SEX, DRUGS, AND AMERICAN JURISPRUDENCE: THE MEDICALIZATION OF PLEASURE

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INTRODUCTION

Courts are squeamish about pleasure. Despite the American emphasis on "Life, Liberty, and the pursuit of Happiness,"[1] you will rarely see a court acknowledge that seeking pleasure can be an important part of pursuing happiness.[2] Yet, the pursuit of pleasure figures heavily into the lives, identities, and ideologies of most Americans.[3] Indeed, the regulation of pleasure-seeking behaviors has always posed a complicated problem in American law, provoking powerful reactions from the public, and causing splits between and within political parties.

Pleasure-seeking behavior encompasses a range of voluntary activities that stimulate the "reward center" of the brain.[4] Activities that cause pleasure do so by affecting the concentrations of certain neurotransmitters in the brain, causing a sense of euphoria, well-being, and happiness.[5] A variety of activities can stimulate this kind of chemical pleasure response, including: sexual stimulation,[6] ingestion of food and other substances,[7] listening to music,[8] social interaction,[9] gambling,[10] and skydiving.[11] Indeed,

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† Many thanks to Professor Katherine Franke and the members of the Legal Scholarship seminar.

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. Morten L. Kringelbach & Kent C. Berridge, *The Functional Neuroanatomy of Pleasure and Happiness*, 13 TRENDS IN COGNITIVE SCI. 479, 479 (2009) (noting that sensual pleasure, or hedonia, "is indispensable to most people seeking happiness").

3. *See* LIONEL TIGER, THE PURSUIT OF PLEASURE 15–17 (1992) (recognizing that both individuals and communities, such as the luxury-loving capitalists in Silicon valley, are characterized by how they pursue pleasure); Kringelbach, *supra* note 2, at 479.

4. *See, e.g.*, Kringelbach, *supra* note 2, at 480–82; Tobias Esch & George B. Stefano, *The Neurobiology of Pleasure, Reward Processes, Addiction, and Their Health Implications*, 25 NEUROENDOCRINOLOGY LETTERS 235, 236–39 (2004), *available at* http://www.nel.edu/pdf_/NEL250404R01_Esch-Stefano_p_.pdf (examining the neurobiological drivers of reward processes and pleasure phenomena).

5. Esch & Stefano, *supra* note 4, at 239.

6. *Id.* at 236.

7. *Id.*

8. Anne J. Blood & Robert J. Zatorre, *Intensely Pleasurable Responses to Music Correlate with Activity in Brain Regions Implicated in Reward and Emotion*, 98 PROC. NAT'L ACAD. SCI. 11818, 11823 (2001).

9. Esch & Stefano, *supra* note 4, at 243.

10. Marcello Spinella, *Evolutionary Mismatch, Neural Reward Circuits, and Pathological Gambling*, 113 INT'L J. NEUROSCIENCE 503, 503 (2003) (noting neuroanatomical structures are implicated in processing reward and punishment).

"[a]ll pleasures, from sensory pleasures and drugs of abuse to monetary, aesthetic, and musical delights would seem to involve the same fundamental hedonic brain systems."[12] Thus, the pleasure derived from sexual intimacy is fundamentally similar, at least from a neurological perspective, to the pleasure derived from other reward-stimulating activities, such as drug use.[13]

Despite the similarities between the neurological effects of sex and drugs on those who engage in them, their treatment under the law has diverged sharply. Over the past fifty years, noncommercial consensual sexual intimacy has undergone a dramatic transition from being heavily regulated by criminal law to being largely decriminalized.[14] The courts have played a central role in that process by overturning statutes criminalizing the possession, sale, and promotion of contraception, upholding the right to abortion, and overturning statutes criminalizing sodomy.[15] In contrast, American approaches to drug use remain primarily rooted in prohibition and criminal sanction.[16] Indeed, in 2010, the United States spent $74 billion on criminal proceedings for drug offenders, compared to only $3.6 billion for drug treatment programs.[17] Unlike challenges to laws that burden sexual

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11. Ingmar H.A. Franken et al., *Are Nonpharmacological Induced Rewards Related to Anhedonia? A Study Among Skydivers*, 30 PROGRESS IN NEURO-PSYCHOPHARMACOLOGY AND BIOLOGICAL PSYCHIATRY 297, 297 (2006).

12. Kringelbach, *supra* note 2, at 481 (footnote omitted).

13. *Id.*; *see also* Esch & Stefano, *supra* note 4, at 236 ("Neurobiologists have long known that the euphoria induced by drugs of abuse, sex or other things we enjoy arises because all these factors ultimately boost the activity of the brain's pleasure and reward systems.").

14. *See infra* Part II. *C.f.* CONTROLLING REPRODUCTION: AN AMERICAN HISTORY xviii–xix (Andrea Tone ed., 1997). "In the closing decades of the nineteenth century, federal and state governments abandoned their earlier laissez-faire attitudes toward reproduction. Through law they classified as deviant a whole complex of behaviors and practices." *Id.* at xviii*;* Bowers v. Hardwick, 478 U.S. 186, 193–94 (1986) (noting that until 1961, all 50 states had laws criminalizing sodomy), *overruled by* Lawrence v. Texas, 539 U.S. 58 (2003). Commercial sexual behavior, such as prostitution, remains largely criminalized in the United States. Lauren M. Davis, *Prostitution*, 7 GEO. J. GENDER & L. 835, 835 (2006).

15. *See infra* Part II; *see also Lawrence*, 539 U.S. at 578 (overturning a law criminalizing sodomy); Carey v. Population Servs. Int'l., 431 U.S. 678, 685 (1977) (overturning a statute limiting access to contraception); Roe v. Wade, 410 U.S. 113, 152, 164 (1973) (holding unconstitutional a statute criminalizing abortion); Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (overturning a law criminalizing distribution of contraception to unmarried individuals); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (overturning a statute prohibiting the use or distribution of contraception); David K. Johnson, *The Supreme Court and the Right to Sexual Intimacy*, 38 REV. AMER. HISTORY 743, 743 (2010).

16. *See, e.g.*, JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 19–28 (2001).

17. Barry Hatton & Martha Mendoza, *Portugal's Drug Policy Pays Off; U.S. Eyes Lessons*, ASSOCIATED PRESS, Dec. 26, 2010, *available at* http://seattletimes.com/html/health/2013771962_apeufaileddrugwarsolutions.html.

intimacy, challenges to statutes criminalizing narcotics or drug paraphernalia continue to be largely unsuccessful. While the courts have begun to favor individual interests in decriminalizing sexual intimacy, they have continued to defer to the state's interests in criminalizing narcotics.[18]

States have a legitimate interest in "promoting morality," and they often criminalize even victimless pleasure-seeking behavior in furtherance of that interest.[19] As we shall see, asserting an interest in pleasure is not often a successful way to challenge existing paradigms of criminalization. If, however, the individual's interest can be reframed as health-related (receiving treatment or avoiding injury), then that interest may outweigh the state's interest in morality.

In the marketplace of the American court, medicine sells. Although courts may hesitate to engage in normative debates about pleasure, they are frequently receptive to medical arguments.[20] Courts often see medical interests as weighty, but largely ignore any interest in pleasure, even in cases that purportedly involve the right to privacy.[21] This article argues that framing the individual's interests as primarily medical—and the state's interests as moral—can facilitate the decriminalization of pleasure-seeking behavior.[22] "Medicalizing" the individual's interest is particularly important

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18. *See* David A.J. Richards, *Drug Use and the Rights of the Person: A Moral Argument for Decriminalization of Certain Forms of Drug Use*, 33 RUTGERS L. REV. 607, 607, n.4 (1980) (comparing the success of advocates for drug decriminalization with that of advocates seeking decriminalization of abortion and contraception).

19. For example, states have historically criminalized activities such as gambling, drug use, and non-procreative sexual intimacy, including sodomy. *See infra* Part I.A.

20. *See infra* Part I.B; *see also* Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529, 555 (1996) ("[I]n an age when it was undisputed, for the most part, that the criminal law must be placed at the service of the state to suppress sexual nonconformity, courts faced with challenges to sodomy statutes also increasingly resorted to the language of medicine and sociopsychology to define sexual nonconformists and, on that basis, to reject all such challenges.").

21. *See* Clyde Spillenger, *Reproduction and Medical Interventionism: An Historical Comment*, 13 NOVA L. REV. 385, 385, 390 (1989) (discussing the reliance on medical reasoning and noting that "societal 'interests' that are defined primarily by the contemporary state of medical technology have been elevated to equal status with human values that have been recognized for thousands of years").

22. Throughout this paper, a statute that "criminalizes" pleasure-seeking behavior will include statutes that, while not criminalizing the behavior itself, nonetheless impose criminal penalties on goods related to the behavior, thereby burdening individuals' ability to engage in the behavior. For example, statutes criminalizing the sale of contraceptives would fall under this definition as statutes that burden the pleasure-seeking behavior of non-procreative sex. Courts have recognized that regulations that criminalize the sale of goods are tantamount to criminalization of the good itself (and, by logical extension, any behavior for which that good might necessary). *See, e.g.*, Carey v. Population Services Int'l, 431 U.S. 678, 687–88 (1977). In *Carey*, the Court stated:

> Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives, for

in the early stages of the transition away from criminalization, because it allows courts to expand individual rights and encourage decriminalization, while avoiding the sticky underlying moral or philosophical issues. Once gains are made under a medicalized framework, then courts may eventually decide to take on the latent moral issues more directly.

It is important to note from the outset that this paper does not address the merits of decriminalizing any given pleasure-seeking behavior.[23] The question of whether criminal regulation is an appropriate response to a given type of victimless pleasure-seeking behavior is a complicated one, for which a vast, multidisciplinary range of literature already exists, and to which significant public and political discourse is devoted. Key issues, such as whether the War on Drugs remains (or ever was) a useful tool for regulating drug use, have been richly explored in both the academic and public arenas. Debate continues to rage over access to contraception and abortion, a number of states are currently exploring the medical use—and legalization—of marijuana, and the propriety of abstinence-only sex education draws fervent arguments from both sides. This paper shall not enter that normative fray.

Instead, this article puts aside the policy debate and explores the *mechanics* of decriminalizing pleasure-seeking behavior by challenging criminal laws in court. It examines cases in which the courts have overturned statutes criminalizing pleasure-seeking behavior, and speculates that courts' decisions to invalidate those statutes was facilitated by the medicalization of individual interests, and the demedicalization of state interests. It also comments on the conspicuous absence of pleasure from the legal discourse around pleasure-seeking activities. Thus, rather than tackling the question of whether drugs (or gambling, or non-procreative

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> example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception.

Id. at 688.

23. It also bears mentioning that this article focuses on victimless pleasure-seeking behaviors. To the extent that crimes such as rape or murder could be characterized as pleasure-inducing for individual offenders, such crimes are outside the scope of this paper. Behaviors that victimize others implicate entirely different state interests and impact victims' rights, thus significantly altering the legal analysis. The regulation of violent crime falls squarely within the state's traditional police powers. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."); United Auto., Aircraft & Agric. Implement Workers v. Wis. Emp't Relations Bd., 351 U.S. 266, 351 (1956). "The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern." *Id*.

sex, or extreme sports) should be decriminalized, this paper explores the role of medicine in facilitating the judicial decriminalization of pleasure-seeking behavior.

