NOTES

MORALS LEGISLATION AFTER *LAWRENCE*: CAN STATES CRIMINALIZE THE SALE OF SEXUAL DEVICES?

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In Lawrence v. Texas*, the Supreme Court struck down a Texas law criminalizing sexual relations between individuals of the same sex. The Court held that laws based on nothing more than moral disapproval lack a legitimate basis and are therefore unconstitutional. Despite the Court's strong language, state and lower federal courts have adopted contradictory interpretations of* Lawrence*. In particular, the Fifth and Eleventh Circuits, and several state courts, disagree over the constitutional validity of laws criminalizing the sale of devices used for sexual stimulation. In this Note, I argue that the Fifth Circuit reached the right decision, holding that such laws are unconstitutional after* Lawrence*. In addition, this Note explores the Court's evolving approach to morals legislation more generally. Part I examines where* Lawrence *came from and what exactly it said. Part II analyzes state and lower federal court decisions that disagree over the constitutional validity of laws criminalizing the sale of sexual devices. Part III explores the consequences that* Lawrence *might have for morals legislation going forward.*

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INTRODUCTION

Dissatisfied with the outcome in *Lawrence v. Texas*, Justice Scalia warned in his dissent that the Court had "effectively decree[d] the end of all morals legislation."[1] For him, this was a result to be feared rather than celebrated. It meant the end of all criminal prohibitions against deviant sexual behavior, including "fornication, bigamy, adultery, adult incest, bestiality, and obscenity."[2] Worse still, the decision was a product not of democratic deliberation but rather of imposition by a select set of judges committed to the "homosexual agenda."[3] No longer could the people determine the content of the criminal law by mere reference to their moral code.

Despite these dire predictions, recent decisions by state and lower federal courts have adopted conflicting interpretations of *Lawrence*. In *Williams v. Morgan*, the Eleventh Circuit upheld an Alabama law prohibiting sales of devices used for sexual stimulation, finding that "public morality remains a legitimate rational basis for the challenged legislation even after *Lawrence*."[4] The Fifth Circuit reached the opposite conclusion when reviewing a similar statute in Texas, concluding that "[t]o uphold the statute would be to ignore the holding in *Lawrence* and allow the government to burden consensual private intimate conduct simply by deeming it morally offensive."[5] The supreme courts of five states are similarly divided.[6]

The debate over laws regulating the sale of sexual devices—what some call "sex toys"[7]—may at first glance seem insignificant, but it gets at the heart of an

1. 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

2. *Id.*

3. *See id.* at 602.

4. Williams v. Morgan, 478 F.3d 1316, 1318 (11th Cir. 2007).

5. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 (5th Cir. 2008).

6. The supreme courts of Alabama and Mississippi have upheld laws regulating the sale of devices for sexual stimulation. *See* 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319, 321 (Ala. 2010); PHE, Inc. v. State, 877 So. 2d 1244, 1250 (Miss. 2004). State courts in Colorado, Kansas, and Louisiana, however, have held such laws to be invalid. *See* People *ex rel.* Tooley v. Seven Thirty-Five E. Colfax, Inc., 697 P.2d 348, 353 (Colo. 1985); State v. Hughes, 792 P.2d 1023, 1032 (Kan. 1990); State v. Brenan, 772 So. 2d 64, 65 (La. 2000).

7. Throughout this Note, I use the term "sexual devices" rather than "sex toys," despite an arguable loss in rhetorical flair, for two principal reasons. First, courts that have considered the validity of laws criminalizing the sale of such devices have referred to them as

important question that was raised in *Lawrence* and is still hotly contested: to what extent can morality serve as a legitimate basis for laws that place a significant burden upon individual liberty interests? The Court has yet to provide an answer to this question, but its decision could significantly impact future determinations about the validity of a whole host of laws, including laws prohibiting certain sexual behavior, disallowing same-sex marriage, and criminalizing drug possession. The Court may be reluctant to take *Lawrence* quite so far, but it will at least need to establish meaningful limiting principles for the rule established in that case.

In this Note, I argue that it is unconstitutional for states to criminalize the sale of sexual devices on the basis of mere moral disapproval.[8] In other words, I argue that the Fifth Circuit made the right decision in holding such laws invalid. In *Lawrence*, the Court adopted a new, much more restrictive approach to morals legislation. It made clear that a law burdening a fundamental liberty interest cannot withstand scrutiny if supported by moral disapproval alone. Although a similar principle had been applied in the context of equal protection, the Court expanded it in *Lawrence* to the realm of substantive due process. In so doing, it indicated that prohibitions on certain kinds of conduct are tantamount to an attack on an entire class of persons. It also suggested that morality-based criminal prohibitions are particularly problematic when they target underlying conduct that is sexually intimate, consensual, and private.

Part I examines where *Lawrence* came from and what exactly it said. Only by understanding the context of the decision will it be possible to determine its underlying motivations and binding effect. A major challenge in writing about morals legislation, however, is that the term has no easy or widely accepted definition. In hopes of avoiding confusion, therefore, I start by exploring what exactly "morals legislation" means. After offering a working definition of the term, I then provide an overview of Supreme Court cases decided before *Lawrence* examining the validity of laws based on moral judgment. There has been a marked shift in the Court's jurisprudence on this point, starting with equal protection cases, and making its way into those involving substantive due process. In both contexts, the Court has become increasingly suspicious of laws that it considers to be based on nothing more than moral disapproval.

Part II analyzes state and lower federal court decisions that have adopted conflicting interpretations of *Lawrence*'s prohibition against morals legisla-

"sexual devices." *See, e.g.*, *Morgan*, 478 F.3d at 1318-19. Second, such devices likely are, for many, considered not mere "toys" but rather integral parts of their sexual experience.

8. Several student works have addressed some aspects of this issue, although they have focused on different areas of the problem and reached different conclusions. *See, e.g.*, Nathan R. Curtis, Comment, *Unraveling* Lawrence*'s Concerns About Legislated Morality: The Constitutionality of Laws Criminalizing the Sale of Obscene Devices*, 2010 BYU L. REV. 1369; Jamie Iguchi, Comment, *Satisfying* Lawrence*: The Fifth Circuit Strikes Ban on Sex Toy Sales*, 43 U.C. DAVIS L. REV. 655 (2009).

tion.[9] Specifically, I examine the split between the Fifth and Eleventh Circuits over the constitutional validity of laws criminalizing the sale of devices used for sexual stimulation. I also examine decisions of the supreme courts of Alabama, Mississippi, Louisiana, Kansas, and Colorado. Several of these courts have looked to the Eleventh and Fifth Circuits for guidance, finding only disagreement. Ultimately, I argue that the Fifth Circuit got it right. Although the prohibition at issue in *Lawrence* implicated a serious equal protection question, the Court did not decide the case on those grounds, and its primary concern about state regulation under moral pretenses of behavior that is intimate, consensual, and private applies with full force to laws criminalizing the sale of sexual devices.

Finally, Part III explores the consequences that *Lawrence* might have for morals legislation going forward. I begin by discussing a series of doctrinal ambiguities left open in *Lawrence*. Perhaps most importantly: is *Lawrence* about substantive due process or equal protection? I suggest that it might aim at undermining, or at least calling into question, the strict separation that exists between these doctrinal areas. In addition, I argue that *Lawrence*'s holding should draw attention to the important distinction between state *involvement* in moral discourse and state *coercion* on the basis of moral disapproval. The state might have a role to play in shaping moral debate, but it must be much more circumspect in its efforts to impose moral viewpoints upon individuals who disagree. I conclude by considering, albeit briefly, how various issues of contemporary debate—including controversies over laws against prostitution, polygamy, and gay marriage—may be affected by *Lawrence*.

Ultimately, this Note has two primary aims. Most narrowly, it seeks to determine the constitutional validity of state laws criminalizing the sale of sexual devices. This issue alone merits review. Foolish though such laws may seem, they are real laws with real consequences. They have been enforced by undercover police operations, and people have been prosecuted and imprisoned for violating their terms. Courts, moreover, have disagreed as to their constitutional validity. More broadly, however, this Note aims to examine the Supreme Court's evolving approach to morals legislation. The Court's views are far from clear, and they are certainly not yet fully determined. For this reason, it is necessary to think carefully about what role morality should play in law, and whether moral disapproval alone may serve as a legitimate basis for legislation.

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9. It is important to note that courts also disagree about the *level of scrutiny* applied in *Lawrence*. *Compare* Witt v. Dep't of the Air Force, 527 F.3d 806, 813 (9th Cir. 2008) ("[W]e hold that *Lawrence* requires something more than traditional rational basis review . . . ."), *with* Lofton v. Sec'y of the Dept. of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004) ("[T]he *Lawrence* Court never applied strict scrutiny, the proper standard when fundamental rights are implicated, but instead invalidated the Texas statute on rational-basis grounds . . . ."). This Note, however, focuses solely on divergent views about the Court's approach to *morality as a basis for law*.

I. WHERE DID *LAWRENCE* COME FROM, AND WHAT DID IT SAY?

Before embarking on a discussion of the cases leading up to *Lawrence*, it is important to examine what exactly "morals legislation" means. The purpose here is not to argue for one proper definition, but rather to suggest a range of plausible meanings. Simply understanding the fault lines of the debate will enable discussion of the constitutional questions at stake. Nevertheless, I offer a working definition of the term for the purposes of this Note.

