contraceptives.¹⁷ In order to test the constitutionality of the contraceptives law, Estelle Griswold and Dr. C. Lee Buxton opened a birth control clinic in New Haven, Connecticut.¹⁸ Soon after the clinic was opened, Griswold and Dr. Buxton were charged, tried, found guilty, and fined for giving "information, instruction, and medical advice to *married persons* as to the means of preventing conception."¹⁹ In 1965, the United States Supreme Court, in a 7-2 decision, held that this statute was unconstitutional on the grounds that it violated the right to marital privacy.²⁰ Justice William O. Douglas, in the majority opinion, reasoned that although the Constitution does not explicitly enumerate a general protected right to pri-

13. See discussion *infra* Parts V-VI.

14. See discussion *infra* Part VI.

15. Purposely, the author reserves the following cases to statutes involving contraceptives. Although it is clearly evident that *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Roe v. Wade*, 410 U.S. 113 (1973), are any constitutional scholar's staple precedents when engaging in debate about sexual privacy rights, in an attempt to keep the "commercial" concentration of this Note's argument intact, the focus will not extend to the fundamental right to abortion—as the right to contraceptives is already considered a fundamental right. Additionally, the sexual rights of homosexuals may arguably be implicated by the issues at stake in the case at hand; however, because the Note's argument focuses on substantive due process, the author will be evading any equal protection argument and, consequently, avoiding *Romer v. Evans*, 517 U.S. 620 (1996).

16. CONN. GEN. STAT. §§ 53-32, 54-196 (repealed 1971). Section 53-32 provides, "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.* § 53-32. Section 54-196 provides, "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id.* § 54-196.

17. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

18. *Id.*

19. *Id.*

20. *Id.* at 485-86.

vacy,²¹ the various guarantees found within different amendments in the Bill of Rights created penumbras²² that established a right of privacy.²³ Justice Douglas found these penumbras in the First,²⁴ Third,²⁵ Fourth,²⁶ and Ninth²⁷ Amendments to create a new constitutional right—the “right of marital privacy.”²⁸ The Court found that the Connecticut statute conflicted with the exercise of this right of privacy and held the statute to be unconstitutional.²⁹

21. *Id.* at 482. Justice Douglas explains how the Court’s purpose is not to evaluate the legislature’s choice of policing economic affairs, but because the statute involves privacy issues, it is within the Court’s review: “We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, *operates directly on an intimate relation* of husband and wife and their physician’s role in one aspect of that relation.” *Id.* (emphasis added).

22. BLACK’S LAW DICTIONARY 1170-71 (8th ed. 2004) (“In constitutional law, the Supreme Court has ruled that the specific guarantees in the Bill of Rights have penumbras containing implied rights, esp. the right of privacy.”); *see also* MARK V. TUSHNET, WARREN COURT: IN HISTORICAL AND POLITICAL PERSPECTIVE 180 n.61 (Mark Tushnet, ed., 1993) (“One might note here that Douglas did not invent the idea of a penumbra doctrine. *Black’s Law Dictionary* traces it to an early federal eminent domain decision, *Kohl v. United States*, 91 U.S. 367 (1875). Holmes used the notion in the wiretap case, *Olmstead v. United States*, 277 U.S. 438, 469 (1928).”).

23. *Griswold*, 381 U.S. at 483-86.

24. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

25. U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

26. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

27. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

28. *Griswold*, 381 U.S. at 486-99 (Goldberg, J., concurring). Although Justice Douglas does not use the exact words, “the right of marital privacy,” he refers to the majority opinion, in his concurring opinion, with this phrase. *Id.* Justice Goldberg contends that the language and history of the Ninth Amendment reveals that the Framers of the Constitution left the door open for additional fundamental rights beyond those specifically enumerated in the first eight amendments. *Id.* at 488-93. Justice Goldberg stated, “The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.” *Id.* at 495. In applying this logic, he went on to state that “[b]y ignoring marital privacy rights, you ignore the 9th Amendment and give it no effect.” *Id.*

29. *Griswold*, 381 U.S. at 485-86.

As time went on, the application of this privacy right expanded beyond strictly the sanctity of marriage.³⁰ In *Eisenstadt v. Baird*, the United States Supreme Court extended the “right of privacy” found in *Griswold* to unmarried couples.³¹ William Baird was convicted under an anti-contraceptive statute³² for two reasons: “[F]irst, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address.”³³ In the majority opinion, Justice William J. Brennan reasoned that under the Equal Protection Clause of the Fourteenth Amendment,³⁴ to deny unmarried couples the right to use contraception when married couples did have that right would indeed violate the Equal Protection Clause.³⁵ Thus, the “right of marital privacy” reached beyond the sanctity of marriage and into the realm of the sexual liberty of the intimate human relationship itself.

In *Carey v. Population Services International*, a New York statute³⁶ prohibited the advertisement or display of contraceptives, distribution of contraceptives by anyone other than a licensed pharmacist, and distribution of contraceptives to anyone under sixteen.³⁷ Population Services International, a nonprofit corporation disseminating birth control information and services, along with other plaintiffs,³⁸ challenged the statute on the grounds that it unconstitutionally burdened the fundamental decision of “whether or not to beget or bear a child.”³⁹ Justice Brennan, in his majority opinion, rejected the state’s arguments that limiting access to contraceptives substan-

30. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *see also Griswold*, 381 U.S. at 481 (making this distinction by stating that the issue in *Griswold* revolved around “an intimate relation of husband and wife”).

31. *Eisenstadt*, 405 U.S. at 453.

32. MASS. GEN. LAWS ch. 272 § 21 (2000).

33. *Eisenstadt*, 405 U.S. at 440.

34. U.S. CONST. amend. XIV. The Equal Protection Clause is found in the language of the Fourteenth Amendment, which provides, “[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

35. *Eisenstadt*, 405 U.S. at 454-55.

36. N.Y. EDUC. LAW § 6811(8) (McKinney 1972). Under this statute, it is a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives. *Id.*

37. *Carey v. Population Servs., Int’l*, 431 U.S. 678, 681 (1977).

38. *Id.* at 682. Other plaintiffs included the following: “Rev. James B. Hagen, a minister and director of a venereal disease prevention program that distributes contraceptive devices; three physicians specializing in family planning, pediatrics, and obstetrics-gynecology; and an adult New York resident who alleges that the statute inhibits his access to contraceptive devices and information, and his freedom to distribute the same to his minor children.” *Id.*

39. *Id.* at 685.

tially discourages early sexual behavior and implicates the state's interest in protecting minors.⁴⁰ Considering that the "scope of permissible state regulation is broader as to minors than as to adults," the Court still found that "for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive,"⁴¹ and accordingly, struck down the regulation in absence of "compelling state interests . . . narrowly drawn to express only those interests."⁴²

The outcome of a right not enumerated in the Constitution of the United States greatly depends on how the specific right or interest asserted is framed.⁴³ The United States Supreme Court possesses rather broad power in determining how to frame the interest asserted in terms of the scope of the statute in question, and thus, the subsequent outcome of the matter.⁴⁴ In the case of *Washington v. Glucksberg*, the respondents, Harold Glucksberg and physicians who practice in Washington, argued that the statute⁴⁵ banning assisted suicide violated their "right to die."⁴⁶ Instead, the Court framed the right asserted more narrowly as the right to assisted suicide, not the right to die.⁴⁷ The Court stated that assisted suicide has always been offensive to our national traditions and practices, and thus, there is great deference to laws that have consistently rejected assisted suicide.⁴⁸ Subsequently, the Court "concluded that the asserted 'right' to assistance in committing suicide is not a *fundamental*⁴⁹ liberty interest protected by the Due Process Clause."⁵⁰

40. *Id.* at 694-96.

41. *Id.* at 685. Additionally, the Court cited *Eisenstadt* in order to further support the importance of this right: "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 678 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

42. *Carey*, 431 U.S. at 686.

43. See discussion *infra* Part V.C.

44. See discussion *infra* Part V.C.

45. WASH. REV. CODE § 9A.36.060(1) (1994).

46. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).

47. *Id.* at 722. The Ninth Circuit stated that the issue was, "Is there a right to die?" *Compassion in Dying v. State*, 79 F.3d 790, 799 (9th Cir. 1996), *rev'd*, *Washington v. Glucksberg*, 521 U.S. 702 (1997). Justice Rehnquist, instead, stated that "the question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." *Glucksberg*, 521 U.S. at 723.

48. *Glucksberg*, 521 U.S. at 728.

49. See discussion *infra* Part V.C.

50. *Glucksberg*, 521 U.S. at 728 (emphasis added).