Part I of this paper develops the theory of medicalization by providing background on how courts balance individual and state interests, and by explaining what is meant by "medicalizing" the interests. Part II explores the role of medicalization of individual interests and demedicalization of state interests in liberating sexual intimacy. In particular, this Part examines the use of medicalization in important contraception and "obscene devices"[24] cases. Part III explores the conspicuous absence of pleasure in the sexual intimacy cases and speculates about the reasons for excluding pleasure from legal discourse and practice. Part IV applies the lessons from Parts II and III to the case of psychoactive substances. This Part speculates that substance abuse, unlike sexual intimacy, continues to be criminalized in part because the individual interests at stake are persistently associated with pleasure, while the state interests continue to be regarded as health-related. In particular, the state assertion that criminalization furthers public health often goes unchallenged, despite the dubiousness of that assertion. This Part argues that lessons from sexual intimacy cases can potentially be used to effectively "demedicalize" the state's interests, allowing the individual's medicalized interest to trump the state's interest in morality. Finally, Part V explores the potential costs of reframing issues of pleasure as medical concerns.

I. BACKGROUND

A. The State's Right to Criminalize

Under its traditional police powers, the state can regulate the behavior of its citizens in order to further legitimate state interests.[25] The state may impose reasonable criminal sanctions to encourage citizens to comply with valid state regulations.[26] Legitimate state interests include traditional state

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24. An obscene device has been defined as "a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs." Kansas v. Hughes, 792 P.2d 1023, 1027 (Kan. 1990) (citing KAN. STAT. ANN. § 21-4301 (repealed 2010)).

25. *See* Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (noting that the structure and limitations of federalism allow states "'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons'" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996))).

26. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (reinforcing that "'States [sic] possess primary authority for defining and enforcing the criminal law'" (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993))).

concerns such as the morality, health, safety, and general welfare of the citizenry.[27]

States frequently exercise their police powers to criminalize or otherwise burden pleasure-seeking behaviors. Criminal regulation of pleasure-seeking activity is particularly likely where such behavior is associated, correctly or not, with the commission of other crimes or with the proclivities of "disreputable" subgroups.[28] In some cases, states arguably criminalize a behavior *because* it is pleasurable (or, often interchangeably, because it is immoral).[29] Thus, historically, states have at some point restricted a wide range of pleasure-seeking activities, including various aspects of non-procreative sexual intimacy,[30] adultery,[31] homosexuality,[32] drug use,[33] alcohol use,[34] and gambling.[35]

But the government's power to criminalize is not without limits. Criminal laws cannot run afoul of the rights guaranteed to individuals by

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27. *See* Barnes v. Glen Theater*,* 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals . . . ."); Vill. of Euclid Ohio v. Ambler Realty Co.*,* 272 U.S. 365, 395 (1926) (noting that before an ordinance could be declared unconstitutional, the court had to find it "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); *see also* BLACK'S LAW DICTIONARY 1541 (9th ed. 2009) (defining state police powers as "[t]he power of a state to enforce laws for the health, welfare, morals, and safety of its citizens, if enacted so that the means are reasonably calculated to protect those legitimate state interests.").

28. Mario J. Rizzo, *The Problem of Moral Dirigisme: A New Argument Against Moralistic Legislation*, 1 N.Y.U. J. L. & LIBERTY 790, 825 (2005).

29. KANE RACE, PLEASURE CONSUMING MEDICINE, at ix (2009) ("When it comes to drugs, [pleasure] could be said to provide the basis upon which legal and moral distinctions (between licit and illicit instances) are made").

30. *See*, *e.g.*, Richard Green, *Fornication: Common Law Legacy and American Sexual Privacy*, 17 ANGLO-AM. L. REV. 226, 226–28 (1988) (noting that Massachusetts and New Jersey were among the first states to pass statutes banning fornication); Backer, *supra* note 20, at 554–55 ("By the 1950s it was clear enough that criminal, consensual, adult sexual conduct included genital-anal, genital-oral, and oral-anal contact, whether performed by same or opposite sex couples."(footnotes omitted)).

31. *See*, *e.g.*, Eric Rasmusen, *An Economic Approach to Adultery Law, in* THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 85 (Anthony W. Dnes & Bob Rowthorn eds., 2002).

32. Lawrence v. Texas, 539 U.S. 558, 570 (2003).

33. *See*, *e.g.*, Lana D. Harrison et al., *Cannabis Use in the United States: Implications for Policy*, *in* CANNABISBELEID IN DUITSLAND, FRANKRIJK EN DE VERENIGDE STATEN 179–276 (Peter Cohen & Arjan Sas eds., Centrum voor Drugsonderzoek, Universiteit van Amsterdam 1996), available at http:// www.cedro-uva.org/lib/harrison.cannabis.05.html; ROBERT M. HARDAWAY, NO PRICE TOO HIGH: VICTIMLESS CRIMES AND THE NINTH AMENDMENT 87–136 (explaining the origins of state laws prohibiting opiates and marijuana).

34. *See, e.g.*, U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI (empowering Congress and the states to prohibit "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof" for beverage purposes).

35. *See, e.g.*, HARDAWAY, *supra* note 33, at 167–69 (describing early state gambling laws).

the federal Constitution.[36] For example, criminal laws that unduly restrict the exercise of free speech are unconstitutional.[37] The issues that this Article discusses have primarily been characterized as relating to the right to privacy or the right to liberty.[38] "[T]he protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."[39] Thus, "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint."[40] Under the Supreme Court's substantive due process jurisprudence, the Due Process Clause "also provides heightened protection against government interference with certain fundamental rights and liberty interests."[41]

When evaluating whether a criminal statute violates substantive due process, the court first must ascertain the nature of the individual right at stake.[42] The Due Process Clause "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[43] Courts may only uphold statutes that infringe upon such fundamental rights if they are narrowly tailored to serve compelling government interests.[44] When the right at issue is not fundamental, the Constitution requires that the

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36. *See, e.g.*, Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1552 (2007) (noting that "the rule of law also requires that [legislative institutions responsible for defining criminal law] adhere to constitutional protections of individual rights").

37. *See* Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002) ("'[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972))).

38. *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003) (concluding that "the case should be resolved 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 to the Constitution."); Roe v. Wade, 410 U.S. 113, 152, 164 (1973) (recognizing the existence of a right to privacy and holding that a criminal abortion law that unduly infringes on that right violates the Due Process Clause); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (recognizing a right to privacy, particularly with regard to marital relations).

39. *Lawrence*, 539 U.S. at 565.

40. Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (citing Collins v. Harker Heights, 503 U. S. 115, 125 (1992)).

41. *Id*. at 720.

42. *Id.* at 721.

43. *Id.* at 720–21 (quoting Moore v. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Palko v. Conn., 302 U.S. 319, 325–26 (1937)) (citing Snyder v. Mass., 291 U.S. 97, 105 (1934)).

44. *Glucksberg*, 521 US at 721; Roe v. Wade, 410 U.S. 113, 155–56 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate interests at stake." (quoting Kramer v. Union Free Sch. Dist, 395 U.S. 621, 627 (1969)) (citations omitted)).

law be rationally related to legitimate government interests.[45] Furthermore, the line between rational basis scrutiny and strict scrutiny has become increasingly blurry.[46] Indeed, substantive due process jurisprudence is one of the more muddled areas of law, as is the nature and source of the right to privacy.[47] What is apparent, however, is that "determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'"[48]

Thus, in cases involving the constitutional right to privacy or liberty, courts care a great deal about the precise nature of the state and individual interests at stake.[49] Strategic framing of those interests is therefore paramount. The way an interest is portrayed can have a significant impact on how much weight the court places on it. Courts may undervalue interests framed in ways that implicate debates over social morays, especially where uncontroversial legitimate state interests are present.[50] Conversely, courts may be tempted to place great weight on interests that society traditionally views as important, or that enjoy a great deal of public support, or are unlikely to provoke moral outrage.[51] In other words, while courts may not explicitly take public opinion into account when making decisions, the

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45. *See Glucksberg*, 521 U.S. at 728 (explaining that since the right to assistance in suicide is not fundamental, the court will uphold a ban on assisted suicide when it is rationally related to a legitimate government interest).

46. Richard Glover, *Can't Buy a Thrill: Substantive Due Process, Equal Protection, and Criminalizing Sex Toys*, 100 J. CRIM. L. & CRIMINOLOGY 555, 576 (2010).

47. *See Roe*, 410 U.S. at 152–53 (citing, e.g., Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Terry v. Ohio, 392 U.S. 1, 8–9 (1968)) (discussing the many possible sources of the right to privacy).

48. Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 279 (1990) (footnote omitted) (quoting Youngberg v. Romeo*,* 457 U.S. 307, 321 (1982)).

49. *See Glucksberg*, 521 U.S. at 721 ("[W]e have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." (quoting Reno v. Florez, 507 U.S. 292, 302 (1993)).

50. *See* Backer, *supra* note 20, at 538 ("At least with respect to the issue of adult consensual sex crimes, courts will absorb, consider, evaluate the equities of, and decide such cases within a context provided by the multiple of cases, their narratives, and morals which forms the courts' interpretive reality of the world and the way it works. Likewise, the judgment implicit in the accumulated narratives can serve to justify application of personal religious beliefs or to temper the nonapplication of those beliefs.")

51. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 18 (2d ed. 2008) ("To the extent that lower court judges are part of a community, ordering massive change in their community may isolate them and threaten respect of the court."). "Also, the judicial selection process for lower federal court judges, [sic] is designed to select people who reflect the mores and beliefs of the community in which the court sits." *Id*.; *See also Glucksberg*, 521 U.S. at 721 (defining fundamental rights as those which are "'deeply rooted in this Nation's history and tradition'" (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977))).

general public and political atmosphere surrounding an issue operates in the background of the judicial process.[52] In the context of substantive due process challenges, courts may be unlikely to find a right "fundamental" when it has been defined in a way that continues to generate public outcry. However, courts may be willing to re-imagine the right in a way that finds greater support in history and in the mind of the public.[53] The way that a court ultimately chooses to construe the right at issue depends in part on how the parties have framed the right.

B. The Rock-Paper-Scissors of Balancing Interests

Courts manifest implicit preferences for some interests over others. In evaluating the importance of medical interests versus interests in pleasure or morality, an unspoken hierarchy emerges. In particular, this hierarchy

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52. *See* Backer, *supra* note 20, at 541 ("[I]t is necessary to appreciate the position of courts both within law (understood as a kind of systematizing of social (hortatory) reality) and within the popular culture which gives both courts and law their form and function. This position becomes most apparent in the context of formal social control of sexual practice. It is especially acute when courts are confronted with the task of delineating the relationship of law (as formalized hortatory reality) to social sexual practices (as temporal popular reality) because courts serve as both a source and reflection of the popular culture in which they reside.").