A. *Defining "Morals Legislation"*

The Supreme Court has never itself provided a clear definition of "morals legislation." In fact, it has avoided those words altogether. The term "morals legislation" has made appearances in only two Supreme Court opinions. First, Justice Brennan used it in a footnote of his opinion in *Ginsberg v. New York*, quoting an article discussing the constitutional validity of legislation protecting children from obscene materials.[10] Second, Justice Scalia made mention of the term when he predicted in his dissent in *Lawrence* that the Court had decreed "the end of all morals legislation."[11]

Despite the Court's infrequent use of the term, morals legislation has been at the center of many important controversies over equal protection of the laws and the regulation of sexual and private conduct. The Court has on multiple occasions struck down legislation based on moral disapproval,[12] animosity,[13] "mere negative attitudes,"[14] or a "bare . . . desire to harm" an unpopular group.[15] In other cases, it has suggested that morality actually can serve as a legitimate basis for legislation.[16] Despite these seemingly contradictory conclusions, there is no doubt that the Court has been speaking about morals legislation for some time. It has simply done so under different labels and with different words.

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10. 390 U.S. 629, 639 n.7 (1968) ("While many of the constitutional arguments against *morals legislation* apply equally to legislation protecting the morals of children, one can well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit." (emphasis added) (quoting Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 413 n.68 (1963)) (internal quotation marks omitted)).

11. Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

12. *See id.* at 577-78 (majority opinion) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

13. *See* Romer v. Evans, 517 U.S. 620, 634-35 (1996).

14. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

15. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

16. *E.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (Rehnquist, C.J.) (plurality opinion); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973); Roth v. United States, 354 U.S. 476, 485 (1957) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

Both on and off the Court, there has been significant and continuing debate over the validity of morals legislation.[17] Part of that debate stems from a fundamental disagreement over what it means for legislation to be moral in the first place. On the one hand, the term "morals legislation" could include basically any law motivated, even partially, by moral judgment. In *Bowers v. Hardwick*, for example, when considering whether a Georgia law prohibiting sodomy was supported by a rational basis, the Court affirmed that states have the authority to enact "laws representing essentially moral choices."[18] The Court ultimately concluded that moral disapproval of sodomy provided a legitimate basis for the law. On this interpretation, legislation is morality based if it is simply the product of moral judgment.

The *Bowers* definition proves overly broad, however, because it makes all legislation into morals legislation. Virtually all criminal laws are based not merely on a desire to prevent harm but also in a conviction that hurting another human being is morally blameworthy. As stated by the Court, "criminal punishment usually represents the moral condemnation of the community."[19] Even laws motivated by a desire to increase market efficiency are based, at least to some extent, in moral viewpoints as to how wealth should be distributed in society and what role different individuals should play in contributing to economic growth. Likewise, virtually every law is motivated by moral choices, at least to some degree. A broad interpretation of morals legislation, therefore, is unworkable precisely because it is overinclusive.

There might, however, be a useful distinction between laws based on morality (virtually all laws) and laws based *essentially* in morality (some smaller set of laws). When Justice Scalia predicted that *Lawrence* would result in the end of all morals legislation, he clearly did not mean that it would bring about the end of *all* legislation. He seemed to believe instead that it would invalidate laws based *substantially* in moral determinations, such as those criminalizing prostitution, adult incest, bestiality, and polygamy. Nevertheless, it is not clear why the list should end there, or why a law motivated by a strong moral sentiment is categorically different from one with a relatively weak moral compo-

17. *See generally* Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998); Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Suzanne B. Goldberg, *Morals-Based Justifications for Law-Making: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233 (2004); John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1 (2010); Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159 (2003); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521 (1989). The Hart-Devlin debate over the validity of laws against homosexuality and prostitution drew significant attention to the issue in the mid-twentieth century. *See generally* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965); H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963).

18. 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

19. United States v. Bass, 404 U.S. 336, 348 (1971).

nent, at least for the purpose of determining whether the law has a legitimate basis. The distinction suffers from an unsolvable line-drawing problem.[20] Perhaps it is a distinction that needs to be made, but, if so, it will be made imperfectly.

On the other hand, morals legislation could be defined quite narrowly, as including only laws based *entirely* on moral judgment. The problem is that it may be difficult to identify such laws, if they even exist. Disentangling morality from other considerations, such as utility or economic efficiency, is a difficult task. In addition, it is not easy to determine which laws are entirely based on morality and which are supported by some combination of motivations. Laws against polygamy, for example, are certainly rooted in moral disapproval, but they may be justified on other grounds, such as a desire to protect minors from domestic abuse and sexual exploitation.

Two other potential points of distinction are worth mentioning. First, there may be an important difference between morals legislation imposing a criminal penalty as opposed to legislation creating mere civil liability. Criminal laws are inherently designed to punish, and they impose significant burdens upon individuals engaging in the targeted behavior. Civil laws, in contrast, create complicated incentive structures often not clearly aimed against a particular group, and they generally pose less of a threat to fundamental liberty interests.[21] In addition, although John Stuart Mill's "harm principle"[22] may prove useful in determining which types of criminal legislation are permissible, the principle does not have an easy application to civil law, where legislation often is the product of a complicated balancing of costs and benefits to society. Second, there may be a difference between laws based on a desire to cultivate a particular morality and those motivated simply by moral disapproval. The problem with this distinction is that most morals legislation can be framed either as a moral attack against a particular class of individuals or rather as upholding

20. Drawing lines is not inherently problematic, but it is warranted only where lines can be drawn on a principled basis. There is no reason to believe that laws based substantially on morality are categorically problematic whereas laws based only minimally on morality are not. They both include some moral component. The issue is whether all morality must be excluded from legislation (a seemingly impossible task) or, if not, how much or what kind of moral motivation should be tolerated.

21. A full discussion of the civil/criminal distinction is beyond the scope of this Note. Many legal scholars have considered whether such a distinction is tenable and what, if anything, differentiates civil from criminal laws. *See, e.g.*, Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 78-94 (1996) (discussing the basis for the civil/criminal distinction). Criminal laws, however, seem on the whole to provide harsher penalties than civil laws and to be more closely associated with the assignment of moral blame.

22. According to Mill's harm principle, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." JOHN STUART MILL, ON LIBERTY 68 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

moral decency in society. In his dissent in *Lawrence*, Justice Scalia criticized Justice O'Connor on this very point, arguing that she failed to recognize in her concurrence that laws motivated by *disapproval* can simply be recast as being motivated by moral *approval* of some *other* set of values.[23]

Resolution of these definitional distinctions is beyond the scope of this Note, but recognition of these analytical problems will enable consideration of the constitutional issues at stake. In fact, part of the purpose of this Note is to demonstrate that these distinctions might matter in important ways. For the purposes of this Note, I define "morals legislation" narrowly, as *legislation motivated substantially by moral disapproval of a disfavored group*. This is the kind of legislation the Court seemed to have in mind in *Lawrence*. Nevertheless, the case may have consequences for other kinds of laws as well. Although *Lawrence* involved a criminal prohibition, the Court's decision likely extends beyond the criminal realm. This is suggested in part by the fact that the Court's antipathy toward morals legislation first manifested itself outside the criminal context.[24] Part of the puzzle will be to determine how *Lawrence* fits in with, and possibly modifies, the rules and rationales established by precedent.

B. *Morals Legislation Before* Lawrence

The Supreme Court has stated, time and again, that states have the power to regulate the public health, safety, and morals.[25] It has established, moreover, that state legislation over these areas, whether morally motivated or not, is generally entitled to a "presumption of constitutionality."[26] This presumption may originally have been rebuttable, but by the 1940s and 1950s it had become virtually incontrovertible, at least with regard to economic regulation.[27] In the classic cases of *Williamson v. Lee Optical of Oklahoma, Inc.* and *Railway Express Agency, Inc. v. New York*, the Court made clear that state legislatures

23. 539 U.S. at 601-02 (Scalia, J., dissenting) ("In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as 'preserving the traditions of society' (good); or invalidate them by characterizing them as 'expressing moral disapproval' (bad)." (capitalization altered)).

24. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 529 (1973) (holding unconstitutional section 3(e) of the Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703, which excluded from participation in the food stamp program any household containing an individual unrelated to any other member of the household).

25. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 291, 296 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991); Lochner v. New York, 198 U.S. 45, 53 (1905); Mugler v. Kansas, 123 U.S. 623, 660-61 (1887).

26. *See* O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 257-58 (1931) ("[T]he presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."); Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002-2003 CATO SUP. CT. REV. 21, 24-25 (2003).

27. Barnett, *supra* note 26, at 25.

have significant leeway in passing legislation, even if it appears to be only minimally related to a legitimate state purpose.[28]

Although the presumption of constitutionality is still good law, the force of the presumption was at least blunted by the Court in *United States v. Carolene Products Co.*[29] In the famous footnote four of that opinion, Justice Stone qualified the rule by stating that "[t]here may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments."[30] He went on to identify two more possible exceptions to the presumption of constitutionality: (1) for laws restricting the political process and (2) for laws directed at "discrete and insular minorities."[31]

After *Carolene Products*, legislation was presumed to be constitutional unless one of the exceptions in footnote four was met, in which case the Court would apply heightened scrutiny in reviewing the challenged legislation.[32] In addition, over time the Court recognized a series of new rights, and expanded others, through the doctrine of substantive due process. The right to privacy, recognized during this period as having applications in a variety of different contexts, is perhaps the most notable product of the Court's new jurisprudence.[33] At the same time, the Court struggled, in various cases, to determine whether morality could continue to serve as a legitimate basis for legislation.

