

TO THE RIGHT TO INTIMACY AND BEYOND:  
A CONSTITUTIONAL ARGUMENT FOR THE RIGHT TO  
SEX IN MENTAL HEALTH FACILITIES

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ABSTRACT

This article confronts the controversial topic of the sexuality of individuals who experience mental disability. Through idiosyncratic and punitive treatment of sexual activity, mental health institutions generally do not allow inpatients to exercise an acceptable degree of sexual freedom. This article argues that individuals who are institutionalized on the basis of mental disability, but possess the capacity to engage in sexual activity, have a constitutional right to do so. Relying on precedent set by sexual freedom cases including *Lawrence v. Texas* and *Obergefell v. Hodges*, this article argues that the Due Process Clause of the Fourteenth Amendment encompasses a right to sexual intimacy. This article argues that courts that have declined to recognize a fundamental right to sex were wrongly decided, showing that those courts either misinterpreted the sexual freedom cases or relied on the *Glucksberg* test declared defunct in *Obergefell*. The article further claims that nothing in *Lawrence* justifies a refusal to recognize that the right to sex persists in the institutional setting. Applying strict scrutiny, this article evaluates policies—including risk-based classification systems and overall bans on masturbation and other sexual activity—that burden the free exercise of sex in mental health facilities. The article concludes by focusing on the social significance of recognizing that the right to sexual intimacy extends to persons institutionalized on the basis of mental disability.

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I.  
INTRODUCTION

In the field of mental health, there are few topics more taboo than the sexuality of people who experience mental disability.<sup>1</sup> Throughout history, the sexuality of people affected by mental disability has been suppressed through mass gender segregation, sterilization, and marriage prohibition.<sup>2</sup> For decades, advocates and scholars have fought an uphill battle to end these and other forms of systemic desexualization of individuals who experience disabilities.<sup>3</sup> This article seeks to add to the body of literature that rejects the standard practice of desexualizing people who experience mental disability. Beyond that, this article aims to fill a current void in constitutional, psychology, and disability law commentary. With the notable exception of a series of articles written by Professor Michael L. Perlin,<sup>4</sup> legal commentators have largely avoided the subject of the sexuality of individuals who experience mental disability. Although there has been extensive commentary on the subject of whether there exists a fundamental right to sex,<sup>5</sup> to this point, commentators have not contemplated this right with the aim of drawing its contours within the setting of institutions housing individuals who experience disability.

For most adults, sexual experience is part of the fabric of everyday life. Sexual expression comes in a wide variety of forms. It is not limited to physical performances of penetration involving two people, but encompasses complex

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1. Hereinafter, this article uses “mental disability” as an umbrella term to refer to people who experience psychotic disorders, affective disorders, personality disorders, developmental disorders, and intellectual disabilities. The claims made in this article are intended to apply generally to persons who are institutionalized on the basis of experiencing any of these types of disorders. While this is an admittedly broad approach, this article argues that the alternative risk-based approach advanced herein would apply equally well to all inpatients, regardless of their specific disability.

2. Miriam Taylor Gomez, *The S Words: Sexuality, Sensuality, Sexual Expression and People with Intellectual Disability*, 30 *SEXUALITY & DISABILITY* 237, 238 (2012); Winifred Kempton & Emily Kahn, *Sexuality and People with Intellectual Disabilities: A Historical Perspective*, 9 *SEXUALITY & DISABILITY* 93, 93–94 (1991).

3. See Jacob M. Appel, *Sex Rights for the Disabled?*, 36 *J. MED. ETHICS* 152, 152 (2010).

4. Michael L. Perlin, “*Make Promises by the Hour*”: *Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 *DEPAUL L. REV.* 947, 965–70 (1997); Michael L. Perlin & Alison J. Lynch, “*All His Sexless Patients*”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 *WASH. L. REV.* 257 (2014).

5. See *infra* note 47.

and intersecting spheres of social, cultural, emotional, and physiological pleasure.<sup>6</sup> As Janet R. Jakobsen and Ann Pellegrini put it, “there is no one act or set of acts that constitutes ‘sex’—there are as many ways to make sex as there are people.”<sup>7</sup> Of equal importance, sexual expression embraces the voluntary decision to engage in or refrain from sexual activity.<sup>8</sup> The World Health Organization recognizes that sexuality is “a central aspect of being human” and further declares that “sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviors, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed.”<sup>9</sup>

The 2009 documentary *Monica & David* chronicles the lives of two young people who date, marry, and begin their lives together.<sup>10</sup> Like other young couples, Monica and David bicker over chores, assign one another silly pet names like “Winnie the Pooh,” and speak longingly about babies and dream jobs.<sup>11</sup> Viewers of the film are drawn into the lives of the couple as they experience the ins and outs of married life: flirtation and laughter, sex and intimacy, and at times disappointment and frustration.<sup>12</sup>

In many ways, Monica and David are not unlike most married couples in America; as one NPR reviewer put it, this is a film about two young people who, like so many others, are “building a life on their own terms.”<sup>13</sup> There is, however, at least one noteworthy difference between Monica and David and most other newlyweds—Monica and David both live with Down syndrome. Monica and David show viewers of the film that people who experience mental disability lead lives that are enriched with sex and intimacy. Unfortunately, the experiences of Monica and David, who live under the care and supervision of

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6. Shaniff Esmail, Kim Darry, Ashlea Walter & Heidi Knupp, *Attitudes and Perceptions Towards Disability and Sexuality*, 32 DISABILITY & REHABILITATION 1148, 1151–52 (2010); Gomez, *supra* note 2, at 237.

7. JANET R. JAKOBSEN & ANN PELLEGRINI, LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE 127 (2003).

8. Gomez, *supra* note 2, at 237; *see also* Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (citing Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 637 (1980); *cf.* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Roe v. Wade, 410 U.S. 113, 153 (1973) (“The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many ‘right’ ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.”).

9. *Defining Sexual Health*, WORLD HEALTH ORG., [http://www.who.int/reproductivehealth/topics/sexual\\_health/sh\\_definitions/en/](http://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/) (last visited July 7, 2016).

10. *See* MONICA & DAVID 20:00, 30:00–31:00 (Home Box Office 2010); *see also* MONICA & DAVID, <http://www.monicaanddavid.com> (last visited Mar. 30, 2016).

11. *Id.*

12. *Id.*

13. Elizabeth Blair, ‘Monica and David,’ *Building a Life on Their Own Terms*, NPR (Oct. 14, 2010), <http://www.npr.org/templates/story/story.php?storyId=130540395>.

Monica's parents, are unrepresentative of the reality of a significant number of people with mental disabilities who are living under state supervision.<sup>14</sup>

Little has been published in the way of comparing the sexual opportunities of people who are institutionalized on the basis of mental disability to the opportunities of similarly situated people who—like Monica and David—live under some lesser degree of supervision. Nevertheless, there are numerous reasons for one to conclude that people who are institutionalized on the basis of mental disability are often more deprived of sexual freedom than people who experience mental disability, but are not institutionalized, or people who undergo institutional treatment due to physical disability.

There is no shortage of sex-positive, educational resources for parents of individuals who experience mental disability and are living in deinstitutionalized settings.<sup>15</sup> Many scholars have noted the shift in recent decades among advocates and parents of disabled children toward recognizing the sexual agency of people with disabilities.<sup>16</sup> As chronicled in *Monica & David*, having supportive parents is crucial to creating meaningful opportunities for individuals who experience mental disability to pursue intimate relationships.<sup>17</sup>

Additionally, in some U.S. states<sup>18</sup> sex surrogates provide sexual contact to non-institutionalized individuals who experience physical disabilities.<sup>19</sup> By

14. See Rachel Adams, *Privacy, Dependency, Discegenation: Toward a Sexual Culture for People with Intellectual Disabilities*, 35 *DISABILITY STUD. Q.* (2015), <http://dsq-sds.org/article/view/4185/3825>.

15. See, e.g., *Resources for Learning About Sexuality*, AUTISM NOW, <http://autismnow.org/articles/resources-for-learning-about-sexuality/> (last updated Mar. 30, 2016) (listing numerous books, articles, and websites on the subject of sexuality for parents and caretakers of people with disabilities); *Sexuality & Down Syndrome*, NAT'L DOWN SYNDROME SOC'Y, <http://www.ndss.org/Resources/Wellness/Sexuality/Sexuality-and-Down-Syndrome/> (last visited Mar. 30, 2016) (providing answers to caretakers' questions about Down syndrome and sexuality and providing a list of external resources); ALBERTA HEALTH SERVS., *SEXUALITY AND DISABILITY: GUIDE FOR PARENTS* (2016), <http://teachers.teachingsexualhealth.ca/wp-content/uploads/Sexual-and-Development-Disability-Guide-2016.pdf> (providing a comprehensive guide on sexuality and disability, complete with audiovisual resources on masturbation and other topics, for parents of individuals with disabilities).

16. See, e.g., Carli Friedman, Catherine K. Arnold, Aleksa L. Owen, & Linda Sandman, "Remember Our Voices are Our Tools:" *Sexual Self-advocacy as Defined by People with Intellectual and Developmental Disabilities*, 32 *SEXUALITY & DISABILITY* 515, 515–16 (2014); Kempton & Kahn, *supra* note 2, at 93–94, 96–100 (1991).

17. See *MONICA & DAVID*, *supra* note 10, at 19:30 (capturing Monica's parents closely following the couple as they walk along the beach on their honeymoon); Adams, *supra* note 14.

18. The number of states in which sex surrogates operate is unclear because sex surrogates often work under veil of secrecy to avoid prosecution for prostitution. See Brian Alexander, "Sex Surrogates' Put Personal Touch on Therapy," *NBC NEWS* (Mar. 26, 2009, 8:38 AM), [http://www.nbcnews.com/id/29881206/ns/health-sexual\\_health/t/sex-surrogates-put-personal-touch-therapy/#.V5o6G5MrKt8](http://www.nbcnews.com/id/29881206/ns/health-sexual_health/t/sex-surrogates-put-personal-touch-therapy/#.V5o6G5MrKt8).

19. See Rachel Dodes, *Confessions of a Sex Surrogate*, *WALL ST. J.: SPEAKEASY* (Oct. 18, 2012, 10:00 AM), <http://blogs.wsj.com/speakeasy/2012/10/18/confessions-of-a-sex-surrogate/>; Susan Donaldson James, *Sex Surrogates Seem Like Prostitutes but Are Helping Hands*, *ABC NEWS* (Aug. 2, 2011), <http://abcnews.go.com/Health/sex-surrogates-prostitutes-helping-hands-therapists/story?id=14207647>; Mark O'Brien, *On Seeing a Sex Surrogate*, *THE SUN* (May 1990),

working under the supervision of physicians and therapists, sex surrogates can facilitate sexual contact for people living with disabilities who, either as a direct result of their condition or social barriers, face difficulties meeting sexual partners. However, these services can be costly, must be referred by a clinician, and are in some cases scheduled through the assistance of an advocate.<sup>20</sup> Perhaps as a result of the distinctive stigma attached to the sexuality of people who experience mental disability, up to this point the public's growing interest in sex surrogacy<sup>21</sup> has focused primarily on the benefits this service provides to those who experience physical disability.<sup>22</sup>

Moreover, the unique barriers to intimacy faced by individuals who experience mental disability can be particularly difficult to overcome in the institutional setting, where safety is often valued over patients' rights.<sup>23</sup> The unfortunate reality is that, among individuals who experience mental disability, safe and pleasurable sexual experiences are often available only to those who—in addition to not being under institutional care—have supportive, sex-positive personal advocates.<sup>24</sup>

This article argues for the recognition of a right to sex among people who are institutionalized on the basis of mental disability. First, it argues that all people have a fundamental right to sex under the Fourteenth Amendment. Second, it argues that this fundamental right to sex persists even upon institutionalization on the basis of mental disability, and that individuals who have been either civilly committed or hospitalized on the basis of mental disability, but possess the capacity to engage in sexual activity,<sup>25</sup> should be

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[http://thesunmagazine.org/issues/174/on\\_seeing\\_a\\_sex\\_surrogate](http://thesunmagazine.org/issues/174/on_seeing_a_sex_surrogate); see also Rosie Garelick, *What I Learned from a Male Sex Surrogate*, SALON.COM (Mar. 12, 2015, 7:00 PM), [http://www.salon.com/2015/03/12/what\\_i\\_learned\\_from\\_a\\_male\\_sex\\_surrogate/](http://www.salon.com/2015/03/12/what_i_learned_from_a_male_sex_surrogate/).

20. See O'Brien, *supra* note 19; *Referrals*, INT'L PROF. SURROGATES ASS'N, <http://www.surrogatetherapy.org/referrals-2/> (last visited Apr. 3, 2016); see also *Service Provider Awareness Training (SPAT)*, TOUCHING BASE, <http://www.touchingbase.org/workshops-and-training/spat> (last visited July 7, 2016) (training service providers to help people with disabilities access the sex industry).

21. See *supra* note 19; see also THE SESSIONS (Fox Searchlight 2012) (chronicling the true story of the relationship between Mark O'Brien, a disabled poet and journalist, and sex surrogate Cheryl Cohen Greene); *Masters of Sex* (Showtime 2013) (depicting the work of sex surrogacy pioneers William Masters and Virginia Johnson).

22. See James, *supra* note 19 (focusing on the ways in which sex surrogacy benefited "a wheel-chair bound man [who] was going through a divorce and was fearful of initiating a new relationship"); O'Brien, *supra* note 19 (providing an autobiographical account of physically disabled man's experience with a sex surrogate); *Surrogate Partner Therapy*, INT'L PROF. SURROGATES ASS'N, <http://www.surrogatetherapy.org/what-is-surrogate-partner-therapy/> (last visited Apr. 3, 2016) (mentioning the benefits of surrogate partner therapy for those who experience "medical conditions" or "negative body image or physical disfigurement," but failing to expressly mention mental disability).

23. See *infra* Part III.A.

24. See *supra* notes 10–17 and accompanying text.

25. A discussion of the criteria for determining whether an individual possesses the capacity to engage in sexual activity is beyond the scope of this article. For an example of one such policy, see Steven J. Welch & Gerrit W. Clements, *Development of a Policy on Sexuality for Hospitalized*

entitled to do so as an exercise of their Fourteenth Amendment substantive due process rights.<sup>26</sup>

Part II of this article explains why the Due Process Clause of the Fourteenth Amendment encompasses the right to sexual intimacy. Parts II.A and II.B introduce the “sexual freedom” cases in which the Supreme Court has found rights concerning intimate choices or sexual activity to be protected liberty interests. Part II.C examines the current circuit court split on the full meaning and impact of the most important of these cases, *Lawrence v. Texas*. Circuits and lower federal and state courts disagree on whether the *Lawrence* Court recognized a fundamental right to sexual intimacy.

Part II.D argues that the Supreme Court has, in fact, recognized that the right to sex is a fundamental substantive due process privacy right. This section first argues that the pre-*Lawrence* “sexual freedom cases” that identified fundamental rights to marriage, procreation, contraception, and abortion *also* identified a fundamental right to sexual intimacy. It then shows that this right to sexual intimacy was most recently recognized in the Supreme Court’s landmark same-sex marriage decision, *Obergefell v. Hodges*.<sup>27</sup> This Part concludes by explaining why the cases that declined to recognize a fundamental right to sex were wrongly decided, on the grounds that they either misinterpreted *Lawrence* and the other sexual freedom cases, or that they relied on the *Washington v. Glucksberg* test that was declared defunct in *Obergefell*.

Part III takes up the argument that the right to sex persists even upon institutionalization stemming from mental disability. Part III.A considers the current state of sexual regulation in mental health facilities, highlighting the idiosyncratic and punitive treatment of sexual activity in mental health facilities that prevents inpatients from exercising an acceptable degree of sexual freedom. It further notes that the general contempt toward the sexuality of people who are institutionalized on the basis of mental disability serves to further demean this already marginalized population. Ultimately, this Part frames recognition of a

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*Chronic Psychiatric Patients*, 41 CAN. J. PSYCHIATRY 273, 277 (1996); Perlin & Lynch, *supra* note 4, at 263–65.