Thus, when the *Glucksberg* Court found that no fundamental liberty interest existed, they employed mere rationality as its standard of review.⁵¹ On the other hand, if the Court in *Glucksberg* were to have found that a fundamental right indeed existed, the Court would have employed a standard of review known as strict scrutiny.⁵² There is a great deal of criticism concerning the rigid two-tier approach and the predictable outcome that will result⁵³—if the Court invokes a mere rationality standard, the government will almost always win; if strict scrutiny, the petitioner will normally emerge victorious.⁵⁴ Thus, when analyzing the substantive due process constitutionality of a statute, it can be argued that the most important step in analyzing a case involving a statute that restricts the sale, advertising, giving, or lending of any device designed or marketed for sexual stimulation, is to first identify what the government is regulating: a liberty interest or a fundamental right.

III. ANTI-VIBRATOR LAWS—COMMERCIAL REGULATION OR PRIVACY INVASION? ENTER: *RELIABLE CONSULTANTS V. EARLE*

The case of *Reliable Consultants, Inc. v. Earle*⁵⁵ originated in the United States District Court for the Western District of Texas in 2004, when businesses that sold sexual devices challenged a Texas statute⁵⁶ that criminalized the selling, advertising, giving, or lending of any device designed or marketed for sexual stimulation.⁵⁷ *Reliable Consultants, Inc.* operated four retail stores in Texas that sold sexual devices.⁵⁸ Additionally,

51. *Id.* at 728. The Court applied a rationality test when they found no fundamental liberty: “[O]ur decisions lead us to conclude that the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington’s assisted-suicide ban be rationally related to legitimate government interests.” *Id.*

52. *E.g.*, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (“[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.” (footnotes omitted) (citing *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973))).

53. *Id.* at 319 (Marshall, J., dissenting). Justice Marshall explains how there should be a middle ground between mere rationality and strict scrutiny because when “a statute is subject to strict scrutiny, the statute always, or nearly always . . . is struck down.” *Id.* But, when strict scrutiny is not used, all remaining legislature falls into the bottom tier of mere rationality and the “challenged legislature is always upheld.” *Id.*

54. *Id.*

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

56. TEX. PENAL CODE ANN. § 43.21 (Vernon 2003 & Supp. 2007).

57. *Reliable*, 517 F.3d at 741.

58. *Id.* at 741.

Adam & Eve, Inc., a business that did not have public facilities in Texas, but sold sexual devices via the internet and mail, joined the suit in the Austin federal court.⁵⁹ The District Court for the Western District of Texas upheld the law as constitutional and entered an order to dismiss for failure to state a claim.⁶⁰ The plaintiffs appealed to the Fifth Circuit Court of Appeals to assess “the constitutionality of a Texas statute making it a crime to promote or sell sexual devices.”⁶¹ The Fifth Circuit first addressed the issue of standing, as most courts do when a vendor is asserting the rights of its customers, and found that the United States Supreme Court has consistently upheld the standing of vendors to challenge the constitutionality of statutes on their customers' behalf, where those statutes are directed at the activity of the vendors.⁶² The Fifth Circuit weighed the constitutionality of the Texas statute and, in a 2-1 decision, rejected the State's argument that the statute served the interest in protecting “minors and unwilling adults from exposure to sexual devices and their advertisement,”⁶³ and held that the statute “impermissibly burden[ed an individual's] substantive due process right[] to engage in private intimate conduct of their choosing.”⁶⁴ As a result, the statute was unconstitutional.⁶⁵

The majority opinion⁶⁶ in *Reliable* used the Court's reasoning in *Lawrence v. Texas*⁶⁷ to recognize sexual privacy as a constitutional right:

59. *Id.* at 741-42.

60. *Id.* at 740.

61. *Id.*

62. *Reliable*, 517 F.3d at 743; *see, e.g.*, *Carey v. Population Servs., Int'l*, 431 U.S. 678, 682-84 (1977) (holding that a mail-order seller of non-medical contraceptives had standing to argue that a state statute prohibiting the distribution of non-medical contraceptives violated its customers' substantive due process rights to use such contraceptives); *Craig v. Boren*, 429 U.S. 190, 195 (1976) (holding that a beer seller had standing to challenge a state statute on behalf of certain underage customers); *see also United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 155 (3d Cir. 2005) (holding that vendor of obscene materials had standing to challenge federal obscenity statute on behalf of customers).

63. *Reliable*, 517 F.3d at 746. The court stated, “It is undeniable that the government has a compelling interest in protecting children from improper sexual expression. However, the State's generalized concern for children does not justify such a heavy-handed restriction on the exercise of a constitutionally protected individual right.” *Id.* The court subsequently used this line of reasoning to determine that “[u]ltimately, because we can divine no rational connection between the statute and the protection of children, and because the State offers none, we cannot sustain the law under this justification.” *Id.*

64. *Id.* at 744. The Fifth Circuit held, 2-1, that the “morality-based” justification for the statute could not be justified when such appreciable privacy rights were at stake. *Id.*

65. *Id.*

66. As a result of this Note focusing on the arguments presented in the dissenting opinions to *Reliable*, such discussion of the dissenting opinions is reserved for Parts IV and V. *See* discussion *infra* Parts IV-V.

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

The right the Court recognized was not simply a right to engage in the sexual act itself, but instead a right to be free from governmental intrusion regarding “the most private human contact, sexual behavior.” That *Lawrence* recognized this as a constitutional right is the only way to make sense of the fact that the Court explicitly chose to answer the following question in the affirmative: “We 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.”⁶⁸

The *Reliable* court framed the issue as recognizing a sexual privacy right rather than a commercial right.⁶⁹ Additionally, the court treated this sexual privacy right as if it were a fundamental right, although the court did not explicitly state that in the majority opinion.⁷⁰

The court in *Reliable* used the Supreme Court’s holding in *Carey*⁷¹ to conclude that when “[a]n individual who wants to legally use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device in Texas,” such legislation is unconstitutional because it too heavily burdens an individual from exercising this right.⁷² Additionally, because the Texas statute in *Reliable* made it illegal to “lend”⁷³ or “give”⁷⁴ a sexual device to another person, the *Reliable* court arrived at the conclusion that since the Supreme Court in *Carey* and *Griswold* held that “restricting commercial transactions unconstitutionally burdened the exercise of individual rights,”⁷⁵ it was appropriate for them to

68. *Reliable*, 517 F.3d at 744 (quoting *Lawrence*, 539 U.S. at 564).

69. *Id.* (“Because of *Lawrence*, the issue before us is whether the Texas statute impermissibly burdens the individual’s substantive due process right to engage in private intimate conduct of his or her choosing.”).

70. *Id.* at 749 (Barsdale, J., dissenting) (“[T]he level of scrutiny to be employed is of critical importance to our review.” *Id.* He goes on to conclude that “*Lawrence* declined to employ a fundamental-rights analysis, choosing instead to apply rational basis.”)

71. See *supra* text accompanying notes 37-42.

72. *Reliable*, 517 F.3d at 744 (“This conclusion is consistent with the decisions in *Carey* and *Griswold*, where the Court held that restricting commercial transactions unconstitutionally burdened the exercise of individual rights.” (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965))).

73. TEX. PENAL CODE ANN. § 43.21(a)(5) (Vernon 2003 & Supp. 2007) (defining the crime to “promote” to include to “give” or “lend”).

74. *Id.*

75. *Reliable*, 517 F.3d at 744 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Carey v. Population Servs., Int’l*, 431 U.S. 678, 681 (1977)). Although the author of this Note does not agree that this was ultimately what the Court in both cases did, the author believes that reading each case’s holding so broadly—to say that the state may never regu-

find that the statute went beyond just regulating a commercial activity and “undercut[] any argument that the statute only affects public conduct.”⁷⁶

Although the *Reliable* court signaled its use of other United States Supreme Court precedents to support its contention in finding sexual privacy rights, it is clear that the *Reliable* majority’s main contention rested upon the precedent of *Lawrence* when invalidating the Texas statute.⁷⁷ Thus, it is imperative to examine *Lawrence* and the criticisms of its holding when pertaining to the scope of its application and standard of review.⁷⁸

IV. WHERE THE *RELIABLE* MAJORITY’S ARGUMENT BEGAN: *LAWRENCE V. TEXAS*

Martin Luther King Jr. once said, “An individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law.”⁷⁹ In a way, the petitioners in *Lawrence v. Texas* did just that—challenged a statute they were guilty of violating, and by doing so, opened up a constitutional debate of sexual privacy rights.⁸⁰ Thus, before the validity of the *Reliable* holding can properly be examined, it is necessary to first analyze dissenting Judge Garza’s main contention—the *Reliable* court improperly extended the holding of *Lawrence*.⁸¹

Lawrence involved a statute⁸² that made it a crime for homosexuals to engage in certain sexual conduct that remained legal for heterosexuals—sodomy. Officers of the Harris County Police Department in Houston, Texas, entered the apartment of John Geddes Lawrence in response to a reported weapons disturbance.⁸³ When the officers entered the apartment, they observed Lawrence and Tyron Garner engaging in homosexual sodomy.⁸⁴ Lawrence and Garner challenged the statute as a violation of the

late commercial activity that burdens a right—is dangerous. As the *Reliable* court does not advance any standard by which it comes to its conclusion, this language could potentially to invoke an unintended precedent in the Fifth Circuit. *See id.*

76. *Reliable*, 517 F.3d at 744.