1. *Enforcing morality*

Despite increasing constitutional protection for privacy in the mid-twentieth century, the Court remained committed to the notion that the states and Congress could legislate on matters of public morality. In *Roth v. United States*, decided in 1957, the Court upheld two obscenity statutes on the ground that obscene speech is not protected under the First Amendment.[34] Specifically, the Court found that any benefit derived from the exposition of lewd and obscene utterances is "clearly outweighed by the social interest in order and morality."[35] Noting the existence of obscenity laws in all of the states, and many such laws passed by Congress, the Court reaffirmed that the government has a legitimate interest in regulating matters of public decency and moral concern.

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28. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88 (1955); Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 109-10 (1949); *see* Barnett, *supra* note 26, at 25-27.

29. 304 U.S. 144 (1938); *see* Barnett, *supra* note 26, at 27-29.

30. *Carolene Prods.*, 304 U.S. at 152 n.4.

31. *See id.*

32. Barnett, *supra* note 26, at 29.

33. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).

34. 354 U.S. 476, 492-93 (1957).

35. *Id.* at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

Justice Harlan, concurring in part and dissenting in part, argued that different standards should apply to the federal government,[36] but even he agreed that "it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society."[37] The states, in his view, could certainly regulate such "obnoxious" speech:

> Since the domain of sexual morality is pre-eminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality. It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to "deprave or corrupt" a reader.[38]

This was the traditional view of the authority of the states over matters of moral concern.

In *Paris Adult Theatre I v. Slaton*, the Court again held that the states have a "legitimate interest in regulating commerce in obscene material."[39] Writing for the majority, Chief Justice Burger quoted *Roth* in reaching the conclusion that a legislature can legitimately act "to protect 'the social interest in order and morality.'"[40] Remarkably, however, Chief Justice Burger suggested that the law might also be supported by a nonmoral justification:

> The States have the power to make a *morally neutral* judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society."[41]

Chief Justice Burger seemed to view this "right . . . to maintain a *decent society*," which he cited twice in his opinion, as different from a right to punish *immoral behavior*.[42] There may or may not be a valid distinction between the two,[43] but it is worth noting that Chief Justice Burger went out of his way to argue that the law at issue in this case may have been the product of a "morally neutral" motivation rather than mere moral disapproval. Regardless of the justi-

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36. *See id.* at 504 (Harlan, J., concurring in part and dissenting in part).

37. *Id.* at 501-02.

38. *Id.* at 502.

39. 413 U.S. 49, 69 (1973).

40. *Id.* at 61 (emphasis omitted) (quoting *Roth*, 354 U.S. at 485).

41. *Id.* at 69 (emphasis added) (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

42. *See id.* at 59-60, 69 (emphasis added).

43. H.L.A. Hart argued that there is in fact a distinction between laws maintaining decency and laws that prohibit private immorality. In his view, decency laws are like nuisance laws insofar as they seek to protect individuals' sensibilities from overt public acts, and are therefore justifiable. In contrast, laws prohibiting private immorality are based on mere disapproval and are not a legitimate exercise of state power. HART, *supra* note 17, at 38-48. The distinction is somewhat tenuous, but not without merit.

fication, the Court held that "the States have a legitimate interest in regulating commerce in obscene material."[44]

Chief Justice Burger may have hedged his bets in *Slaton*, but the Court left no room for interpretation in *Bowers v. Hardwick*.[45] Although the respondent asserted that the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was an inadequate rationale for the law, the Court explicitly rejected that argument.[46] It stated:

> The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[47]

In upholding the Georgia sodomy law, the Court pronounced in no uncertain terms that moral disapproval could serve as a legitimate basis for criminal legislation. That decision, however, would be relatively short-lived.[48]

More recently, in *Barnes v. Glen Theatre, Inc.*, decided in 1991, the Court upheld an Indiana statute prohibiting public nudity in places of public accommodation.[49] After quoting language in *Roth*, *Slaton*, and *Bowers*, Chief Justice Rehnquist, writing for the plurality, found that "the public indecency statute furthers a substantial government interest in protecting order and morality."[50] Yet again, a plurality of the Court reaffirmed that moral judgment can be a legitimate basis for law.

2. *Changing attitude of the Court*

Despite the Court's frequent reminder that state police powers traditionally include the authority to enforce public morals, the Court has also indicated, even before *Lawrence*, that certain laws based on moral judgment might not survive rational basis review. In his dissent in *Slaton*, Justice Brennan argued that a state's interest in suppressing obscenity was "predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion," and that such assumptions could not validate a statute substantially undermining the guarantees of the First Amendment.[51] The supposed causal

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44. *Slaton*, 413 U.S. at 69.

45. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

46. *Id.* at 196.

47. *Id.*

48. *See Lawrence*, 539 U.S. at 578 (overruling *Bowers*).

49. 501 U.S. 560, 562-63 (1991) (plurality opinion); *id.* at 572 (Scalia, J., concurring in the judgment); *id.* at 581 (Souter, J., concurring in the judgment).

50. *Id.* at 569 (plurality opinion).

51. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 109-10 (1973) (Brennan, J., dissenting).

link between "immoral" obscenity and subsequent criminal, or even antisocial, behavior was too weak, he argued, to justify the inevitable burdens on free speech.[52]

Although he dissented in *Slaton*, Justice Brennan ultimately carried the day in *United States Department of Agriculture v. Moreno*,[53] where, now writing for the majority, he succeeded in pushing his argument against morals legislation one step further. In *Moreno*, decided in the same year as *Slaton*, the Court held invalid section 3(e) of the Food Stamp Act of 1964, which excluded from participation in the food stamp program any household containing an individual unrelated to any other member of the household.[54] The Court concluded that section 3(e) unconstitutionally discriminated against individuals living in households containing one or more members unrelated to the rest.[55] That section, according to the Court, was not rationally related to the stated purpose of the Act or to the asserted governmental interest in preventing fraud.[56]

In addition to finding that section 3(e) lacked any rational basis, the Court concluded that the provision was based on an impermissible desire to harm a politically unpopular group.[57] Through examination of the sparse congressional record, the Court found statements indicating that section 3(e) was intended only "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[58] The Court would not tolerate such open hostility to a political minority. It held that a "bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[59] According to the Court, this section of the Act was based entirely in moral disapproval of "hippies" and "hippie communes" and therefore could not stand on its own two feet.

Twelve years later, in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court again applied a more demanding form of rational basis review when it invalidated the application of a local ordinance that required a special use per-

52. *See id.*

53. 413 U.S. 528 (1973).

54. *Id.* at 529; *see also* Food Stamp Act of 1964, Pub. L. No. 88-525, § 3(e), 78 Stat. 703, 703.

55. *Moreno*, 413 U.S. at 529.

56. *See id.* at 533-36. Specifically, the Court found that the statutory classification was "clearly irrelevant" to the stated purposes of the Act, which included "safeguard[ing] the health and well-being of the Nation's population" and "rais[ing] levels of nutrition among low-income households." *Id.* at 533-34. It also rejected the government's argument that the challenged classification was rationally related to the legitimate governmental interest in minimizing fraud in the administration of the food stamp program, making reference to the fact that the government denied essential food assistance to all otherwise eligible households containing unrelated members. *Id.* at 535-36.

57. *Id.* at 534.

58. *Id.*

59. *Id.*

mit for construction of a group home for the mentally retarded.[60] Cleburne Living Center, Inc. (CLC) had leased a building in the city to house thirteen mentally disabled persons, but the city council denied CLC a special use permit, which was required by city ordinance for the construction of "[h]ospitals for the insane or feeble-minded."[61] The Court held that mental retardation is not a suspect classification and therefore refused to apply heightened scrutiny,[62] but it concluded nevertheless that the ordinance was unconstitutional as applied because it was based, in the Court's opinion, in "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding."[63] The ordinance, which required a special use permit for construction of a house for the mentally retarded but not for other uses such as fraternity or boarding houses, was grounded in nothing more than "an irrational prejudice against the mentally retarded" and therefore violated equal protection.[64]

In *Romer v. Evans*, the Court reaffirmed that *Moreno* and *Cleburne* were not mere exceptions to the rule but rather the beginning of a new trend in its jurisprudence. The Court reiterated that laws based on moral animosity do not have a legitimate basis.[65] Under the Equal Protection Clause, the Court held invalid a provision of the Colorado Constitution, which had stripped homosexuals of protection from local antidiscrimination laws and prohibited the enactment of such laws in the future.[66] Amendment 2 (the constitutional provision at issue) was, in the Court's estimation, both "too narrow and too broad" because it identified "persons by a single trait [homosexuality] and then denie[d] them protection across the board."[67] As such, "the amendment impose[d] a special disability upon those persons alone."[68] Worse still, it was "born of animosity toward the class of persons affected."[69]

In *Romer*, the Court suggested both that the law was improperly motivated *and* that it lacked a legitimate basis. It did not specify, however, whether one conclusion must necessarily follow from the other. For example, it might be possible to imagine a law motivated by moral disapproval yet supported also by a variety of neutral public policies. In *Romer*, the legislation was arguably

60. 473 U.S. 432, 435 (1985). In a separate opinion, Justice Marshall suggested that the Court was in fact applying "something more than minimum rationality review." *Id.* at 459 (Marshall, J., concurring in the judgment in part and dissenting in part). He was critical, moreover, of the Court for refusing to acknowledge that it was really applying a new kind of rational basis test. *Id.* at 459-60.

