

Community Defense Reporter



A resource of the Alliance Defense Fund: Protecting Children and Their Neighborhoods

Editor's Note: The *Williams* case abstracted below highlights some of the key Constitutional issues raised by the U.S. Supreme Court's decision in *Lawrence v. Texas*. The impact of *Lawrence* is very broad. It affects regulation of sexually oriented businesses, obscenity, prostitution, abortion, same sex marriage, and many other areas.

Attorneys are encouraged to read *Williams* in its entirety. It has been the subject of significant discussion in legal circles. See, e.g., [11th Circuit Upholds Alabama Ban on Sale of Sex Toys](#), How Appealing, Howard J. Bashman, 7.28.2004 (links to numerous web sites discussing the case)

[Williams v. Attorney General of Ala.](#), No. 02-16135 (11th Cir. July 28, 2004)

Alabama's statute prohibiting commercial distribution of sexual devices is constitutional, because there is no fundamental right to sexual privacy in the U.S. Constitution.

The Statute

Alabama's Anti-Obscenity Enforcement Act prohibits commercial distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value." The statute exempts sales of sexual devices "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose." Ala. Code § 13A-12-200.2 (Supp. 2003).

Procedural History

The ACLU filed suit alleging that the statute violates a fundamental right to sexual privacy pursuant to the 14th Amendment's substantive due process protections. After a bench trial, the district court concluded there is no currently recognized fundamental right to use sexual devices, but the court permanently enjoined the statute's

enforcement holding it failed rational basis review.

The 11th Circuit reversed holding that the promotion and preservation of public morality provided a rational basis. It remanded for further consideration of the *as-applied* fundamental rights challenge. On remand, the district court found a fundamental right to "sexual privacy" and held that the statute fails strict scrutiny review. This appeal by the state ensued.

In a 2-1 panel decision, the court of appeals held that there is no fundamental right to "sexual privacy." The majority opinion, written by Circuit Judge begins:

In this case, the American Civil Liberties Union ("ACLU") invites us to add a new right to the current catalogue of fundamental rights under the Constitution: a right to sexual privacy. It further asks us to declare Alabama's statute prohibiting the sale of "sex toys" to be an impermissible burden on this right. Alabama responds that the statute exercises a time-honored use of state police power--restricting the sale of sex. We are compelled to agree with Alabama and must decline the ACLU's invitation.

Majority Opinion

"Rights have been denominated 'fundamental' not simply because they implicate deeply personal and private considerations, but because they have been identified as 'deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" Op. at 3 citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

Reporting on Legal Developments for

July 2004
IN THE NEWS

Pornography - the Degrading Behemoth:

[Part 1](#), [Part 2](#)

ZENIT News Interviews Alan Sears, President of ADF, 7.28-29.2004

Confronted With Indecency, FCC Commissioner Changes Mind on a Closed Case

CWA, 7.28.2004

The Right to Life, Liberty, and Pornography?

[Pennsylvania Families & Schools](#), Josh Grissom, Summer 2004.

British Technology Blocks Child Porn Access

[Southlondon.co.uk](#), 7.20.2004

Porn Bests Political Speech

[Washington Times](#), Bruce Fein, 7.20.2004

Homosexual Porn Web Site Operators Outed:

Court Rules in Favor of Homeowners' Association in ADF-funded Case Against Men Running Porn Web Site from Home

7.16.2004

[American Liberties Institute](#)

Obscenity Charges to Be Dropped in Sex Toy Case

[Dallas Morning News](#), Jeff Mosier, 7.19.2004

S.D. Governor Halts Access to Library's Teen Web Site; Political War Ensues

[AP on First Amendment Center](#), 7.13.2004

A Decent Proposal: John Ashcroft May Be Last Defense for Online Child Safety

[World](#), Lynn Vincent, 7.12.2004

Supremes Again Prefer Pornographers and Perverts Over Kids

CWA, Sarah Markwood and Megan Roberts, 7.1.2004

Internet Crimes Against Children -- the War on Pornography: Overwhelming in Magnitude