53. For example, in *Bowers v. Hardwick*, the Court construed the right at issue as the right to engage in homosexual sodomy. Bowers v. Hardwick, 478 U.S. 186, 190 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). That right, narrowly defined, was one for which the Court found little traditional support and which generated a great deal of public opposition and turmoil. *Bowers,* 478 U.S. at 194–96. In overruling *Bowers*, the court in *Lawrence v. Texas* emphasized that the *Bowers* court had misunderstood the nature of the right at issue and reframed the right in a way that was arguably more palatable to the general public. *Lawrence*, 539 U.S. at 567. The issue was not whether there was a right to engage in consensual homosexual sodomy; it was whether there was a right to sexual privacy within the home or, at least, a right for homosexuals not to be singled out to have their sexual privacy invaded. *See id.* at 566–67. As noted in *Lawrence*:

> The Court began its substantive discussion in *Bowers* as follows: "The issue presented is 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 and have done so for a very long time." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

Id. (quoting *Bowers*, 478 U.S. at 190 (citations omitted)).

prioritizes concerns about physical health—corporeal concerns—and devalues considerations related to spiritual and emotional health—incorporeal concerns.[54]

The individual has a stake in both incorporeal and corporeal well-being. When challenging a statute criminalizing pleasure-seeking behavior, the individual likely has, unsurprisingly, an interest in pleasure. Pleasure is an important and integral part of the human experience. Accordingly, a state-mandated restriction of pleasure may reduce an individual's sense of spiritual or incorporeal well-being by cutting her off from a familiar source of happiness. The criminalization of pleasure-seeking behavior may also impact individuals' corporeal well-being. Insofar as the regulation at issue can be construed as either subjecting the individual to bodily harm or preventing the individual from receiving treatment for a physical ailment, the regulation implicates the individual's interest in corporeal health.

Similarly, the state can have a legitimate interest in both the incorporeal and corporeal health of its citizens. With regard to the spiritual health of those within its borders, the state may impose regulations that aim to improve its citizens' moral character.[55] Courts view the promotion of morality as a legitimate state interest.[56] A state may also wish to protect the corporeal well-being of its citizens by enacting regulations that seek to protect or increase public health, including statutes that aim to reduce the spread of disease[57] or prevent contamination of consumables.[58] Courts have routinely accepted that public health is a legitimate state interest.[59]

Thus, in the context of a challenge to a statute criminalizing a pleasure-seeking behavior, the individual and the state may each have relevant interests in both corporeal and incorporeal well-being. Specifically, the individual may have an interest in pleasure as well as a medical interest. The state, meanwhile, may have interests in promoting morality and public health.

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54. This distinction between corporeal and incorporeal concerns is not necessarily generalizable to interests outside the medical versus pleasure/morality context explored in this paper. For example, courts may prioritize freedom of religion (an incorporeal concern) over a state interest in public health (a corporeal concern). *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543, 546–47 (1993) (protecting religious freedom despite asserted state concerns about public health and sanitation).

55. *See, e.g.*, Barnes v. Glen Theater, 501 U.S. 560, 569 (1991) (upholding a public indecency statute). The Court stated "[t]his and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." *Id*. at 569.

56. *E.g.*, *id.*

57. *See* Jacobson v. Massachusetts, 197 U.S. 11, 25, 27, 30–31 (1905) (upholding a Massachusetts statute that mandated smallpox vaccinations).

58. *See*, *e.g.*, Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 151 (1942) (discussing the constitutionality of an Alabama statute that permitted a state official to confiscate packing stock butter).

59. *See*, *e.g.*, *Jacobson,* 197 U.S. at 25, 35 (noting that it is within the police power of the state to enact legislation that protects the health and welfare of the public); Richards, *supra* note 18, at 607.

But courts do not treat all of these interests alike. On the contrary, courts tend to elevate health interests and devalue concerns about morality or pleasure. In addition to prioritizing corporeal concerns over incorporeal ones,[60] courts often defer to the state when reasonable policy determinations are at issue. In other words, where both the state and the individual assert an interest in health (or assert an interest in morality and pleasure, respectively), the court is likely to defer to the state's rational legislative determinations.[61] This implicit hierarchy of interests can be seen in the examples that follow.

1. Moral (State) versus Pleasure (Individual)

When the state manifests a primarily moral interest in criminalizing a pleasure-seeking behavior while the individual essentially asserts an interest in pleasure, the state usually wins. Although the state has a widely recognized legitimate interest in promoting morality, the individual's legitimate interest in pleasure, if any, is more contentious. As discussed in Part III, legal actors rarely discuss pleasure explicitly. Instead, they often couch the individual's interest in pleasure through terms of an interest in privacy or liberty. Particularly when the process of decriminalization is in its infancy, an asserted interest in privacy or liberty for the purpose of engaging in pleasurable activity may crumble in the face of the state's interest in morality. For example, prior to *Lawrence v. Texas*,[62] courts routinely upheld statutes criminalizing consensual, private sexual activity[63] and courts continue to uphold statutes criminalizing pleasure-seeking activities such as gambling.[64] As society's values evolve on a particular issue, or as decriminalization progresses (perhaps under a more medicalized

60. *See infra* Part I.B.2, 3.

61. *See infra* Part I.B.1, 4.

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

63. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 58 (2003).; Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001) (upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality . . . indisputably is a legitimate government interest under rational basis scrutiny"); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997) (upholding the federal statute and regulations banning from military service those who engage in homosexual conduct); Owens v. State, 724 A.2d 43, 53 (Md. 1999) (observing that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage"); Sherman v. Henry, 928 S.W.2d 464, 471–73 (Tex. 1996) (rejecting a claimed constitutional right to commit adultery).

64. *See*, *e.g.*, Ianelli v. United States, 420 U.S. 770, 771–73 (1975) (footnotes omitted).

framework), an interest in privacy may eventually overcome the state's interest in morality.[65]

2. Moral (State) versus Medical (Individual)

When the state offers a moral justification for a law that significantly impacts individuals' medical interests, courts often invalidate the law. Individuals generally frame their medical interests as either an interest in preventing bodily harm or an interest in receiving medical treatment. The case of contraception provides an example of an individual interest in avoiding bodily harm trumping a state interest in promoting morality.[66] Cases involving the criminalization of "obscene devices" illustrate how an individual's interest in receiving treatment can outweigh the state's interest in morality.[67] Part II of this Article explores both of those cases in detail.

3. Public Health (State) versus Pleasure (Individual)

When the state asserts that a criminal statute furthers an interest in public health, and the individual alleges that the statute impacts an interest in pleasure (often couched in terms of privacy), the statute will likely withstand scrutiny.[68] In general, challenges to statutes criminalizing illicit drug use are assumed to involve this distribution of interests. Courts generally presume that the government has a legitimate public health interest in criminalizing drug use,[69] and they often presume that the individual's interest in using drugs or possessing paraphernalia is nonmedical.[70] In Part IV, this Article proposes a recharacterization of those interests.

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65. *See Lawrence*, 539 U.S. at 571–73, 578 (noting the evolution of attitudes toward homosexuality and questioning the state's ability to intrude on individuals' private, consensual activity for the purpose of regulating morality); *see also infra* Part V.

66. *See infra* Part II.B.

67. *See infra* Part II.C.

68. *See* Eisenstadt v. Baird, 405 U.S. 438, 463 (1972) (White, J., concurring) (noting that courts are generally reluctant "to question a State's judgment on matters of public health").

69. *E.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 438 (2006) (expressing no doubt that the government has a "general interest in promoting public health and safety by enforcing the Controlled Substances Act").

70. For drugs listed in Schedule I of the Controlled Substances Act, which include marijuana, MDMA, and heroin, Congress has found that no medical use exists. 21 U.S.C. § 812 (2006).

4. Public Health (State) versus Medical (Individual)

When the state asserts that a criminal statute serves a legitimate and important public health interest and the individual asserts that the statute impacts a medical interest, courts often defer to state policy determinations. This is consistent with the general understanding of judicial and legislative institutional roles. For example, in *Jacobson v. Commonwealth of Massachusetts*, the Court refused to overturn a statute criminalizing the failure to receive a smallpox vaccination.[71] In doing so, the Court deferred to the legislature's assessment of competing medical interests.[72] The defendant in *Jacobson* asserted that receiving the smallpox vaccination could result in adverse individual health consequences,[73] while the State alleged that requiring vaccination furthered its interest in public health.[74] The Court deferred to the legislature's determination of the correct course of action to prevent the spread of disease within the state.[75]

C. Reframing the Interests at Stake Through Medicalization

Medicalization of the individual interest is the process of shifting the focus from the individual's incorporeal concerns to his or her corporeal needs. In challenging statutes criminalizing pleasure-seeking behavior, medicalization involves refocusing the debate from the individual's interest in pleasure to the individual's interest in bodily health. Demedicalizing the state interest involves rejecting the contention that the state is principally interested in public health, and recharacterizing the state interest as primarily concerned with promoting morality.

The medicalization of individual interests frequently takes one of two forms. In the first, the individual asserts that the criminal statute at issue unacceptably burdens pleasure-seekers with increased health risks in an attempt to further the state's moral agenda. In the second, the individual alleges that the pleasure-seeking behavior (or item related to the behavior)

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71. Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905).

72. *Id.* at 30–31.

73. *Id.* at 26.

74. *Id.* at 30–31.

75. *See id.* at 25. ("[T]his court . . . has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

is itself therapeutic and that the state has thus impinged on the individual's right to medical treatment.

The Parts that follow explore the role of medicalization in the context of challenges to statutes that criminalize two particular pleasure-seeking behaviors: non-procreative sex and illicit drug use. First, the Article investigates the role of medicalization in the context of sexual pleasure, focusing on the contraception cases and the "obscene devices" cases. Next, it explores the conspicuous absence of pleasure in the legal discourse surrounding the sexual intimacy cases. Finally, using the observations from the sexual pleasure cases, the Article will speculate about the potential role of medicalization in decriminalizing drug use.

II. SEXUAL PLEASURE

A. Introduction

Sex for pleasure, or non-procreative sex, has not always enjoyed protection under the law. To the contrary, the United States has a history of criminalizing many pleasure-seeking sexual behaviors that do not fit the traditional norm of heterosexual procreative sex in wedlock, such as pre- or extra-marital sex, non-procreative sex (often made possible by contraception), and sodomy.[76] Over the past half-century or so, however, courts have overturned laws criminalizing many of these types of "illicit" pleasure-seeking behaviors, ushering in a new era of decriminalization.[77]

This Article argues that the medicalization of the individual's interests and the demedicalization of the state's asserted interest facilitated the decriminalization of non-procreative sexual intimacy. Exploring the use of medicalization in the context of sexual intimacy can help us understand how, when, and why medicalization works, and can provide useful models for employing medicalization in the context of other criminalized pleasure-seeking behaviors, such as drug use.

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76. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 193–94 (1986) (noting that until 1961, all 50 states had laws criminalizing sodomy), *overruled by* Lawrence v. Texas, 539 U.S. 58 (2003); Green, *supra* note 30, at 226–28 (stating that the statutes often criminalized illicit sex between unmarried persons); Backer, *supra* note 20, at 554–55 ("By the 1950s it was clear enough that criminal, consensual, adult sexual conduct included genital-anal, genital-oral, and oral-anal contact, whether performed by same or opposite sex couples.").

77. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overturning a law criminalizing sodomy); Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (overturning a law criminalizing distribution of contraception to unmarried individuals); CONTROLLING REPRODUCTION: AN AMERICAN HISTORY, *supra* note 14, at xix, 147–48 (examining how feminist attitudes after WWI began to emphasize the importance of female sexual pleasure leading to the era of decriminalization of pleasure-seeking behaviors in the 1960s and 1970s).

As discussed above, medicalization of individual interests frequently takes two forms. In the first, the individual asserts that the criminal statute at issue unacceptably burdens pleasure-seekers with increased health risks in an attempt to further the state's moral agenda. In the second, the individual alleges that the pleasure-seeking behavior is itself therapeutic and that the state therefore impinges on the individual's right to medical treatment by criminalizing the behavior. Both of those alternatives exist in cases involving sexual intimacy. The contraception and abortion cases provide an excellent example of the first form of medicalization, while the "obscene devices" cases provide insight into the second form.