61. *Id.* at 435-36 (majority opinion) (alteration in original) (internal quotation marks omitted).

62. *Id.* at 442.

63. *Id.* at 448.

64. *Id.* at 446-47, 450.

65. Romer v. Evans, 517 U.S. 620, 634-35 (1996).

66. *Id.* at 623-24.

67. *Id.* at 633.

68. *Id.* at 631.

69. *Id.* at 634.

motivated by a desire to conserve state resources for the enforcement of minority rights[70] and, in the words of Justice Scalia, to prohibit "*special treatment* of homosexuals."[71] The Court rejected that argument, finding it "impossible to credit" the resource conservation rationale.[72] It was likely willing to do so primarily because the amendment was motivated by moral animus and a "bare . . . desire to harm."[73]

Despite sweeping language, *Romer*, *Cleburne*, and *Moreno* were relatively idiosyncratic cases. The legislative history of the Food Stamp Act of 1964 made it hard for the government to deny that the provision at issue in *Moreno* was based on anything other than a desire to harm a politically unpopular group. The narrowly applied ordinance in *Cleburne*, for its part, was based in irrational fear of the mere proximity of mentally disabled persons, a group traditionally subjected to social stigma. Finally, in *Romer*, the Colorado constitutional amendment not only removed certain protections but in fact constitutionally mandated a special disability for the disfavored class. Nevertheless, these cases indicated that a bare desire to harm a particular group on account of moral disapproval alone could not be a legitimate basis for legislation. How the Court would square this conclusion with *Bowers* (a question posed by Justice Scalia in his dissent in *Romer*[74]) was as yet a mystery.[75] Eight years later, the Court gave its answer.

C. *What Did* Lawrence *Decide?*

In *Lawrence v. Texas*, the Supreme Court held unconstitutional a Texas law criminalizing sexual relations between individuals of the same sex.[76] Although it seemed deliberately opaque in its reasoning, the Court concluded that the Texas law infringed the petitioners' "right to liberty" under the Due Process Clause,[77] and that the law furthered "no legitimate state interest" because moral disapproval alone could not justify intrusion into the "personal and private life of the individual."[78] Moreover, the Court specifically overruled *Bowers* and endorsed Justice Stevens's analysis in his dissenting opinion in that case:

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70. *Id.* at 635.

71. *Id.* at 638 (Scalia, J., dissenting).

72. *Id.* at 635 (majority opinion).

73. *See id.* at 634-35 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

74. *See id.* at 640-43 (Scalia, J., dissenting) ("If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.").

75. For a discussion of whether *Romer* and *Bowers* are compatible, see Jay Michaelson, Essay, *On Listening to the Kulturkampf, or, How America Overruled* Bowers v. Hardwick*, Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559 (2000).

76. 539 U.S. 558, 578 (2003).

77. *Id.*

78. *Id.* at 577-78.

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.[79]

By endorsing this language, the Court indicated not only that the Texas law lacked a rational basis but, more specifically, that moral disapproval could not constitute a sufficient reason for upholding the law. At the same time, the Court suggested that Texas's sodomy law was particularly pernicious because it infringed the liberty of persons to engage in deeply "intimate choices," a right it considered to be protected by the Due Process Clause.[80] These conclusions might have constituted independent reasons for holding the law unconstitutional. Nevertheless, the Court chose to rely on a combination of the two.

Although the Court recognized that there was a "tenable argument" for declaring the Texas statute invalid under the Equal Protection Clause, it chose instead to rely on due process. The Court did not, however, explicitly apply heightened scrutiny. Rather, the Court concluded that the law furthered "no legitimate state interest."[81] In this way, the Court indicated that the kind of analysis it had employed in *Moreno* and *Romer*, both equal protection cases, could also be applied in the area of substantive due process. The Court asserted that it decided the case on due process grounds because it wanted to address the central holding of *Bowers*.[82] Perhaps it also feared that a decision on equal protection grounds would have undesirable consequences.[83]

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79. *Id.* (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

80. Notably, the Court in *Lawrence* relied primarily on the right to liberty, rather than privacy. Although it stressed that the petitioners' conduct occurred "in private," *id.* at 564, and that the statute intruded into the "personal and private life of the individual," *id.* at 578, the Court placed much greater emphasis on the right to liberty. The Court constantly spoke of liberty, referencing the "liberty at stake," the "liberty of persons to choose without being punished as criminals," and the "liberty protected by the Constitution." *Id.* at 567. In the first paragraph of the opinion alone, the Court used the word "liberty" three times. *Id.* at 562. Perhaps this is a reflection of a more general change in preference, visible also in its cases on contraception and abortion, where the Court shifted from speaking of "zones of *privacy*," Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (emphasis added), to talking about the "realm of personal *liberty*," Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) (emphasis added). *See* Barnett, *supra* note 26, at 33-34.

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

82. *See id.* at 564, 574-75. In terms of the underlying rationales of *Bowers* and the Court's approach in *Romer* and *Lawrence*, the Court seems to have been correct in suggesting that it could not avoid ruling on the continuing validity of its previous decision. Nevertheless, as Justice O'Connor argued in her concurring opinion, it was not analytically necessary to overrule *Bowers* given that the law at issue in that case applied, at least on its own

Regardless of its motivation, the Court was unabashed in concluding that the two types of inquiry (equal protection and due process) are in fact largely connected. In its words, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[84] In other words, the Court confessed that this case was as much about equal protection as it was about substantive due process. By depriving homosexuals of the liberty to choose a sexual partner of the same sex, the Texas law effectively criminalized part of their identity. This the Court would not tolerate. In its words, the state "cannot demean their existence or control their destiny by making their private sexual conduct a crime."[85]

Nevertheless, it remained unclear what effect *Lawrence* would have on other kinds of conduct, and how far the Court's reasoning against morals legislation would extend. The Court explicitly identified a number of questions not decided in its opinion:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.[86]

Although the Court avoided addressing any of these issues, it did not say that its opinion would have no bearing upon them. By making such a list, the Court in fact seemed to suggest that its decision might have important consequences for these and other issues. Not surprisingly, the holding in *Lawrence* quickly became a matter of dispute.

II. SEXUAL DEVICES AND THE CONTINUING BATTLE OVER *LAWRENCE*

State and federal courts are currently divided as to the constitutionality of laws banning the sale or distribution of devices used for sexual stimulation, or sexual devices—what some call "sex toys." In the wake of *Lawrence*, the Eleventh Circuit upheld the constitutionality of an Alabama law prohibiting the distribution of sexual devices, concluding that "public morality remains a legitimate rational basis for the challenged legislation even after *Lawrence*."[87] The

terms, to all individuals, whereas the law in *Lawrence* criminalized conduct only of individuals of the same sex. *See id.* at 582 (O'Connor, J., concurring).

83. By deciding on due process grounds, the Court could more easily limit its holding to the particular conduct involved in this case. Nevertheless, Justice Scalia feared that the Court's use of an "unheard-of form of rational-basis review" would have "far-reaching implications beyond this case." *Id.* at 586 (Scalia, J., dissenting).

84. *Id.* at 575 (majority opinion).

85. *Id.* at 578.

86. *Id.*

87. Williams v. Morgan, 478 F.3d 1316, 1318 (11th Cir. 2007).

Fifth Circuit, however, reached the opposite result when reviewing a similar statute in Texas.[88] It concluded that "[t]o uphold the statute would be to ignore the holding in *Lawrence* and allow the government to burden consensual private intimate conduct simply by deeming it morally offensive."[89]

Adding fuel to the fire, the high courts of five states have also reached opposing conclusions in their evaluation of laws prohibiting the sale or distribution of sexual devices. After *Lawrence*, the supreme courts of Alabama and Mississippi upheld laws regulating the sale of sexual devices.[90] These courts found that *Lawrence* did not apply.[91] Prior to *Lawrence*, in contrast, state courts in Colorado, Kansas, and Louisiana had held such laws to be invalid. One court found no rational basis for laws prohibiting the sale or distribution of sexual devices,[92] and the other two relied on the right to privacy.[93] Despite such widespread disagreement, the Supreme Court has not resolved this dispute.[94] Which side, in the end, got *Lawrence* right?

A. *Split Between the Circuits*

1. *Eleventh Circuit*

In 1998, vendors and users of sexual devices in Alabama brought an action in federal court seeking to enjoin enforcement of a state law criminalizing the distribution of "any device designed or marketed as primarily useful for the stimulation of human genital organs."[95] They argued that implementation of the statute infringed their fundamental right to privacy and personal autonomy, and, in addition, that the challenged legislation was not reasonably related to a proper legislative purpose.[96] The district court concluded that the law was un-

88. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 (5th Cir. 2008).

89. *Id.*

90. *See* 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319, 337 (Ala. 2010); PHE, Inc. v. State, 877 So. 2d 1244, 1248-50 (Miss. 2004).

91. The Supreme Court of Alabama adopted the Eleventh Circuit approach, concluding that *Lawrence* rejected public morality as a legitimate governmental interest only for laws involving both private and *noncommercial* activity. *See 1568 Montgomery Highway*, 45 So. 3d at 341. The Supreme Court of Mississippi, in contrast, did not even make reference to *Lawrence*. *See PHE*, 877 So. 2d at 1247-49.

92. *See* State v. Brenan, 772 So. 2d 64, 76 (La. 2000).