26. As will be explained more fully in Part III.C, this article does not narrowly frame the constitutional right at stake as “the right to sex among people who are institutionalized on the basis of mental disability.” Framing the issue in this way would stand to conflate an equal protection question (are individuals who experience mental disability of a protected class?) into a due process question (is sex a fundamental right?). See Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 685, 731–33 (2008). This article frames the constitutional issue at stake more broadly, arguing that there is a fundamental right to sex. Note also that this article uses the terms “sex,” “sexual intimacy,” and “sexual activity” interchangeably. After arguing for recognition of a right to sex, this article then seeks to color the exercise of this right within institutions housing those who experience mental disability. When this article uses the terms “institution” or “institutional setting,” it is referring only to state-run facilities that house adults who experience mental disability. This article does not contemplate the form that the right to sex will take in prisons, schools, elder care facilities, or other state-operated facilities.

27. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

constitutional right to sex as an opportunity to improve the lives of people who experience mental disability.

Part III.B argues that nothing in *Lawrence* justifies a refusal to recognize that the right to sex extends to the institutional setting. Part III.C reveals that, despite the confusing language used by the Lawrence Court and the fact that claims involving sexual activity in mental health facilities lie at the intersection of equal protection and fundamental rights jurisprudence, these claims should be analyzed using strict scrutiny. Applying heightened scrutiny, Part III.D evaluates several policies burdening the free exercise of sex in mental health facilities. The policies considered include a comprehensive policy designed by Canadian mental health professionals; a novel risk-based classification system modeled after The Prison Rape Elimination Act; and overall bans, such as those restricting masturbation and sexual contact between patients, staff, and visitors. Part III.D also considers the future of sexual activity in mental health facilities, reflecting on the practice of sexual surrogacy in the U.S. and abroad and how it might be adapted to serve people who experience mental disabilities. Part IV concludes the article with some final comments on the broader social significance and policy implications of recognizing that the right to sexual intimacy extends to persons institutionalized on the basis of mental disability.

## II.

### SEX AS A FUNDAMENTAL RIGHT

#### A. *Substantive Due Process and Fundamental Rights*

The Due Process Clause of the Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”<sup>28</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Sandra Day O’Connor wrote that as early as its 1887 decision in *Mugler v. Kansas*,<sup>29</sup> the Supreme Court has understood the Due Process Clause of the Fourteenth Amendment to contain a “substantive component” that prohibits certain forms of governmental intrusion into the lives of individuals.<sup>30</sup> This substantive element of the Clause stands as “a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”<sup>31</sup>

Substantive due process is one of the most controversial areas of constitutional law.<sup>32</sup> The controversy stems in part from the Court’s willingness to invoke this doctrine to recognize non-textual or non-enumerated rights.<sup>33</sup> For

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28. U.S. CONST. amend. XIV, § 1.

29. *Mugler v. Kansas*, 123 U.S. 623 (1887).

30. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

31. *Id.* at 847.

32. Rosalie Berger Levinson, *Reigning in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 521, 521 n.2 (2008) (collecting literature).

33. *Id.* at 521.

example, in *Griswold v. Connecticut*, the Court invalidated a state statute prohibiting the use of contraceptives on the grounds that the statute impermissibly invaded the non-enumerated right of marital privacy.<sup>34</sup> Writing for the majority, Justice William O. Douglas described the spheres of activity that the government may not invade as constitutionally fundamental “zones of privacy,” which are implied from “penumbras” that emanate from the Bill of Rights.<sup>35</sup>

The Court has repeatedly reaffirmed the broad scope of substantive due process announced in *Griswold*. As Justice O’Connor wrote in *Casey*, “[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.”<sup>36</sup> According to Justice O’Connor, there is no formula for assessing substantive due process claims, but “through the course of [the Supreme Court’s] decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”<sup>37</sup> Moreover, in the Supreme Court’s landmark 2015 decision in *Obergefell v. Hodges*, Justice Anthony Kennedy noted that though fundamental liberties protected under the Due Process Clause of the Fourteenth Amendment encompass most rights enumerated in the Bill of Rights,<sup>38</sup> “[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”<sup>39</sup> As demonstrated by the Court’s language in *Casey* and *Obergefell*, the scope of the Due Process Clause of the Fourteenth Amendment tracks societal evolution and outwardly expanding conceptions of freedom.

### B. “The Sexual Freedom Cases”

In *Obergefell*, Justice Kennedy wrote that the Court has determined that liberties protected under the Fourteenth Amendment Due Process Clause “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>40</sup> Justice Kennedy was undoubtedly referring to the issues involved in what Judge Richard Posner

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34. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

35. *Id.* at 484.

36. *Casey*, 505 U.S. at 848.

37. *Id.* at 850 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

38. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (citing *Duncan v. Louisiana*, 391 U.S. 145, 147–49 (1968)).

39. *Id.* at 2598.

40. *Id.* at 2597 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965)).

and others more recently have termed “the sexual-freedom cases,”<sup>41</sup> wherein the Court found that the following rights concerning intimate choices or sexual activity were protected liberty interests: the use and purchase of contraceptives;<sup>42</sup> reproductive choice;<sup>43</sup> family relations;<sup>44</sup> opposite-sex marriage;<sup>45</sup> and most recently, same-sex marriage.<sup>46</sup> While these cases all necessarily center on sexual activity, both jurists and scholars have disagreed as to whether the Court has recognized a fundamental right to sex.<sup>47</sup> The following section examines the current national split of judicial authority that has emerged on this issue in the wake of the Court’s pathbreaking precedent in this area, *Lawrence v. Texas*.

### C. Confusion over *Lawrence v. Texas*

In *Lawrence v. Texas*, the Supreme Court considered the validity of a Texas statute that criminalized sexual contact between members of the same sex.<sup>48</sup> Lawrence was arrested pursuant to this statute after police officers were summoned to his private residence after receiving a report about a weapons violation.<sup>49</sup> When officers arrived at Lawrence’s residence, they found Lawrence and another man engaged in anal sex.<sup>50</sup> At trial, Lawrence’s Fourteenth Amendment equal protection challenges were rejected.<sup>51</sup> Having pleaded no contest, Lawrence and his fellow petitioner were each fined two hundred

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41. Richard A Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 214 (1979); David B. Cruz, “*The Sexual Freedom Cases*”? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 299 (2000); Kathleen Anne Ward, *Williams v. Attorney General of Alabama: Does a Constitutional Right to Sexual Privacy Exist?*, 31 T. JEFFERSON L. REV. 1, 1 (2008)

42. *Griswold*, 381 U.S. at 485; *Eisenstadt*, 405 U.S. at 454.

43. *Roe v. Wade*, 410 U.S. 113, 154 (1973) (recognizing right to abortion); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992) (reaffirming right to abortion); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that compulsory sterilization violates fundamental right to procreation).

44. *Moore v. City of E. Cleveland*, 431 U.S. 494, 500 (1977).

45. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

46. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

47. See, e.g., Marybeth Herald, *A Bedroom of One’s Own: Morality and Sexual Privacy after Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 6–15 (2004); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1571–85 (2004); Laurence H. Tribe, *Lawrence v. Texas: “The Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Donald H.J. Hermann, *Pulling the Fig Leaf off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909 (2005); Carissa D. Siebeneck, *Sexual Privacy after Lawrence v. Texas*, 9 GEO. J. GENDER & L. 561 (2008); Ward, *supra* note 41, at 1; Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 (2004).

48. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

49. *Id.*

50. *Id.* at 563.

51. *Id.*

dollars.<sup>52</sup> Lawrence appealed the constitutionality of the Texas statute.<sup>53</sup> Sitting with every justice on the panel, the Texas Court of Appeals for the Fourteenth District rejected the petitioners' Fourteenth Amendment equal protection and due process arguments and affirmed the convictions.<sup>54</sup> In rejecting these arguments, the Texas Court of Appeals relied on the Supreme Court's decision in *Bowers v. Hardwick*<sup>55</sup>—at that time, still the law of the land with respect to sodomy statutes.

In *Bowers*, the Court considered “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal.”<sup>56</sup> Finding that anti-sodomy laws, including those that restrict certain sex acts by heterosexuals, have “ancient roots,” the *Bowers* Court upheld the statute.<sup>57</sup> Seventeen years after *Bowers* was decided, the Supreme Court granted certiorari in *Lawrence* to consider three questions: first, whether the petitioners' convictions under the Texas anti-sodomy statute violated the Equal Protection Clause of the Fourteenth Amendment; second, whether the petitioners' convictions “for adult consensual sexual intimacy in the home violate[d] their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment”; and third, whether *Bowers* should be overruled.<sup>58</sup>

Delivering the opinion of the Court, Justice Kennedy wrote that, “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>59</sup> Relying on precedent set by the earlier sexual freedom cases, the *Lawrence* Court found criminal prohibitions on consensual adult sodomy unconstitutional.<sup>60</sup> The Court reasoned that there are “spheres of our lives and existence, outside the home” in which the state should not intrude.<sup>61</sup> Consequently, all persons are entitled to constitutionally secured freedom in those matters that involve “intimate and personal choices . . . central to personal dignity and autonomy.”<sup>62</sup> The *Lawrence* Court further determined that prior cases have held that decisions related to intimate physical contact warrant protection under the Fourteenth Amendment's Due Process Clause.<sup>63</sup> In making this determination, the Court reaffirmed the principle that “[a]t the heart

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52. *Id.*

53. *Id.* at 564.

54. *Lawrence v. State*, 41 S.W.3d 349, 357–59, 359–61, 362 (Tex. App. 2001) (en banc), *rev'd*, 539 U.S. 558 (2003).

55. *Id.* at 354–55.

56. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by Lawrence*, 539 U.S. 558.

57. *Id.* at 192.

58. *Lawrence*, 539 U.S. at 564.

59. *Id.* at 562.

60. *Id.* at 578–79.

61. *Id.* at 562.

62. *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

63. *Id.*

of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>64</sup> For these reasons, the petitioners' convictions under the Texas anti-sodomy statute, one "touching upon the most private human conduct,"<sup>65</sup> could not be upheld.<sup>66</sup> Although the *Lawrence* Court clearly determined that anti-sodomy statutes are unconstitutional, judges and commentators disagree on what more, if anything, *Lawrence* stands for.

### 1. *Finding a Fundamental Right to Consensual Sex*

Some courts have interpreted *Lawrence* broadly—finding that the Court recognized a fundamental right or protected liberty interest in adult consensual sex and applying heightened scrutiny. This section discusses some of the leading cases from these jurisdictions—the Ninth Circuit, the First Circuit, and the Fifth Circuit.<sup>67</sup> As will be argued in Part III.D, these courts have complied with the spirit of *Lawrence* and the other "sexual freedom cases."

#### i. *The Ninth Circuit*

In several cases, the Ninth Circuit has found that the *Lawrence* Court recognized a right to consensual sex.<sup>68</sup> In the most important of these cases, *Witt v. Department of Air Force*, the Ninth Circuit set forth a distinct heightened scrutiny framework for evaluating policies that impinge upon the consensual sexual conduct of gay persons.<sup>69</sup> The plaintiff in *Witt* challenged the U.S. Military's "Don't Ask, Don't Tell" (DADT) policy on the grounds that the policy violated substantive due process.<sup>70</sup> Both the plaintiff and the military based their arguments on their readings of *Lawrence*.<sup>71</sup> According to the plaintiff, "*Lawrence* recognized a fundamental right to engage in private, consensual, homosexual conduct and therefore [the Ninth Circuit is required] to

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64. *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992))

65. *Id.* at 567.

66. *Id.* at 577–79.

67. Other cases have also recognized a due process right to engage in sexual intimacy. *See, e.g., Doe v. Miller*, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004), *rev'd on other grounds*, 405 F.3d 700, 701 (8th Cir. 2005); *Hudson Valley Black Press v. IRS*, 307 F. Supp. 2d 543, 548 n.6 (S.D.N.Y. 2004); *People v. Knox*, 903 N.E.2d 1149, 1153 (N.Y. 2009); *Paschal v. State*, 388 S.W.3d 429, 435 (Ark. 2012); *Briggs v. North Muskegon Police Dep't*, 563 F. Supp. 585, 590 (W.D. Mich. 1983); *Martin v. Zihlerl*, 607 S.E.2d 367, 370 (Va. 2005).

68. *Anderson v. Morrow*, 371 F.3d 1027, 1032–33 (9th Cir. 2004); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005); *Witt v. Dep't of Air Force*, 527 F.3d 806, 823 (9th Cir. 2008) (Canby, J., concurring in part and dissenting in part).

69. *Witt*, 527 F.3d at 817.

70. *Id.* at 811.

71. *Id.* at 814.

subject DADT to heightened scrutiny.”<sup>72</sup> The military disagreed, arguing that *Lawrence* applied only rational basis review.<sup>73</sup>

To evaluate the plaintiff’s substantive due process claim and decide what level of scrutiny should be applied to DADT, the Ninth Circuit conducted its own analysis of *Lawrence*.<sup>74</sup> After determining that a close examination of the Supreme Court’s “verbal analysis in *Lawrence*” would prove inconclusive and that sister circuit precedent provided little guidance, the Ninth Circuit ultimately “analyze[d] *Lawrence* by considering what the Court actually *did*, rather than by dissecting isolated pieces of text.”<sup>75</sup> Through this analysis, the Ninth Circuit held that the *Lawrence* court applied heightened scrutiny.<sup>76</sup>

The Ninth Circuit based its holding on three assessments of the *Lawrence* decision.<sup>77</sup> First, the Ninth Circuit observed that *Lawrence* overruled *Bowers* not because the anti-sodomy statute at issue in *Bowers* lacked any rational basis, but because of the *Bowers* Court’s “failure to appreciate the extent of the liberty at stake.”<sup>78</sup> According to the Ninth Circuit, this type of consideration “does not sound in rational basis review.”<sup>79</sup> In other words, if the *Lawrence* Court were indeed applying rational basis review, it would have “no reason to consider the extent of the liberty involved.”<sup>80</sup> Second, the Ninth Circuit noted that the cases on which the *Lawrence* Court relied—including *Griswold*, *Roe*, *Carey v. Population Services*,<sup>81</sup> and *Casey*—were heightened scrutiny cases.<sup>82</sup> Indeed, the *Lawrence* court declined to mention or apply *Romer v. Evans*, a case “in which the Court applied rational basis review to a law concerning homosexuals.”<sup>83</sup> The third and final point the Ninth Circuit made regarding *Lawrence* was that:

The *Lawrence* Court’s rationale for its holding—the inquiry analysis that it was applying—is inconsistent with rational basis review. The Court declared: “The Texas statute furthers no legitimate state interest *which can justify its intrusion into the personal and private life of the individual*.” Were the Court applying rational basis review, it would not identify a legitimate state interest to “justify” the particular intrusion of liberty at

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 816.

76. *Id.*

77. *Id.*

78. *Id.* at 817 (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

79. *Id.*

80. *Id.*

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

82. *Witt*, 527 F.3d at 817.

83. *Id.* (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

issue in *Lawrence*; regardless of the liberty involved, any hypothetical rationale of the law would do.<sup>84</sup>

For these reasons, the Ninth Circuit concluded that *Lawrence* applied some level of heightened scrutiny.<sup>85</sup> However, because the *Lawrence* court did not discuss narrow tailoring or the existence of a compelling interest, the Ninth Circuit declined to subject DADT to strict scrutiny.<sup>86</sup> Instead, the Ninth Circuit applied a unique form of heightened scrutiny inspired by the Supreme Court's decision in *Sell v. United States*.<sup>87</sup> In *Sell*, the Court applied a heightened level of scrutiny to a policy that permitted the government to forcibly administer antipsychotic medication to criminally accused individuals who experience mental disability in order to render them competent to stand trial.<sup>88</sup> Analyzing the plaintiff's claim under substantive due process, the Court held that:

[T]he defendant has a significant constitutionally protected liberty interest at stake, so the drugs could be administered forcibly only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.<sup>89</sup>

Finding the level of scrutiny applied by the *Sell* Court instructive, the Ninth Circuit crafted a tripartite interest-balancing rubric for evaluating "government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*."<sup>90</sup> First, the policy "must advance an important governmental interest."<sup>91</sup> Second, "the intrusion must significantly further that interest."<sup>92</sup> Third, "the intrusion must be necessary to further that interest. In other words . . . a less intrusive means must be unlikely to achieve substantially the government's interest."<sup>93</sup> Having set forth this framework for evaluating the DADT policy under substantive due process, the Ninth Circuit remanded the case for further consideration.<sup>94</sup>

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84. *Id.* (internal citations omitted).