77. *Id.* at 746.

78. *See* discussion *infra* Part IV.

79. Martin Luther King Jr., Letter from a Birmingham Jail, in *AFRICAN INTELLECTUAL HERITAGE* 740, 744 (Molefi Kete Asante & Abu S. Abarry eds., 1996).

80. *See* Michael J. Hooi, *Substantive Due Process: Sex Toys After Lawrence*, 60 *FLA. L. REV.* 507, 511 (2008); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 *HARV. L. REV.* 1893, 1944 (2004);

81. *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 365 (5th Cir. 2008).

82. *TEX. PENAL CODE ANN.* § 21.06(a) (Vernon 2003 & Supp. 2007).

83. *Lawrence v. Texas*, 539 U.S. 558, 562-63 (2003).

84. *Id.* at 563.

Equal Protection Clause of the Fourteenth Amendment⁸⁵ and also challenged a similar provision of the Texas Constitution;⁸⁶ however, their contentions were rejected, and subsequently, they pleaded nolo contendere—resulting in each being fined \$200 plus court costs.⁸⁷ The Court of Appeals for the Fourteenth District of Texas also rejected the constitutional arguments⁸⁸ and affirmed the convictions.⁸⁹ In 2003, the United States Supreme Court granted certiorari and, in a 6-3 decision, struck down the Texas anti-sodomy law, because the statute unconstitutionally interfered with the liberty of intimate consensual sexual conduct that was protected by the Fourteenth Amendment.⁹⁰

Following the decision in *Lawrence*, a wave of litigation demanding that the sexual privacy “rights” enumerated in *Lawrence* be recognized.⁹¹ In the majority opinion for *Lawrence*, Justice Anthony Kennedy stated,

To say that the issue . . . was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, *touching upon the most private human conduct, sexual behavior, and in the most private of places, the home*. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.⁹²

The court in *Reliable* used the above excerpt from *Lawrence* to decide what right was at stake: “[T]he right the Court recognized was not simply a right to engage in the sexual act itself, but instead a right to be free from governmental intrusion regarding ‘the most private human contact [sic], sexual

85. *Id.*

86. TEX. CONST. art. I, § 3a.

87. *Lawrence*, 539 U.S. at 563.

88. The constitutional arguments came under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.*

89. *Id.*

90. *Id.* at 585.

91. Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 250-70 (2005).

92. *Lawrence*, 539 U.S. at 567 (emphasis added).

behavior.”⁹³ The *Reliable* court further reasoned that because the Supreme Court in *Lawrence* answered the following issue in the affirmative, the issue before the court was one of sexual privacy, not commercial regulation: “We 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.”⁹⁴ Subsequently, the court in *Reliable* framed the issue as follows: “[W]hether the Texas statute impermissibly burdens the individual’s substantive due process right to engage in private intimate conduct of his or her choosing.”⁹⁵

In the *Reliable* majority’s analysis, the court found that because the statute makes it illegal to even lend or give a sexual device to another person, the statute regulates much more than just commercial activity.⁹⁶ The court further stated that while being compelled to apply *Lawrence*, the justifications for the statute were “morality based,”⁹⁷ and thus, a statute based on solely moral justifications cannot be constitutionally valid after *Lawrence*, because the government may not “burden consensual private intimate conduct simply by deeming it morally offensive.”⁹⁸ Furthermore, the *Reliable* majority found that “the Texas statute cannot define sexual devices themselves as obscene and prohibit their sale.”⁹⁹ There is debate, however, about reading *Lawrence*, or more notably Justice Stevens’s dissent in *Bowers*,¹⁰⁰ too broadly so that the resulting precedent creates a chilling effect on appropriate legislation reflecting morals.¹⁰¹

93. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008) (quoting *Lawrence*, 539 U.S. at 567), *reh’g denied*, 538 F.3d 355 (5th Cir. 2008).

94. *Id.* at 744 (citing *Lawrence*, 539 U.S. at 564).

95. *Reliable*, 517 F.3d at 744.

96. *Id.* (identifying title 9, section 43.21(a)(5) of the Texas Penal Code as defining “promote” to include to “give” or “lend” (citing TEX. CODE ANN. tit. 9, §43.21(a)(5) (2009)).

97. *Reliable*, 517 F.3d at 745.

98. *Id.* at 745. Justice Kennedy, in his majority opinion in *Lawrence*, found that Justice Stevens’s previous dissenting opinion in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), should have been controlling there and subsequently should be controlling in *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003). The Supreme Court in *Bowers* previously upheld the validity of an anti-sodomy statute by finding the moral justifications of anti-sodomy and anti-homosexual legislation to be a proper government interest. *Bowers*, 478 U.S. at 196. In his dissent, Justice Stevens stated that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” *Id.* at 216 (Stevens, J., dissenting).

99. *Reliable*, 517 F.3d at 747. Additionally, the court stated that “[w]hatever one might think or believe about the use of these devices, government interference with the personal and private use violates the Constitution.” *Id.*

100. *See Bowers*, 478 U.S. at 216.

101. *See Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (concluding that the liberty rationale for invalidating bans on same-sex sodomy statutes that the

The majority in *Reliable* reasoned that although *Lawrence* narrowed its applicable scope to not include the “commercial sale of sex,”¹⁰² that exclusion was intended to only indicate that *Lawrence*’s precedent would specifically not compel a court to strike down a law criminalizing prostitution¹⁰³ and not exempt the constitutionality of laws prohibiting the sale of devices used for the “pursuit of sexual gratification unrelated to procreation.”¹⁰⁴ Thus, the holding in *Lawrence* is not inapplicable to a statute prohibiting the sale and distribution of sexual devices, because the simple sale of sexual devices does not unequivocally fall into the realm of the “sale of sex.”¹⁰⁵

In his dissenting opinion in *Reliable*, Circuit Judge Rhesa Hawkins Barksdale directly opposed the majority’s analysis of the Fourteenth Amendment substantive due process claim.¹⁰⁶ Judge Barksdale brought attention to the majority’s critical error in failing to determine what level of scrutiny should apply to this substantive due process claim.¹⁰⁷ He believed that the majority completely avoided the standard of review issue by misinterpreting *Lawrence*, and quoted the majority as stating,

The Supreme Court did not address the classification [of the level of scrutiny], nor do we need to do so, because the [*Lawrence*] Court expressly held that “individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due

majority argues as constitutionally impermissible will render invalid other moral legislation including bans on consensual incestuous relationships); *see also* Tribe, *supra* note 80, at 1944.

102. *Reliable*, 517 F.3d at 746.

103. *See, e.g.*, *United States v. Thompson*, 458 F. Supp. 2d 730, 732 (N.D. Ind. 2006) (“*Lawrence* held only that a state cannot enact laws that criminalize homosexual sodomy; it did not address the constitutionality of prostitution statutes. . . . [I]t would be an untenable stretch to find that *Lawrence* necessarily renders (or even implies) laws prohibiting prostitution . . . unconstitutional.”).

104. *Reliable*, 517 F.3d at 746.

105. *Id.* The *Reliable* court noted that the Court in *Lawrence* stated, “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or *prostitution*.” *Id.* (quoting *Lawrence*, 539 U.S. at 578) (emphasis added). Thus, the Court attempted to provide guideposts to the applicability of *Lawrence*. Here, the most significant debate is whether or not the commercial sale or distribution of devices intended for sexual stimulation falls within this category of “commercial sale of sex,” which the Court in *Lawrence* forewarned as being inapplicable. *See Lawrence*, 539 U.S. at 578.

106. *Reliable*, 517 F.3d at 749 (Barksdale, J., concurring in part and dissenting in part).

107. *Id.*

Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”¹⁰⁸

As Judge Barksdale found there was no fundamental right at issue, he urged that because “*Lawrence* declined to employ a fundamental-rights analysis, choosing instead to apply rational-basis review,”¹⁰⁹ the statute in the case at hand should be upheld pursuant to the rational-basis standard of review.¹¹⁰ He specifically cited *Williams v. Attorney General of Alabama*¹¹¹—an Eleventh Circuit case that upheld a materially identical statute¹¹²—and language from the *Lawrence* opinion itself.¹¹³ Additionally, Judge Barksdale agreed with the Eleventh Circuit in *Williams* that the limitation of morality as a legitimate government interest is only focused on “laws that target conduct that is *both private and non-commercial*.”¹¹⁴ A more comprehensive discussion regarding the standard of review follows in Part V.A, and the circuit split with *Williams* will be addressed in Part V.C.