93. *See* People *ex rel.* Tooley v. Seven Thirty-Five E. Colfax, Inc., 697 P.2d 348, 368 (Colo. 1985); State v. Hughes, 792 P.2d 1023, 1032 (Kan. 1990).

94. The Supreme Court denied certiorari in the Eleventh Circuit case before the Fifth Circuit rendered its decision, and therefore before a conflict had arisen between the circuits. *See* Williams v. King, 552 U.S. 814 (2007) (denying certiorari to Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007)).

95. Williams v. Pryor (*Williams I*), 41 F. Supp. 2d 1257, 1259-60 (N.D. Ala. 1999), *rev'd*, 240 F.3d 944 (11th Cir. 2001).

96. *Id.* at 1260.

constitutional because it bore "no reasonable, rational relation to a legitimate state interest."[97]

The State of Alabama appealed, and, in the midst of a complicated web of reversals and remands by the Eleventh Circuit,[98] the Supreme Court released its decision in *Lawrence*. The Eleventh Circuit, in *Williams v. Morgan*, ultimately held that the Alabama statute was constitutional because it did not burden a fundamental right and was supported by a rational basis.[99] In reaching this holding, the Eleventh Circuit adopted two important interpretations of *Lawrence*. First, it concluded that *Lawrence* "did not recognize a fundamental right to sexual privacy."[100] Second, it held that "public morality survives as a rational basis for legislation even after *Lawrence*."[101]

The Eleventh Circuit provided alternate arguments for its holding that *Lawrence*'s prohibition against morals legislation did not apply. It argued that "while the statute at issue in *Lawrence* criminalized *private* sexual conduct, the statute at issue in this case forbids *public*, *commercial* activity."[102] In the court's view, commerce is "an inherently public activity" and therefore is not covered by *Lawrence*, which invalidated a law criminalizing private sexual acts.[103] It concluded, therefore, that "because the challenged statute in this case does not target private activity, but public, commercial activity, the state's interest in promoting and preserving public morality remains a sufficient rational basis."[104]

In addition, the Eleventh Circuit held that "we do not read *Lawrence*, the overruling of *Bowers*, or the *Lawrence* court's reliance on Justice Stevens's dissent, to have rendered public morality altogether illegitimate as a rational basis."[105] Somewhat strangely, it quoted *Bowers* in support of this conclusion: "The principle that '[t]he law . . . is constantly based on notions of morality,' was not announced for the first time in *Bowers* and remains in force today."[106] In fact, "the Supreme Court has affirmed on repeated occasions that laws can

97. *Id.* at 1293.

98. For a complete case history, see *Williams I*, 41 F. Supp. 2d 1257; Williams v. Pryor (*Williams II*), 240 F.3d 944 (11th Cir. 2001) (reversing *Williams I*); Williams v. Pryor (*Williams III*), 220 F. Supp. 2d 1257 (N.D. Ala. 2002) (on remand from *Williams II*); Williams v. Attorney Gen. (*Williams IV*), 378 F.3d 1232 (11th Cir. 2004) (reversing *Williams III*); Williams v. King (*Williams V*), 420 F. Supp. 2d 1224 (N.D. Ala. 2006) (on remand from *Williams IV*); Williams v. Morgan (*Williams VI*), 478 F.3d 1316 (11th Cir. 2007) (affirming *Williams V*).

99. *Williams VI*, 478 F.3d at 1318-20.

100. *Id.* at 1319.

101. *Id.* at 1323.

102. *Id.* at 1322.

103. *Id.*

104. *Id.* at 1322-23.

105. *Id.* at 1323.

106. *Id.* (citation omitted) (quoting Bowers v. Hardwick, 478 U.S. 186, 196 (1986)).

be based on moral judgments."[107] For this reason, the Eleventh Circuit concluded that "public morality survives as a rational basis for legislation even after *Lawrence*."[108]

2. *Fifth Circuit*

In *Reliable Consultants, Inc. v. Earle*, the Fifth Circuit reached the opposite conclusion, invalidating a Texas statute that criminalized the "selling, advertising, giving, or lending of a device designed or marketed for sexual stimulation" unless the defendant could prove that such action was taken "for a statutorily-approved purpose."[109] The statute did not punish the "use or possession of sexual devices for any purpose."[110] Although suit was brought in this case only by vendors of sexual devices, the court concluded, in accordance with *Griswold v. Connecticut*,[111] that they had standing to challenge the legislation on behalf of individuals wishing to use such devices.[112]

The Fifth Circuit found that Texas's "primary justifications for the statute are 'morality based.'"[113] The interests asserted by the state included "discouraging prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and prohibiting the commercial sale of sex."[114] Applying rational basis review, the court concluded that an interest in "public morality" could not constitutionally sustain the statute after *Lawrence*:

> To uphold the statute would be to ignore the holding in *Lawrence* and allow the government to burden consensual private intimate conduct simply by deeming it morally offensive. In *Lawrence*, Texas's only argument was that the anti-sodomy law reflected the moral judgment of the legislature. The Court expressly rejected the State's rationale by adopting Justice Stevens' view in *Bowers* as "controlling" and quoting Justice Stevens' statement 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." Thus, if in *Lawrence* public morality was an insufficient justification for a law that restricted "adult consensual intimacy in the home," then public morality also cannot serve as a rational basis for Texas's statute, which also regulates private sexual intimacy.[115]

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107. *Id.*

108. *Id.*

109. 517 F.3d 738, 740-41 (5th Cir. 2008).

110. *Id.* at 741. Under the statute, therefore, although a person could legally use a sexual device in the privacy of his or her own home, he or she could be held criminally liable for giving or lending that device to another person.

111. *See* 381 U.S. 479, 481 (1965) (holding that the plaintiff pharmacists "have standing to raise the constitutional rights of the married people with whom they had a professional relationship").

112. *Reliable Consultants*, 517 F.3d at 743.

113. *Id.* at 745.

114. *Id.* (internal quotation marks omitted).

115. *Id.* (footnotes and internal quotation marks omitted).

In addition, the Fifth Circuit found that the sale of sexual devices is not equivalent to the "commercial sale of sex," or in other words, prostitution.[116] First, it analogized the sale of sexual devices to the sale of contraceptives, which it claimed does not involve the kind of "sale of sex" that may be constitutionally proscribed.[117] Second, the court indicated that "there are justifications for criminalizing prostitution other than public morality, including promoting public safety and preventing injury and coercion."[118] The sale of sexual devices does not threaten the public safety or present any danger of injury or coercion. The court was careful to note, however, that "[n]othing here said or held protects the *public display* of material that is obscene."[119]

The Fifth Circuit concluded that "[j]ust as in *Lawrence*, the State here wants to use its laws to enforce a public moral code by restricting private intimate conduct."[120] In dissent, Judge Barksdale essentially endorsed the reasoning of the Eleventh Circuit.[121] According to the majority, however, this case was "not about public sex."[122] Moreover, it was not about "controlling commerce in sex."[123] Rather, it was "about controlling what people do in the privacy of their own homes because the State is morally opposed to a certain type of consensual private intimate conduct."[124] This, the court concluded, was "an insufficient justification for the statute after *Lawrence*."[125]

B. *State Courts Divided*

The supreme courts of five states have come out on different sides on this issue. Only two states have upheld laws against the sale of sexual devices: Alabama and Mississippi. Both of these cases were decided after *Lawrence*.

In *1568 Montgomery Highway, Inc. v. City of Hoover*, decided in 2010, the Alabama Supreme Court held that "public morality can still serve as a legitimate rational basis for regulating commercial activity, which is not a private activity."[126] The court's analysis, driven by the briefing of the parties, focused on the decisions of the Fifth and Eleventh Circuits.[127] In fact, the court quoted

116. *Id.* at 746.
117. *Id.*
118. *Id.*
119. *Id.* at 747 (emphasis added).
120. *Id.* at 746.
121. *Id.* at 749-50 (Barksdale, J., dissenting).
122. *Id.* at 746 (majority opinion).
123. *Id.*
124. *Id.*
125. *Id.*
126. 45 So. 3d 319, 345-46 (Ala. 2010).
127. *Id.* at 329 ("Because of the way the parties have framed the federal constitutional issues, a detailed discussion of *Williams* and *Reliable Consultants* is necessary.").

extensively from the opinions of the Fifth and Eleventh Circuits.[128] Without a great deal of explanation, it ultimately chose to embrace the Eleventh Circuit's interpretation of *Lawrence*.[129] The court noted that the Alabama statute targeted public commercial activity, not private sexual conduct.[130] In addition, it asserted that, although "*Lawrence* involved a discrete class of individuals targeted for discrimination out of simple hostility," no such class was targeted by the Alabama statute.[131] In other words, it indicated that, even though *Lawrence* did limit the kind of morals legislation that could pass constitutional muster, the Alabama statute did not fall into the category of prohibited legislation.

In 2004, the Supreme Court of Mississippi, in *PHE, Inc. v. State*, also upheld under its state constitution a law prohibiting the sale, advertisement, publishing, or exhibiting of any device "designed or marketed as useful primarily for the stimulation of human genitalia."[132] Although decided on state constitutional grounds, the case nevertheless offers insight into the varied analytical approaches adopted by courts considering the propriety of morals legislation. The court found that the right to privacy did not make the law invalid and "that society's interest in protecting the right to control conception is of greater magnitude than the interest in protecting the right to purchase sexual devices."[133] The court referenced a decision by the District Court for the Northern District of Alabama which held a similar statute unconstitutional, but it rejected that court's conclusion.[134] That district court decision was ultimately reversed by the Eleventh Circuit.[135]

Three states have held laws prohibiting the sale of sexual devices to be unconstitutional: Louisiana, Colorado, and Kansas. Notably, these cases, unlike the two state cases just discussed, were all decided before *Lawrence*.