85. *Id.*

86. *Id.* at 818.

87. *Id.*

88. *Sell v. United States*, 539 U.S. 166, 179 (2003).

89. *Witt*, 527 F.3d at 818 (quoting *Sell*, 539 U.S. at 178–80) (quotation marks omitted).

90. *Id.* at 819.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 821. On remand, the district court concluded that application of "Don't Ask, Don't Tell" to the plaintiff violated her substantive due process rights because the policy "does not further the government's interest in promoting military readiness, unit morale and cohesion." *Witt v. Dep't of Air Force*, 739 F. Supp. 2d 1308, 1316 (W.D. Wash. 2010).

*ii. The First Circuit*

The First Circuit also determined that *Lawrence* established a liberty interest in consensual sexual activity in the home.<sup>95</sup> As in *Witt*, the plaintiffs in *Cook v. Gates* challenged the military policy of “Don’t Ask, Don’t Tell.”<sup>96</sup> Like the Ninth Circuit, the First Circuit found that interpreting *Lawrence* was central to the question of whether DADT violated the plaintiffs’ Fourteenth Amendment rights.<sup>97</sup> As will be shown below, the First Circuit’s reasoning somewhat paralleled the Ninth Circuit’s, but with one key distinction: unlike the Ninth Circuit, the First Circuit declined to rely on *Sell*, finding the involuntary medication decision not “especially helpful” in analyzing military policy.<sup>98</sup>

The First Circuit identified at least four reasons to view *Lawrence* as creating a fundamental right to consensual sexual intimacy in the home.<sup>99</sup> First, like the Ninth Circuit, the First Circuit observed that the *Lawrence* Court relied on other fundamental rights cases (including *Griswold*, *Eisenstadt*, *Roe*, *Carey*, and *Casey*) to support its holding.<sup>100</sup> Second, the First Circuit noted that “the language employed throughout *Lawrence* supports the recognition of a protected liberty interest.”<sup>101</sup> For example, the First Circuit stated that the *Lawrence* Court compared the right at issue in *Lawrence* to rights of “freedom of thought, belief, and expression.”<sup>102</sup> The First Circuit also observed that in *Lawrence*, Justice Kennedy quoted the following language from *Casey*: “it is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”<sup>103</sup>

The third reason the First Circuit offered for interpreting *Lawrence* as creating a fundamental right to consensual sexual intimacy in the home was that in overruling *Bowers*, the *Lawrence* Court stated that Justice John Paul Stevens’ dissent in that case should have been controlling.<sup>104</sup> The passage from Justice Stevens’ dissent quoted by the *Lawrence* Court stated that the protection of the Due Process Clause extends to “individual decisions” by married and unmarried persons “concerning the intimacies of their physical relationship.”<sup>105</sup> Justice Stevens also relied on several due process cases—including *Griswold*,

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95. *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008).

96. *Id.* at 47.

97. *Id.* at 48.

98. *Id.* at 60 n.10.

99. *Id.* at 52.

100. *Id.*

101. *Id.*

102. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 563 (2003)).

103. *Id.* at 51 (citing *Lawrence*, 539 U.S. at 578 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992))).

104. *Id.* at 52 (citing *Lawrence*, 539 U.S. at 578).

105. *Id.* (citing *Lawrence*, 539 U.S. at 578 (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

*Eisenstadt*, and *Carey*—to support this position.<sup>106</sup> The final reason provided by the First Circuit for recognizing a fundamental right to consensual, private sex is that if the *Lawrence* Court had applied rational basis review (rather than a higher level of scrutiny), the convictions under the Texas statute would have been upheld.<sup>107</sup> According to the First Circuit, this is because the Supreme Court has acknowledged that public morality provides a rational basis for legislation,<sup>108</sup> and “prohibiting immoral conduct was the only state interest that Texas offered to justify the statute.”<sup>109</sup> In light of these four reasons, the First Circuit stood “convinced that *Lawrence* recognized that adults maintain a protected liberty interest to engage in certain ‘consensual sexual intimacy in the home.’”<sup>110</sup>

iii. *The Fifth Circuit*

The Fifth Circuit found that the *Lawrence* Court recognized “a right to be free from governmental intrusion regarding ‘the most private human conduct, sexual behavior.’”<sup>111</sup> In *Reliable Consultants, Inc. v. Earle*, the Fifth Circuit invalidated a Texas statute that criminalized the promotion and distribution of sexual devices.<sup>112</sup> According to the Fifth Circuit:

That *Lawrence* recognized this as a constitutional right is the only way to make sense of the fact that the Court explicitly chose to answer the following question in the affirmative: “We granted certiorari . . . [to resolve whether] petitioners’ criminal convictions for *adult consensual sexual intimacy* in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.”<sup>113</sup>

In its analysis, the court analogized the ban on selling sex toys to the statute that was invalidated in *Lawrence* in that both of these statutes were an attempt to regulate private sexual conduct.<sup>114</sup> The Fifth Circuit explained that the *Lawrence* court concluded that Texas’s anti-sodomy law “violated the substantive due process right to engage in consensual intimate conduct in the home free from government intrusion.”<sup>115</sup> The Fifth Circuit further declared that “[o]nce *Lawrence* is properly understood to explain the contours of the substantive due

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106. *Id.* (citing *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

107. *Id.* at 52–53.

108. *Id.* (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973)).

109. *Id.* at 52.

110. *Id.* at 53.

111. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008) (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

112. *Id.* at 740.

113. *Id.* at 744 (quoting *Lawrence*, 539 U.S. at 567).

114. *Id.* at 743–45.

115. *Id.* at 744.

process right to sexual intimacy, the case plainly applies.”<sup>116</sup> The Fifth Circuit stopped short of describing the right articulated in *Lawrence* as fundamental,<sup>117</sup> but found that the ban did “impermissibly burden[] the individual’s substantive due process right to engage in private intimate conduct of his or her choosing.”<sup>118</sup>

## 2. Narrow Interpretations of *Lawrence*

Some courts that narrowly construe *Lawrence* rely on the *Lawrence* court’s statement, in *dicta*, that the case did not involve minors, prostitution, formal recognition of same-sex relationships, or “persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”<sup>119</sup> Courts have used this so-called “what *Lawrence* isn’t”<sup>120</sup> passage to uphold laws barring consensual adult incest,<sup>121</sup> prostitution,<sup>122</sup> public sex,<sup>123</sup> and (prior to *Obergefell*) same-sex marriage.<sup>124</sup> Other courts that have narrowly interpreted *Lawrence* have focused not on the “what *Lawrence* isn’t” passage, but on the level of scrutiny applied by the *Lawrence* Court.<sup>125</sup> Still others have cited the fact that at no point does the *Lawrence* majority invoke the phrase “fundamental right.”<sup>126</sup> A number of courts have also relied on the *Washington v. Glucksberg* “history and tradition” test to decline to recognize a fundamental

116. *Id.* at 744 (emphasis added).

117. *Id.* at 745 n.32.

118. *Id.* at 744.

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

120. LiJia Gong & Rachel Shapiro, *Sexual Privacy After Lawrence v. Texas*, 13 GEO. J. GENDER & L. 487, 495 (2012).

121. *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005).

122. *State v. Freitag*, 130 P.3d 544, 545–46 (Ariz. Ct. App. 2006); *State v. Romano*, 155 P.3d 1102, 1109–15 (Haw. 2007); *People v. Williams*, 811 N.E.2d 1197, 1199 (Ill. App. Ct. 2004); *State v. Pope*, 608 S.E.2d 114, 115–16 (N.C. Ct. App. 2005).

123. *Singson v. Commonwealth*, 621 S.E.2d 682, 685–86 (Va. Ct. App. 2005); *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 1008) (“[Don’t Ask, Don’t Tell] provides for the separation of a service person who engages in a public homosexual act or who coerces another person to engage in a homosexual act. Both of these forms of conduct are expressly excluded from the liberty interest recognized by *Lawrence*.”).

124. *Andersen v. King Cty.*, 138 P.3d 963, 979, 1010 (Wash. 2006), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

125. *See Williams v. Att’y Gen. of Alabama (Williams IV)*, 378 F.3d 1232, 1236 (11th Cir. 2004); *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006) (interpreting *Lawrence* as applying rational basis review, and thereby signaling that a fundamental right was not recognized); *State v. Lowe*, 861 N.E.2d 512, 517 (Ohio 2007) (“In using a rational-basis test to strike down the Texas statute, the court declined to announce a new fundamental right arising from the case.”).

126. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008) (basing its conclusion on the fact that the U.S. Supreme Court has never expressly articulated a right “to engage in private sexual conduct”); *State v. Clinkenbeard*, 123 P.3d 872, 878 (Wash. Ct. App. 2005) (“While the decision in *Lawrence* restricts the degree to which government may regulate private, adult, consensual sexual behavior, the court did not establish that this behavior rises to the level of a fundamental right.”).

right to sex.<sup>127</sup> Some of the leading cases that narrowly interpret *Lawrence* are discussed below. As will be argued in Part III.D, these cases—which could perhaps be construed as an exercise in “juris-prudishness”—were wrongly decided because they either misinterpreted *Lawrence* or relied on the defunct *Glucksberg* fundamental rights test.

*i. The Eleventh Circuit*

In *Williams v. Attorney General of Alabama (Williams IV)*, buyers and sellers of sex toys claimed that an Alabama statute that prohibited the commercial exchange of devices used primarily for genital stimulation violated their fundamental right to privacy.<sup>128</sup> Of all courts following *Lawrence* that have broached the question of whether the Supreme Court has recognized a right to sex, none more directly considered the issue than the Eleventh Circuit in *Williams IV*. For this reason, the *Williams IV* decision and its rather complicated procedural history require close analysis.

Four years before *Lawrence* was decided, in *Williams v. Pryor (Williams I)*, the U.S. District Court for the Northern District of Alabama concluded that the Supreme Court had not recognized a fundamental right to use sexual devices.<sup>129</sup> The *Williams I* court also declined to recognize a new fundamental right.<sup>130</sup> In reaching this determination, the *Williams I* court relied on *Washington v. Glucksberg*<sup>131</sup> and determined that the pertinent question in deciding whether an interest at issue warrants substantive due process protection is whether the interest is so “deeply rooted” in the history and traditions of the nation that “neither liberty nor justice would exist if [it were] sacrificed.”<sup>132</sup> The *Williams I* court found that the “interest in using devices designed or marketed as useful primarily for the stimulation of human genital organs when engaging in lawful, private, sexual activity” did not rise to the level of a substantive due process interest under the *Glucksberg* test.<sup>133</sup> Nevertheless, the *Williams I* court invalidated the Alabama statute, finding that it did not withstand rational basis review.<sup>134</sup>

On appeal, in *Williams II*, the Eleventh Circuit concluded that the district court erred in finding that the Alabama statute lacked a rational basis.<sup>135</sup> According to the Eleventh Circuit, “[t]he State’s interest in public morality is a legitimate interest rationally served by the statute.”<sup>136</sup> Moreover, noting that the

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127. See *infra* notes 128–168 and accompanying text.

128. *Williams IV*, 378 F.3d at 1235.

129. *Williams v. Pryor (Williams I)*, 41 F. Supp. 2d 1257, 1281–84 (N.D. Ala. 2001).

130. *Id.* at 1283–84.

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

132. *Williams I*, 41 F. Supp. 2d at 1283 (quoting *Glucksberg*, 521 U.S. at 720–21).

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

134. *Id.* at 1293.

135. *Williams v. Pryor (Williams II)*, 240 F.3d 944, 949 (11th Cir. 2001).

136. *Id.*

district court devoted only two paragraphs to determining whether “the ‘use of sexual devices’ is a deeply rooted and central liberty” for purposes of the *Glucksberg* analysis, the Eleventh Circuit remanded the case for further analysis of this matter.<sup>137</sup> On remand, in *Williams III*, the U.S. District Court for the Northern District of Alabama stated that there are two parts to the *Glucksberg* test for evaluating substantive due process claims.<sup>138</sup> First, the court must determine “whether the fundamental right alleged is deeply rooted in this Nation’s history and tradition.”<sup>139</sup> The second part of the *Glucksberg* test requires the court to “carefully describe the fundamental liberty interest at issue.”<sup>140</sup> With these requirements in mind, the *Williams III* court stated the issue before it as follows:

In light of *Glucksberg* and the two-part substantive due process test outlined above, plaintiffs must demonstrate that the fundamental right to privacy recognized by the Supreme Court incorporates a fundamental right to *sexual privacy* between married persons and between unmarried persons which, in turn, ‘encompasses a right to use sexual devices.’ This court will recognize a fundamental right to *sexual privacy* if plaintiffs’ evidence of our national history, legal traditions, and contemporary practices establishes that such right is ‘deeply rooted in this Nation’s history and tradition.’<sup>141</sup>

The *Williams III* court then proceeded to recount the history of sexual privacy beginning with colonial America;<sup>142</sup> then proceeding through the eighteenth century’s Revolutionary Period;<sup>143</sup> the nineteenth century’s “Dawn of Urbanism and Secularism,”<sup>144</sup> including “the appearance of electromechanical vibrators”<sup>145</sup> and the “Comstock Laws,”<sup>146</sup> and concluding with twentieth century developments ranging from the Kinsey studies to advertisements in *Cosmopolitan* magazine.<sup>147</sup> The *Williams III* court concluded that the substantive due process right to privacy encompasses a right to use sexual devices.<sup>148</sup> The court ruled in favor of the plaintiffs, determining that the Alabama statute was not narrowly tailored to serve compelling state interests.<sup>149</sup>

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137. *Id.* at 955–56.

138. *Williams v. Pryor (Williams III)*, 220 F. Supp. 2d 1257, 1275 (N.D. Ala. 2002).

139. *Id.*

140. *Id.*

141. *Id.* at 1277 (internal citations omitted).

142. *Id.* at 1278–80.

143. *Id.* at 1280–82.

144. *Id.* at 1282–83.

145. *Id.* at 1283–85.

146. *Id.* at 1285–89.

147. *Id.* at 1289–94.

148. *Id.* at 1296.

149. *Id.* at 1303–07.

In *Williams IV*, the Eleventh Circuit again reversed the district court's decision.<sup>150</sup> The *Williams IV* court held that neither *Lawrence* nor any other previous Supreme Court decision recognized a fundamental, substantive due process right to sexual privacy that would trigger strict scrutiny.<sup>151</sup> In support, the court reiterated its earlier observation that the *Lawrence* Court did not employ a traditional fundamental rights analysis.<sup>152</sup> The court stated that it was "not prepared to infer a new fundamental right from an opinion that never employed the usual *Glucksberg* analysis for identifying such rights."<sup>153</sup> In response to the plaintiffs' invitation to recognize a new fundamental right, the *Williams IV* court conducted its own *Glucksberg* analysis.<sup>154</sup> The *Williams IV* court found that the district court erred in conducting its *Glucksberg* analysis by framing the asserted right too broadly—as a "right to sexual privacy."<sup>155</sup> Through tracing the nation's history and traditions relating to the right to use sexual devices,<sup>156</sup> the *Williams IV* court concluded "the asserted right does not clear the *Glucksberg* bar."<sup>157</sup> Having prohibited application of strict scrutiny, the *Williams IV* court remanded the case for further proceedings consistent with its holdings.<sup>158</sup>

ii. *Seventh Circuit*

*Williams IV* is not the only case that has found support in *Glucksberg* for declining to recognize a fundamental right to consensual sex. In *Muth v. Frank*, a habeas petitioner invoked a fundamental right to sex in a constitutional challenge to his incest conviction.<sup>159</sup> In response, the Seventh Circuit relied on *Glucksberg* to find that the *Lawrence* Court did not recognize a fundamental right to sex.<sup>160</sup> Citing the "history and tradition" passage, the Seventh Circuit determined that the *Lawrence* Court "did not apply the specific method it had previously created for determining whether a substantive due process claim implicated a fundamental right."<sup>161</sup> The *Muth* court also determined that the *Lawrence* Court did not apply strict scrutiny.<sup>162</sup> For these reasons, the Seventh Circuit concluded

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150. *Williams v. Att'y Gen. of Alabama (Williams IV)*, 378 F.3d 1232, 1234–35, 1250 (11th Cir. 2004).