B. Pleasure as Punishment: Contraception and Abortion

1. Background

The decriminalization of many aspects of adult consensual sexual activity depended in large part on the success of cases challenging the legality of criminal statutes that burdened access to contraception and abortion. In the early 1970s, cases such as *Eisenstadt v. Baird*,[78] *Roe v. Wade*,[79] and *Carey v. Population Services International*[80] overturned criminal statutes and paved the way for greater access to contraception and abortion. In doing so, the Supreme Court released many aspects of non-procreative sexual intimacy from the stigma and onus of criminal sanction.[81] These core cases provided a legal framework in which non-marital and non-procreative sexual behavior moved from being harshly criminalized to regarded as within the sphere of individual autonomy and privacy.[82]

Each of these cases overturned statutes that exposed sexually active individuals to disease or unwanted pregnancy. In *Eisenstadt*, the Court overturned a Massachusetts statute criminalizing the provision of any

78. *Eisenstadt,* 405 U.S. at 454–55.

79. Roe v. Wade, 410 U.S. 113, 164 (1973).

80. Carey v. Population Servs. Int'l, 431 U.S. 678, 681–82 (1977).

81. *See* David A. J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1239–40 (1979) ("Recognition of this inadequacy of the procreational model underlies the decriminalization by constitutional decision of contraception, abortion, and pornography in the home, and the gradual decriminalization of consensual non-commercial sexual relations between consenting adults." (footnotes omitted)).

82. *See Lawrence*, 539 U.S. at 564–65 (listing *Griswold, Eisenstadt, Roe,* and *Carey* among the key cases that led to the current understanding of the "fundamental significance" of the Due Process Clause in "defining the rights of the person").

contraceptive device to unmarried persons.[83] In *Roe v. Wade*, the Court overturned a statute criminalizing the provision of abortions, except when necessary to save the life of the mother.[84] And in *Carey*, the Court overturned a New York statute that criminalized the dispensation of contraceptives to individuals under sixteen years of age, and required that a pharmacist dispense all contraceptives.[85]

One of the critical elements of each of these three core cases was the turn to medical reasoning to support decriminalization. In particular, the contraception cases characterized laws criminalizing contraception as singularly—and unacceptably—punitive because the laws sought to discourage "immoral" behavior by exposing individuals to increased health risks. Rather than asserting individuals' interest in sexual pleasure, the individuals in these cases focused on the health risks that the statutes imposed on them. This turn allowed the courts to invalidate criminal statutes burdening contraception and abortion while declining to find an explicit right to pleasure or sexual privacy as such.

Also important to the success of these challenges was the effective demedicalization of the state interests. In the contraception cases, the state asserted that the statutes at issue furthered legitimate public health interests. But the individual litigants successfully argued that the statutes were actually morally motivated and were not rationally related to the asserted health interests.

By reframing the individual's interest as medical and by exposing the state's purportedly medical interest as merely a pretense for moralistic legislation, the litigants in these cases were able to shift the balance of interests to their favor. Thus, these early cases on sexual intimacy provide an excellent model for understanding how medicalization can facilitate the decriminalization of controversial pleasure-seeking behavior.

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83. Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972). The statute at issue in *Eisenstadt* essentially prohibited the provision of contraceptives to anyone, with a narrow exception allowing doctors to prescribe contraceptives for married persons and licensed pharmacists to provide contraceptives to married persons in possession of a prescription. *Id*. at 440–41. The original statute was a complete bar on contraceptives and contained no such exceptions. Commonwealth v. Baird, 247 N.E.2d 574, 576 (Mass. 1969). The allowance for married individuals was a legislative response to the Court's decree in *Griswold v. Connecticut*. *Id. Griswold* prohibited criminalization of the *use* of contraceptives by married persons because of the statute's intrusion on marital privacy. Griswold v. Connecticut, 381 U.S. 479, 485 (1965). The *Griswold* decision was premised entirely on the marital relationship and the protection of the marital bedroom from unwarranted intrusion by the state. *Id*.

84. Roe v. Wade, 410 U.S. 113, 117–18, 164 (1973).

85. Carey v. Population Servs. Int'l, 431 U.S. 678, 681–82 (1977).

2. Medicalizing the Individual Interest

There are no references whatsoever to sexual pleasure or enjoyment in the *Eisenstadt*, *Roe*, or *Carey* decisions. The Court never acknowledged any individual interest in engaging in sex for pleasure, either within or outside of marriage. Despite the fact that these decisions deal directly with non-procreative sexual behavior—which it seems safe to conclude is often undertaken precisely for the purpose of producing pleasure—the Court declined to discuss the nature or implications of individuals' motivations for their behavior. Instead, the Court focused on the individuals' health interests, including their interests in avoiding disease and pregnancy.

Two conceptual developments were vital to the successful characterization of the individual interests as primarily medical. The first development was an emerging awareness of the epidemiological mechanics and consequences of sexually transmitted diseases. The second—and more ideologically radical—development was a re-imagination of pregnancy as a *medical* condition rather than as simply the natural function of women of childbearing age.[86] Together, these two developments provided a medical basis for individuals' interest in contraceptives and abortion and placed the underlying issue of individuals' desire to engage in sex for pleasure on the back burner of legal contemplation.

Roe v. Wade provides the clearest illustration of that second conceptual move—the re-imagining of pregnancy as a medical condition. In *Roe v. Wade*, the Court invalidated a Texas statute banning all abortions except where medically necessary to save the mother's life.[87] *Roe* illustrates the extreme medicalization of pregnancy. Appellants asserted that the statute impacted several important individual rights:

> [F]undamental rights entitled to constitutional protection are involved in the instant case, namely the right of individuals to

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86. *See, e.g.*, DEBRA ROWLAND, THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN'S RIGHTS IN AMERICA xxiv (2004) (describing the view that women's primary societal function is motherhood). Rowland notes that historically, women were valued primarily for their ability to produce children. *Id*. Motherhood was seen not as a choice but as an obligation—in other words, women were subject to a procreative imperative. *Id*. Pregnancy was therefore not viewed as a potentially life-threatening medical bodily condition, but rather as the natural condition of a woman who was fulfilling her role in society. "Because women bore children, it has often been argued—indeed, *understood*—that by God and nature women had been assigned the 'divine mission' of motherhood." *Id*. *See also* LESLIE REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973 11 (1997) (noting that the antiabortion movement of the 1870s, which resulted in the mass criminalization of abortion, condemned women "for avoiding the self-sacrifice expected of mothers").

87. *Roe*, 410 U.S. at 164.

> seek and receive health care unhindered by arbitrary state restraint; the right of married couples and of women to privacy and autonomy in the control of reproduction; and the right of physicians to practice medicine according to the highest professional standards.[88]

Indeed, the appellants portrayed the entire experience of pregnancy and childbearing in a highly medicalized context.[89] They stressed the significant health risks and bodily intrusion posed by pregnancy.[90] Childbearing was characterized as within the decisional purview of women and physicians, rather than being seen as simply a natural, inevitable, and desirable result of marital relations. "When pregnancy begins, a woman is faced with a

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88. Brief for Appellants at 93–94, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128054, at *43.

89. *Id.* at 18–43. Appellants' decision to frame the individual interests in medical terms was likely a strategic one. Leslie Reagan describes one of the early successful challenges to an abortion law, *Doe v. Scott*, which resulted in the overturning of an Illinois abortion ban by the U.S. Court of Appeals:

> The Illinois attorneys did not make privacy their primary argument, despite some pressure to do so. Members of the ACLU board wanted Fritzsche to argue the case exclusively on privacy grounds, the preferred argument of feminists. Jody Parsons, one of Jane's founders, advocated this position. (Her presence on the ACLU board illustrates the efforts of different groups to work together.) Fritzsche and Grossman, however, planned to present an array of arguments for overturning the criminal abortion laws as unconstitutional. Having clerked for a federal judge, Grossman understood their conservatism and wanted to provide alternatives that would allow them to select more conservative arguments to reach the same result. As she later explained, "We decided to focus on vagueness . . . and to downpedal the privacy argument."
>
> The innovative aspect of the case created by Grossman and Fritzsche was its attention to the complaints and interests of the medical profession along with those of women of all classes. They argued that the vagueness of the criminal abortion law made it impossible for physicians to practice medicine and serve their patients. They further argued that the laws violated the physician's right to privacy and freedom of speech in the relationship between physician and patient.
>
> Fritzsche and Grossman identified physicians as a class that had an interest in decriminalizing abortion. In recruiting the physicians, the civil liberties lawyers drew upon a growing consensus within the medical profession, but they were not approached by doctors nor were they particularly aware of medical efforts to reform the abortion laws. Fritzsche and Grossman's ideas grew out of an incredible ferment and demand for change that makes the linking of the interests of the medical profession and women in legal reform seem inevitable, but abortion activism was not coordinated. The legal team had thought "very carefully" about who they wanted as representatives of the class and sought out the most prestigious doctors to say, "I should have the freedom to order and do one if I feel it is medically necessary."

Regan, *supra* note 86, at 235–38.

90. Brief for Appellants at 24-25, *Roe*, 410 U.S. 113 (No. 70-18).

governmental mandate compelling her to serve as an incubator for months. . . ."[91] Furthermore, the appellants asserted that the statute at issue actually created increased health risks for women, above and beyond the risks inherent in pregnancy:

> Additional data reveal that statutes like the one here actually *create* "a public health problem of pandemic proportions" by denying women the opportunity to seek safe medical treatment. Severe infection, permanent sterility, pelvic disease, and other serious complications accompany the illegal abortions to which women are driven by laws like this one.[92]

The character of the *amicus curiae* further illustrates the highly medical nature of the interests at stake. Many of the briefs submitted were by medical professionals, including groups of physicians, the American Medical Women's Association, the American College of Obstetricians and Gynecologists, the American Psychiatric Association, the American Association of Planned Parenthood Physicians, and Medical School Deans and Professors.[93]

The court accepted the medical nature of both the decision to bear children as well as many of the consequences associated with denying women access to abortion. The majority noted:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care.[94]

The Court also focused on the physician's interests, recognizing the "right of the physician to administer medical treatment according to his

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91. *Id.* at 106.

92. *Id.* at 115–16 (quoting Robert E. Hall, *Abortion in American Hospitals*, 57 AM. J. PUB. HEALTH 1933, 1934 (1967)).

93. Brief for the American College of Obstetricians and Gynecologists et al. as Amici Curiae Supporting Appellees, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128053 (encompassing support from four medical organizations and 178 physicians); Motion for Leave to File a Brief and Brief as Amici Curiae for the American College of Obstetricians and Gynecologists et al., Doe v. Bolton, 410 U.S. 179 (1973) (No. 70-40), 1971 WL 126685.

94. Roe v. Wade, 410 U.S. 113, 153 (1973).

professional judgment up to the points where important state interests provide compelling justifications for intervention."[95]

The contraception cases were perhaps not as explicitly focused on the individual's medical interests as *Roe v. Wade*. They do, however, reflect an unwillingness to allow the state to enforce its moral tenets by increasing the physical risks attendant on the opprobrious behavior. They also illustrate the Court's reluctance to place the judicial stamp of approval on a general right to engage in non-procreative sex.