In *State v. Brenan*, decided in 2000, the Supreme Court of Louisiana held that a statute banning the promotion of obscene sexual devices violated the Fourteenth Amendment because it bore no rational relationship to a legitimate state interest.[136] The court started out by noting that both parties were mistaken as to the true motivation of the law:

> In the instant case, both parties and the court of appeal have mistakenly assumed that the primary purpose behind [the statute] is to protect minors and unconsenting adults from viewing obscene devices; however, the minutes

128. *See id.* at 329-40.

129. *Id.* at 340 ("It is the Eleventh Circuit's view of *Lawrence* that we embrace.").

130. *Id.* at 341.

131. *Id.*

132. 877 So. 2d 1244, 1246, 1250 (Miss. 2004).

133. *Id.* at 1248-49.

134. *PHE, Inc.*, 877 So. 2d at 1248 (citing *Williams III*, 220 F. Supp. 2d 1257, 1298 (N.D. Ala. 2002), *rev'd*, *Williams IV*, 378 F.3d 1232 (11th Cir. 2004)).

135. *See Williams IV*, 378 F.3d at 1250.

136. 772 So. 2d 64, 76 (La. 2000).

> from the 1985 Senate Committee considering the bill reveal that the backers of the statute were more concerned with waging a general war on obscenity.[137]

Considering that the court decided the case on rational basis review, the true purpose of the statute may have been irrelevant (at least insofar as it did not demonstrate animus). The court went on to note that the state's "unqualified ban on sexual devices" ignored the fact that the use of vibrators is therapeutically appropriate in some cases.[138] The court concluded, in a rather unforgiving application of the rational basis standard, that "we cannot say that the State's actions in banning all devices . . . without any review of their prurience or medical use is rationally related to the 'war on obscenity.'"[139]

In *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, decided in 1985, the Colorado Supreme Court held that a state law prohibiting the sale or promotion of sexual devices impermissibly burdened the right of privacy.[140] The court found that "[t]he statutory scheme, in its present form, impermissibly burdens the right of privacy of those seeking to make legitimate medical or therapeutic use of such devices."[141] In other words, the effect of the statute was "to equate sex with obscenity."[142] Given the extreme breadth of the statute, the court concluded that the state had demonstrated "no interest in the broad prohibition of [sexual devices] sufficiently compelling to justify the infringement on the privacy right of those seeking to use them in legitimate ways."[143]

Finally, in the 1990 case of *State v. Hughes*, the Kansas Supreme Court invalidated a state law prohibiting the promotion of sexual devices on largely the same grounds as the Colorado court. "We agree with the opinion in *Seven Thirty-Five* that a statute is impermissibly overbroad when it impinges without justification on the sphere of constitutionally protected privacy which encompasses therapy for medical and psychological disorders."[144] Given that the statute provided no exception for legitimate medical uses,[145] and the state provided no compelling interest in support of such a prohibition, the court concluded that the statute was unconstitutionally overbroad.[146]

This brief overview of these five state cases reveals a great variety of approaches to the legal issue presented. In Alabama, the state court focused squarely on the issue of morals legislation, but it seemed to put a spin on the

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137. *Id.* at 72-73.

138. *Id.* at 75.

139. *Id.* at 76.

140. 697 P.2d 348, 368 (Colo. 1985).

141. *Id.* at 370.

142. *Id.*

143. *Id.*

144. State v. Hughes, 792 P.2d 1023, 1031-32 (Kan. 1990).

145. For a discussion of the historical (although dubious) use of sexual devices for medical purposes, see Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After* Lawrence v. Texas, 16 YALE J.L. & FEMINISM 1, 15-17 (2004).

146. *Hughes*, 792 P.2d at 1032.

doctrine, effectively concluding that *Lawrence*'s rule applies only where the disfavored class is entitled to special protection. The Mississippi court focused on questions of privacy, finding that the sale of sexual devices was simply not covered by the privacy doctrine. In contrast, the Louisiana court applied a traditional, albeit unforgiving, version of the rational basis test, finding that there was not an adequate relation between the laws under consideration and the state interest in fighting a "war on obscenity." Finally, the courts in Kansas and Colorado were concerned by the apparent overbreadth of these laws.

Somewhat strangely, the two state cases upholding laws criminalizing the sale or distribution of sexual devices were decided *after Lawrence*, whereas the three cases striking down such legislation were decided *before* the Supreme Court explicitly rejected the *Bowers* morality-based approach. The cases decided before *Lawrence* do not provide examples of state courts' interpretation of the Supreme Court's new rule, but they do indicate alternate approaches to the problem posed. Whereas the Supreme Court in *Lawrence*, and the Fifth Circuit in applying that decision, focused on moral disapproval as an insufficient basis for legislation, these state courts relied on overbreadth and privacy doctrines. If nothing else, these state cases demonstrate that statutes criminalizing the sale of sexual devices raise a variety of overlapping concerns relating to freedom, privacy, and morality.

C. *Why the Fifth Circuit Got It Right*

I argue that the Fifth Circuit made the better argument and reached the right decision in interpreting and applying *Lawrence*. Admittedly, *Lawrence* provides few clear answers, but almost every aspect of the Court's reasoning suggests that laws criminalizing the sale of sexual devices are unconstitutional. Such laws impose a significant burden upon individual liberty interests exercised by consenting adults in the privacy of their own home, and they have no rational basis. These laws are motivated by moral disapproval of the commercialization of sex and the use of nontraditional forms of sexual stimulation. After *Lawrence*, these are not permissible bases for state legislation.

Laws banning the sale or distribution of sexual devices impose a significant burden upon individual liberty interests. In *Webber v. State*, the Texas Court of Appeals affirmed an initial sentence of thirty days in jail and a fine of $4000 against the defendant, Dawn Webber, for promoting an obscene device.[147] The police had sent an undercover detective into an adult video store masquerading as a wife experiencing marital problems and seeking to purchase a device for sexual stimulation.[148] This case demonstrates that states can impose serious criminal penalties for violation of these laws and that there is a real threat of enforcement.

147. 21 S.W.3d 726, 728 (Tex. Ct. App. 2000).

148. *Id.* at 728-29.

Although prohibitions of the sale of sexual devices are fundamentally distinct from prohibitions of their use, the Court has made clear that criminalizing even the sale or distribution of certain products can impinge upon protected liberty interests. In *Griswold v. Connecticut*, the Court held that the plaintiff pharmacists had "standing to raise the constitutional rights of the married people with whom they had a professional relationship" and to whom they provided contraception.[149] The sale of sexual devices, like the provision of contraceptives, is necessarily incidental to personal use of such products, which are not available except by purchase. For this reason, prohibitions of the sale of sexual devices cannot be separated from prohibitions of their use,[150] and vendors of such devices have standing to bring suit on behalf of their clients.

The personal use of a sexual device by a consenting adult in the privacy of his or her own home implicates a liberty interest warranting constitutional protection. There are three important aspects of the conduct burdened by the laws in question here that, when drawn together, make a close parallel between this case and the case presented in *Lawrence*. Namely, sexual devices are used (1) in the privacy of the home, (2) by consenting adults, and (3) for an intimate sexual purpose.

The laws at issue in these cases criminalize the sale of sexual devices used in the privacy of the home. In *Lawrence*, the Texas sodomy laws were particularly problematic because they involved police enforcement not only of public sex but also of sex within the home. Certainly, the state may criminalize some forms of sexual activity that occur in the privacy of the home (for example, rape or child molestation), but such regulation warrants more careful review where it impinges on the right to privacy. In addition, the state could, and in fact does, punish sex or the use of sexual devices in public places, but the challenged laws do not limit themselves to criminalizing public acts. By criminalizing the sale of sexual devices, which is in some sense a public act, these laws also impose a significant burden upon their private use. Without a right of public purchase, the right to private use becomes close to inconsequential.

In addition, the laws in question criminalize the sale of sexual devices to individuals who use such devices for consensual acts. There is no threat that, by allowing the sale of sexual devices, the state will fail to protect nonconsenting sexual partners. In fact, such devices are often used by individuals who seek sexual gratification without engagement with a partner.

Finally, laws criminalizing the sale of sexual devices target a product that is used for sexually intimate conduct, implicating an additional set of privacy concerns. Although the Court in *Lawrence* spoke about the importance of sex

149. 381 U.S. 479, 481 (1965).

150. *See* Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059, 1067 (2004) (noting that "if a ban on the sale of contraceptives cannot be justified, it is not clear, after *Lawrence,* how the state can justify a ban on the sale of sexual devices").

in fostering personal relationships, such language was irrelevant to the outcome of the case. There was no evidence presented that the individuals prosecuted by Texas were in a meaningful relationship at the time of their apprehension. In any event, courts should be wary of engaging in determinations as to which kinds of sexual behavior are important to the development of personal relationships and which are not. This is a question outside the special competency of the courts and best left to determination by individuals and their sexual partners in society at large.