151. *Id.* at 1235–38.

152. *Id.* at 1236 (citing *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 815–17 (11th Cir. 2004)).

153. *Id.* at 1237.

154. *Id.* at 1235, 1239–50.

155. *Id.* at 1239, 1242.

156. *Id.* at 1242–50.

157. *Id.* at 1235.

158. *Id.* at 1250.

159. *Muth v. Frank*, 412 F.3d 808, 810 (7th Cir. 2005).

160. *Id.* at 817–18.

161. *Id.* at 817 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

162. *Id.* at 818.

that *Lawrence* did not announce a fundamental right to consensual, private sexual activity.<sup>163</sup>

iii. *Court of Appeals of Texas*

Additionally, the Court of Appeals for the Third District of Texas in *Ex parte Morales* concluded that the *Lawrence* Court did not recognize a fundamental right to sex.<sup>164</sup> The plaintiff in this case—a school employee challenging his conviction for having sex with a student—argued that the Supreme Court implicitly recognized such a right in *Griswold* and *Eisenstadt*.<sup>165</sup> However, the court stated that the *Lawrence* Court at no point characterized the liberty interest asserted as fundamental.<sup>166</sup> Moreover, the Texas court emphasized the fact that the *Lawrence* Court did not “employ its typical fundamental-rights analysis and nomenclature.”<sup>167</sup> Citing *Glucksberg*, the court observed “[t]he *Lawrence* court did not attempt to equate sexual conduct with ‘those fundamental rights and liberties which are . . . deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty,’ and it did not describe this interest with specificity.”<sup>168</sup>

To recap, courts disagree on what exactly *Lawrence* stands for. The Ninth, First, and Fifth Circuits and the Court of Appeals of New York interpret *Lawrence* as having recognized a right to sexual intimacy, and have thus applied heightened scrutiny to claims of due process violations of this right. On the other hand, the Tenth, Eleventh, and Seventh Circuits and a Texas appellate court have narrowly construed *Lawrence*, finding that the Supreme Court has not recognized a fundamental right to sex and applying only rational basis review to claims involving statutes that burden consensual sexual activity.

As will be argued in the next section, courts that interpret *Lawrence* as establishing anything less than a fundamental right to sexual intimacy calling for strict scrutiny have failed to recognize the full force of *Lawrence*. This article argues that cases declining to recognize a fundamental right to sex were wrongly decided either because they misinterpreted *Lawrence* or, as with *Williams IV* and its progeny, relied on the now-defunct *Glucksberg* test. It also argues that strict scrutiny should be applied to policies and statutes that burden sexual intimacy. For these reasons, this article contends that *Lawrence* actually stands for more than what has been recognized by even the majority of courts that broadly interpret the opinion.

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163. *Id.*

164. *Ex parte Morales*, 212 S.W.3d 483, 492–93 (Tex. App. 2006, pet. ref’d).

165. *Id.* at 491.

166. *Id.* at 493.

167. *Id.*

168. *Id.*

#### D. *The Right to Consensual Adult Sex is Fundamental*

Having described the split of authority, this article now turns to arguments for reading *Lawrence* as recognizing a fundamental right to sex. In one of the leading scholarly interpretations of *Lawrence*, Professor Laurence Tribe argues that the “core contribution of *Lawrence* comes from the manner in which the Court framed the question of how best to provide content to substantive due process rights.”<sup>169</sup> In describing the interests at stake in *Lawrence*, Justice Kennedy, writing for the majority, quoted the following passage from *Planned Parenthood of Southeastern Pennsylvania v. Casey*:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>170</sup>

This language captures the broad conception of liberty standing at the heart of *Lawrence*. *Lawrence* undermined the practice of pinpointing isolated, fact-specific rights by demonstrating that “the whole of substantive due process . . . is larger than, and conceptually different from, the sum of its parts.”<sup>171</sup>

The following subsection will first argue that the Pre-*Lawrence* sexual freedom cases recognized a fundamental right to sex. Second, this subsection will argue that in *Obergefell v. Hodges*, the Supreme Court decisively resolved the question of whether there exists a fundamental right to sex. The article will then explain why arguments for declining to recognize this right are unpersuasive.

##### 1. *The Pre-Lawrence “Sexual Freedom Cases” Recognized a Fundamental Right to Sex*

Two points from *Lawrence* demonstrate that the sexual freedom cases decided before it recognized a right to adult consensual sex.<sup>172</sup> First, the majority in *Lawrence* stated in no uncertain terms that *Bowers* was incorrectly decided.<sup>173</sup> Second, the *Lawrence* court relied, importantly, on Justice Stevens’ assertion in *Bowers* that it is “abundantly clear” that prior cases had established that

169. Tribe, *supra* note 47, at 1900.

170. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

171. Tribe, *supra* note 47, at 1937.

172. These points were recognized by Judge Barkett in her dissent in *Williams IV*. *Williams v. Att’y Gen. of Alabama*, 378 F.3d 1232, 1254 (11th Cir. 2004) (Barkett, J., dissenting).

173. *Lawrence*, 539 U.S. at 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

decisions concerning physical intimacies are a protected liberty.<sup>174</sup> In that dissent, Justice Stevens wrote:

Our prior cases make [it] abundantly clear . . . [that] individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.<sup>175</sup>

According to the *Lawrence* majority, Justice Stevens’ dissenting opinion in *Bowers* “should have been controlling.”<sup>176</sup> Justice Stevens explained “[t]he essential ‘liberty’ that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive sexual conduct that others may consider offensive or immoral.”<sup>177</sup> According to Justice Stevens, these cases dealt with an individual’s right to make certain crucially important decisions affecting their and their family’s destiny.<sup>178</sup> Additionally, “[t]he character of the Court’s language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen’s right to decide how he will live his own life intolerable.”<sup>179</sup>

To recognize the existence of a fundamental right to reproductive choice, contraception use, and family relations, and yet refuse to extend the same level of protection to sexual activity, disregards what is at the heart of these recognized liberties. As Justice Harry Blackmun put it, although the pre-*Bowers* “sexual freedom cases” each center on “protection of the family,” any court that concludes that Due Process privacy protections extend no further than the boundaries of the family “clos[es] [its] eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment’s Due Process Clause.”<sup>180</sup> These rights have been afforded protection because they are “so central a part of an individual’s life.”<sup>181</sup> These observations from the *Bowers* dissenting opinions find further support in the Court’s statement in *Zablocki v. Redhail*:

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174. *Id.* at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

175. *Id.*

176. *Id.* at 578.

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

178. *Id.* at 217 (quoting *Fitzgerald v. Porter Mem’l Hosp.*, 523 F. 2d 716, 719–720 (7th Cir. 1975)).

179. *Id.*

180. *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977)).

181. *Id.*

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.<sup>182</sup>

Without engaging in cherry-picking, it is difficult to explain why the *Lawrence* Court would discuss the Supreme Court's catalogue of fundamental rights cases only to stop short of recognizing that the right to sexual intimacy itself is fundamental. To understand the *Lawrence* Court's reasoning, it seems fitting to employ the centuries-old principle that the simplest explanation is often the correct one.<sup>183</sup> That is, the *Lawrence* Court saw fit to compare the right to "consensual sexual intimacy"<sup>184</sup> with the rights to abortion, contraception, and marriage because the former, like the latter rights, is in fact a fundamental, substantive due process right.

Moreover, the choices of with whom and in what manner to engage in sexual activity are arguably no less important or central to one's individuality and autonomy than the decision to "bear or beget a child"<sup>185</sup> or enter into the bond of marriage. Each of these choices is so closely related that, for purposes of protecting individual freedoms, one would be hard pressed to identify meaningful distinctions among them. In concluding that marriage is a fundamental right protected under the Fourteenth Amendment, the *Griswold* Court characterized marriage as a "right of privacy older than the Bill of Rights," an "association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."<sup>186</sup>

If marriage promotes a certain way of life and is a right of privacy older than the Bill of Rights, it is difficult to see how sexual intimacy would not also fall into these categories. As Justice Blackmun notes in his dissenting opinion in *Bowers*, "sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'"<sup>187</sup> The sexual self helps define one's existence by contributing to the construction of one's political, social, religious, and cultural identity.<sup>188</sup> Not

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182. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

183. See Alan Baker, *Simplicity*, STAN. ENCYCLOPEDIA PHIL. (last updated Feb. 25, 2010), <http://plato.stanford.edu/entries/simplicity/> (explaining Occam's Razor and other philosophical theories of simplicity).

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

185. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

186. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

187. *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting) (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)).

188. See JAKOBSEN & PELLEGRINI, *supra* note 7, at 139, 147 (discussing the "value-making" capacity of sex" and noting that "many gay male and lesbian social theorists have valued sex

only does sex have the power to inform other spheres of activity, sex itself “can be a site for the production of values.”<sup>189</sup> As Professor Laurence Tribe has argued,

[H]uman relationships beyond the purely instrumental—and the expressive dimensions and mutual commitments they entail—are indispensable to the process of transmitting and transmuted values in an intergenerational, cross-social progression that keeps faith with a starting set of basic democratic undertakings while remaining open to evolution in the direction of greater empathy, inclusion, and respect.<sup>190</sup>

In its most conscientious form, sex can be used as a tool for teaching people to be attentive to the wants, needs, and differences of others.<sup>191</sup> It can foster confidence and a healthy sense of curiosity, as well as engender open and honest communication.<sup>192</sup> Furthermore, when grounded in consent based upon honest communication, sex reinforces principles of racial, cultural, and gender equality.<sup>193</sup> Because they are so central to the ability to define one’s own existence, the rights to abortion, contraception, marriage, family relations, and sexual activity must be exploited or honored together. Attempting to parse and treat these interests differently subverts a central principle of American jurisprudence: treat like cases alike.

## 2. Lawrence’s Legacy

In *Obergefell v. Hodges*, the landmark decision that recognized a fundamental substantive due process right to same-sex marriage, the Supreme Court recognized that *Lawrence* identified a right to sex. Effectively overruling *Glucksberg*,<sup>194</sup> the *Obergefell* Court made the important declaration that the *Glucksberg* test “is inconsistent with the approach this Court has used in discussing other fundamental rights, *including marriage and intimacy*.”<sup>195</sup> Thus, Justice Kennedy explicitly indicated that the Court has indeed identified a fundamental right to intimacy. There are two reasons to interpret the right to

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precisely for its ability to remake social relations”; “lesbian sexual ethics has developed alternative ways of doing kinship”).

189. JAKOBSEN & PELLEGRINI, *supra* note 7, at 17.

190. Tribe, *supra* note 47, at 1940–41.

191. See JAKOBSEN & PELLEGRINI, *supra* note 7, at 145 (“a willingness to take responsibility for each other, which can grow out of sexual relations, has certainly been on view in both gay and lesbian responses to HIV and AIDS.”).

192. *Id.* at 146 (“the bathhouses and bars that were the site of [gay men’s] sexual networks also became places to distribute safer sex information and organize politically.”).

193. See, e.g., *id.* at 147 (noting that working-class lesbian communities of Buffalo, New York during the 1950s “produced alternative practices of sex and gender that offered some safety and support in the face of repressive gender, sexual, racial, and class norms”).

194. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2620–21 (2015) (Roberts, J., dissenting).

195. *Id.* at 2602 (emphasis added).

intimacy as encompassing the right to *sexual* intimacy. First, in everyday use, the term “intimacy” has become synonymous (or at least very closely associated) with sex.<sup>196</sup> Second, it would be difficult to argue that the Constitution protects intimacy only in the abstract. For constitutional protection of the fundamental right to intimacy to have any workable force, its scope cannot be limited to mere thoughts or feelings of closeness to another person. It is hard to envision how the constitution would work to protect “intimate association” to the extent that such an association encompasses a close—but unobservable—emotional bond, yet stop short of protecting a physical manifestation of that bond.

Moreover, the *Obergefell* Court made the following statement regarding the impact of *Lawrence*: “[a]s this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association.”<sup>197</sup> This would be a nugatory and pointless declaration if there were *no* right to intimate association. That is, stating that same-sex couples enjoy the *same* right to intimate association as opposite-sex couples implies that there *does* exist a right to sexual intimacy. Because the court uses the term “intimate association” to describe a right of couples engaged in a romantic relationship and for the reasons stated above, it seems relatively clear here that the use of the phrase “intimate association” here refers to sexual intimacy, and not simply other, non-sexual manifestations of romantic familiarity.

Furthermore, at least one of the principles offered by the *Obergefell* Court for identifying a fundamental right to same-sex marriage also supports the *Lawrence* Court’s finding that there is a fundamental right to sex. The *Obergefell* Court stated “[a] first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>198</sup> As already noted in this article, the decisions of with whom and in what manner to engage in sexual activity are as central to individual autonomy as decisions regarding childrearing and marriage.<sup>199</sup> Separating the right to sex from other fundamental rights that, by their very nature, center on sexual activity is a failure to treat like cases alike.

Consideration of the Court’s language throughout the *Obergefell* opinion also counsels in favor of recognition of a right to sex. For example, Justice Kennedy begins the opinion with the following statement: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”<sup>200</sup> Justice Kennedy further states that the liberties protected under the Due Process Clause extend to “intimate choices that define personal identity and

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196. See *Intimacy*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/intimacy](http://www.oxforddictionaries.com/us/definition/american_english/intimacy) (last visited May 28, 2016) (defining “intimacy” as “an intimate act, especially sexual intercourse.”).

197. *Obergefell*, 135 S. Ct. at 2600.

198. *Id.* at 2599.

199. See *supra* notes 185–193 and accompanying text.

200. *Obergefell*, 135 S. Ct. at 2593.

beliefs.”<sup>201</sup> Justice Kennedy’s use of this language strongly suggests that the scope of the Due Process Clause is broad enough to encompass the right to sex.

### 3. *Problems with Narrow Interpretations of Lawrence*

As discussed in Part II.C.2, courts have offered several arguments for declining to recognize a fundamental right to sex. In reaching the conclusion that *Lawrence* did not identify a fundamental right to sex, courts have reasoned that the *Lawrence* Court did not describe the right asserted as “fundamental”; the *Lawrence* court did not apply strict scrutiny; and the *Lawrence* court did not conduct the traditional *Glucksberg* assessment for identifying a new fundamental right. The subsections below will demonstrate that these arguments are either seriously flawed or too weak to prevail in light of arguments in favor of a right to sex. The cases that declined to recognize a fundamental right to sex were, therefore, wrongly decided.

#### i. *“Fundamental” is Not a Magic Word*

The Tenth Circuit declined to interpret *Lawrence* as recognizing a fundamental right to sex because “nowhere in *Lawrence* does the Court describe the right at issue in that case as a fundamental right or a fundamental liberty interest.”<sup>202</sup> Although the *Lawrence* court never described (or at least did not describe in traditional terms) the interests at stake in the case as “fundamental,” this is not a persuasive reason for denying that the *Lawrence* Court recognized a fundamental right to consensual sex. As Professor Tribe has argued, the Constitution affords protection to “certain fundamental facets of freedom” even when these liberties have “defied easy labeling and enumeration.”<sup>203</sup> The term “fundamental” has no magic powers.<sup>204</sup> Its mention is not a necessary condition for the finding of a substantive due process right because the U.S. Supreme Court has on numerous occasions identified such a right, but failed to use the term “fundamental.”<sup>205</sup> As Professor Tribe writes, “[t]o search for the magic words proclaiming the right protected in *Lawrence* to be ‘fundamental,’ and to assume that in the absence of those words mere rationality review applied, is to universalize what is in fact only an occasional practice.”<sup>206</sup>

Moreover, the *Lawrence* court did indeed use the term “fundamental,” although the Court’s use of the term diverged slightly from the usual formula.<sup>207</sup> For example, the *Lawrence* court stated that it dealt with a “protection of liberty under the Due Process Clause [that] has a substantive dimension of fundamental

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201. *Id.* at 2597.

202. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008).

203. Tribe, *supra* note 47, at 1898.

204. *Id.* at 1917.

205. *Cook v. Gates*, 528 F.3d 42, 53 (1st Cir. 2008).

206. Tribe, *supra* note 47, at 1917.

207. Tribe, *supra* note 47, at 1916–17.

significance in defining the rights of the person.”<sup>208</sup> Thus, although the *Lawrence* court was not required to describe the right to sexual intimacy as “fundamental” to enshrine it as such, the court did in fact use the so-called “talismanic verbal formula”<sup>209</sup>—even if in a roundabout way. This leaves little doubt that the *Lawrence* court did in fact identify a fundamental right.

ii. *Glucksberg is Dead*

The Eleventh Circuit in *Williams IV*,<sup>210</sup> the Seventh Circuit in *Muth v. Frank*,<sup>211</sup> and the Court of Appeals of Texas in *Ex parte Morales*<sup>212</sup> each found support in *Glucksberg* to justify their refusal to recognize a fundamental right to consensual sex.<sup>213</sup> However, the Supreme Court finally laid to rest the oft-criticized<sup>214</sup> *Glucksberg* standard. The respondents in *Obergefell* argued that before declaring a new fundamental right to same-sex marriage, the court must first find that the right passes the *Glucksberg* bar by accepting a “careful description” of the right asserted and then determining that the right is grounded in the nation’s “history and tradition.”<sup>215</sup> According to the *Obergefell* Court, “[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.”<sup>216</sup> However, the *Obergefell* Court effectively overruled *Glucksberg*, limiting application of the test it announced to the right involved in *Glucksberg* (physician-assisted suicide).<sup>217</sup> The *Obergefell* Court then declared that the test announced in *Glucksberg*

is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a “right to interracial marriage”; *Turner* did not ask about a “right of inmates to marry”; and *Zablocki* did not ask about a “right of fathers with unpaid child support duties to marry.”<sup>218</sup>

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208. *Lawrence v. Texas*, 539 U.S. 558, 565 (2003).

209. Tribe, *supra* note 47, at 1917.

210. *Williams v. Att’y Gen. of Alabama (Williams IV)*, 378 F.3d 1232, 1237 (11th Cir. 2004).

211. *Muth v. Frank*, 412 F.3d 808, 817–18 (7th Cir. 2005).

212. *Ex parte Morales*, 212 S.W.3d 483, 493 (Tex. App. 2006).

213. See *supra* notes 128–168 and accompanying text.

214. See, e.g., *Williams IV*, 378 F.3d at 1257–59 (Barkett, J., dissenting); see also *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (responding to the majority’s reliance on the well-established history of anti-sodomy laws and quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897): “[I]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past”).

215. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

216. *Id.* at 2598.

217. *Id.* at 2602.

218. *Id.*

Justice Kennedy's statement not only indicates that future cases announcing new fundamental rights should steer clear of the *Glucksberg* test; it also means that cases that employed the *Glucksberg* test despite contrary guidance from *Loving*, *Turner*, and *Zablocki* did so in error. Justice Kennedy's announcement thus inflicts a fatal blow to the *Williams IV* line of cases, which relies on *Glucksberg* to conclude that there does not exist a fundamental right to sex.

### III.

#### THE RIGHT TO SEX IN MENTAL HEALTH INSTITUTIONS

##### A. *Sexual Regulation in U.S. Mental Health Facilities*

Having established that the Supreme Court has recognized that there is a fundamental due process right to sex, this article now turns to the second part of its thesis—namely, the right to sex persists even upon institutionalization stemming from mental disability. *Wyatt v. Stickney*, the first major case to set forth minimum constitutional standards of care for people who have been involuntarily committed,<sup>219</sup> called for “suitable opportunities for the patient’s interaction with members of the opposite sex.”<sup>220</sup> Of the many states that adopted some form of the *Wyatt* standards, only a handful of them adopted provisions that in any way address patients’ rights to intimate contact.<sup>221</sup> Mental health institutions generally do not permit mentally disabled individuals who receive inpatient treatment to exercise a substantial degree of sexual freedom. In fact, as will be discussed below, the opportunities for sexual activity in mental health institutions in the United States are extremely limited, and being caught engaging in sexual activity in these facilities may result in punishment. Problems with the current tenor of sexuality in mental health treatment facilities are complicated by the fact that there is little case law addressing the issue of intimate relationships involving individuals institutionalized on the basis of mental disability.<sup>222</sup>

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219. Involuntary civil-commitment is one of the few processes by which individuals within the U.S. who have not been charged with a crime may be detained against their will. The vast majority of people who are involuntarily civilly committed are people who have been diagnosed with a psychiatric disorder or experience intellectual disability. Susan Stefan, *The Americans with Disabilities Act and Mental Health Law: Issues for the Twenty-First Century*, 10 J. CONTEMP. LEGAL ISSUES 131, 156 (1999).

220. *Wyatt v. Stickney*, 344 F. Supp. 373 app. A at 381 (M.D. Ala. 1972) *aff’d in part, rev’d in part and remanded sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

221. Perlin, *supra* note 4, at 965; *see also* Robin Cheryl Miller, *Construction and Application of State Patient Bill of Rights Statutes*, 87 A.L.R. 5th 277 §§ 17–18, 22, 42 (2001) (demonstrating an absence of statutes addressing patient sexuality beyond prohibitions on sexual violence and coercive relationships; viewing of patient by opposite sex staff).

222. A search of the term “sex!” within the rather insensitively titled WestLaw headnote, “Asylums and Assisted Living Facilities” produces only 70 results—a significant portion of which are repeat entries and/or not directly relevant to the topic of the sexual rights of inpatients who experience mental disability.

In the absence of clearly articulated standards governing intimate contact between patients, hospitals and similar institutions have been relatively free to set strict no-sex policies or to refrain from implementing any policies addressing patient sexuality. Institutions have also been able to indirectly eliminate any chance for sexual privacy by requiring that the doors to patients' rooms be open at all times or by housing multiple patients in one room.<sup>223</sup> When inpatient sexual activity is discovered, staff responses are often inconsistent, and based on the sexual mores of facility staff.<sup>224</sup> In a study conducted by Welch and Clements, patients reported receiving "double messages" from staff.<sup>225</sup> For example, one patient reported that staff did not approve of sex between patients and that patients did not have access to a private space in which to engage in sexual activity, but that patients were encouraged to practice safe sex.<sup>226</sup> This patient articulated the staff's double message as "don't have sex but use a condom."<sup>227</sup> These idiosyncrasies confuse and demean patients housed in these facilities.

Inconsistency with regard to policies on sexual behavior exists not only at the level of individual facilities, but in institutions throughout the United States. A study by Peter Buckley & Tricia Robben surveyed mental health facilities in sixteen states and found that policies treating inpatient sexuality vary widely.<sup>228</sup> Thirty-nine percent of hospitals that submitted policies stressed patient autonomy; fifty-eight percent of policies stressed competence and consent; fifty-five percent made contraception available; and thirty-nine percent stressed strategies on prevention of sexual relations.<sup>229</sup> However, forty-five percent of hospitals had policies that explicitly forbade sexual activity; forty-five percent of policies expressed disapproval of staff-patient relationships; and ten percent had policies that explicitly provided for punitive measures in response to inpatient sexual activity.<sup>230</sup> In Wright's study on sexual isolation of people with mental illness, one hospitalized respondent diagnosed with schizophrenia stated:

There is no way to have sex in here. They check rooms every so often and you don't know when they are going to come in . . . I

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223. See Appel, *supra* note 3, at 153; Judith A. Cook, *Sexuality and People with Psychiatric Disabilities*, 18 *SEXUALITY & DISABILITY* 195, 200 (2000); see also Eric R. Wright, Dustin E. Wright, Brea L. Perry & Carrie E. Foote-Ardah, *Stigma and the Sexual Isolation of People with Serious Mental Illness*, 54 *SOC. PROBS.* 78, 81 (2007).

224. Peter F. Buckley & Tricia Robben, *A Content Analysis of State Hospital Policies on Sex Between Inpatients*, 51 *PSYCHIATRIC SERVS.* 243, 243 (2000).

225. Welch & Clements, *supra* note 25, at 274.

226. *Id.*

227. *Id.*

228. Buckley & Robben, *supra* note 224, at 243.

229. *Id.* at 244 tbl.1.

230. *Id.*

think if you get caught you end up in one of the seclusion rooms for a while. I would lose my buildings and grounds pass.<sup>231</sup>

Although some institutions have begun to address the sexual health of residents, it is clear that lack of respect and even contempt toward the sexual activity of institutionalized individuals who experience mental disability is still a rampant problem.

Key among the reasons for extending the right to sex to people housed in mental institutions is the basic recognition of dignity and humanity of all people. As is the case with other marginalized groups, individuals who experience mental disability are at risk of internalizing society's disapproval of their sexuality.<sup>232</sup> One possible step in improving the sexual and overall health of institutionalized people affected by mental disability is the recognition of their constitutional right to sex.<sup>233</sup>

*B. Lawrence's Language Does Not Justify a Refusal to Recognize that the Right to Sex Persists in Institutional Settings*

*1. Lawrence's Privacy Language*

Some might use *Lawrence's* privacy language to argue that the right to sex does not survive in institutional settings. One possible counter to this argument is that, for purposes considered by the *Lawrence* Court, a residential mental health facility is the functional equivalent of a home or private residence. Although inpatients may not enjoy the same level of privacy as those who live in more traditional private residences, this fact alone should not suffice to limit extension of the constitutional protection recognized in *Lawrence*.

A second possible response to arguments grounded in *Lawrence's* privacy language is that these arguments misinterpret the Court's opinion. The *Lawrence* Court granted certiorari to consider "[w]hether petitioners' criminal convictions for adult consensual sexual intimacy *in the home* violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment."<sup>234</sup> The Court states that adults may enjoy the freedom to engage in sexual activity "in the *confines of their homes* and their own *private lives*."<sup>235</sup>

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231. Wright, Wright, Perry & Foote-Ardah, *supra* note 223, at 90.

232. Kalpana Dein & Paul Simon Williams, *Relationships Between Residents in Secure Psychiatric Units: Are Safety and Sensitivity Really Incompatible?*, 32 PSYCHIATRIC BULL. 284, 285 (2008).

233. See PLANNED PARENTHOOD FEDERATION OF AMERICA, THE HEALTH BENEFITS OF SEXUAL EXPRESSION (2007) [https://www.plannedparenthood.org/files/3413/9611/7801/Benefits\\_Sex\\_07\\_07.pdf](https://www.plannedparenthood.org/files/3413/9611/7801/Benefits_Sex_07_07.pdf) (collecting and summarizing studies finding links between health benefits and sexual expression).

234. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (emphasis added).

235. *Id.* at 567 (emphasis added).

Contrary to what some courts and scholars have argued,<sup>236</sup> this language does not limit *Lawrence*'s scope, but emphasizes the severity of the violation involved. Application of *Lawrence*'s holding is not spatially limited.<sup>237</sup> In fact, the Court made clear, in other language in the opinion, that the privacy interests involved extend well beyond the four corners of the home:

[T]here are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.<sup>238</sup>

Furthermore, the Court explained that sexual behavior is one of the spheres of existence that the state should leave undisturbed, characterizing the anti-sodomy statute at issue as one that “touch[es] upon the *most private human conduct*, sexual behavior.”<sup>239</sup> The Court concluded that the case should be decided “by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment.”<sup>240</sup> The *Lawrence* Court was not concerned solely with violations of one's right to privacy in a private residence. Rather the Court was concerned with *private conduct*, which may—but does not necessarily—occur in the home.

Not only does the language of *Lawrence* signal that its holding should not be limited to the spatial confines of private residences, but a purely “privacy-driven” reading of *Lawrence* is inconsistent with prior decisions. The “sexual freedom cases” decided before *Lawrence* do not dwell on the significance of the physical location where the interests at stake are expressed.<sup>241</sup> In fact, as Justice Blackmun explains in his dissenting opinion in *Bowers*,

In construing the right to privacy, the Court has proceeded along two somewhat distinct, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain *decisions*

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236. See, e.g., *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008); Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1545 (2004).

237. Tribe, *supra* note 47, at 1915.

238. *Lawrence*, 539 U.S. at 562.

239. *Id.* at 567 (emphasis added).

240. *Id.* at 564.

241. See Herald, *supra* note 47, at 6 (“There are at least two possible theories [outlining the extent of our constitutional liberty and privacy interests]: (1) certain fundamental rights exist that, once established, require the government to justify intrusion upon them with compelling interests and narrowly tailored means; or (2) a liberty interest exists in which people retain a certain spatial, decisional, or personal privacy that requires the government to justify intrusion at some, yet to be defined, level. The first theory reflects Justice Blackmun's approach in *Roe v. Wade*, and the second theory reflects Justice Kennedy's opinion in *Lawrence*.”).

that are properly for the individual to make. *E.g.*, *Roe v. Wade*; *Pierce v. Society of Sisters*. Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged. *E.g.*, *United States v. Karo*; *Payton v. New York*; *Rios v. United States*. The case before us implicates both the decisional and the spatial aspects of the right to privacy.<sup>242</sup>

If anything, the *Lawrence* Court's mention of the privacy of the home serves to demonstrate the egregiousness of the violation that occurred or to indicate that the case implicates both decisional and spatial aspects of the right to sex, rather than to narrow the scope of that right. Interpreting *Lawrence* to recognize a right to sex only when it is performed in a private residence not only lacks justification under Supreme Court precedent,<sup>243</sup> but also arbitrarily privileges housed, able-bodied people over homeless and institutionalized people who live in public space.

## 2. "Persons who Might be Injured or Coerced"

Some might try to rely on the "persons who might be injured or coerced"<sup>244</sup> prong of the so-called "what *Lawrence* isn't"<sup>245</sup> passage to deny institutionalized people the right to sex. However, categorizing all people who experience mental disability as easily "injured or coerced" is overly protective and further perpetuates stereotypes that people who experience disability are "childlike, asexual and in need of protection."<sup>246</sup> Policies built upon these stereotypes limit opportunities and diminish the quality of life of people living with mental disabilities.

Social science-based findings also caution against patronizing treatment of individuals who experience mental disability. Although studies have shown that the relationships between inpatients in psychiatric facilities "are not always reciprocal,"<sup>247</sup> researchers Dein and Williams highlight a study that "found little

242. *Bowers v. Hardwick*, 478 U.S. 186, 203–04 (1986) (Blackmun, J., dissenting) (citations omitted), *overruled by Lawrence*, 539 U.S. 558.

243. *See supra* Part II.

244. *Lawrence*, 539 U.S. at 560.

245. Gong & Shapiro, *supra* note 120, at 495.

246. Esmail, Darry, Walter & Knupp, *supra* note 6, at 1151; *see also* Gomez, *supra* note 2, at 238; Perlin, *supra* note 4, at 969.