In order to understand the two contraception cases discussed here, it is important to understand an earlier case, *Griswold v. Connecticut*.[96] There, the Supreme Court overturned a Connecticut law that prohibited the use or distribution of contraceptives, including the use of such devices by married couples.[97] Plaintiffs, who were charged with providing information and advice about contraceptives, asserted the rights of their married patients to use contraception.[98] The Court held that the law violated married individuals' right to privacy within the marital bedroom.[99] In so holding, however, the Court also noted that the law intruded on another important relationship—that of the physician and the patient.[100]

In *Eisenstadt v. Baird*, the Supreme Court considered a statute prohibiting the provision of any kind of contraceptive substance or device to unmarried individuals.[101] William Baird was convicted of giving spermicidal jelly to unmarried women after giving a lecture on contraception at Boston University. He appealed his conviction on the grounds that the statute was unconstitutional.[102] The Massachusetts Supreme Court sustained Baird's conviction,[103] so he filed for a writ of *habeas corpus*. The district court denied his application.[104] The First Circuit, however, sustained his application and held the statute unconstitutional.[105] The state appealed to the United States Supreme Court,

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95. *Id*. at 165–66.

96. Griswold v. Connecticut, 381 U.S. 479 (1965).

97. *Id*. at 480.

98. *Id*. at 481.

99. *Id*. at 485–86.

100. *Id*. at 482 (noting that the contraception statute "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation").

101. Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).

102. *Id.* at 440.

103. Commonwealth v. Baird, 247 N.E.2d 574, 580 (Mass. 1969).

104. Baird v. Eisenstadt, 310 F. Supp. 951 (D. Mass. 1970), *vacated,* 429 F.2d 1398 (1st Cir. 1970), *aff'd*, 405 U.S. 438 (1972).

105. Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970), *aff'd*, 405 U.S. 438 (1972).

and Justice Brennan delivered the majority opinion invalidating the statute and overturning Baird's conviction.[106]

Because the statute in *Eisenstadt* criminalized only the provision of contraceptives to *unmarried* individuals, the appellee could not argue that the statute violated the right to marital privacy identified in *Griswold*. He therefore argued for an expansion of the right recognized in *Griswold*, and he chose to frame that expansion as a right to health rather than a more general right to sexual privacy:

> In the instant case, we are also concerned with a fundamental right older than the Bill of Rights — older and more cherished even than the marriage relationship. We concern ourselves here with the right to health, to social and economic well-being and, indeed, the right to life itself. The argument of the moralist is no more effective against the unalienable right of the citizen to protect his health or life, than it was in its assault on the sanctity of the marriage relationship concerned in the *Griswold* case.[107]

Appellee then outlined the catastrophic health consequences of limited or nonexistent access to contraception for unmarried individuals, including dramatically increased maternal mortality rates, increased infant mortality, and inferior health outcomes for illegitimate children.[108] The appellee stressed that "[t]he danger to health and life that is encouraged by the continued operation of our proscription on information and availability of contraceptives is not answered by shouting 'abstinence.'"[109]

Because the Massachusetts law already contained an exception for contraceptives sold for the purpose of preventing disease,[110] the appellee focused on the health issues surrounding pregnancy, rather than the medical risks of sexually transmitted infections. This exception was the result of a Massachusetts Supreme Court decision, *Commonwealth v. Corbett*, which acknowledged the state's legitimate interest in punishing promiscuity and promoting morality, but concluded:

> [I]t does not appear to be any part of the public policy of the Commonwealth, as declared by the Legislature, to permit venereal disease to spread unchecked *even among those who indulge in illicit sexual intercourse.* It is now recognized that

106. Eisenstadt v. Baird, 405 U.S. 438 (1972).
107. Brief for the Appellee at 6–7, Eisenstadt v. Baird, 405 U.S. 438 (1972) (No. 70-17).
108. *Id.* at 8–10.
109. *Id.* at 8.
110. Eisenstadt v. Baird, 405 U.S. 438, 442 (1972).

> venereal disease cannot be confined to the guilty, but may afflict innocent wives or husbands, innocent children in whom it is congenital, and innocent victims of contact with diseased persons or the germs of disease apart from sexual intercourse. Statutes show that the policy of the Commonwealth is to endeavor to check the spread of venereal disease."[111]

Deprived of a disease-based health argument, the appellees were forced to argue that pregnancy itself was a health issue that impacted individuals' right to well being.[112]

Meanwhile, the State argued that the case involved no legitimate individual health interests because individuals had no right to engage in non-marital sex, and therefore could not complain for harm suffered as a result of engaging in such behaviors.[113] As the State argued in its brief, "The court below has adopted the specious argument of Baird that there is some 'right' of the unmarried to have sexual intercourse free of unwanted pregnancy. Such a right does not exist except by an attempted judicial fiat."[114] The State also argued that unmarried individuals had no health interest in consulting with physicians about family planning methods because unmarried individuals had no *legitimate* interest in having sex at all:

> The court below attempted to ridicule the "health argument" by asserting the "right" of the unmarried to the same professional assistance of physicians as afforded the married, and by characterizing the denial of professional help to the unmarried, "grossly discriminating." This argument is fallacious because it is predicated on the totally untenable ground that the unmarried have a "right" to indulge in the act of sexual intercourse which creates the need for professional contraceptive advice. This right just does not exist.
>
> One might think after reading the opinion of the court below that an unmarried person required this type of professional advice and service as a result of accidentally contracting typhoid fever or diphtheria. It becomes important to remind ourselves that an unmarried person needs this type of professional advice only if he violates or contemplates the violation of the law.[115]

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111. Commonwealth v. Corbett, 29 N.E.2d 151, 152 (Mass. 1940) (emphasis added).

112. *See* Brief for the Appellee at 8-11, Eisenstadt v. Baird, 405 U.S. 438 (1972) (No. 70-17) (outlining the negative consequences of pregnancy, including maternal, infant mortality, and poor health outcomes for illegitimate offspring).

113. Brief for the Appellant at 16, Eisenstadt v. Baird, 405 U.S. 438 (1972) (No 70-17).

114. *Id*. at 16–17 (citing Poe v. Ullman, 367 U.S. 497, 553 (1961)).

115. *Id*. At the time of this litigation, Massachusetts had a statute making fornication a

Thus, the State attempted to characterize the individual's interest as simply the interest of engaging in non-marital, non-procreative sex—in other words, the State characterized the individual's interest as the desire to engage in sex-for-pleasure outside of wedlock. And that interest, according to the State, held no legal weight.[116]

The Supreme Court accepted the appellee's argument that individuals, including unmarried ones, had a significant interest in deciding whether or not to use their bodies for procreation.[117] The Court noted:

> Appellant insists that the unmarried have no right to engage in sexual intercourse and hence no health interest in contraception that needs to be served. The short answer to this contention is that the same devices the distribution of which the State purports to regulate when their asserted purpose is to forestall pregnancy are available without any controls whatsoever so long as their asserted purpose is to prevent the spread of disease. It is inconceivable that the need for health controls varies with the purpose for which the contraceptive is to be used when the physical act in all cases is one and the same.[118]

The Court also noted that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[119]

In *Carey*, the Court followed *Eisenstadt*'s lead by focusing on the individual's interests in avoiding unwanted pregnancy and sexually transmitted diseases.[120] In particular, the *Carey* Court applied those interests to juveniles, despite the social and legal stigma applied to sexual promiscuity among underage individuals. The Court overturned a New York statute that: 1) criminalized the dispensation of contraceptives to

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misdemeanor, which meant that unmarried individuals who engaged in sexual intercourse were technically violating the law. M.G.L.A. 272 § 18. That law remains on the books. *Id.*

116. *Id*.

117. Eisenstadt v. Baird, 405 U.S. 438, 448–53 (1972).

118. *Id.* at 451 n.8.

119. *Id.* at 453. The First Circuit had gone further, stating: "To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state." Baird v. Eisenstadt, 429 F.2d 1398, 1402 (1st Cir. 1970), *aff'd*, 405 U.S. 438 (1972).

120. Carey v. Population Services Int'l., 431 U.S. 678, 685 (1977).

individuals under 16 years of age; 2) required that a pharmacist dispense all contraceptives; and 3) made it a crime for anyone, including licensed pharmacists, to advertise or display contraceptives.[121]

With respect to the individual interests implicated by the provision requiring that pharmacists dispense all contraceptives, the *Carey* Court took cues from *Griswold*, *Eisenstadt*, and *Roe* and focused on "the constitutionally protected right of decision in matters of childbearing."[122] This right, as understood by the *Carey* Court, had little to do with any individual interest in sexual freedom. Indeed, the *Carey* Court explicitly declined to ground its holding in the concept of sexual privacy, noting:

> Contrary to the suggestion advanced in Mr. Justice Powell's opinion, we do not hold that state regulation must meet this standard "whenever it implicates sexual freedom," or "affect(s) adult sexual relations," but only when it "burden(s) an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision." As we observe below, "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating (private consensual sexual) behavior among adults," and we do not purport to answer that question now.[123]

For the *Carey* Court, the important issue was whether the regulation unduly burdened the individual's right to control procreation. "Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."[124] Accordingly, the majority applied heightened scrutiny to the case not because the regulation implicated sexual freedom but, instead, because heightened scrutiny was required where a regulation "burden(s) an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision."[125]

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121. *Id.* at 681–82. *Carey* involved a challenge to the constitutionality of the New York statute brought by distributors of contraceptives. *Id*. As in *Griswold* and *Eisenstadt*, the contraceptive distributors had standing to assert the rights of individuals who wished to use contraception—or, in other words, of individuals who wanted to engage in non-procreative intercourse. *Id.* at 682–83. The Court found that the first two provisions of the statute violated the Due Process Clause of the Fourteenth Amendment and that the third provision violated the right to freedom of speech under the First Amendment. *Id.* at 690–91, 701.

122. *Id.* at 688.

123. *Id.* at 688 n.5 (footnotes and citations omitted).

124. *Id.* at 687.

125. *Id.* at 688.

With regard to the provision criminalizing the dispensation of contraceptives to individuals younger than sixteen, the Court's emphasis on medical concerns becomes more apparent.[126] As an initial matter, the Court noted that although minors did possess constitutional rights, the protection offered by those rights might not be as broad for minors as it is for adults.[127] Furthermore, the State has greater authority to control the conduct of children than it does to regulate adult behavior.[128] Thus, a minor's interest in freedom to decide whether to bear children may not be as strong as an adult's interest in making the same decision.[129]

In addition to the general right to make decisions related to the use of one's body to beget children, the appellees asserted two other health-related factors—the increased risk of injury to mother and baby posed by teen pregnancies and the transmission of venereal disease through unprotected sexual conduct.[130] Amici for the appellees introduced evidence showing that "[t]he medical risks associated with pregnancy are significantly higher for women under twenty and increase dramatically with decreasing age."[131] Amici asserted:

> Special medical risks to the young girl and the infant she bears are much higher than for older mothers. The risk that infants born to very young mothers will be stillborn or die soon after birth is extremely high . . . .
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> . . . .

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126. *Id.* at 697.

127. *Id.* at 692.

128. *Id.*; *see also* Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (explaining that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults"); George v. United States, 196 F.2d 445, 453 (9th Cir. 1952) (noting that "minority as a special classification has always had judicial sanction").

129. *Carey*, 431 U.S. at 692.

130. Brief for Appellees at 8, 27, 35, n. 15, 38-40, 44-47, Carey v. Population Services Int'l, 431 U.S. 678 (1977) (No. 75-443), 1976 WL 178657.