Although the Court has not explicitly announced a right to engage in sex, it has come close. In *Eisenstadt v. Baird*, the Court abandoned the marital bedroom as the limit of its jurisprudence by making clear that its contraception decisions applied to laws intruding on the sexual decisions of unmarried individuals.[151] In *Lawrence*, the Court went one step further by protecting even sexual behavior between persons of the same sex, which is obviously unconnected to reproduction. Although a distinction between sex for the sake of intimacy and sex for simple pleasure is still discernible in the Court's reasoning, the cases protecting the use and sale of contraception suggest that such a distinction is in fact untenable.

In light of *Lawrence*, therefore, laws criminalizing the sale or distribution of devices used for sexual stimulation demand a more searching level of constitutional scrutiny than traditional rational basis review would otherwise afford. There is strong reason to believe, moreover, that such laws lack a legitimate basis. The asserted interests of protecting the public against commerce in sex, and of keeping children safe from obscenity, fail to hold water. As the Fifth Circuit noted, the sale of sexual devices is not the sale of sex, or at least not any more so than is the sale of contraceptives. With regard to protecting children, it is one thing to require that sexual devices be hidden from easy view in stores where they are made available for purchase, and to limit where such devices may be sold through zoning laws, but it is entirely another to make a blanket criminal prohibition against the sale of such devices however and wherever they are sold.

Laws prohibiting the sale of sexual devices are motivated by moral disapproval of the commercialization of sex and the sexual practices associated with individuals who purchase them. In *Reliable Consultants, Inc. v. Earle*, for example, Texas asserted a state interest in "discouraging prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and prohibiting the commercial sale of sex."[152] Such interests, however, are not legitimate reasons for regulation. After *Lawrence*, such moral justifications, based on distaste and disapproval, fail to pass constitutional muster.

151. *See* 405 U.S. 438, 442-43 (1972).

152. 517 F.3d 738, 745 (5th Cir. 2008).

III. LEARNING FROM *LAWRENCE*: WHERE DO WE GO FROM HERE?

Part of the reason that federal and state courts have struggled to reach consensus over the validity of laws criminalizing the sale of sexual devices is that the Supreme Court's opinion in *Lawrence* is unclear. Although the Court spoke of liberty, it never identified a fundamental liberty burdened by the Texas law, nor did it explicitly apply heightened scrutiny. Despite its emphasis on the privacy of the sexual acts at issue, it eschewed a privacy rationale in favor of one based on liberty.[153] The Court explicitly rejected equal protection and employed a due process analysis, but at the same time it recognized that the two types of inquiry are essentially intertwined. Finally, although it adopted the language in Justice Stevens's dissenting opinion in *Bowers*, it never entirely explained which kinds of morals legislation are appropriate, and which are not. In light of all of these ambiguities, how could the lower courts not be confused? Despite these problems, *Lawrence* does provide some useful starting points for discussion.

A. *Substantive Due Process Versus Equal Protection*

In her concurrence in *Lawrence*, Justice O'Connor stated that she would not have overruled *Bowers* but would have decided the case on equal protection grounds.[154] She argued that the Court in *Bowers* decided only that the substantive component of the Due Process Clause does not protect a "right to engage in homosexual sodomy."[155] She admitted that the *Bowers* Court rejected the argument that no rational basis existed to justify the law (in her words, by "pointing to the government's interest in promoting morality"), but she claimed that it nevertheless "did not hold that moral disapproval of a group is a rational basis under the *Equal Protection Clause* to criminalize homosexual sodomy when heterosexual sodomy is not punished."[156] *Bowers*, after all, did not involve an equal protection claim.

Justice O'Connor's reliance on the distinction between equal protection and due process, although technically accurate as a matter of historical fact, seems to be little more than an appeal to empty formalism. With regard to *Lawrence*, O'Connor argued that, if viewed under equal protection analysis, moral disapproval could not be a sufficient basis for the law. "Moral disapproval of

153. Randy Barnett has argued that, in *Lawrence*, the Court abandoned the right to privacy and adopted what amounts to a "presumption of liberty" to strike down Texas's antisodomy legislation. *See* Barnett, *supra* note 26, at 35-36. Sonu Bedi goes so far as to claim that *Lawrence* made the right to privacy obsolete. Sonu Bedi, *Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete*, 53 CLEV. ST. L. REV. 447, 447 (2006).

154. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

155. *Id.* at 582.

156. *Id.* (emphasis added).

this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[157] In fact, she argued, the Court has never held that moral disapproval is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.[158]

True though her statements may be, does the legitimacy of a law based on moral disapproval change simply because it is viewed under equal protection rather than due process analysis? In *Lawrence*, there is little reason to think so. Even Justice Scalia would likely admit this point. As he noted in his dissent in *Romer*, "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[159] The prohibition on sexual conduct between individuals of the same sex was in effect an attack on the identity of homosexual persons. Well aware of this fact, the Court in *Lawrence* concluded that "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[160]

Perhaps in some cases, moral disapproval of a particular act may in fact be a legitimate justification for a law. Where an act is not so closely tied to personal identity as it was in *Lawrence*, there might be less reason to fear that moral disapproval is aimed at a class of persons (for who they are) rather than a class of actors (for what they have done). Certainly, the line between status and conduct is a difficult one to draw, but there is at least some merit to the idea that moral disapproval of certain acts is not always tantamount to moral animus toward a particular group of persons. There is little room for doubt, however, that *Lawrence* prohibits moral disapproval of an act fundamental to the personal identity of a large class of persons from serving as a justification for law.

On this reading, it is not clear that laws criminalizing the sale of sexual devices should actually be covered by *Lawrence*. Users of sexual devices, like any class of persons burdened by a criminal law, may claim to identify as "users of sexual devices." They may claim that the freedom to purchase and use such devices is crucial to their identification as sexually liberated persons. Such arguments, however, seem less compelling than those made by homosexuals prohibited from engaging in sex with same-sex partners. Homosexuality has come to be associated with a particular form of identity or personhood, whereas the use of sexual devices has not. Part of the challenge going forward will be to determine what classes of persons, if any, deserve special protection under *Lawrence*.

In both *Romer* and *Lawrence*, the classes of persons affected negatively by the laws at issue were targeted based on their sexual orientation. Although dis-

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157. *Id.*

158. *Id.*

159. Romer v. Evans, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting) (quoting Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987)) (internal quotation mark omitted).

160. *Lawrence*, 539 U.S. at 578 (majority opinion).

crimination based on sexual orientation has not been deemed by the Court to warrant heightened scrutiny, there are compelling arguments that such discrimination might in fact deserve more careful consideration. *Moreno* also, and arguably even more obviously, did not involve discrimination against a class requiring special protection. Hippies, even if at times denigrated by society, do not qualify as a class in need of special protection. For this reason, the Court did not apply heightened scrutiny. What about users of sexual devices? On equal protection grounds, they certainly are not entitled to special protection. But under due process, they might be. Harkening back to *Lawrence*, the regulation of private, consensual sex might require more searching scrutiny.

The real question coming out of *Lawrence* and the sexual devices cases is whether equal protection or due process is doing the real work. In addition, it is not clear why the Court has assumed that morals legislation is a type of legislation that can be defined and curtained off for special judicial oversight. What makes certain laws qualify as morals legislation, while others do not? The answer to this question may in fact depend largely upon whether equal protection or substantive due process provides the dominant analytic lens. If equal protection is the desired mode of analysis, then the issue is whether laws that denigrate one class simply *because society disapproves of a particular group of persons* are inherently suspect. If, in contrast, due process provides the relevant doctrinal hook, the issue is whether a law that *burdens a serious liberty interest* has any justification other than mere moral disapproval.

The equal protection approach seems redundant if limited to invalidating laws that discriminate against classes that already receive heightened scrutiny. Where heightened scrutiny is already applied, the moral content of a law is largely irrelevant. So long as the law is not supported by an important governmental interest, it cannot stand. Whether it is deemed morals legislation or not, it will not survive heightened scrutiny. On the other hand, if equal protection analysis is found to provide heightened scrutiny not only for discrimination against protected classes, but against any disfavored political group, as *Moreno* and its progeny at times seem to suggest, then are all groups protected? Which minorities count? It is not clear that equal protection can provide a useful lens of analysis given that the issue under rational basis review is traditionally whether a law itself lacks a legitimate basis, not whether the law discriminates unfairly. If these two questions cannot be untangled from one another, then perhaps courts should question whether the dichotomy between substantive due process and equal protection is still tenable.

The substantive due process approach, in contrast, would seem to invalidate morals legislation only where such legislation hinders a fundamental liberty interest. Here, again, it is not clear how a special test for morals legislation can or should diverge from traditional substantive due process analysis. If a given law, whether of moral motivation or not, burdens a fundamental liberty interest, only a compelling government interest will justify the law. Any lesser justification, whether purely moral or not, will not suffice. On the other hand, if

substantive due process applies in the context of morals legislation not only where a fundamental liberty interest is infringed, but also where some lesser liberty interest has been burdened, courts will have to establish a new set of principles to decide which kinds of liberty interests are sufficiently serious to give rise to special scrutiny. Morals legislation that does not burden an important liberty interest, moreover, would not give rise to substantive due process concerns, regardless of whether it is entirely based in morality or not.

The Court, if it chooses to develop its morals legislation jurisprudence, will have to think carefully about how the equal protection and substantive due process doctrines interrelate, and at times collide, with one another. At the same time, it will have to clearly define which kinds of laws count as morals legislation and which do not. It might be possible to argue that morals legislation should be invalid only where substantive due process and equal protection concerns overlap, as in *Lawrence*. Perhaps the real problem is that neither the substantive due process nor the equal protection doctrines, with their artificial tiers of scrutiny,[161] are able to address the kinds of constitutional concerns raised by morals legislation. The Court may need to consider a new way forward.