247. Dein & Williams, *supra* note 232, at 284 (citing Gabor I. Keitner, L.M. Baldwin, Miriam J. McKendall, *Copatient Relationships on a Short-term Psychiatric Unit*, 37 HOSP. & CMTY. PSYCHIATRY 166 (1986); David Nibert, Sally Cooper & Maureen Crossmaker, *Assaults Against Residents of a Psychiatric Institution*, 4 J. INTERPERSONAL VIOLENCE 342 (1989); D. Batcup, *Mixed Sex Wards. Recognising and Responding to Gender Issues in Mental Health Settings and Evaluating Their Safety for Women*, INTERIM REP. FOR BETHLEM & MAUDSLEY NHS TRUST (1994)).

evidence of coercion into unwanted relationships in a high-security hospital.”<sup>248</sup> The results of this study helped lead Dein and Williams to conclude that the “extremely rare incidents” of unwanted sexual advances “do not merit a total ban on sexual expression.”<sup>249</sup>

The authors also caution against inferring that unsafe sex practices are more common among people who experience mental illness.<sup>250</sup> Thus, they argue that precautionary measures should be proportionate to the frequency of the risks created.<sup>251</sup> They also recommend that “[s]ecure units should have written policies which look to accepting patient sexuality and helping patients to manage their sexuality safely both within the unit and after they have returned to the community.”<sup>252</sup>

Some U.S. courts have also recognized that institutional policies should use the least restrictive means to ensure the safety of inpatients. For example, as will be discussed in greater detail below, the California Court of Appeals has declared “[t]he degree of the hospital’s duty of care is measured by the ability of the patient to care for herself.”<sup>253</sup> This is one case that demonstrates that the judiciary is moving away from sweeping models of infantilization or demonization that plagued decades of disability policy and eventually led to wide-sweeping reform. It is still worth noting all these years later that when the Americans with Disabilities Act (ADA) was enacted, Congress recognized that discrimination persists in institutionalization, and can come in the form of “overprotective rules and policies.”<sup>254</sup> It is fallacious and overprotective to assume that all people who experience mental disability are likely to be injured or coerced. Today there is more support than ever before, in both social science and law, for the implementation of sex-based policies that avoid facial stereotyping as well as its more elusive forms.

### C. Determining the Applicable Standard of Review

A necessary first step in evaluating policies burdening sexual intimacy in institutions is determining what standard of review to apply. At first glance, this is no simple task. Even if one grants (as this article argues) that *Lawrence* recognized a fundamental right to sexual intimacy, it is not entirely clear what standard of review the Court applied. As discussed above, several courts have claimed that *Lawrence*’s declaration that “[t]he Texas statute furthers *no*

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248. *Id.* (citing Heidi Hales, Crystal Romilly, Sophie Davison, & Pamela J. Taylor, *Sexual Attitudes, Experience and Relationships Amongst Patients in a High Security Hospital*, 16 CRIM. BEHAV. & MENTAL HEALTH 254 (2006)).

249. *Id.*

250. *Id.* at 285.

251. *Id.* at 284.

252. *Id.* at 286.

253. *Foy v. Greenblott*, 190 Cal. Rptr. 84, 92 (Cal. Ct. App. 1983) (citing *Murillo v. Good Samaritan Hosp.*, 160 Cal. Rptr. 33 (1979)).

254. 42 U.S.C. § 12101(a)(3), (5) (1994).

*legitimate state interest* which can justify its intrusion into the personal and private life of the individual”<sup>255</sup> signifies that the *Lawrence* Court applied a lower standard of review than strict scrutiny.<sup>256</sup> On the other hand, some jurists and commentators argue that the *Lawrence* Court did apply strict scrutiny.<sup>257</sup>

A second complication in determining whether strict scrutiny, intermediate scrutiny, “rational basis with a bite,” or rational basis review should apply when evaluating statutes burdening the right to sex in mental health facilities is the fact that this issue lies at the intersection of both an equal protection and fundamental rights claim. That is, the question of whether a policy restricting the sexual activity of those who experience mental disability asks both 1) whether individuals who experience mental disability are members of a suspect class; and 2) whether sex is a fundamental right. Traditionally, the court has found that individuals who experience mental disability are not members of a suspect class, but are instead members of a non-suspect class.<sup>258</sup> Thus, according to equal protection jurisprudence, these individuals are only entitled to rational basis review or intermediate scrutiny of their claims. However, does the fact that a policy affecting individuals with disabilities impinges on the right to sex impact the standard of review? What standard prevails when one aspect of a claim triggers strict scrutiny while another aspect of the same claim triggers a lower standard of review? The sections below dissect these ambiguities and ultimately reveal that strict scrutiny should be applied in evaluating policies burdening the right to sex in mental health facilities.

### *1. Lawrence Applied Strict Scrutiny*

To begin with, the notion that the *Lawrence* Court declined to expressly announce the standard of review that it applied is of little import. Terms describing the standard of review are not bedrocks of fundamental rights jurisprudence and use of these terms has occasionally drawn criticism. As Professor Laurence Tribe explains,

The practice of announcing such a standard—naming a point somewhere on the spectrum from minimum rationality to per se prohibition in order to signal the appropriate level of judicial deference to the legislature and the proper degree of care the legislature should expect of itself—is of relatively recent vintage, is often more conclusory than informative, has frequently been subjected to cogent criticism, and has not shown

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255. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (emphasis added).

256. See *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006); *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005) (citing *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004)).

257. See discussion *infra* Part III.C.1 and notes 259–266.

258. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

itself worthy of being enshrined as a permanent fixture in the armament of constitutional analysis.<sup>259</sup>

With that said, Professor Tribe proclaims that it is abundantly clear that the *Lawrence* Court applied strict scrutiny because the Court declared *Griswold* as its starting point and relied almost entirely upon fundamental rights cases that applied strict scrutiny.<sup>260</sup>

Beyond declining to use the term “strict scrutiny,” the fact that the *Lawrence* Court did not invoke the “compelling interest” and “narrow tailoring” language—language that is indicative of a court applying strict scrutiny—still does not detract from the conclusion that the Court did apply strict scrutiny. Simply put, there was no need to use these terms in light of the circumstances. Professor Sharon Rush coins the term “Logical Exception” to refer to cases in which heightened scrutiny would theoretically apply, but the court strikes down the law on the grounds that it serves no legitimate interest and thus cannot even pass a rational basis review.<sup>261</sup> Professor Rush uses the term “because when a court finds a law cannot pass rational basis review . . . it is unnecessary for the court to evaluate the law under a higher level of review even though one theoretically applies or might apply.”<sup>262</sup>

*Lawrence* is a prime example of the logical exception. According to the *Lawrence* majority, “[t]he Texas statute furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual.”<sup>263</sup> The *Lawrence* Court determined that the anti-sodomy statute served only to enforce morality, and moral disapproval is not a legitimate state interest.<sup>264</sup> Because the *Lawrence* Court found that the statute furthered *no legitimate interest*, it was wholly unnecessary to invoke traditional strict scrutiny language, which would involve consideration of whether the statute furthered a *compelling interest*. To say that a law serves *no* legitimate interest whatsoever necessarily implies that it serves no *compelling* interest. In other words, the *Lawrence* Court declined to ask whether the statute served a compelling interest and was narrowly tailored to serve that interest not because it failed to find a fundamental right to sex, but because there was no need to invoke this language.<sup>265</sup> Thus, the fact that the *Lawrence* majority did not use the terms “compelling interest” or “narrow tailoring” does not undermine the conclusion

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259. Tribe, *supra* note 47, at 1916–17.

260. *Id.* at 1917.

261. Rush, *supra* note 26, at 690.

262. *Id.*

263. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (emphasis added).

264. *Id.* at 582–83 (recognizing that the case at hand raises whether “moral disapproval [alone] is a legitimate state interest” and finding that “[m]oral disapproval of a group cannot be a legitimate governmental interest”).

265. *See id.* (“The Texas statute furthers no legitimate state interest . . .”).

that the *Lawrence* Court recognized consensual sex as a fundamental right and applied strict scrutiny.<sup>266</sup>

## 2. *The Intersection of Equal Protection and Fundamental Rights*

Even when one grants that the *Lawrence* Court applied strict scrutiny to address the due process issue of fundamental rights, there remains the question of whether some lesser level of scrutiny should be applied to evaluate an equal protection challenge to policies restricting sexual activity that target mentally disabled individuals. The law is fairly well settled that individuals who experience mental disability are members of a non-suspect class.<sup>267</sup> And as members of a non-suspect class, equal protection jurisprudence calls for rational basis review of government action targeting these individuals.<sup>268</sup> What standard of review then should courts apply when evaluating policies burdening the sexual freedom of individuals institutionalized on the basis of mental disability?

According to Professor Sharon Rush, part of the confusion surrounding claims that involve both equal protection and fundamental rights elements stems from courts' tendency to commit what Rush calls the "Collapsible Error."<sup>269</sup> According to Rush, courts commit this error when the fundamental right at issue is framed in terms of the class of individuals targeted by the law.<sup>270</sup> One classic example of a court committing this error is in *Bowers v. Hardwick*, where the Court conflated the equal protection and due process questions, holding that there was no fundamental right to homosexual sodomy.<sup>271</sup>

Recognizing the problems associated with narrowly framing issues, the Court in both the *Lawrence* and *Obergefell* rectified collapsible errors committed by previous courts and set a standard for future evaluation of claims at the intersection of equal protection and fundamental rights. As previously mentioned, the *Lawrence* Court expressly overruled *Bowers*, finding that the right at issue should not have been defined as a right to engage in homosexual sodomy.<sup>272</sup> The *Lawrence* Court itself did not limit its holding by reference to gays or lesbians—the class of persons targeted by anti-sodomy statutes—but

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266. See *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 377 F.3d 1275, 1309–10 (11th Cir. 2004) (Barkett, J., dissenting) (“Once the *Lawrence* Court found that the Texas sodomy statute completely proscribed the petitioners’ substantive right under the Due Process Clause, and that the law lacked any legitimate purpose, its inquiry was at an end. Heightened scrutiny requires a compelling state interest. The *Lawrence* Court clearly found that there was not even a conceivable legitimate state interest that could have sustained the Texas law.”).

267. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

268. *Id.* at 446.

269. Rush, *supra* note 26, at 689.

270. *Id.*

271. *Id.*; *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

272. *Lawrence*, 539 U.S. at 567 (“To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward . . .”).

instead used broad, neutral terms to describe the right it announced.<sup>273</sup> The court thus made clear that *all* enjoy the right to sex. The *Obergefell* Court took an even stronger position against commission of the collapsible error:

*Loving* did not ask about a “right to interracial marriage”; *Turner* did not ask about a “right of inmates to marry”; and *Zablocki* did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.<sup>274</sup>

Just as one would not speak of the “right of black people to obtain abortions” or the “right of Mormons to use contraceptive devices,” this article does not frame the right at stake by the class of persons affected by government action (people institutionalized on the basis of mental disability). It does not frame it as the “right of mentally disabled, institutionalized individuals to engage in sexual intimacy.” Rather, this article aims to avoid the collapsible error by framing the fundamental rights issue simply as the right to sex. From this point, the article proceeds by imagining the exercise of this right within the context of mental health facilities.

Strict scrutiny analysis should only be applied when government action impinges on the exercise of a fundamental right or disadvantages members of a suspect class. Rational basis review should be applied when government action neither burdens a fundamental right nor impermissibly distinguishes members of a suspect class.<sup>275</sup> Thus, if a court declares a claim involves a fundamental right, strict scrutiny must be used to evaluate the claim. In that instance there is no need to address the question of whether the government action targets a suspect class. Since (as this article has argued) sex is a fundamental right, strict scrutiny should apply when evaluating claims that burden the exercise of sex in mental health facilities. This is so regardless of the rather unfortunate fact that mental disability is a non-suspect classification, giving rise to rational basis review<sup>276</sup> under equal protection jurisprudence.

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273. *Id.* at 574 (declaring that liberty protects the “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

274. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

275. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”); *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (explaining that classifications involving neither a fundamental right nor a suspect classification are constitutionally valid if “there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.”) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)).

276. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

D. *Evaluating Policies Burdening Sexual Intimacy in Institutions*

1. *Comprehensive and Risk-Based Policies*

One possible method of regulating sexual activity in mental health facilities is the implementation of a classification system. Classification systems are currently used in prisons across the country.<sup>277</sup> An inmate's classification determines where the inmate is housed and with whom the inmate may interact. This type of risk-based segregation could be applied in mental health institutions. In determining an inpatient's classification for this system, mental health institutions could conduct intake screenings similar to the screenings for sexual abusiveness and victimization conducted during prison intakes. Under the Prison Rape Elimination Act (PREA), correctional facilities are required to comply with national standards to prevent, detect, and respond to prison rape.<sup>278</sup> These standards often take the form of a questionnaire conducted within seventy-two hours of arrival at the facility.<sup>279</sup> The questionnaires focus on factors relevant to sexual vulnerability, such as "the inmate's age and physical build and whether the inmate has a mental, physical, or developmental disability."<sup>280</sup> The questionnaires "also take account of factors relevant to being sexually abusive, including any prior history of being violent or sexually abusive."<sup>281</sup>

The PREA screening tools could be adapted and used to help classify institutionalized mental health patients. The adapted forms might also take into account capacity to engage in sexual activity, past victimization and abusiveness, past and present symptoms (particularly homicidal ideation and sexually impulsive behavior), and whether the person has a demonstrated understanding of safe sex practices. Since risk factors might change or be eliminated over time, classifications should be periodically reviewed. The periodic review of classifications would have the added benefit of giving patients some control, through their behavior, over the level of restrictions to which they will be subjected.

In an article that appeared in the *Canadian Journal of Psychiatry*, Welch and Clements developed an even more thorough method of respecting the sexual rights of mental facility inpatients. Their method aptly illustrates a risk-based policy comparable to that employed by the PREA.<sup>282</sup> Welch and Clements set forth a comprehensive policy for addressing the sexuality of patients treated in long-term psychiatric care facilities,<sup>283</sup> which is composed of seven distinct

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277. See MICHAEL SINGER, *PRISON RAPE: AN AMERICAN INSTITUTION?* 131–32 (2013).

278. 42 U.S.C. § 15601.

279. SINGER, *supra* note 277, at 131–32.

280. *Id.* at 132.

281. *Id.*

282. Welch & Clements, *supra* note 25, at 274.

283. *Id.* at 275–78.

parts.<sup>284</sup> The first part of the policy describes the rights of the patient and duties of the mental health care workers and professionals.<sup>285</sup> Under this part of the policy, “patients have a right to sexual intimacy in a private and dignified setting.”<sup>286</sup> Additionally, health care providers have a duty to accept the patient’s sexuality “in an empathetic, nonjudgmental, and humane manner” and hospitals have a duty to provide sexual education and rehabilitative treatment and exercise reasonable care in protecting patients from harms associated with sexual activity.<sup>287</sup>

The second part of the policy details the logistical aspects of complying with the rights and duties outlined in the first part of the policy.<sup>288</sup> This entails the availability of:

- (a) privacy curtains around beds, removable in certain circumstances;
- (b) private suites for purposes of sexual intimacy;
- (c) condoms, usually placed in machines in washrooms;
- (d) a sex education course available on a regular basis; and
- (e) counseling for issues pertaining to sexual abuse, sexual dysfunction, sexually transmitted diseases, and family planning.<sup>289</sup>

The third part of the policy outlines the process of orienting patients to the policy and assessing the sexual histories and needs of patients.<sup>290</sup> The fourth part of the policy addresses masturbation,<sup>291</sup> and the fifth part sets forth the prerequisites patients must fulfill before obtaining access to private suites for purposes of sexual activity.<sup>292</sup> These prerequisites include completion of a sex education course and screening for medical or psychiatric contraindication.<sup>293</sup> The fifth part also provides, “a patient shall be presumed capable of consenting and behaving responsibly unless explicit indicators of possible incapability are present . . . [and] if indicators are present, a capability test shall be applied.”<sup>294</sup> The sixth part of the policy sets out a “notwithstanding option” that enables care staff to override the policy if doing so is in the best interests of the patient.<sup>295</sup> The seventh and final part of the policy requires a formal review once the policy has been fully implemented for one year.<sup>296</sup>

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284. *Id.* at 276.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 276–77.

290. *Id.* at 277.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 278.

This article now turns to a constitutional evaluation of the policies described above. Even if a substantive due process right to sex exists, and this right survives institutionalization, institutionalized people with mental disabilities might legitimately be denied the freedom to engage in sexual activity. States have the authority to regulate sexual activity in state-run mental health institutions as an exercise of their broad police powers.<sup>297</sup> The potential problems with permitting sexual activity in mental health institutions are numerous and quite serious. They include the risk of sexual abuse; unwanted pregnancy and sexually transmitted infection or disease; and danger to staff and visitors.<sup>298</sup> Given these considerations, courts might find that institutions' policies burdening sexual activity survive even heightened scrutiny.