131. Brief for Planned Parenthood Federation of America, Inc. et al. as Amicus Curiae Supporting Appellees at 18, Carey v. Population Services Int'l, 431 U.S. 678 (1977) (No. 75-443), 1976 WL 194148. The amicus brief went on to detail the increased health risks attendant on minor pregnancies. "The maternal death rate from complications of pregnancy, birth and delivery for teenagers under the age of fifteen is 1.6 times that of women in their early twenties. Moreover, teenagers under the age of fifteen are 3 1/2 times as likely to die as a result of toxemia associated with pregnancy. Alan Guttmacher Institute, *supra*, at II.16. Infant mortality and medical risks are also considerably higher for babies born to teenagers in the younger age groups. For first babies, the infant mortality rate during the first year is 3.3 times higher for babies born to teenagers under fifteen than to women in their early twenties. The mortality rate during the first year for all babies born to women ten to fourteen years of age is 2 1/2 times the mortality rate for infants of women over twenty. Low birth weight, a major cause of childhood illness and birth injuries including neurological defects, as well as of infant mortality, is also more common in infants born to young teenagers than to women in their early twenties. For teenagers under fifteen the incidence of low birth weight is 2 1/2 times greater." *Id.* at 18–19.

> Infants of very young mothers who do survive are much more likely to suffer serious mental and physical defects.[132]

Thus, for minors, the interest in decisions relating to procreation became more explicitly health-related. Rather than simply implicating the right to decide whether or not to bear a child, the regulation potentially exposed minors to an increased risk of catastrophic health consequences for themselves and their offspring.[133]

Appellees also contended that the use of contraceptives reduced the risk not just of pregnancy, but also of acquiring sexually transmitted diseases.[134] They argued that sexually active minors had a significant risk of contracting a sexually transmitted infection, and that limiting access to contraceptives significantly exacerbated that risk. [135] They concluded that "[t]he effect of this statute is to attempt to deter teenage sexual conduct by potentially punishing fornication with venereal disease . . . ."[136]

A plurality of the Court held that control over procreation was a fundamental right,

> confirm[ing] the principle that when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.[137]

The plurality also expressed concern about the contention that the State could regulate minors' morality by increasing the risks attendant on the objectionable behavior:

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132. Brief for the American Civil Liberties Union as Amicus Curiae Supporting Appellees at 5, 7, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (No. 75-443), 1976 WL 178660.

133. *See generally* Briefs for Appellees and their Amici, *supra* notes 130–32.

134. Brief for Appellees at 8 n.14, 27 nn. 35, 39 & 44-47, *Carey*, 431 U.S. 678 (1977) (No. 75-443).

135. Brief for the American Civil Liberties Union as Amicus Curiae Supporting Appellees at 8, *Carey*, 431 U.S. 678 (1977) (No. 75-443) ("There is a high incidence of venereal disease among young people which could be prevented by the use of condoms. In 1975, 303 cases of gonorrhea and syphilis were detected in youngsters under the age of 15 in New York City. For the 15-19 age group, 8,350 cases of gonorrhea and syphilis were reported. Indeed, in response to these alarming venereal disease data, New York State law has been amended to permit physicians to treat minors of any age for venereal disease regardless of their parents' knowledge or consent.").

136. Brief for Appellees at 44, *Carey*, 431 U.S. 678 (1977) (No. 75-443).

137. *Carey*, 431 U.S. at 696.

> Appellants argue, however, that significant state interests are served by restricting minors' access to contraceptives, because free availability to minors of contraceptives would lead to increased sexual activity among the young, in violation of the policy of New York to discourage such behavior. The argument is that minors' sexual activity may be deterred by increasing the hazards attendant on it. The same argument, however, would support a ban on abortions for minors, or indeed support a prohibition on abortions, or access to contraceptives, for the unmarried, whose sexual activity is also against the public policy of many States. Yet, in each of these areas, the Court has rejected the argument, noting in *Roe v. Wade*, that "no court or commentator has taken the argument seriously." The reason for this unanimous rejection was stated in *Eisenstadt v. Baird*. "It would be plainly unreasonable to assume that [the State] has prescribed pregnancy and the birth of an unwanted child [or the physical and psychological dangers of an abortion] as punishment for fornication." We remain reluctant to attribute any such "scheme of values" to the State.[138]

The plurality thus recognized the psychological and physical risks of pregnancy and expressed concern about the propriety of increasing those risks as punishment for failing to adhere to the state's moral vision.

Interestingly, the concurring Justice who most conspicuously rejected minors' interest in sexual pleasure also devoted the most attention to the minors' medical interests.[139] After concluding that the statute at issue failed even rational basis scrutiny, the appellees added: "Indeed, there is room for doubt whether the State enjoys any legitimate interest in maintaining legislation of this character for the purpose of fostering a particular moral climate."[140] The majority took note of the appellees' assertion and left it an open question whether the State could legitimately legislate with the purpose of discouraging sexual activity.[141]

Justice Stevens, by contrast, declared at the outset of his concurrence that he "would describe as 'frivolous' appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State."[142] After openly rejecting the contention that minors have any right to sexual

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138. *Id.* at 694–95 (citations omitted) (quoting Roe v. Wade, 410 U.S. 113, 148 (1973); Eisenstadt v. Baird, 405 U.S. 438, 448 (1972)).

139. *Id*. at 715–16 (Stevens, J. concurring).

140. Brief for Appellees at 43, *Carey*, 431 U.S. 678 (1977) (No. 75-443).

141. *Carey*, 431 U.S. at 694, n.17.

142. *Id*. at 713 (Stevens, J. concurring).

pleasure, Justice Stevens focused heavily on the potential health consequences of restricting access to contraceptives for many juveniles who "will engage in sexual activity regardless of what the New York Legislature does."[143] He emphasized that the New York statute imposed increased health consequences on minors, noting, "[t]he statutory prohibition denies them and their parents a choice which, if available, would reduce their exposure to disease or unwanted pregnancy."[144] Justice Stevens' concurrence positioned this interest in avoiding increased health risks as the primary individual interest implicated by the statute.[145]

The Court's assessment of the individual interests implicated by the New York statute was therefore heavily entwined with issues of bodily health and well being. The majority (with respect to the pharmacist provision) and the plurality (with respect to the provision relating to minors) relied primarily on the individual's interest in being able to decide whether or not to use her body to bear children.[146] As discussed above, this interest is, in large part, a physical one. Justice Stevens also focused on the increased health risks attendant to teenage pregnancy and the dangers of venereal disease.[147]

Thus, the individuals in *Roe*, *Carey*, and *Eisenstadt* all presented medical arguments about the impacts of the challenged statutes. Many of the individuals also made more sweeping arguments about the existence of a general right to sexual privacy. But the courts, in overturning the statutes, relied heavily on a medicalized understanding of the individual interests at issue—conceptualizing pregnancy in terms of risk, and sex in terms of unwanted conception and disease.

3. Demedicalizing the State Interest

In *Eisenstadt* and *Carey*, the State attempted to assert health rationales for the statutes at issue.[148] In each of these cases, the individuals argued that the State's purported health interests were not rationally related to the

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143. *Id.* at 714.

144. *Id.*

145. *See id.* at 714 (arguing that the statute selectively endangers minors, who will engage in sex whether or not they can procure contraceptives).

146. *Carey*, 431 U.S. at 687–88 (majority opinion).

147. *Id*. at 714–15 (Stevens, J. concurring).

148. Brief for the Appellant at 11–14, *Eisenstadt*, 405 U.S. 438 (1972) (No. 70-17) (quoting Baird v. Eisenstadt, 310 F. Supp. 951, 954 (D. Mass. 1970)); Brief for Appellant at 14, 16–17, *Carey*, 431 U.S. 678 (1977) (No. 75-443).

statutes.[149] Instead, the asserted health interests were portrayed as mere pretenses for what was, in truth, moralistic legislation.[150] And, in both of these cases, the Court accepted that the States' goals in enacting the statutes were in fact moral, rather than public health related.[151] Thus, these cases provide examples of the successful demedicalization of state interests by refuting the asserted public health interest served by the statute and exposing the true moral bent of the legislation.

In *Eisenstadt*, the State characterized its contraception statute as related to public health in two ways. First, it asserted that the use of contraception required individuals to seek medical advice in order to avoid adverse health consequences.[152] This provided a health rationale for the statute's requirement that married people obtain contraception for family planning by prescription only. The State noted that: "Medical authorities indicate that professional advice is needed at the outset, in order to determine the best method of contraception to be employed, and to insure its suitability."[153] The State asserted that this concern extended to nonprescription contraceptives such as condoms and spermicidal foams and jellies.[154] According to the State, Baird's distribution of spermicide represented "a tacit recommendation that it is to be preferred by the recipient to some other method of contraception. This recommendation calls for a professional judgment."[155] Furthermore, even seemingly innocuous contraceptives like spermicidal jelly and condoms could cause "irritation," which the State appeared to consider a notable medical risk.[156] The State asserted:

> With the possibility of such effects being caused by the contraceptive devices mentioned, it, then, cannot be doubted that "The statutes in question have a clear relationship to the legislative purpose of safeguarding the health of the community

149. *See, e.g.*, Brief for the Appellee at 30–31, *Eisenstadt*, 405 U.S. 438 (1972) (No. 70-17); Supplemental Brief for the Appellee at 8, Eisenstadt v. Baird, 405 U.S. 438 (1972) (No. 70-17); Brief for Appellees at 32, 34 n.14, *Carey*, 431 U.S. 678 (1977) (No. 75-443).

150. *See* Brief for the Appellee at 6–7, 15 n.19, *Eisenstadt*, 405 U.S. 438 (1972) (No. 70-17) (noting that "[t]he argument of the moralist is no more effective against the unalienable right of the citizen to protect his health or life, than it was in its assault on the sanctity of the marriage relationship concerned in the *Griswold* case" and questioning whether requiring a prescription for contraception was simply "a covert way of discouraging use in order to soothe the feelings of the moralist"); Supplemental Brief for the Appellee at 8, *Eisenstadt*, 405 U.S. 438 (1972) (No. 70-17); Brief for Appellees at 41–42, *Carey*, 431 U.S. 678 (1977) (No. 75-443).

151. *Carey*, 431 U.S. at 690–91; *Eisenstadt*, 405 U.S. at 450.

152. Brief for the Appellant at 11–14, *Eisenstadt*, 405 U.S. 438 (1972) (No. 70-17).

153. *Id*. at 11.

154. *Id.* at 12.

155. *Id.* at 12–13.

156. *Id.* at 12.

> by placing the distribution of such substances exclusively in the hands of registered physicians and pharmacists. The statutes therefore can reasonably be regarded as furthering an important and substantial governmental interest." Under the circumstances, the state would be remiss in its obligations if it did not prevent distribution of contraceptive devices indiscriminately by nonprofessional persons.[157]

Thus, the State asserted that its requirement that married persons seek a prescription even for nonprescription contraceptives was firmly grounded in a legitimate interest in public health and welfare.[158]

Second, while admitting that the proscription on contraception for unmarried persons primarily served a moral interest, the State asserted that it also served the public health in a broad sense by encouraging chastity amongst the unmarried.[159] The State cited *Commonwealth v. Allison* with approval:

> The statutes under which the several counts in this indictment are drawn contravene no provision of the constitution. Manifestly they are designed to promote the public morals and in a broad sense the public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women. The subject matter is well within one of the most obvious and necessary branches of the police power of the State.[160]

The suppression of non-marital promiscuity was thus portrayed as serving the State's interest in promoting public health.