In summary, the majority in *Reliable* found that the statute was not about public sex or controlling commerce, but instead was simply geared towards the State “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”¹¹⁵—thus, being compelled by *Lawrence*, the statute was unconstitutional.¹¹⁶ The dissenting opinion, however, found that the majority erred in ignoring the importance of articulating the standard of review to be applied, as well as erroneously extending the liberty interests announced in *Lawrence* to strike down a constitutional statute that targets public and commercial conduct—both of which may be properly regulated by the State as a legitimate government interest concerning morality.¹¹⁷

108. *Id.* at 749 (first alteration in original) (quoting *Reliable*, 517 F.3d at 744 (majority opinion)).

109. *Id.*

110. *Id.*

111. *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1236 (11th Cir. 2004); see discussion *infra* Part V.C.

112. *Reliable*, 517 F.3d at 749.

113. *Id.* (“The Texas statute furthers no *legitimate state interest* which can justify its intrusion into the personal and private life of the individual.” (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003))).

114. *Reliable*, 517 F.3d at 749 (quoting *Williams v. Morgan*, 478 F.3d 1316, 1322 (11th Cir. 2007)).

115. *Id.* at 746.

116. *Id.*

117. *Reliable*, 517 F.3d at 748-50.

V. UN-RELIABLE: DISSENTING OPINIONS TO THE DENIAL OF REHEARING EN BANC OF *RELIABLE*

After the *Reliable* case was originally decided by the Fifth Circuit, the State of Texas petitioned for a rehearing en banc.¹¹⁸ The majority of judges denied the petition for rehearing en banc without comment;¹¹⁹ however, the dissenting judges published their opinion opposing the denial for rehearing, which provides the foundation for this Note.¹²⁰ Judge Emilio Garza contended that *Reliable* “extends *Lawrence v. Texas* without warrant; conflicts with the decisions of other circuits; . . . and [conflicts with other state] Supreme Court precedent upholding similar sexual device legislation.”¹²¹ The dissent goes on to say that the *Reliable* majority “exploited the [*Lawrence*] decision’s broad and vague statements about liberty while ignoring the Court’s self-imposed limits on its applications.”¹²² The following sections assess these arguments and contend that the dissent’s reasoning behind each argument was unsound, although the ultimate legal conclusion that the dissent advocated for was correct.

A. LEGISLATING FROM THE BENCH: AN IMPROPER EXTENSION OF *LAWRENCE*

Judge Barksdale, in his dissenting opinion in the original *Reliable Consultants, Inc. v. Earle* case, focused on the majority’s critical mistake: treating the sexual liberty interest enumerated in *Lawrence* as a fundamental right.¹²³ Thus, the majority erroneously subjected the Texas statute to the most tenacious standard of review—strict scrutiny.¹²⁴ Accordingly, Circuit Judge Emilio M. Garza, in his dissenting opinion to the denial of rehearing en banc, focused his main contention of dissent on the premise that the *Reliable* majority made two critical errors when analyzing *Lawrence*: “[T]hey misunderstood the right announced in *Lawrence*, and they extended that right far beyond its limits.”¹²⁵

118. *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355 (5th Cir. 2008). A rehearing en banc is a subsequent hearing of a case or an appeal with all judges present and participating to consider an alleged error or omission in the court’s judgment or opinion. BLACK’S LAW DICTIONARY 606, 1399 (9th ed. 2009).

119. *See Reliable*, 538 F.3d at 355-56.

120. *Id.*

121. *Id.* (citation omitted).

122. *Id.* at 356 (alteration in original).

123. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 749 (5th Cir. 2008), *reh’g denied*, 538 F.3d 355 (5th Cir. 2008).

124. *Id.*

125. *Reliable*, 538 F.3d at 358 (Garza, J., dissenting).

The standard of review applied to a substantive due process claim is essential to the life or death of the constitutional validity of the statute being challenged.¹²⁶ A paramount criticism to the majority opinion in *Lawrence* is the ambiguity in addressing what standard of review the Court employed.¹²⁷ The fact that *Lawrence* specifically held that the statute furthered “no legitimate state interest” when striking it down suggested that the Court was applying a rational-basis standard of review.¹²⁸ Traditionally, a statute under the review of a rational-basis standard would be given profound deference and would nearly always withstand a constitutional challenge.¹²⁹ Justice Scalia vehemently argued in his dissenting opinion in *Lawrence v. Texas* that the test employed by the majority is one of rational basis, and as a result, the Texas statute should be upheld.¹³⁰ Similar to the qualms Justice Scalia had with the rational-basis test employed and the seemingly uncorrelated outcome, Judge Garza, in his dissenting opinion to the denial of a rehearing for *Reliable*, similarly reasoned that even though “the *Reliable* ma-

126. Justice Marshall, in his dissenting opinion to *Mass. Bd. of Ret. v. Murgia*, stated, “If a statute is subject to strict scrutiny, the statute always, or nearly always is struck down For that test [the mere rationality/rational-basis test], too, when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld.” *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 319 (Marshall, J., dissenting) (citation omitted) (alteration in original).

127. See *Lawrence v. Texas*, 539 U.S. 558, 592-94 (2003) (Scalia, J., dissenting). Justice Scalia argued that “[n]ot once does it [the majority decision] describe homosexual sodomy as a ‘fundamental right’ or a ‘fundamental liberty interest,’ nor does it subject the Texas statute to strict scrutiny.” *Id.* at 594 (alteration in original). He feared that the majority opinion, in failing to enumerate what standard of review the Court was employing, would cause confusion when determining what the proper level of review should be when handling a case involving a similar interest since the statute should clearly—and as the majority fails to rebut—be scrutinized under a rational-basis test. See *id.* at 599.

128. Tribe, *supra* note 80, at 1917 n.83. Tribe stated that [t]he strictness of the scrutiny employed in *Roe* was explicit. See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (invoking the need for a “compelling state interest” and for narrow tailoring—the twin signifiers of strict scrutiny—in order for the Texas abortion statute to survive constitutional challenge (citations omitted) (internal quotation marks omitted)). To be sure, the *Lawrence* Court did use language suggestive of rational basis review as well when it proclaimed that the law before it “further[s] no legitimate state interest,” 123 S. Ct. at 2484, the phrase cited by Justice Scalia as proof that the Court was applying rational basis review, see *id.* at 2495 (Scalia, J., dissenting), albeit of an “unheard-of form,” see *id.* at 2488. Far from implying that any “legitimate state interest” would have sufficed, however, the Court’s reference was to a “legitimate state interest which can justify its intrusion into the personal and private life of the individual,” *Lawrence*, 123 S. Ct. at 2484 (emphasis added)—an intrusion the Court had already concluded was of great significance.

Id.

129. See *id.*

130. See *id.*

majority seemed to acknowledge that *Lawrence* did not recognize a fundamental right, they failed to acknowledge that *Lawrence* recognized only a narrow liberty interest worthy of rational basis review,” and therefore “recast the right announced in *Lawrence* as something outside of substantive due process jurisprudence entirely.”¹³¹

Was the majority in *Lawrence* really compelled to use the magic words “fundamental right,” however, to employ a standard of review similar to strict scrutiny? Some scholars have engaged in a debate about whether or not *Lawrence v. Texas* truly implements a traditional rational-basis standard of review.¹³² Professor of Constitutional Law at Harvard Law School, Laurence Henry Tribe, makes a compelling argument that although the majority in *Lawrence* did not use the “magic words proclaiming the right protected in *Lawrence* to be ‘fundamental,’”¹³³ the right recognized was nevertheless “fundamental.”¹³⁴ He argues that although no clear “standard” was explicitly enumerated in *Griswold v. Connecticut*, “what we would today call ‘strict scrutiny’ was plainly at work.”¹³⁵ Additionally, Tribe contends that although the word “fundamental” did not directly precede the word “right,” the Court in *Lawrence* did invoke “the talismanic verbal formula of substantive due process but did so by putting the key words in one unusual sequence or another.”¹³⁶ Unconvinced by this argument, the dissent in *Reliable* pointed to cases in both the Tenth and Eleventh Circuits that determined that the *Lawrence* Court had clearly employed a rational-basis standard of review, and, in doing so, found no fundamental right or fundamental liberty interest.¹³⁷ Even so, did the majority in *Reliable* in fact find a fundamental right? In reading the language of the majority

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

132. *See* Tribe, *supra* note 80, at 1916-20 (arguing that although the Court in *Lawrence* does not explicitly say the interest at stake is a “fundamental right,” it does not necessarily have to in order to treat a right asserted as “fundamental”).

133. *Id.* at 1917.

134. *See id.*

135. *See id.* at 1917 n.82.

136. *See id.* at 1917 (“[A]s in the Court’s declaration that it was dealing with a ‘protection of liberty under the Due Process Clause [that] has a substantive dimension of fundamental significance in defining the rights of the person’ (quoting *Lawrence v. Texas*, 539 U.S. 558, 565 (2003)).