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161. Justices Stevens and Marshall were consistent critics of the Court's tiers-of-scrutiny analysis in equal protection cases, favoring instead a less formalistic approach that focused on determining the rationality of legislation in light of the specific societal interests and individual harms at stake in any given case. In *Cleburne*, for example, Justice Stevens offered this criticism:

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, gender, or illegitimacy. But that is not because we apply an "intermediate standard of review" in these cases; rather it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve.

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 453-54 (1985) (Stevens, J., concurring) (footnotes omitted); *see also* Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) ("I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."). Justice Marshall similarly advocated for a more functional analysis. *See Cleburne Living Ctr.*, 473 U.S. at 458-60 (Marshall, J., concurring in the judgment in part and dissenting in part) ("I have long believed the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting))).

B. *Promoting Morality by Other Means*

In addition to bringing into question the distinction between equal protection and substantive due process (and status and conduct), the Court in *Lawrence* also seems to have suggested that there is a difference between laws aimed at public decency and laws directed against moral depravity. Although privacy was not the focus of the decision in *Lawrence*, it certainly was crucial to the outcome. Privacy seems to have played a role not as a substantive right protecting the criminalized sexual acts, but rather as a reason for why such acts cannot legitimately give rise to public condemnation. *Lawrence* did not proscribe the criminalization of *public* sex. Laws restricting such behavior, regardless of their distinctive problems, are based not primarily in the condemnation of the intimate behavior involved, but rather its public expression.

Likewise, laws designed to protect children from obscenity may have a legitimate, alternative basis. Although such laws are likely often a product of moral disapproval of a particular type of behavior (and maybe even moral disapproval of certain statuses, such as homosexuality), they may nevertheless be justified by an overriding concern for the autonomy of parents to oversee their children's development. In other words, there might be a distinction between the state wanting to control the morality of children and wanting to allow parents, rather than businesses and passersby, to develop their children's moral compass.[162] In any case, courts seem to be wary of these kinds of justifications, legitimate as they may be, because they may so easily be used to defend laws that in fact are motivated by other, more pernicious desires. In the case of sexual devices, for example, at least one court rejected the child-protection rationale, believing that the law was in fact aimed primarily at the suppression of certain sexual behavior.

There may be some merit to a distinction between, on the one hand, laws that are aimed at proscribing immoral behavior and, on the other, governmental action that seeks simply to promote a particular moral viewpoint. While the former presents the threat of imposing a significant burden upon disfavored individuals on the basis of their allegedly immoral behavior (for example, by criminalizing their conduct and subjecting them to imprisonment), the latter could be used simply as a form of argument. According to H.L.A. Hart, the "distinction between the use of coercion to enforce morality and other methods which we in fact use to preserve it, such as argument, advice, and exhortation, is both very important and much neglected."[163] For example, in 2010, during

162. *See* Ginsberg v. New York, 390 U.S. 629, 639 n.7 (1968) ("While many of the constitutional arguments against morals legislation apply equally to legislation protecting the morals of children, one can well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit." (quoting Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 413 n.68 (1963)) (internal quotation marks omitted)).

163. HART, *supra* note 17, at 75.

continuing United States military operations in Afghanistan, Secretary of Defense Robert Gates called Pastor Terry Jones, based in Florida, asking him to refrain from publicly burning the Koran because Secretary Gates had "grave concerns" that such action might incite tumult among Muslims and result in the death of American military personnel abroad.[164] By making this call, Secretary Gates expressed moral disapproval, but it was an expression made, at least arguably, without undue coercion. Through "democratic persuasion," rather than coercion, the state may be able to advance its moral objectives without undermining individuals' constitutional rights.[165] As Hart so eloquently stated, "in morality we are not forced to choose between deliberate coercion and indifference."[166]

Lawrence does not answer any of these questions definitively, but it does suggest the importance of considering the validity of these and other distinctions. *Lawrence* may have decreed the end of only a very narrow class of morals legislation. Nevertheless, it made clear that the Court would no longer allow moral disapproval alone to serve as a legitimate basis for laws placing a substantial burden upon individual liberty interests. What about laws based substantially in moral disapproval? And what about laws burdening a liberty interest not as fundamental to personal identity as the decision about with whom to be sexually intimate? Despite these and many other lingering questions, the rationale of *Lawrence* will push both commentators and the courts to consider whether laws based substantially in moral disapproval are founded in legitimate societal interests. Where interests in privacy, sexual intimacy, and personal expression are at stake, as in *Lawrence* and the sexual devices cases, morals legislation is particularly suspect. How far *Lawrence*'s reasoning will extend, however, is far from clear, and it will without doubt stir much discussion and continued litigation.

CONCLUSION

Justice Scalia seems, for the most part, to have been incorrect insofar as he predicted an end to all legislation prohibiting immoral sexual acts. Laws against polygamy and bestiality, for example, have not been stricken from the books. Although *Lawrence* may still have a significant impact upon legislation regulating these and other kinds of behavior, it is important to note that laws aimed at different kinds of sexual behavior, commercial or otherwise, raise very different kinds of questions. Laws against prostitution on the streets, for example, may be distinguished from laws prohibiting the sale of sex altogether. Although

164. *See* Devin Dwyer, *Secretary Gates Called Pastor Jones, Defense Department Confirms*, ABC NEWS (Sept. 9, 2010), http://abcnews.go.com/blogs/politics/2010/09/secretary-gates-called-pastor-jones-defense-department-confirms.

165. *See* COREY BRETTSCHNEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY 3-5 (2012).

166. HART, *supra* note 17, at 77.

the public solicitation of prostitution may implicate significant concerns for public decency, when carried out behind closed doors (both the solicitation and the sexual acts themselves) such behavior may fall less squarely within the domain of the state's police power.

Polygamy raises its own set of concerns. Although laws against polygamy are almost certainly based primarily on moral disapproval, they also are based on a desire to maintain a particular public institution (i.e., marriage) in the form that society has long conceived of it. In addition, legislation against polygamy may reflect a desire to protect women, and especially minors, from entering into situations that may be prone to domestic violence and sexual abuse. Whether or not these reasons are sufficiently substantial to provide a neutral justification for these laws, it seems unlikely that the courts will strike down antipolygamy legislation anytime in the near future. Perhaps such a determination turns on people's instinct as to whether anyone is actually born a polygamist. When conduct and status can be decoupled, the state may be on firmer ground in regulating acts about which it disapproves.

Finally, different interpretations of *Lawrence* could have significant consequences for the debate over same-sex marriage.[167] As with polygamy, laws prohibiting marriage between individuals of the same sex are often justified as being motivated by a desire to preserve the institution of marriage. Although the right to marry has been recognized as fundamental, involving the most intimate of relationships, the request of a couple to be married is, ultimately, a request for public recognition of a private relationship. If *Lawrence* was in fact limited to private decisions, and conduct carried out inside the home, it may not reach the same-sex marriage debate. If the public nature of the act is irrelevant, however, then the Court's reasoning might apply in the marriage context with full force.

Laws constraining sexual freedom and limiting the right to marry provide examples of only a few of the many issues that will inevitably give rise to continued dispute over what *Lawrence* said. Even if the holding in *Lawrence* does

167. In 2012, the Ninth Circuit held unconstitutional California's Proposition 8, which amended the state constitution to disallow marriage between individuals of the same sex. *See* Perry v. Brown, 671 F.3d 1052, 1064 (9th Cir.) ("The People may not employ the initiative power to single out a disfavored group for unequal treatment and strip them, without a legitimate justification, of a right as important as the right to marry."), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012). The Ninth Circuit held Proposition 8 unconstitutional on equal protection grounds, relying largely upon *Romer* and *Moreno*. *See Brown*, 671 F.3d at 1080-85. The court quoted but did not draw significant attention to *Lawrence*, *see id.* at 1093, likely because it chose to avoid deciding "whether same-sex couples have a fundamental right to marry" under the Federal Constitution, *see id.* at 1082. On December 7, 2012, the Supreme Court granted certiorari to determine whether the petitioners have standing to defend Proposition 8 and whether the Equal Protection Clause of the Fourteenth Amendment prohibits California from defining marriage as the union of a man and a woman. *See Hollingsworth*, 133 S. Ct. 786; Petition for a Writ of Certiorari at i, *Hollingsworth*, 133 S. Ct. 786 (No. 12-144), 2012 WL 3109489.

not apply to all of these controversies, the opinion reveals a changing attitude of the Court. The states traditionally had great discretion in legislating over public morality, but the Court now views such laws with at least somewhat closer scrutiny. Moreover, the Court has expressed its willingness, perhaps even a renewed desire, to ensure protection for the rights of less favored and inadequately represented political groups in society.

Moral disapproval is often directed at those about whom society knows the least and whom it fears, not because of reason, but out of ignorance.[168] The extent to which society may transform that fear into the force of law is a question, as of yet, still to be determined. But it is made no less important by the continuing absence of an answer.

168. In the infamous *Dred Scott* decision, the Court offered a vivid description of the historic and reprehensible subjugation of African American slaves in the United States:

> [Negroes of the African race] had for more than a century before [the time of the Declaration of Independence] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Although keenly aware of the history of racial oppression, the *Dred Scott* Court nevertheless held that African American slaves were not citizens under the United States Constitution. *Id.* at 411, 427.