The appellee challenged the State's contention that the statute furthered the State's legitimate interests in public health. Appellee noted:

> [Condoms and spermicides] are unanimously considered to be non-prescriptive in nature and that the Massachusetts Statutes fail to acknowledge the fact that condoms and foams do not require the approval of a medical expert. Moreover, it cannot be argued,

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157. *Id.* at 13–14 (citation omitted) (quoting Baird v. Eisenstadt, 310 F. Supp. 951, 954 (D. Mass. 1970)).

158. *Id*.

159. *Id.* at 15–17 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

160. *Id*. at 15 (quoting Commonwealth v. Allison, 116 N.E. 265, 266 (Mass. 1917)).

> other than in a tenuous concept of morality, that the use of a contraceptive itself results in any injury.[161]

Furthermore, the appellee pointed to the fact that "all of the Massachusetts cases have consistently taken the view that this legislation is designed to improve the public morals and prevent 'sexual immorality'. . . ."[162] He continued:

> The Attorney General of the Commonwealth of Massachusetts seeks to justify his state's statutes by reference to traditional police powers designed to protect the health, welfare and morals of its citizens . . . In so doing, the Attorney General has ignored the reasoning of the Circuit Court below which specifically found that the statutes, if supportable at all, could only be viewed as attempts to legislate morality:
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> > . . . [it] is impossible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married. If there could be any doubts, it is to be noted that health protection, even for the married, had no place prior to the 1966 amendment. The legislature intended just the opposite. Consistent with the fact that the statute was contained in a chapter dealing with 'Crimes Against Chastity, Morality, Decency and Good Order,' it was cast only in terms of morals.
>
> The appellee reiterates that these statutes are designed solely to affect the morals of Massachusetts citizens.[163]

The appellee's arguments illustrate his attempt to demedicalize the State's interests by reframing them as moral rather than medical.

The First Circuit and the Supreme Court agreed with Baird and concluded that the statute was not, at its heart, a health measure.[164] The First Circuit declared, "it is impossible to think of the statute as intended as a

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161. Brief for the Appellee at 30–31, *Eisenstadt*, 405 U.S. 438 (1972) (No. 70-17).

162. *Id*. at 21.

163. Supplemental Brief for the Appellee at 8, *Eisenstadt*, 405 U.S. 438 (1972) (No. 70-17) (quoting Baird v. Eisenstadt, 429 F. 2d 1398, 1401 (1st Cir. 1970)).

164. Eisenstadt v. Baird, 405 U.S. 438, 450 (1972); Baird v. Eisenstadt, 429 F.2d 1398, 1401 (1st Cir. 1970), *aff'd*, 405 U.S. 438 (1972).

health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married."[165] Indeed, the original version of the statute was contained in the chapter dealing with "Crimes Against Chastity, Morality, Decency and Good Order" and was phrased entirely in moral terms.[166] Both courts concluded that "despite the statute's superficial earmarks as a health measure," the statute actually served no legitimate health purpose.[167]

The State in *Carey* also attempted to assert a variety of health-related interests to justify the challenged regulation. With respect to the pharmacist provision, the State asserted interests in protecting contraceptives from tampering and ensuring that consumers could consult a knowledgeable source (the pharmacist) as to the relative merits of the products.[168]

The appellees strongly challenged the State's asserted medical interests in restricting contraceptive sales to pharmacies,[169] and the Court agreed that none of the State's asserted medical interests rang true.[170] As in *Eisenstadt*, the Court took notice of the fact that "not all contraceptives are potentially dangerous."[171] The Court then dismissed the contention that requiring a pharmacist to dispense "nonmedical" contraceptives (i.e. condoms, spermicide, etc.) was in any way related to the legitimate state interest of maintaining medical standards.[172] The Court similarly eviscerated the State's contention that a pharmacist would prevent tampering or provide consumers with meaningful advice:

> Nothing in the record suggests that pharmacists are particularly qualified to give advice on the merits of different nonmedical contraceptives, or that such advice is more necessary to the purchaser of contraceptive products than to consumers of other nonprescription items. Why pharmacists are better able or more inclined than other retailers to prevent tampering with prepackaged products, or, if they are, why contraceptives are singled out for this special protection, is also unexplained.[173]

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165. *Baird*, 429 F.2d at 1401.
166. *Id.*
167. *Eisenstadt*, 405 U.S. at 452.
168. Brief for Appellant at 14, *Carey*, 431 U.S. 678 (No. 75-443).
169. *Id.* at 32.
170. Carey v. Population Servs. Int'l, 431 U.S. 678, 690–91 (1977).
171. *Id*. at 690 n.8.
172. *Id*. at 690.
173. *Id*. at 691.

Thus, the Court rejected all of the State's asserted medical interests in requiring contraceptives to be dispensed by a pharmacist and held that the provision furthered no legitimate State interest.[174]

The State asserted two interests to justify the provision criminalizing dispensation of contraceptives to persons younger than sixteen: preventing teen pregnancy and stemming the spread of venereal disease by reinforcing societal disapproval of promiscuous sex among underage individuals.[175] The State asserted that decriminalizing contraception for minors under sixteen would send the message that having sex at that age was socially acceptable, thus increasing rates of teen sex and posing a significant health risk.[176] "New York rationally has determined that unregulated exposure of minors to contraceptives, as argued for by appellees, instead of decreasing out-of-wedlock births and venereal diseases, as appellees contend, would increase them since such complete exposure would sanction and as a result encourage sexual intercourse by young children."[177] The State also analogized to narcotics to stress that criminalization served public health interests by stigmatizing the unwanted behavior: "Dr. Gaylin gives as an example the liberalization of the narcotic laws in England. There was an increase in addiction among younger, healthier individuals. He says the same thing is happening with marijuana. . . . The point is that legalizing it would enhance its chances of becoming a social institution."[178]

The appellees vigorously disputed the State's contention that access to contraceptives would increase rates of teen sex, venereal disease, or pregnancy.[179] Appellees pointed to studies showing that laws had a negligible effect on teens' sexual decision-making, as teens' decisions about sex were based on personal preferences.[180] They also noted that the State had admitted to the lower court that "there is no evidence that teenage extramarital sexual activity [increases] in proportion to the availability of contraceptives . . . ."[181] Appellees thus disagreed that the statute served a compelling state interest in promoting health, declaring that "[t]he cruel paradox of the New York law is that it is in fact an *anti*-health measure. By limiting access to condoms-an effective preventive measure against syphilis

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174. *Id*. at 690.

175. Brief for Appellant at 16–17, *Carey*, 431 U.S. 678 (No. 75-443).

176. *Id*.

177. *Id*.

178. *Id.* at 18 (quoting William M. Gaylin, M.D., Book Reviews, *The Prickly Problems of Pornography*, 77 YALE L.J. 579, 595 (1968)).

179. Brief for Planned Parenthood Fed'n of America, Inc. et al. as Amicus Curiae Supporting Appellees at 13–19, *Carey*, 431 U.S. 678 (No. 75-443).

180. *Id*.

181. *Id.* at 13.

and gonorrhea-this law contributes to the spiraling epidemic of venereal disease and the increase of unwanted births to female adolescents."[182]

The Court in turn rejected the State's argument that availability of contraceptives would encourage sexual activity by minors, thus increasing rates of venereal disease and unwanted pregnancy.[183] The Court, while noting that the State did have a legitimate interest in discouraging "promiscuous sexual intercourse among the young," found that no part of the statute actually furthered any state health interest.[184] Thus, the State's only remaining interest was in promoting morality.[185]

In *Roe*, on the other hand, the Court did not completely reject the State's purported health interest in protecting women from undergoing dangerous procedures.[186] But the Court did limit that interest.[187] In particular, the Court found that medical technology had greatly reduced the riskiness of undergoing an abortion.[188] In so holding, the Court relied on medical data submitted by the appellants and their amici, which demonstrated that mortality rates for first trimester abortions were lower than for normal childbirth.[189] "Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared."[190] The Court thus rejected the idea that banning first trimester abortions would serve the State's interest in protecting women's health.[191] It did recognize, however, that the State's interest in protecting maternal health could justify some regulation during the second trimester.[192]

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182. Brief for Appellees at 34 n.14, *Carey*, 431 U.S. 678 (1977) (No. 75-443).

183. Carey v. Population Servs. Int'l, 431 U.S. 678, 694–95 (1977).

184. *Id*. at 692, 696.

185. *Id*. at 690–91.

186. Roe v. Wade, 410 U.S. 113, 150 (1973).

187. *Id*. at 149–50.

188. *Id*.

189. *Id*. at 149 (citing, e.g., Potts, Postconceptive Control of Fertility, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Mortality 208, 209 (June 12, 1971) (U.S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States: Therapeutic Abortions, 1963–1968, 59 Studies in Family Planning 5, 7 (1970)).

190. *Id*.

191. *Id*. at 149–50.

192. *See id*. at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."). The Court in *Roe* also recognized the existence of an entirely different state interest—that of protecting fetal life—which became compelling at the point of viability. *Id.*

4. Balancing the Interests

Once the courts in these cases determined whose version of the interests at stake to accept, they looked closely at the relationship between the statutes, the statutes' goals, and the statutes' impacts on individuals. Because the contraception statutes at issue impacted a fundamental right, the State had to demonstrate that the provision was narrowly tailored to further a compelling state interest.[193] "'Compelling' is of course the key word, where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[194]

The Supreme Court in *Eisenstadt* concluded that the statute at issue did not serve any state interest in health.[195] With regard to the State's interest in morality, particularly its interest in discouraging premarital sex, the Court concluded that the statute was not reasonably related to the State's moral goals.[196] In particular, the Court took issue with the idea that the State would seek to punish immoral sexual behavior with pregnancy.[197] "It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication . . . ."[198] The Court of Appeals concluded:

> To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state.[199]

Although the Supreme Court declined to explicitly endorse the Court of Appeals' conclusion that the State could not deem contraceptives immoral as such, it nonetheless held that any right to contraception must be the same

193. Carey v. Population Services Int'l, 431 U.S. 678, 685–86 (1977).
194. *Id*. at 686.
195. Eisenstadt v. Baird, 405 U.S. 438, 450 (1972).
196. *Id*. at 448–49.
197. *Id*.
198. *Id*. at 448.
199. Baird v. Eisenstadt, 429 F.2d 1398, 1402 (1st Cir. 1970), *aff'd*, 405 U.S. 438 (1972).

for married and unmarried individuals.[200] And both courts were uneasy about the notion that the State could seek to punish "immoral" pleasure-seeking behavior by exposing wrongdoers to unwanted pregnancy and disease.[201]

In *Carey,* the Court concluded that the pharmacy provision failed to pass constitutional muster.[202] Indeed, under the Court's analysis, the pharmacy provision was not reasonably related to any legitimate state interest.[203] Instead, it needlessly burdened the individual's right to be free from disease and unwanted pregnancy.[204]

The Court had more trouble disposing of the provision criminalizing dispensation of contraceptives to minors younger than sixteen, and declined to clarify what standard of review it chose to apply.[205] The resulting analysis was fractured, with four justices joining Part IV of the main opinion and Justices White, Powell, and Stevens concurring separately.[206] But both the plurality and Justice Stevens took issue with the idea that the State could impose health risks on children as a means of promoting the State's moral agenda.[207] As in *Eisenstadt*, the Court rejected the argument that the State may attempt to deter sexual activity by increasing the hazards attendant on it.[208] Justice Stevens, concurring, explained the problem in greater detail:

> It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse. Even as a regulation of behavior, such a statute would be defective. Assuming that the State could impose a uniform sanction upon young persons who risk self-inflicted harm by operating motorcycles, or by engaging in sexual activity, surely that sanction could not take the form of deliberately injuring the cyclist or infecting the promiscuous child . . . . This kind of government-mandated harm, is, in my judgment, appropriately characterized as a deprivation of liberty without due process of law.[209]

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200. *Eisenstadt*, 405 U.S. at 453–55.
201. *Id*. at 448; *Baird*, 429 F.2d at 1402.
202. Carey v. Population Servs. Int'l, 431 U.S. 678, 690–91 (1977).
203. *Id*.
204. *Id*. at 689–90.
205. *Id*. at 693, n.15.
206. *Id*. at 691 (majority opinion), 702–03 (White, J. concurring), 712 (Stevens, J. concurring).
207. *Id*. at 695, 714 (Stevens, J. concurring).
208. *Id*. at 694–95 (majority opinion).
209. *Id*. at 715-16 (Stevens, J. concurring).