Although this article has argued that "fatal in fact" strict scrutiny should be applied to policies burdening sexual intimacy, the Supreme Court's application of lesser levels of heightened scrutiny to the involuntary medication of people who experience mental illness is instructive. In *Washington v. Harper*, the Court declared that incarcerated persons have a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."<sup>299</sup> However, focusing on the unique circumstances of a prison environment, the Court held that it is permissible to forcibly administer antipsychotic drugs to incarcerated persons when they pose danger to themselves or others.<sup>300</sup> Two years after *Harper* was decided, the Court applied the *Harper* rule in *Riggins v. Nevada*, and held that involuntary medication of pre-trial detainees may be justified when medically appropriate and "considering less intrusive alternatives, essential for the sake of [the detainee's] own safety or the safety of others."<sup>301</sup>

Finishing off the line of involuntary medication cases, in *Sell v. United States*, the Court held that the involuntary treatment of pre-trial detainees may be justified in rare circumstances where "treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary . . . to further important governmental trial-related interests."<sup>302</sup> Notably, the *Sell* Court

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297. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically, . . . matter[s] of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'") (internal citations omitted).

298. See, James Warner, Nicola Pitts, Mike J. Crawford, Marc Serfaty, Pramod Prabhakaran, & Rizkar Amin, *Sexual Activity Among Patients in Psychiatric Hospital Wards*, 97 J. ROYAL SOC. MED. 477, 478–79 (2004) (noting that some surveyed psychiatric inpatients reported non-consensual sexual activity; also noting that health care providers in psychiatric facilities may face liability if patients become pregnant or contract a sexually transmitted disease).

299. *Washington v. Harper*, 494 U.S. 210, 221 (1990).

300. *Id.* at 227.

301. *Riggins v. Nevada*, 504 U.S. 127, 135 (1992).

302. *Sell v. United States*, 539 U.S. 166, 179 (2003).

indicated that before seeking to justify involuntary medication on these grounds, courts should determine whether forcible treatment is valid for a “different purpose, such as the purposes set out in *Harper* related to the individual’s dangerousness, or . . . where refusal to take drugs puts his health gravely at risk.”<sup>303</sup>

In each of the three involuntary medication cases discussed above, the Court based its holding on recognition of a constitutional right to be free from unwanted bodily intrusion.<sup>304</sup> Although the Supreme Court did not apply strict scrutiny in these cases, this failure can be explained by the unique circumstances presented by incarceration and trial administration.<sup>305</sup> Neither of these factors that led the court to diverge from strictly scrutinizing policies impinging upon a fundamental right are present in the typical case involving policies restricting sexual activity in mental health facilities. Nevertheless, for the sake of argument, this article assumes that a court evaluating a policy burdening sexual intimacy in a mental health facility might draw a comparison between the mental health issues before it and those raised in *Harper* and *Sell*.

The Supreme Court endorsed the use of individualized risk assessments in treatment of persons who experience mental illness by indicating that before applying the multi-part test outlined in *Sell*, courts should consider the needs and dangerousness of the individual.<sup>306</sup> The Supreme Court has thus made clear that the judiciary should be concerned with the individual needs and risk profiles of persons who experience mental disability. Carrying this analysis to its logical conclusion, courts might apply *Harper*’s dangerousness standard to institutional policies burdening sexual activity. That is, a possible extension of the *Sell* Court’s reasoning is that, as with the substantive due process right to bodily integrity, the substantive due process right to sexual intimacy may only be abridged in mental health facilities when individuals are found to be a danger themselves or others. A court applying the *Harper* dangerousness test to either a PREA-based policy or Welch and Clements’s policy would likely uphold these regulations because case-by-case evaluation of the risks of and dangers posed by sexual activity is a central component of both policies. Turning now to a slightly

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303. *Id.* at 181–82.

304. *See Sell*, 539 U.S. at 177; *Harper*, 494 U.S. at 221; *Riggins*, 504 U.S. at 134.

305. *See* U.S. v. Brandon, 158 F.3d 947, 957 (1998) (“*Harper*’s rationale is based upon the premise that if the government’s action focuses primarily on matters of prison administration, then the action is proper if reasonably related to a legitimate penological interest, even if it implicates fundamental rights.”); *Riggins*, 504 U.S. at 135 (“[W]e do not adopt a standard of strict scrutiny. We have no occasion to finally prescribe such substantive standards as mentioned above, since the District Court allowed administration of Mellaril to continue without making *any* determination of the need for this course or *any* findings about reasonable alternatives.”) (internal citation and quotation marks omitted); *Sell*, 539 U.S. at 179 (stating that medication can be forcibly administered “only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.”).

306. *See Sell*, 539 U.S. at 185–86

different form of heightened scrutiny analysis, recall that in evaluating claims of involving government attempts to intrude upon “the rights identified in *Lawrence*,” the Ninth Circuit has applied a *Sell*-inspired tri-partite interest-balancing test.<sup>307</sup> Under this framework, to survive review, the policy “must advance an important governmental interest”; “the intrusion must significantly further that interest”; and “the intrusion must be necessary to further that interest. In other words . . . a less intrusive means must be unlikely to achieve substantially the government’s interest.”<sup>308</sup> Because the factual predicates of the test set forth by the Ninth Circuit lie at the intersection of mental health issues and sexual activity, courts might view this test as being particularly well-suited for evaluating institutional policies that restrict sexual intimacy. With this assumption in mind, this article now turns to a Ninth Circuit style evaluation of both a PREA-based policy and Welch and Clement’s policy for restricting sexual activity in mental health facilities.

It is undisputed here that these policies advance the important, even compelling, governmental interest in protecting the safety and security of inpatients and staff. It is also undisputed here that these policies significantly further those interests by minimizing the threat of sexual abuse, coercion, and high-risk sexual activity. Furthermore, with the PREA-based sexual history questionnaires and the seven distinct parts of Welch and Clements’ policy, which cover issues from infrastructure to personalized assessments, capacity determinations, and procedures for obtaining access to private suites, it is highly likely that the third prong of the Ninth Circuit’s variation of *Sell*—the counterpart of the more traditional narrow tailoring requirement of strict scrutiny—will be satisfied. This is because both policies are aimed at determining and addressing individualized risk profiles. Moreover, these policies are also likely to satisfy strict scrutiny by embodying the least restrictive means for ensuring safety while protecting constitutionally guaranteed liberties. The following sections consider the ways in which alternative, less complex policies addressing sexual contact might be evaluated under heightened scrutiny.

## 2. *Policies Restricting the Sexual Activity of Individuals who Lack the Capacity to Engage in Sex*

Beyond the fact that those who lack capacity to engage in sex fit squarely within the “persons who are likely to be injured or coerced” prong of the “what *Lawrence* isn’t” passage,<sup>309</sup> any policies restricting the sexual activity of patients who lack the capacity to engage in sex would certainly survive the *Harper* dangerousness test, the Ninth Circuit’s variation of the *Sell* test, and strict scrutiny. The state’s interest in shielding individuals from exploitation and abuse is undoubtedly compelling, and as long as the policy is directed toward only

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307. *Witt*, 527 F.3d at 819.

308. *Id.*

309. See *supra* notes 245–254 and accompanying text.

those individuals who lack the capacity to engage in sex and not *all* institutionalized people who are affected by mental disability, these policies seem appropriately tailored. As mentioned previously, defining the minimum criteria for determining whether a person possesses the capacity to engage in sex is a task better suited for mental health professionals. As such, any attempt to define what constitutes capacity to engage in sex is beyond the scope of this article.<sup>310</sup> However, it is worth noting that one study surveying policies on sexual activity in mental health facilities found that more than half of the policies on sex evaluated in the study addressed competency to engage in sex.<sup>311</sup> According to the authors of this study,

One policy emphasized the distinction that legal competency or status was not the major determinant of the capacity to consent to sexual acts and that adults who were declared incompetent may or may not have the capacity to consent to sex, just as legally competent adults may or may not have such capacity.<sup>312</sup>

As this policy makes clear, some institutionalized people are capable of engaging in sexual activity, and it is a significantly more arduous task to determine whether policies burdening the sexual activity of these individuals would survive constitutional review.

### 3. *Policies Restricting Contact between Sexually Competent Patients and Mental Health Care Providers*<sup>313</sup>

The Supreme Court of Arkansas has held that a statute prohibiting ministers, medical personnel, law enforcement, and other persons in positions of authority from using their position of trust to engage in sexual activity did not violate the substantive due process right to consensual sexual activity.<sup>314</sup> *Talbert v. State* involved a minister who was convicted under the statute after sexually assaulting two members of his clergy.<sup>315</sup> One of the victims testified that she did not resist the defendant's sexual advances because she was afraid to do so.<sup>316</sup> She further testified that during the time of the assaults, she saw the defendant "as a father figure and looked up to him as a preacher."<sup>317</sup>

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310. For an example of one such policy, however, see Welch & Clements, *supra* note 25, at 276–78.

311. Buckley & Robben, *supra* note 224, at 244.

312. *Id.*

313. For an example of such a policy, see N.Y. STATE OFF. MENTAL HEALTH, OMH OFFICIAL POLICY MANUAL: EMPLOYEE/PATIENT RELATIONSHIPS 6 (2002), <http://www.omh.ny.gov/omhweb/policymanual/PC527.pdf> ("Employees shall not, in any way, encourage, facilitate, promote, or engage in any sexual behavior, sexual contact or close personal relationship with *any* inpatient or residential patient, with or without the patient's consent.").

314. *Talbert v. State*, 239 S.W.3d 504, 511 (Ark. 2006).

315. *Id.* at 508.

316. *Id.*

317. *Id.*

The defendant relied on *Lawrence* to challenge his conviction.<sup>318</sup> He argued that conviction under the statute impinged upon his right to engage in private, consensual sex with other adults.<sup>319</sup> The *Talbert* court recognized that the Constitution does protect a substantive due process right to consensual sexual activity, but the court rejected the defendant's argument, explaining that the statute did not burden a fundamental right because the conduct criminalized by the statute is abusing one's authority for the purpose of engaging in sexual activity.<sup>320</sup>

There are several reasons that courts may follow the lead of *Talbert* and treat policies restricting sexual contact between sexually competent patients and mental health care providers as not burdening the right to sexual intimacy recognized in *Lawrence*. To begin with, the power differential between mental health patients and mental health care providers is so substantial that, at least in most cases, one would be hard pressed to find that a sexual relationship between care-provider and patient is truly consensual. Moreover, any abuse of the care-provider/patient relationship jeopardizes not only current treatment efforts, but future interventions as well because patients might develop feelings of distrust or vulnerability toward health care providers. Given these considerations, policies restricting interaction between patients and care-providers, at least while the former is being treated by the latter, would likely survive constitutional review.

4. *Policies Restricting Contact between Sexually Competent Patients at the Same Facility and Policies Restricting Contact between Sexually Competent Patients and Visitors to the Facility*<sup>321</sup>

When it comes to policies restricting interaction between patients at the same facility as well as between patients and visitors, the California Court of Appeals' decision in *Foy v. Greenblott*<sup>322</sup> is instructive. The plaintiff in *Foy* had been adjudicated "a gravely disabled and incompetent person" and was placed in a state-licensed mental health facility.<sup>323</sup> The plaintiff became pregnant and gave

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318. *Id.* at 511.

319. *Id.*

320. *Id.*

321. For an example of a blanket restriction on inpatient-inpatient and inpatient-visitor sexual activity such as that considered in this section, see N.Y. STATE OFF. MENTAL HEALTH, OMH OFFICIAL POLICY MANUAL: PATIENT SEXUAL ACTIVITY 1 (2010), <http://www.omh.ny.gov/omhweb/policymanual/pc-525.pdf> ("While it is recognized that there are sexual aspects to the lives of all individuals, (including persons with psychiatric diagnoses), a hospital must provide a therapeutic environment for all patients. As such, it is not an appropriate setting for sexual activity. It is therefore the expectation of OMH that patients will not engage in such activity while on the premises of the hospital or when under the supervision of OMH staff. It is also expected that staff will proactively communicate hospital policy on sexual activity (through community meetings and counseling of patients) and will intervene when they believe any kind of sexual contact may be taking place.").

322. *Foy v. Greenblott*, 190 Cal. Rptr. 84, 87–92 (Cal. Ct. App. 1983).

323. *Id.* at 87.

birth while housed in the facility.<sup>324</sup> The opinion leaves unclear the identity of the child's father, but the *Foy* court states that the complaint alleged that the plaintiff had "a medical history of irresponsible sexual behavior toward patients and other persons."<sup>325</sup>

*Foy v. Greenblott* is a medical malpractice case, but the court noted that it had to consider the plaintiff's suggested policy of close supervision against the plaintiff's "own constitutional and statutory rights of privacy, freedom of association, reproductive choice and informed consent to medical treatment."<sup>326</sup> Though the court did not expressly state that the right to sex is fundamental, the court found that extensive policing of patients would not only "deprive them of the freedom to engage in consensual sexual relations, which they would enjoy outside the institution,"<sup>327</sup> but would also interfere with their autonomy, as well as their rights to "privacy and social interaction."<sup>328</sup> The *Foy* court rejected the argument that "voluntary sexual conduct is an objective harm which the patient must be spared."<sup>329</sup> The court instead stated "the degree of the hospital's duty of care is measured by the ability of the patient to care for herself."<sup>330</sup>

The key takeaway from *Foy* is the significance the court placed on the individual risks and abilities of the patient. The plaintiff in *Foy* had been admitted to the hospital following "a judicial determination that she was incapable of providing for her own basic personal and medical needs."<sup>331</sup> Furthermore, her complaint alleged no facts "other than [her] status . . . as a conservatee" that would justify overriding her privacy interests.<sup>332</sup> The *Foy* court's focus on individualized risk assessment is consistent with the Supreme Court's reasoning in *Harper* and *Sell*. In the paragraphs below, this article will examine bans on inpatient-inpatient and inpatient-visitor sexual activity according to the *Harper* dangerousness standard as well as the Ninth Circuit's variation of the *Sell* doctrine.

Recall that if courts were to draw a comparison between the mental health issues involved in institutional restrictions on sexual conduct and involuntary medication policies, courts might extend the *Harper* doctrine to hold that the substantive due process right to sexual intimacy may only be abridged in mental health facilities when individuals are found to be a danger themselves or

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324. *Id.*

325. *Id.*

326. *Id.* at 89.

327. *Id.* at 91.

328. *Id.* at 90 (internal quotations omitted).

329. *Id.* at 91.

330. *Id.* at 92 (citing *Murillo v. Good Samaritan Hosp.*, 160 Cal. Rptr. 33 (1979)). Although *Foy* appears to stand as a significant step forward in the field of patients' rights, at least one commentator has described it as "an isolated case." Perlin, *supra* note 4, at 966.

331. *Foy*, 190 Cal. Rptr. at 92.

332. *Id.* at 90.

others.<sup>333</sup> Under this standard, a blanket policy barring inpatient-inpatient and inpatient-visitor sexual activity would likely not be upheld because it fails to consider the risks individuals pose to themselves and others. Because *Harper* and *Sell* made clear that courts must make an individualized assessment to satisfy the dangerousness standard, general and stereotypical assumptions about the risks and dangers of sexual activity of individuals who experience mental disability would not support a finding under the *Harper* doctrine.<sup>334</sup>

As described above,<sup>335</sup> the Ninth Circuit has applied a *Sell*-inspired tripartite interest-balancing test which requires that policies burdening the right announced in *Lawrence* “advance an important governmental interest;” “the intrusion must significantly further that interest;” and “the intrusion must be necessary to further that interest. In other words . . . a less intrusive means must be unlikely to achieve substantially the government’s interest.”<sup>336</sup> Again, this article does not dispute that policies restricting all inpatient-inpatient or inpatient-visitor sexual activity advance the compelling governmental interest in protecting the safety and security of inpatients and staff, or even that these policies significantly further those interests. The problem with these policies is revealed upon application of the third prong. Under the Ninth Circuit’s variation of *Sell*, courts are required to consider whether there are any less intrusive alternatives that are likely to achieve substantially the same results.<sup>337</sup> As has already been explained, blanket restrictions on sexual activity fail to take into account the individual risk profiles of inpatients. A policy that in some way accounts for individualized risk—whether through the assignment of rooms, floors, frequency of periodic bed-checks, or conditional availability of private space for sexual activity—represents a less intrusive way of keeping inpatients, staff, and visitors protected from unwanted sexual contact. For this reason, blanket restrictions on inpatient-inpatient or inpatient-visitor sexual activity cannot survive heightened constitutional review.