137. *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 359 (5th Cir. 2008) (citing *Seegmiller v. Laverkin City*, 528 F.3d 762, 771-72 (10th Cir. 2008)) (noting that *Seegmiller* sustained an executive action under rational-basis review in light of *Lawrence*); *see also* *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1236 (11th Cir.2004) (noting that the *Lawrence* opinion ultimately applied rational-basis review, rather than strict scrutiny, to the challenged statute).

opinion, the court struck down the statute because they could “divine no *rational connection* between the statute and the protection of children.”¹³⁸

The language of “rational connection” would seem to suggest the majority was employing a rational-basis standard of review, not strict scrutiny;¹³⁹ and as a result, the absence of addressing whether or not the right at stake was fundamental would not be outcome determinative.

In addition, a standard of review outside the two-tier approach has evolved, which is not necessarily compelled to implement either strict scrutiny or simple rational basis—this standard has become known as heightened scrutiny.¹⁴⁰ Heightened-scrutiny, or “rational basis with bite,” has evolved from the strict scrutiny review of equal protection that is invoked when statutes identify “classifications that disadvantage a ‘suspect class,’ or that impinge upon a ‘fundamental right.’”¹⁴¹ As evidenced by the *Reliable* majority opinion, with the evolvement of heightened-scrutiny in the realm of equal protection, it could be argued that the *Lawrence* decision may be a stepping-stone to the evolution of a heightened-level of scrutiny involving sexual privacy rights.¹⁴² However, this argument may be a frail one at best as the Supreme Court has been reluctant to extend any new non-fundamental liberty interests into the zone of “fundamental rights;” therefore, the Court would be equally, if not more, reluctant to overlap the standard of review for fundamental rights (strict scrutiny) with those of non-fundamental liberty interests (rational basis) in order to comport with the doctrine of judicial self-restraint.¹⁴³ Nevertheless, Justice Kennedy has de-

138. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 746 (5th Cir. 2008) (emphasis added), *reh’g denied*, 538 F.3d 355 (5th Cir. 2008).

139. *See Lawrence*, 539 U.S. at 592-94 (Scalia, J., dissenting) (finding that the language used by the majority opinion showed they were using rational-basis review).

140. The “heightened scrutiny standard” has been applied by the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996) (applied to homosexuals), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (applied to the mentally retarded). Additionally, Justice O’Connor stated in her concurring opinion in *Lawrence* that “[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a *more searching form of rational basis review* to strike down such laws under the Equal Protection Clause.” *Lawrence*, 539 U.S. at 580 (2003) (O’Connor, J., concurring in part) (emphasis added).

141. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

142. *See generally* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987) (explaining that *Lawrence*’s holding seemingly evidenced the application of something more than mere rational-basis review).

143. *See Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (“As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended”) (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26, (1985)). Additionally, the Court in *Collins* stated that “[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.” *Id.* The importance of judicial self-restraint has been regarded as:

scribed certain rights within the scope of sexual privacy to be part of a new wave of “emergent rights,” which may require a heightened protection on a case-by-case basis.¹⁴⁴ If sexual privacy in fact falls under Justice Kennedy’s scope of “emergent rights,” this notion, when read into his opinion in *Lawrence*, may have muster to satisfy the creation of a new level of review that would mirror the three-tiered review of equal protection categories.¹⁴⁵ The important concept here is that the *Lawrence* Court’s ambiguity in defining what level of review was at work, coupled with its inconsistent outcome if it truly had employed a rational-basis test,¹⁴⁶ will inevitably lead to more circuit splits concerning varying interpretations of what constitutes “sexual privacy,” and ultimately leave its “fundamental” determination up to each individual judge as he or she sees fit.¹⁴⁷

B. OVERRULES SUB SILENTIO A PRIOR CONTROLLING DECISION: *RED BLUFF DRIVE-IN, INC. V. VANCE*

Red Bluff Drive-In v. Vance concerned entrepreneurs in the “adult entertainment” industry who brought suit against Texas law enforcement officials to enjoin prosecutions under the same Texas obscenity statute that was challenged in *Reliable*.¹⁴⁸ The revised statute¹⁴⁹ at issue was rewritten by the Texas Legislature in 1979, and shortly before the statute was about to go into effect, its validity was challenged on several grounds, including

[E]ssential to any discussion of judicial review to recognize that judicial self-restraint has had a long and honored history, and to the extent that judicial review was, and has been legitimized, its limits have always been implicitly recognized. An essential maneuver in the exquisite strategy by which the Courts maintained their cause, despite the rising tide of democracy, was a prolongation of their advocacy of the Common Law into fervent adherence to the principle of judicial restraint.

Elliot E. Slotnick, *The Place of Judicial Review in the American Tradition: The Emergence of an Eclectic Power*, in *JUDICIAL POLITICS: READINGS FROM JUDICATURE* 3, 15 (Elliot E. Slotnick ed., 1999).

144. Parshall, *supra* note 91, at 285-86. Emergent rights are “those rights, which as Justice Kennedy described in *Beller*, are neither wholly lacking foundation in the ‘continuing traditions’ of our society nor are without close connection to ‘interests recognized as private and protected.’” *Id.* at 285 (quoting *Beller v. Middendorf*, 632 F.2d 788, 808 (9th Cir. 1980)). Parshall suggests that Justice Kennedy, while serving on the Ninth Circuit, may have carved out a new standard of review that would essentially be a middle tier of due process analysis that would represent these “emerging rights” and therefore be entitled to a heightened scrutiny standard of review. *Id.* at 281-87 (citing *Beller*, 632 F.2d at 792).

145. *Id.* at 285-86.

146. See *Lawrence v. Texas*, 539 U.S. 558, 592-94 (2003) (Scalia, J., dissenting).

147. Hooi, *supra* note 80, at 517-18.

148. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1024-25 (5th Cir. 1981).

149. TEX. CODE ANN. § 43.21 (Vernon 2003).

vagueness, overbreadth, and equal protection.¹⁵⁰ The court used the 1973 United States Supreme Court obscenity precedent of *Miller v. California* to uphold the constitutionality of the Texas obscenity statute.¹⁵¹ The court found that although there may be numerous hypothetical circumstances in which the statute would be constitutionally overbroad if so applied, the district court chose to defer to the state courts while construing the statute “to find marital, medical, and other necessary exceptions narrowing the scope of the § 43.21(a)(5)’s definition of promote.”¹⁵²

The dissent in the *Reliable* denial for rehearing simply found that the *Lawrence* holding does not undercut previous United States Supreme Court precedent permitting obscenity regulation.¹⁵³ The dissent stated that by ignoring the precedent of *Red Bluff*—where the constitutionality of the statute in question was held to be valid—the court improperly broadened the scope of the narrow personal liberty interest enumerated in *Lawrence* to include commercial activity.¹⁵⁴ Accordingly, since *Red Bluff* stood as a legitimate precedent in the Fifth Circuit, the majority in *Reliable* was wrong in implicitly overruling this precedent and deciding that the *Lawrence* decision undercuts the United States Supreme Court’s obscenity jurisprudence.¹⁵⁵

150. *Red Bluff*, 648 F.2d at 1026-28.

151. *Id.* at 1028. To explain the rationale behind the statute’s “community standards” scope of obscenity limitations, the court quoted Justice Burger’s majority opinion in *Miller*: “It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.” *Id.* (quoting *Miller v. California*, 413 U.S. 15, 32 (1973)).

152. *Id.* at 1030. The court additionally stated that although the literal language of the statute may improperly forbid the most sensitive and intimate conversations involving promotion of sexual devices, the state courts would be able to carve out exceptions to the statute in order to not wrongfully “sweep within its ambit acts the state cannot criminalize.” *Id.* at 1029-30.

153. *See Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 360 (5th Cir. 2008) (Garza, J., dissenting). There has been debate, however, about whether or not *Lawrence* changes obscenity jurisprudence. Elizabeth M. Glazer, Associate Professor of Law at Hofstra Law School, concluded that:

Lawrence’s equality principle mandates that the obscenity doctrine, or for that matter any other doctrine, not discriminate against gays and lesbians. Moreover, the transformation of the concept of homosexuality in *Lawrence*—from subject matter to viewpoint—mandates on First Amendment grounds that this sort of content-based restriction is constitutionally permissible.

Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1433 (2008).

154. *Reliable*, 538 F.3d at 360 (Garza, J., dissenting).

155. *Id.* (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” (quoting *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989)).