[Watch Right Internet Crimes Against Children Weblog](#), Robert T. DeMarco, 6.15.2004

2,400 Lawmakers Warn of Kinsey Influence

[WorldNetDaily](#), 7.6.2004

The Supreme Court Borders on Obscenity Itself: Protects Porn While Gutting Political Speech

[Human Events](#), Linda Chavez, 7.1.2004

The court of appeals held that *Lawrence v. Texas*, 539 U.S. 558 (2003)(holding Texas sodomy law unconstitutional) did not create a new fundamental right. It further observed that *Glucksberg* listed the current catalog of fundamental rights which does not include a right to sexual privacy.

In evaluating whether a new fundamental right should be recognized, the court ruled that *Glucksberg* set forth the governing standard. First, we “must begin with a careful description of the asserted right.” Second, and most critically, we must determine whether the right is deeply rooted in history. *Op.* at 5.

The court then proceeded to describe the right in question laying particular emphasis on its breadth. “The sole limitation provided by the district court’s ruling was that the right would extend only to *consenting adults* . . . If we were to accept the invitation to recognize a right to sexual intimacy, this right would theoretically encompass such activities as prostitution, obscenity, and adult incest – even if we were to limit the right to consenting adults.” *Op.* at 6. The court noted that the statute’s limitation to commercial activities did not impact the constitutional analysis. After engaging in a historical review of laws regulating sexual conduct, court concluded that there was no deeply rooted historical right to sexual privacy.

The majority opinion concludes:

Hunting expeditions that seek trophy game in the fundamental-rights forest must heed the maxim “look before you shoot.” Such excursions, if embarked upon recklessly, endanger the very ecosystem in which such liberties thrive--our republican democracy. Once elevated to constitutional status, a right is effectively removed from the hands of the people and placed into the guardianship of unelected judges.

Dissenting Opinion

Circuit Judge Rosemary Barkett opened her dissent noting that the case was not about sex or sexual devices, but “the tradition of American citizens from the inception of our democracy to value the constitutionally protected right to be left alone in the privacy of their bedrooms and personal relationships.” She wrote that the majority

erred in construing *Lawrence* in three respects.

First, *Lawrence* overruled *Bowers v. Hardwick*, on grounds that the latter had “misapprehended the claim of liberty there presented” as involving a particular sexual act rather than the broader right of adult sexual privacy.” Secondly, *Lawrence* observed that history is the starting point and not the ending point in substantive due process analysis. In cases involving consensual adult privacy the Supreme Court has not required a long standing-history. Finally, she observed that the Court should revisit its earlier decision in the case on grounds that *Lawrence* held that public morality alone is not a rational basis to criminalize private sexual activity.

Concluding, she summarized as follows:

For all the reasons explicated above, Alabama's statute should be invalidated because it violates a substantive due process right of adults to engage in private consensual sexual activity and because the state's reliance on public morality fails to provide even a rational basis for its law. Ignoring *Lawrence*, the majority turns a reluctance to expand substantive due process into a stubborn unwillingness to consider relevant Supreme Court authority. I dissent.



Alliance Defense Fund
15333 N. Pima Rd.
Suite 165
Scottsdale, AZ 85260
Phone: 480-444-0020
Fax: 480-444-0025
Email:
cdc@communitydefense.org
Web:
www.communitydefense.org

Editor
Benjamin W. Bull, Esq.

Associate Editors
J. Michael Johnson, Esq.
D.T. Schmidt, Esq.

Monthly Email Notification

As the *Community Defense Reporter* is posted on the web each month, CDR subscribers are notified by email of its publication. There is no charge for this service. If you would like to receive a monthly email notice that CDR has been published, please contact the Alliance Defense Fund or send an email to:

cdc@communitydefense.org.

© 2004
Alliance Defense Fund, Inc.
All rights reserved.
Recipients on the CDR distribution list are authorized to reproduce this report in its entirety for non-commercial use only.