##### 5. *Policies Restricting Private Self-Stimulation*

The above sections have focused on sexual activity involving at least two people, but the need to consider individual risks and abilities of patients applies equally well to policies regarding self-stimulation. The state’s compelling interest in safety encompasses the interest in shielding other patients, staff, and visitors from unwanted exposure to masturbation. Yet a policy proscribing masturbation altogether likely places too great a burden on mental health patients. Because self-stimulation generally does not pose as great a risk to

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333. See *supra* notes 307–311 and accompanying text.

334. See *supra* notes 245–254 and accompanying text.

335. See *supra* at Part II.C.1.i.

336. *Witt*, 527 F.3d at 819.

337. *Id.*

others as sexual activity involving more than one person,<sup>338</sup> restrictions on masturbation are, at least in theory, even more difficult to defend than restrictions on sex involving more than one person. It is difficult to imagine any set of circumstances in which it is in the best interests of the patient to prohibit even private masturbation, especially when self-simulation is well-known to relieve stress, induce feelings of satisfaction, and help with relaxation.<sup>339</sup> Indeed, the policy on sexual activity in psychiatric hospitals developed by Welch and Clements state,

[E]ach patient is to be informed by a physician or nurse that masturbation is healthy and acceptable within the confines of their privacy curtain; each bed area is to contain tissues and a waste basket; and patients are to be allowed to possess erotic pictures or literature, provided that the material is legal and available to the general public, is stored in the patient's locker, and for any specific patient, is not deemed to be countertherapeutic.<sup>340</sup>

Beyond the counterintuitive nature of banning private masturbation, given its relative safety and documented therapeutic benefits, a blanket ban on self-stimulation cannot survive the *Harper* dangerousness standard. Such a blanket policy fails to take into account the dangers or risks self-stimulation poses for the individual or others. A blanket restriction would also fail under heightened scrutiny because a risk-based policy—like one that would determine availability of privacy curtains or frequency of bed checks—represents a less intrusive alternative method of protecting other patients, staff, and visitors from unwanted exposure.

#### 6. *A Note on Liability*

One reason that mental health facilities might be reluctant to set clear guidelines related to inpatient sexual activity is fear of litigation.<sup>341</sup> There is growing evidence that people who are institutionalized on the basis of mental disability have active sex lives.<sup>342</sup> Although the facilitation of sex in mental health facility opens the door for potential civil liability,<sup>343</sup> some attorneys have opined that risk of liability increases when mental health facilities lack a clear

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338. Welch & Clements, *supra* note 25, at 277 (describing masturbation as “a relatively safe form of sexual activity”).

339. *Masturbation: Questions and Answers*, MCKINLEY HEALTH CENTER, U. ILL. URBANA-CHAMPAIGN, <http://www.mckinley.illinois.edu/handouts/masturbation.html> (last visited Apr. 8, 2016).

340. Welch & Clements, *supra* note 25, at 277.

341. Buckley & Robben, *supra* note 224, at 243.

342. *Id.*; Welch & Clements, *supra* note 25, at 273.

343. See, e.g., *Patient Suing Mental Hospital over Roommate Having Sex with Employee*, DAILY NEWS (Wash.), Oct. 19, 2009, [http://tdn.com/news/patient-suing-mental-hospital-over-roommate-having-sex-with-employee/article\\_e1b1150f-60cd-5ad8-af71-0e89463395c6.html](http://tdn.com/news/patient-suing-mental-hospital-over-roommate-having-sex-with-employee/article_e1b1150f-60cd-5ad8-af71-0e89463395c6.html).

policy on inpatient sexual activity.<sup>344</sup> This is because “[a]dministration and staff know, or ought to know, that some patients are sexually active. Consequently, the failure to develop a policy on patient sexuality could be seen as a neglect of moral responsibility and a negligent omission in law.”<sup>345</sup> When sexually active inpatients do not have the benefit of a policy that facilitates the use of safe, private settings for sexual encounters, they often must resort to having sex in unsafe places and engaging in unsafe sexual practices. For example, in one study, patients in a facility that discouraged sexual activity reported that “[p]atients had no choice but to use uncomfortable and undignified locations for sexual activity such as public dorms, toilets, stairwells, and bushes because no private facilities were available within the hospital.”<sup>346</sup> The authors of this study concluded that these circumstances diminished the patients’ quality of life and increased the risk of sexually transmitted disease or unwanted pregnancy, since sex in these locations is unlikely to involve condom use.<sup>347</sup> It is therefore better to have a clear policy addressing inpatient sexuality than to leave open the possibility of inconsistent handling of the matter, or to invite unsafe, degrading practices.

#### 7. *Looking Ahead: The Therapeutic Value of Sex*

At home and abroad, mental health professionals have begun to recognize the therapeutic value of sexual expression. Sex boosts the immune system, and improves breathing, circulation, cardiovascular health, strength, flexibility, and muscle tone.<sup>348</sup> Sex also improves mental health, relieving anxiety and depression.<sup>349</sup> The more sexually autonomous people feel, the more competent they feel generally.<sup>350</sup> Likewise, there is a positive correlation between sexual autonomy and positive sexual interactions (such as reduced guilt and regret).<sup>351</sup>

Studies have also found that relationships between inpatients tend to mirror those of healthy, non-institutionalized people.<sup>352</sup> Engagement in relationships has been shown to boost the positive feelings of inpatients.<sup>353</sup> Additionally,

A relationship involving an in-patient could give hope to other patients; a health relationship might well be the panacea for a

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344. Welch & Clements, *supra* note 25, at 278.

345. *Id.*

346. *Id.* at 275.

347. *Id.*

348. Barbara Keesling, *Beyond Orgasmatron*, 32 PSYCHOL. TODAY 58, 59 (1999).

349. *Id.*

350. C. Veronica Smith, *In Pursuit of ‘Good’ Sex: Self-Determination and the Sexual Experience*, 24 J. SOC. & PERS. RELATIONSHIPS 69, 81 (2007).

351. *Id.*

352. Dein & Williams, *supra* note 232, at 286 (citing Sophie Davison, *Sexuality*, in COUPLES IN CARE AND CUSTODY 70–85 (Pamela J. Taylor & Tom Swan eds. 1999)).

353. *Id.* (citing Gabor Keitner & Paul Grof, *Sexual and Emotional Intimacy between Psychiatric Inpatients: Formulating a Policy*, 32 HOSP. & CMTY. PSYCHIATRY 188 (1981)).

childhood of emotional deprivation; it could be burned into a therapeutic asset; it could provide an opportunity to understand the patient's difficulties and to work on them in a constructive way.<sup>354</sup>

Given the important physical and mental benefits of sex, it comes as no surprise that Dr. Judith Cook, Director of the National Research and Training Center on Psychiatric Disability at the University of Illinois at Chicago, has theorized that sexual expression and the development intimate relationships are an important part of the recovery process for people with psychiatric disabilities.<sup>355</sup>

The U.N. Convention on the Rights of Persons with Disabilities demands that States “[p]rovide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health.”<sup>356</sup> Germany, the Netherlands, Denmark, and Switzerland have arguably gone above and beyond what is required by this instruction, approving (and sometimes paying for)<sup>357</sup> the use of sexual surrogacy services by people with disabilities.<sup>358</sup> Sexual surrogates in the countries listed provide clients with sexual touch or facilitate sexual interaction with a third party.<sup>359</sup>

In the U.S., the International Professional Surrogates Association (IPSA) is a professional organization that provides certification and enforces a regulatory code for surrogate partner therapy.<sup>360</sup> According to IPSA, surrogate partner therapy is “designed to build client self-awareness and skills in the areas of physical and emotional intimacy . . . [through] partner work in relaxation, effective communication, sensual and sexual touching, and social skills training.”<sup>361</sup> The legality of sexual surrogacy in the U.S. is uncertain.<sup>362</sup> IPSA

354. *Id.* (citing J. Modestin, *Patterns of Overt Sexual Interaction among Acute Psychiatric Inpatients*, 64 ACTA PSYCHIATRICA SCANDINAVICA 446 (1981)).

355. Cook, *supra* note 223, at 198.

356. Convention on the Rights of Persons with Disabilities art. 25(a), Dec. 13, 2006, 2515 U.N.T.S. 3, *entered into force* May 3, 2008, <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.

357. Lars Gravesen, *Taxpayers Foot Bill for Disabled Danes' Visits to Prostitutes*, TELEGRAPH, Oct. 2, 2005, <http://www.telegraph.co.uk/news/worldnews/europe/denmark/1499735/Taxpayers-foot-bill-for-disabled-Danes-visits-to-prostitutes.html>.

358. Appel, *supra* note 3, at 153.

359. *Id.*; Robert McRuer, *Disabling Sex: Notes for a Crip Theory of Sexuality*, 17 GLQ: J. LESBIAN & GAY STUDS. 107, 112–13 (2011). Sexual surrogacy is a contested term across Europe and the United States. For the purposes of this discussion, it will suffice to state that, among other services, sexual surrogates in the countries listed provide clients with sexual touch or facilitate sexual interaction with a third party. Appel, *supra* note 3, at 153; McRuer, *supra* note 359, at 112.

360. See *generally* INT'L PROF. SURROGATES ASS'N, <http://www.surrogatetherapy.org/> (last visited Apr. 8, 2016).

361. *Surrogate Partner Therapy*, INT'L PROF. SURROGATES ASS'N, <http://www.surrogatetherapy.org/what-is-surrogate-partner-therapy/> (last visited Apr. 8, 2016).

surrogate partners work under the direction of licensed and/or certified therapists.<sup>363</sup> According to one article, Kamala Harris, the then District Attorney and current Attorney General of California, has stated, “if [sexual surrogacy] is between two consensual [sic] adults and referred by licensed therapists and doesn’t involve minors, then it’s not illegal.”<sup>364</sup> However, sex surrogacy is governed by prostitution laws, which vary state to state. The co-director of the Sex Workers Project, a New York-based nonprofit organization that provides legal services to sex workers, has stated that under New York’s definition of prostitution, sex surrogacy is illegal, although unlikely to be prosecuted.<sup>365</sup>

Despite support from disability advocates and mental health professionals,<sup>366</sup> sexual surrogacy services have not caught on in the U.S. Perhaps the U.S. will someday follow the lead of the above-mentioned European nations and afford disabled individuals who possess the capacity to engage in sexual contact, particularly those with mental disabilities whose liberty has been curtailed through institutionalization, the opportunity to meet with sex surrogates. However, before this can happen, mental health facilities in the U.S. must first rectify the inconsistent and frequently demeaning treatment of the sexuality of those who experience disability.

#### IV. CONCLUSION

There may be compelling reasons to restrict institutionalized individuals’ rights to privacy, including the right to sexual contact, but if a policy that restricts sexual freedom is to be upheld, the policy should promote the goal of safety, rather than originate in antiquated and damaging stereotypes. As the *Lawrence* Court notes, “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”<sup>367</sup> In the past, misperceptions, irrational attitudes, and generalizations regarding people who experience mental disability have resulted in the severe maltreatment and isolation of these individuals.

This article presents an alternative and novel approach to disability law. As time and collective understanding progress, respecting the sexual autonomy of people who experience mental disability is a key aspect of building a society that is more livable for all. Sex is an integral, perhaps defining, aspect of identity and

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362. *Legal Status*, INT’L PROF. SURROGATES ASS’N, <http://www.surrogatetherapy.org/what-is-surrogate-partner-therapy/legal-status/> (last visited Apr. 8, 2016); Am. Ass’n of Sexuality Educators, Counselors, and Therapists, *Sexual Surrogacy Revisited*, 47 CONTEMP. SEXUALITY 1, 4 (2013).

363. *Surrogate Partner Therapy*, *supra* note 361.

364. *Sexual Surrogacy Revisited*, *supra* note 362, at 4.

365. *Id.*

366. See Appel, *supra* note 3, at 154; McRuer, *supra* note 359, at 112–13.

367. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

self-expression.<sup>368</sup> Sex is “a site for the production of values”<sup>369</sup> and represents “the freedom to form human relationships.”<sup>370</sup> However, by regulating sex, the state defines what behaviors are “normal” or “abnormal,” “what counts as family”<sup>371</sup> and who gets the benefit of certain state protections. Gyanendra Pandey has argued “[t]here is a violence written into the making and continuation of contemporary political arrangements, and into the production and reproduction of majorities and minorities.”<sup>372</sup> The desexualization of institutionalized people who experience mental disability is no trivial matter. It is a form of systemic violence.

Disability advocates and mental health professionals have been apt to recognize two prevailing stereotypes toward people who experience mental illness or disability: infantilization and demonization.<sup>373</sup> On one hand, society tends to view people with disability as “childlike, asexual and in need of protection.”<sup>374</sup> On the other hand, people with disabilities might also be regarded as dangerous<sup>375</sup> or hyper-sexual.<sup>376</sup> These demeaning stereotypes exist in mental health institutions in the form of no-sex policies. It is perhaps this fact—the persistent gross stereotyping of people who experience mental illness—that most strongly counsels in favor of extending the right to sex to people who have been institutionalized on the basis of mental disability. As Professor Tribe writes:

*Lawrence* is a multilayered story. Only on its surface is it a story about removing the sanction of criminal punishment from those who commit sodomy. Given that the criminal laws in this field have notoriously been honored in the breach and, almost from the start, have languished without enforcement, *Lawrence* quickly becomes a story about how *the very fact of criminalization*, even unaccompanied by any appreciable

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368. Hermann, *supra* note 47, at 933; Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 836 (2010).

369. JAKOBSEN & PELLEGRINI, *supra* note 7, at 17.

370. *Id.* at 130.

371. *Id.* at 7; *see also* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1325–30 (describing the ways in which disability policy and social norms define the romantic relationships and marriages of people living with disability); Tribe, *supra* note 47, at 1940 (“And what is government doing but abridging that communication and communion when it insists on dictating the kinds of consensual relationships adults may enter and on channeling all such relationships, to the degree they become inwardly physically intimate or outwardly expressive, into some gender-specified or anatomically correct form?”).

372. GYANENDRA PANDEY, *ROUTINE VIOLENCE: NATIONS, FRAGMENTS, HISTORIES 1* (2006).

373. Perlin, *supra* note 4, at 969.

374. Esmail, Darry, Walter & Knupp, *supra* note 6, at 1151; *see also* Perlin, *supra* note 4, at 969; Gomez, *supra* note 2, at 238; Dein & Williams, *supra* note 232, at 285 (“There is a tendency to control every aspect of the patient’s life—to manage the therapist’s own anxieties, and to infantilise patients. Some argue that such treatment victimises or re-victimises individuals.”).

375. Cook, *supra* note 223, at 198.

376. Gomez, *supra* note 2, at 238; Perlin, *supra* note 4, at 969.

number of prosecutions, *can cast already misunderstood or despised individuals into grossly stereotyped roles, which become the source and justification for treating those individuals less well than others.* The outlawed acts—visualized in ways that obscure their similarity to what most sexually active adults themselves routinely do—come to represent human identities, and this reductionist conflation of ostracized identity with outlawed act in turn reinforces the vicious cycle of distancing and stigma that preserves the equilibrium of oppression in one of the several distinct dynamics at play in the legal construction of social hierarchy. *Lawrence* is a story, too, of shifting societal attitudes toward homosexuality, sex, and gender—a story of cultural upheaval that is related to law roughly as the chicken is to the proverbial egg. But, perhaps more than anything else, *Lawrence* is a story of what “substantive due process,” that stubborn old oxymoron, has meant in American life and law.<sup>377</sup>

Like *Lawrence*, the recognition of the right to sex, and extension of this right to people who are institutionalized on the basis of mental disability, is a multilayered story. On the surface, this story is about providing individuals the opportunity to experience the physical pleasure of sex. But at a deeper level, this story is about eradicating stigma, oppression, and pernicious stereotyping. This story is about building a more livable, inclusive society.

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377. Tribe, *supra* note 47, at 1896–97 (footnotes omitted) (emphasis added).