Although it is an interesting argument to make, it is significant to note that the statute in *Red Bluff* was not challenged specifically based on a Fourteenth Amendment substantive due process issue; instead the arguments were based more on *procedural* due process,¹⁵⁶ equal protection,¹⁵⁷ and overbreadth grounds.¹⁵⁸ *Lawrence* specifically avoided the equal protection issue,¹⁵⁹ so as to invoke the substantive due process analysis to better encompass adjudication of the scope of the rights at stake, rather than revisit an anti-sodomy statute geared towards prohibiting heterosexual and homosexual sodomy equally somewhere down the foreseeable road.¹⁶⁰ Accordingly, rather than overruling *Red Bluff* sub silentio,¹⁶¹ this Note argues that since *Red Bluff*'s policy arguments behind equal protection, procedural due process, and overbreadth have not changed as a result of *Reliable*, the use of *Lawrence* and the subsequent holding of *Reliable* simply created an

156. *Red Bluff*, 648 F.2d at 1030-32. The court in *Red Bluff* rejects the procedural due process argument by stating, "One can certainly imagine hypothetical cases in which the application of either presumption individually or the confluence of both presumptions could deny a criminal defendant due process." *Id.* at 1032. The case indicates that the court focused on procedural due process rights rather than substantive due process under the Fourteenth Amendment. *See id.*

157. *Id.* at 1026-28.

158. *Id.* at 1032 (abstaining in regard to hypothetical cases that would deny someone procedural due process guaranteed by the Fourteenth Amendment "or impermissibly burden First Amendment rights by dispensing with the necessity of proving scienter").

159. James W. Paulsen, *Significance of Lawrence v. Texas*, 41 HOUS. LAW. 32, 34 (2004) ("Substantively, the Court could have grounded its decision on the Equal Protection Clause of the Fourteenth Amendment An equal protection ruling would have struck down the Texas statute while avoiding a head-on collision with *Bowers*.").

160. *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (O'Connor, J., concurring). The Court addressed abstaining from answering the petitioner's issue using an equal protection analysis; however, it would have been a valid route in striking down the statute, as Justice O'Connor points out in her concurring opinion:

Were we to hold the 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. Equality 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.

Id. at 574-75.

161. *See* KENNETH J. VANDELDELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 104 (1996). Professor Vandavelde explains how a case is overruled sub silentio:

The court generally does this by articulating a set of policy judgments in a later case that, if applied to the earlier case, would have caused a different result. The court declines to explicitly overrule the prior case, and yet the lawyer understands that the prior case no longer controls future decisions.

Id.

exception¹⁶² to *Red Bluff*. The precedent of *Red Bluff* can still be transcended into other cases that involve the validity of equal protection issues, involving people with disabilities and what level of vagueness need be present to overturn a statute. Although the incidental impact of a holding contrary to this statute's validity did, in all practical matters, render the previous decision ineffective, the grounds on which the statute was held to be unconstitutional were not the same; thus, the precedent in *Red Bluff* was not necessarily overruled insofar as *Reliable* did not develop new policies under vagueness or equal protection grounds.¹⁶³

C. CREATION OF THE CIRCUIT SPLIT: *WILLIAMS V. ATTORNEY GENERAL OF ALABAMA*

The case of *Williams v. Attorney General of Alabama*¹⁶⁴ was noticeably parallel to *Reliable*. The statute in *Williams* was Alabama's Anti-Obscenity Enforcement Act¹⁶⁵ which, among other things, prohibited the commercial distribution of sexual devices similar to the Texas statute.¹⁶⁶ The American Civil Liberties Union (ACLU), on behalf of various individual users and vendors of sexual devices, sought to enjoin enforcement of this Alabama statute by inviting the Eleventh Circuit to find a fundamental right to sexual privacy and subsequently declare the statute to be an impermissible burden on this right.¹⁶⁷ The *Williams* court answered the ACLU's invitation in the negative, holding that no fundamental, substantive due process right of consenting adults to engage in private sexual conduct existed and refused to recognize a new fundamental right concerning the aforementioned privacy.¹⁶⁸ The court noted that the United States Supreme Court has implicated sexual matters when dealing with "privacy" issues;¹⁶⁹

162. See *id.* at 105. Professor Vandeveld makes the distinction between a case being overruled sub silentio and creating an exception to the precedent: "[An exception] is an explicit, but only partial, repudiation of the prior case. The prior case remains good law, but it no longer controls *all of the situations it once did.*" *Id.* (emphasis added). Thus, since statutes similarly written would still be valid in terms of equal protection and overbreadth, the case of *Red Bluff* would not have been overruled sub silentio.

163. See *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008) (employing a substantive due process analysis in order to strike down the Texas statute), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008).

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

165. ALA. CODE § 13A-12-200.2 (1975).

166. Compare *Reliable*, 517 F.3d 738 (citing TEX. CODE ANN. § 43.21 (Vernon 2003)), with *Williams*, 378 F.3d 1232 (citing ALA. CODE § 13A-12-200.2 (1975)).

167. *Williams*, 378 F.3d 1232.

168. *Id.* at 1250.

169. *Id.* at 1236. The *Williams* court mentioned sexually-related privacy cases involving abortion, see *id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833

however, the Supreme Court has “never indicated that the mere fact that an activity is sexual and private entitles it to protection as a fundamental right.”¹⁷⁰ Moreover, the *Williams* court reasoned that when the Supreme Court was presented an opportunity to recognize a fundamental right to sexual privacy in *Lawrence*, it declined the same invitation that the ACLU was petitioning the court to recognize in the case at hand.¹⁷¹

The *Williams* court deferred to the holding of the Supreme Court in *Carey*,¹⁷² to find that the Supreme Court has continually declined to recognize any free-standing fundamental right to sexual privacy.¹⁷³ The *Williams* court then used *Washington v. Glucksberg*,¹⁷⁴ which provided future courts a scheme for identifying fundamental rights, to determine whether or not sexual privacy could arguably be considered a fundamental right.¹⁷⁵ This two-step analytical framework first begins “with a careful description of the asserted right” and then, most critically, determines whether this asserted right, carefully described, is one of “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”¹⁷⁶ The “careful description of the asserted right” prong of the test was to ensure that future courts would refrain from identifying a fundamental right too broadly, so that unintended interpretations involving fundamental rights, compelling a court to subject challenged statutes to strict scrutiny, would not render penal system statutes unenforceable.¹⁷⁷ While employing the *Glucksberg* test, the court attempted to define the scope of the liberty interest at stake in reference to the scope of the Alabama statute, finding that the statute did not implicate a burden upon any broad right to sexual privacy; rather that the statute banned only the commercial distribution of sexual devices, and therefore, framed the issue as “the right to sell and purchase sexual devices.”¹⁷⁸

(1992)), and contraceptives, *see id.* (citing *Carey v. Population Servs., Int’l*, 431 U.S. 678 (1977)).

170. *Id.*

171. *Id.* (citing *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 815-16 (11th Cir. 2004)). The Eleventh Circuit in *Lofton v. Secretary of Department of Children & Family Services* came to the conclusion that “it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.” 358 F.3d 805, 817 (11th Cir. 2004).

172. *Carey v. Population Servs., Int’l*, 431 U.S. 678, 688 n.5 (1977).

173. *Williams*, 378 F.3d at 1235-36 (citing *Carey*, 431 U.S. at 688).

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

175. *Williams*, 378 F.3d at 1239.

176. *Id.* (citing *Glucksberg*, 521 U.S. at 720-21).

177. *See Glucksberg*, 521 U.S. at 722.

178. *Williams*, 378 F.3d at 1242.

The *Williams* court's analysis, however, went beyond simply the right to sell and purchase sexual devices, but also included the broad right to use such devices.¹⁷⁹ The court reasoned that "restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item."¹⁸⁰ Although *Williams* acknowledged this lack of analytical dissimilarity,¹⁸¹ Judge Garza's dissent in *Reliable* failed to recognize *Williams*'s incorporation of "use" into the commercial language of the statute to define precisely what rights were at stake—merely pointing out that the statute "prohibits only commercial conduct" and refusing to recognize that the statute implicitly burdened the use of such devices.¹⁸² To say that banning the commercial distribution of sexual devices does not in turn ban the use of such devices would be the equivalent of saying that the proscription of alcohol sales does not ban the consumption of it. Is the freedom to use something that is essentially unobtainable any freedom at all? It is not. It is an incendiary for those still seeking the effects of the prohibited item to venture for alternatives that could be potentially dangerous. Although sexual devices are technically alternatives to sex, "[i]n an era where '(f)ear of spreading AIDS or another sexually transmitted disease is compelling grounds to avoid sexual intercourse,'"¹⁸³ it seems as though the "alternatives" to sexual devices may not be as innocuous as one may first assume.

Essentially, the effect of the Texas statute in prohibiting the sale, distribution, advertising, lending, and gifting of sexual devices could be over-

179. *Id.*

180. *Id.* *Williams* used Supreme Court precedent in extending its analysis to include the right to use sexual devices:

Thus it was that the *Glucksberg* Court analyzed a ban on *providing* suicide assistance as a burden on the right to *receive* suicide assistance. Similarly, prohibitions on the *sale* of contraceptives [that were analyzed in *Carey*] have been analyzed as burdens on the *use* of contraceptives. Because a prohibition on the distribution of sexual devices would burden an individual's ability to use the devices, our analysis must be framed not simply in terms of whether the Constitution protects a right to *sell* and *buy* sexual devices, but whether it protects a right to *use* such devices.

Id. (citations omitted) (citing *Glucksberg*, 521 U.S. at 723; *Carey v. Population Servs., Int'l*, 431 U.S. 678, 688 (1977)).

181. *Williams*, 378 F.3d at 1242.

182. *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 360-61 (5th Cir. 2008) (Garza, J., dissenting). Judge Garza uses *Williams* to point out that *Williams* refused to extend the narrow right announced in *Lawrence* into the commercial distribution of sex toys. *Id.* at 361. Although this holding is accurate, Judge Garza fails to recognize that the majority in *Williams* did constitutionally equate the purchasing and selling of sexual devices to the use of such said devices. See *Williams*, 378 F.3d at 1242.

183. Angela Holt, *From My Cold Dead Hands: Williams v. Pryor and the Constitutionality of Alabama's Anti-Vibrator Law*, 53 ALA. L. REV. 927, 942-44 (2002) (citing *Williams v. Pryor*, 41 F. Supp. 2d 1257, 1267 (N.D. Ala. 1999)).

regulating sexual devices to the point that the statute, in all practical matters, denies the use of sexual devices.¹⁸⁴ Just as a point of comparison, the recent United States Supreme Court case of *District of Columbia v. Heller* involved a Second Amendment¹⁸⁵ challenge to a licensing scheme that prohibited the use of a firearm in the home without a license.¹⁸⁶ The Respondent, Dick Heller, was a D.C. special police officer that had authorization to carry a handgun while on duty but was denied a registration certificate for a handgun he wished to have in his home.¹⁸⁷ He sought to enjoin the District of Columbia from enforcing the licensing requirement for handguns carried in the home, but more relevantly, the trigger-lock requirement “insofar as it prohibits the use of ‘functional firearms within the home.’”¹⁸⁸ The district court dismissed his complaint, while the Court of Appeals for the District of Columbia reversed, holding that the Second Amendment protected an individual’s right to possess certain firearms¹⁸⁹ and that the nonfunctional requirement that prohibited individuals from using handguns in the home in cases of self-defense violated the Second Amendment.¹⁹⁰ The United States Supreme Court granted certiorari and held that the District of Columbia’s “ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”¹⁹¹

Obviously, a handgun and a vibrator are not comparable in terms of constitutional significance; nevertheless, the provision¹⁹² in *Heller*, rendering any handgun in the home inoperable, is arguably over-regulating its use inasmuch that it is effectively banning *all* lawful uses.¹⁹³ Similarly, although the Texas statute in *Reliable*, at least on its face, is a prohibition on the sale of sexual devices, because the statute defines “promote” to include “manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same,” it seems as though the statute is doing

184. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008) (identifying Texas Penal Code § 43.21(a)(5) as defining “promote” to include to “give” or “lend,” and as a result regulates much more than simply commercial activity), *reh’g denied*, 538 F.3d 355 (5th Cir. 2008).

185. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

186. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008).

187. *Id.*

188. *Id.*

189. *Id.* at 2817 (recognizing that although handguns are protected, this protection would not extend to the carrying of “dangerous or unusual weapons”).

190. *Id.*

191. *Heller*, 128 S. Ct. at 2821-22.

192. D.C. CODE § 7-2507.02 (2008).

193. *See Heller*, 128 S. Ct. at 2818-19.

much more than simply regulating commercial activity—as applied, the statute is rendering the use of sexual devices impossible by directly and indirectly denying anyone within the state the ability to purchase these devices.¹⁹⁴ Although this conclusion is quite the extrapolation, if *Lawrence* is read to recognize sexual privacy as a fundamental right and the use of sexual devices protected under the ambit of this privacy right, then such a statute that over-regulates use, as the Texas statute does, would be unconstitutional.

Interestingly, there has been debate between whether or not the use of sexual devices is “deeply rooted in this Nation’s history and tradition” as required by the *Glucksberg* test to recognize a new fundamental right.¹⁹⁵ Dr. Rachel Maines, a historian, traced the history of women using vibrators before 1900, and even for personal home-use immediately after 1900.¹⁹⁶ Additionally, *Lawrence* was careful to point out that “[h]istory and tradition are the *starting point* but not in all cases the ending point of the substantive due process inquiry.”¹⁹⁷ The dissent in *Williams* was quick to point to *Lawrence*’s emphasis on specifically finding relevant the “*laws and traditions in the past half century*.”¹⁹⁸ It is important to note, however, that the dissent in *Williams* also rationalized that *Lawrence* declared a substantive due process right to sexual privacy.¹⁹⁹ In doing so, the dissent may have been confused as to why the *Lawrence* Court looked to more contemporary “traditions”—not to find a new fundamental right like the *Glucksberg* test is intended to provide guidance for, but simply to show “an emerging aware-

194. TEX. CODE ANN. § 43.21(a)(5) (Vernon 2003).

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

196. Holt, *supra* note 183, at 942-44 (citing RACHEL P. MAINES, THE TECHNOLOGY OF ORGASM: “HYSTERIA,” THE VIBRATOR AND WOMEN’S SEXUAL SATISFACTION 3 (1999)). According to Holt’s article, which summarizes some of Maines’s research, vibrators were as much part of our nation’s contemporary history as the sewing machine:

[A]fter 1900, women began purchasing vibrators for self-treatment at home. Electric lights were introduced in 1876, and the first home appliance to be electrified was the sewing machine in 1889. The sewing machine was followed in the next ten years by the fan, the teakettle, the toaster and the vibrator, which preceded the electric vacuum cleaner by nine years, the electric iron by ten, and the electric frying pan by more than a decade, “possibly reflecting consumer priorities.” A 1908 vibrator advertisement in the *National Home Journal* proclaimed “Gentle, soothing, invigorating and refreshing. Invented by a woman who knows a woman’s needs. All nature pulsates and vibrates with life.”

Id. at 943 (citing RACHEL P. MAINES, THE TECHNOLOGY OF ORGASM: “HYSTERIA,” THE VIBRATOR AND WOMEN’S SEXUAL SATISFACTION 3 (1999)).

197. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (Kennedy, J., concurring) (emphasis added) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998))

198. *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1258 (11th Cir. 2004) (Barkett, J., dissenting) (citing *Lawrence*, 539 U.S. at 572).

199. *Id.* at 1252 (Barkett, J., dissenting).

ness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”²⁰⁰ Since the *Lawrence* majority did not utilize the *Glucksberg* test to determine whether or not sexual privacy was a fundamental right, as well as employed rational-basis scrutiny, the relevance of “traditions in the past half century” was more likely to just observe that *Bowers* understated the historical premises the Court based its decision on, in order to provide the *Lawrence* Court with sufficient basis to overturn *Bowers*.²⁰¹

Additionally, the commercial distinction of sex toys, as made apparent in the Eleventh Circuit’s interpretation of *Lawrence*,²⁰² which the *Reliable* dissenting opinions (in both the original case and the denial for rehearing) heavily relied upon,²⁰³ may not have been interpreted accurately. The Eleventh Circuit in *Williams v. Morgan*, which emerged from a second appeal after the *Williams v. Attorney General of Alabama* case was remanded,²⁰⁴ relied on the following excerpt from *Lawrence* in making the inference that *Lawrence* did not intend to extend to commercial activity: “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. *It does not involve public conduct* or prostitution.”²⁰⁵ The language from *Morgan*, which Judge Barksdale relied upon in his dissenting-in-part opinion from the original *Reliable* case,²⁰⁶ equated “public conduct” to commercial activity.²⁰⁷ When the *Lawrence* Court spoke of public conduct, however, they specifically addressed “public conduct” to

200. *Lawrence*, 539 U.S. at 572.

201. *See id.* at 571-72. The Court in *Lawrence* cites Chief Justice Burger’s incorrect sweeping historical findings of Western civilization’s condemnation of homosexual conduct in *Bowers* in order to overturn *Bowers*. *See id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)). Interestingly, *Lawrence* also looked to Europe and other authorities not binding on the United States Supreme Court in order to research the abolishment of laws that proscribe conduct involving sodomy and other homosexual conduct. *Id.* at 573-74.

202. *See Williams v. Morgan*, 478 F.3d 1316, 1322 (11th Cir. 2007) (“However, while the statute at issue in *Lawrence* criminalized *private* sexual conduct, the statute at issue in this case forbids *public, commercial* activity. To the extent *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is both private and non-commercial. Unlike *Lawrence*, the activity regulated here is *neither private nor non-commercial*.” (citation omitted) (citing *Lawrence*, 539 U.S. at 578)).

203. *See Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 749 (5th Cir. 2008) (Barksdale, J., concurring in part and dissenting in part), *reh’g denied*, 538 F.3d 355, 359-61 (5th Cir. 2008) (Garza, J., dissenting).

204. *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004), *remanded to Williams v. King*, 420 F. Supp. 2d 1224 (N.D. Ala. 2006), *aff’d*, *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007).

205. *Morgan*, 478 F.3d at 1322 (citing *Lawrence*, 539 U.S. at 578).

206. *Reliable*, 517 F.3d at 749 (Barksdale, J., concurring in part and dissenting in part) (citing *Morgan*, 478 F.3d at 1322).

207. *Morgan*, 478 F.3d at 1322.

mean sex in public places; never specifically and exclusively mentioning commercial conduct.²⁰⁸ In fact, the only place in the *Lawrence* decision where the word “commercial” is even used is in Justice Thomas’s dissent, and even there he only referred to “commercial sex” in the context of prostitution.²⁰⁹ Therefore, it seems to be an incorrect reading of *Lawrence* by the Eleventh Circuit²¹⁰ in finding that the right of privacy announced in *Lawrence* clearly did not extend “to cover the commercial distribution of sex toys”²¹¹ as a direct result of the “public conduct” language in the *Lawrence* opinion.²¹²

VI. CONCLUSION

Arguably, the ultimate outcome of the case of *Reliable Consultants, Inc. v. Earle*²¹³ was wrong, yet the dissenting opinion to the denial of a rehearing en banc cannot be accepted in its entirety as correctly stating the problems associated with the majority opinion in *Reliable*.²¹⁴ First, the dissent’s blind acceptance of its sister-circuit’s decision in the *Williams* case was without proper caution and absent the critical interpretation that should be necessary when using extra-jurisdictional law, which is not binding on the court, to render a decision.²¹⁵ Additionally, although courts must be

208. *Lawrence*, 539 U.S. at 570 (“The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880-1995 are not always clear in the details, but a significant number involved conduct in a public place.”). In following the citation to the ACLU’s brief, the information cited in the brief relates specifically to prosecutions for sex in public; commercial sex referring to “sex for money,” i.e. prostitution. See Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, 2003 WL 164132, 14-15, nn.17-18 (2003).

209. *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting) (“Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.”).

210. See *Morgan*, 478 F.3d at 1322; *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1250 (11th Cir. 2004).

211. *Williams*, 378 F.3d at 1250 (citing *Lawrence* 539 U.S. at 578).

212. See *id.* (holding that there is no “constitutional right to privacy to cover the commercial distribution of sex toys”); see also *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 360-61 (5th Cir. 2008) (Garza, J., dissenting) (using the *Williams* analysis of *Lawrence* as a comparative foundation in arguing for the validity of the Texas statute).

213. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008) (holding that the statute was invalid because it impermissibly burdened customers’ substantive due process right to engage in private intimate conduct of their choosing), *reh’g denied*, 538 F.3d 355 (5th Cir. 2008).

214. See discussion *supra* Part V.

215. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992). The Court emphasized its reluctance in overturning a precedent and its purpose in being averse to doing so:

hesitant in overturning a controlling precedent, the incidental effects of a decision invalidating a statute's constitutionality does not necessarily overturn that precedent if that decision was reached on separate constitutional grounds.²¹⁶ Finally, the contention that *Lawrence v. Texas* was improperly used²¹⁷ was arguably the best argument made; however, the reasoning of each dissent was not entirely sound.²¹⁸

If for no other reason to find reversible error, the majority in *Reliable* erred in making no explicit explanation of what standard of review was being used²¹⁹—the majority merely struck down the statute because of a broad right to sexual privacy that it read out of *Lawrence* and proclaimed to be binding on the court.²²⁰ It is dangerous to read a right of privacy too broadly, because, in doing so, its effect could potentially validate otherwise invalid constitutional challenges meant to render null and void appropriate penal statutes and wane the states' respective policing powers.²²¹ Despite the fact that the arguments made by scholars like Professor Tribe are excep-

The Court is not asked to do this very often [overturn a precedent], having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.

Id. Accordingly, the Fifth Circuit follows a similar guideline to overrule another panel's decision: "[O]ne panel of this court cannot overrule the decision of another panel; such panel decisions may be overruled only by a subsequent decision of the Supreme Court or by the Fifth Circuit sitting *en banc*." *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). This rule is also cited by Judge Elrod in his dissenting opinion. *Reliable*, 538 F.3d at 365 (5th Cir. 2008) (Elrod, J., dissenting).

216. See discussion *supra* Part V.B.

217. *Reliable*, 538 F.3d at 358-65 (Garza, J., dissenting and Elrod, J., dissenting).

218. See discussion *supra* Part V.

219. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744-45 (5th Cir. 2008), *reh'g denied*, 538 F.3d 355 (5th Cir. 2008).

220. *Id.*

221. See, e.g., *Cawood v. Haggard*, 327 F. Supp. 2d 863, 877-79 (E.D. Tenn. 2004) (finding that the defendant could not attempt to justify the legality of prostitution through using the sexual liberty announced in *Lawrence*).

tionally interesting,²²² it seems more likely that *Lawrence v. Texas* did not recognize a fundamental right since the standard of review the Court employed used the language of rational basis.²²³ Due to the ambiguity of the *Lawrence* opinion, however, the door has been left open to the notion of “emergent rights.” As a result, a third, middle-tier form of review may have incidentally been created, similar to the standards of review for equal protection challenges. *Lawrence* was unusual in not only its absence of the talismanic language that typically creates or recognizes a fundamental right or otherwise, but also in its observation of courts and cultures outside of the United States in defining the rights at stake.²²⁴ What is certain, however, is that courts across the United States have read into the *Lawrence* opinion both broadly and narrowly.²²⁵ The core lesson that should be learned from cases like that of *Reliable Consultants v. Earle* is how the case demonstrates the far-reaching effects of broad precedent. Until the United States Supreme Court determines the applicable scope of *Lawrence v. Texas*, incorrect applications of its precedent will continue to occur between circuits deciding the constitutionality of statutes that implicate rights within the ambit of sexual privacy or sexual liberty rights.²²⁶

Texas, a state that, before the *Reliable* decision, upheld anti-vibrator statutes,²²⁷ may be a catalyst for the emergence of successful constitutional attacks on the validity of such statutes. Currently, courts in Texas, Colorado, Kansas, and Louisiana have struck down the constitutionality of anti-vibrator statutes, while Alabama, Colorado, Georgia, Kansas, Louisiana, Mississippi, and Virginia have upheld similar laws that ban the sale, distribution, or promotion of sexual devices.²²⁸ Unfortunately, other circuits choosing to follow the vague majority opinion in *Reliable* will most likely encounter disparagement; therefore, *Reliable* is unlikely to summon up a following. But despite the problems with *Reliable*, it is likely that such anti-vibrator statutes will eventually phase out in due time as a result of an emerging scheme of Supreme Court decisions that reflect notions of sexual

222. See *supra* text accompanying notes 128-36.

223. See *Lawrence v. Texas*, 538 U.S. 558, 560 (2003) (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the individual’s personal and private life.” (emphasis added)).

224. *Id.* at 572-73.

225. Parshall, *supra* note 91, at 297-98.

226. See Glazer, *supra* note 153, at 1411-15 (stating that the “holding of *Lawrence* was anything but straight-forward”); see also Cass R. Sunstein, *What did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 29 (characterizing the decision as “remarkably opaque”).

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

228. Holt, *supra* note 183, at 933-38.

privacy.²²⁹ To the extent of how fundamental a right sexual privacy will become, and ultimately to what limitations that right may encompass, will be left up to future generations, made up of varying Justices with varying perspectives,²³⁰ to determine to what length the Fourteenth Amendment's substantive due process clause protects any person from the deprivation of "life, liberty, or property, without the due process of law."²³¹ Perhaps Justice Kennedy's search for the "greater freedom" provides the best insight as to how the Court will envision the future possibilities of sexual privacy rights:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought to be necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.²³²

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229. *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1252-53 (11th Cir. 2004) (Barkett, J., dissenting). Judge Barkett states that "included within this right to privacy is the ability to make decisions about intimate sexual matters." *Id.* He cites *Carey v. Population Services, International*, 431 U.S. 678, 685 (1977) (right to use contraception), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (right to seek out an abortion), as a scheme of cases identifying a right to sexual privacy. *Williams*, 378 F.3d at 1252-53.

230. *See Payne v. Tennessee*, 501 U.S. 808, 850 (1991) (Marshall, J., dissenting). Justice Thurgood Marshall criticized the majority for overruling precedent—*Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)—since "neither the law nor the facts . . . underwent any change in the last four years." *Id.* at 844. Justice Marshall goes on to point out that the majority's own personal and individual feelings towards the law was what ultimately changed the law: "It takes little detective work to discern just what has changed in *Booth* and *Gathers*: this Court's own personnel." *Id.* at 850; *see also* James F. Spriggs & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1091-111 (2001) ("Marshall, of course, was referring to Justice Kennedy's and Souter's replacement of, respectively, Powell and Brennan between the time when the Court decided and subsequently overruled the two precedents [*Booth* and *Gathers*].").

231. U.S. CONST. amend. XIV.

232. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

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