In other words, despite the fact that states have a legitimate interest in enforcing morality, they cannot impose increased health risks on individuals as punishment for disregarding preferred sexual morays.[210] Importantly, deterring behavior by increasing the harms attendant upon it was illegitimate state action even where there was no clear constitutional right to engage in the activity in question (in this case, sex by minors).[211]

Finally, in *Roe v. Wade*, the Court arrived at a three-tiered result that recognized the competing interests involved.[212] With regard to the first trimester, the Court concluded that the State lacked any compelling interest in regulating or banning abortion.[213] During the first trimester, therefore, the State could not intrude on the woman's interest in controlling procreation and the sanctity of her relationship with her physician.[214] At the end of the first trimester, the State's interest in protecting the health of the mother became compelling.[215] The State could therefore regulate abortion as long as such regulations were narrowly tailored to protect maternal health.[216] Finally, at viability, the State's interest in protecting fetal life became compelling, allowing the State to proscribe abortion, except when necessary to preserve the health or life of the mother.[217]

5. Takeaway

Roe v. Wade demonstrates how the medicalization of pregnancy can affect the Court's understanding of the interests at stake. In particular, the tiered holding in *Roe* reflects the highly medicalized nature of that decision—each point at which a state interest became "compelling" was determined by medical evidence about the comparative risks of childbirth and abortion, and about a fetus' potential to survive outside of the womb.[218] By conceptualizing pregnancy as a medical issue, the Court was able to analyze abortion as a medical problem rather than an ethical quandary. The portrayal of pregnancy as a medical condition, rather than a "divine mission," meant that the decision to keep or terminate a pregnancy did not

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210. *Id*. at 695 (majority opinion), 714 (Stevens, J. concurring).

211. *Id*. at 694 n.17 (majority opinion), 702-03 (White, J. concurring), 713 (Stevens, J. concurring).

212. Roe v. Wade, 410 U.S. 113, 162–63 (1973).

213. *Id*. at 163.

214. *Id*.

215. *Id*.

216. *Id*.

217. *Id*.

218. *Id*. at 162–63.

implicate divine or moral law.[219] Focusing extensively on medical reasoning thus allowed the Court to overturn the abortion ban while avoiding stickier issues, such as the existence of a right to engage in non-procreative sex, women's rights, or fetal personhood.[220]

The contraception cases illustrate the usefulness of portraying the individual interest as medical and of exposing the fact that the statute at issue fails to further legitimate state interests in promoting public health. In particular, these cases stand for the proposition that a state cannot discourage "immoral behavior" by increasing the health risks attendant on such behavior. Courts found abhorrent the idea that a state could punish irresponsible sexual behavior by imposing unwanted pregnancy or disease on its citizens. No court challenged the notion that sex-for-pleasure might be morally wrong, but criminal laws that threatened sickness and pregnancy in pursuit of morality could not stand.

C. Pleasure as Medicine: The "Obscene Devices" Cases

1. Background

The "obscene devices" cases involved challenges to statutes criminalizing the distribution or promotion of devices "designed or marketed as useful primarily for the stimulation of human genital organs."[221] These cases involve the second form of medicalization, in which individuals assert that the statute impacts their interest in receiving treatment for a preexisting medical condition. These cases demonstrate how the legitimacy of criminalizing pleasurable behavior (or items) can turn on whether courts characterize the behavior as being undertaken for the purpose of pleasure or, alternatively, as being done for medical reasons. In order to recast the behavior as therapeutic, the individual interest at stake must be "elevated" from an interest in pleasure to an interest in medical treatment. If the court accepts that re-characterization of the individual interest, and views the behavior as therapeutic, then its recreational or pleasurable consequences are relegated to the status of mere "side effects."[222]

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219. Rowland, *supra* note 86, at xxiv.

220. *Cf. Roe*, 410 U.S. at 159 ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

221. Kansas v. Hughes, 792 P.2d 1023, 1027 (Kan. 1990) (citing KAN. STAT. ANN. § 21-4301 (repealed 2010)); Louisiana v. Brenan, 772 So. 2d 64, 67 (La. 2000).

222. *See* RACE, *supra* note 29, at 2–9 ("[T]he proposition that one might actually experience

This section will explore the role of medicalization in the context of challenges to statutes criminalizing the distribution and promotion of "obscene devices." In particular, this section will focus on early cases that addressed statutes which failed to provide any exception for medical or therapeutic use of the devices. *Kansas v. Hughes*[223] and *Louisiana v. Brenan*[224] invalidated these statutes on the grounds that they impermissibly burdened the use of such devices for therapeutic reasons. Two later "obscene devices" cases, *Williams v. Attorney General of Alabama* [225] and *Reliable Consultants*[226] (each of which address statutes with express exemptions for the medical use of these devices) depart from a medicalized framework and reach differing conclusions. These cases will be explored in Part V.

Hughes and *Brenan* involved similar statutes that criminalized the distribution or promotion of "obscene devices."[227] Both challenges were brought by individuals who had been convicted of distributing "obscene devices" under the statutes.[228] The individuals asserted the rights of their customers to have access to such devices.[229] The "obscene devices" at issue in both cases included vibrators, dildos, and inflatable dolls.[230] The similarity of the statutes at issue and the parallels between the courts' analyses make it possible to explore both cases simultaneously. *Hughes* and *Brenan* both provide a valuable illustration of the effectiveness of recharacterizing an individual interest in pleasure as an interest in receiving medical treatment.

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pleasure while consuming medicine seems slightly absurd. Indeed, it's easy to arrive at the conclusion that pleasure is precisely what should *not* be had in such activity. It is as though the two terms act, or should act, to cancel each other out. . . . To acknowledge pleasure here would seem to betray the self that medicine must contain in its effort to produce a properly objective body, so pleasure is performatively banished from the clinic . . . . Of course, pleasure might be experienced as a corollary of restoring health. One could even be excused for feeling good about such a prospect . . . . When medicines are conceived in the supposedly benign terms of restoring an essential nature, their *surplus effects* recede from view.").

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

224. *Brenan*, 772 So. 2d at 75.

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

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

227. In *Hughes*, an "obscene device" is defined as "a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs." *Hughes,* 792 P.2d at 1027 (citing KAN. STAT. ANN. § 21-4301 (repealed 2010)). In *Brenan*, obscene device was defined almost identically as "a device, including an artificial penis or artificial vagina, which is designed or marketed as useful primarily for the stimulation of human genital organs." *Brenan*, 772 So. 2d at 67.

228. *Brenan*, 772 So. 2d at 65; *Hughes*, 792 P.2d at 1024.

229. *Brenan*, 772 So. 2d at 68 n.2; *Hughes*, 792 P.2d at 1029.

230. *Brenan*, 772 So. 2d at 66; *Hughes*, 792 P.2d at 1025.

2. Medicalizing the Individual Interest

In any significant discussion about sex toys one might reasonably expect some mention of pleasure. But alas, such an expectant reader would be sorely disappointed by the analyses in *Hughes* and *Brenan*. Both courts steadfastly ignore any discussion of an individual interest in sexual pleasure.[231] Neither court suggests that an individual interest in pleasure might present a legitimate obstacle to criminalization of these devices, and neither court embraced a general right to sexual privacy.[232]

Instead, both courts focused on medicine.[233] They relied heavily on expert testimony about the usefulness of vibrators and other devices in treating women with arousal dysfunction, pelvic floor diseases, atrophy, or incontinence.[234] The courts also relied on the fact that vibrators were originally developed for medical purposes and on the existence of FDA regulations concerning "powered vaginal muscle stimulators" and "genital vibrators" for the treatment of sexual dysfunction.[235]

Indeed, the courts discussed orgasm only as it related to sexual dysfunction.[236] The court in *Hughes* relied heavily on the testimony of an expert, Dr. Mould, who asserted that "anorgasmic women may be particularly susceptible to pelvic inflammatory diseases, psychological problems, and difficulty in marital relationships."[237] The expert likened the use of "obscene devices" to treat anorgasmic women to the use of other types of vibrators to treat patients with cerebral palsy.[238] The language of the *Hughes* court reflected the importance it placed on the notion of treatment—it referred to the medical uses of the devices as "legitimate," insinuating that other, non-medical uses would be illegitimate.[239] In *Brenan*, the court similarly declared: "Notwithstanding their reputation as a naughty novelty item, vibrators remain an important tool in the treatment of anorgasmic women who may be particularly susceptible to pelvic

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231. Indeed, the word "pleasure" occurs only once in both opinions combined, and even then, the word is only present because it serves as part of the title of one of the disputed devices—the Sexplorer Pleasure System—of which the plaintiff was convicted of distributing. *Hughes,* 792 P.2d at 1025.

232. *Brenan*, 772 So. 2d at 72; *Hughes*, 792 P.2d at 1030–31. It is important to note that both of these cases were decided before *Lawrence v. Texas*, although, as we will see in Part IV, *Lawrence* did not prove to be uniformly dispositive on these issues.

233. *Brenan*, 772 So. 2d at 75–76; *Hughes*, 792 P.2d at 1032.

234. *Brenan*, 772 So. 2d at 75–76; *Hughes*, 792 P.2d at 1025.

235. *Brenan*, 772 So. 2d at 75; *Hughes*, 792 P.2d at 1031.

236. *Brenan*, 772 So. 2d at 76; *Hughes*, 792 P.2d at 1025.

237. *Hughes*, 792 P.2d at 1025.

238. *Id.*

239. *Id*. at 1026.

inflammatory diseases, psychological problems, and difficulty in marital relationships."[240]

In both cases, the courts focused solely on the individual's interest in using the devices for some kind of medically legitimate treatment, despite ample evidence that the specific devices at issue were intended for recreational use.[241] Indeed, in *Brenan*, the court steadfastly ignored the fact that the particular devices at issue in that case were clearly marked: "Sold as Novelty Only. This Product is not Intended as a Medical Device."[242] Furthermore, *Hughes* involved not only dildos and vibrators, but also an inflatable doll, for which the court could not ascertain any medical purpose.[243] Despite this elephant in the room, the court in *Hughes* was undeterred in its focus on the medical interests at stake—it disposed of the inopportune doll succinctly:

> Dr. Mould testified that he knew of no therapeutic purposes for an inflatable doll and believed such a device to be "more a novelty than any serious sex tool." The inflatable doll was not the basis of the trial court's determination of the issues of this case, and we will not discuss it further in this opinion.[244]

Thus, both courts largely ignored individuals' non-medical interests in the devices, despite the clear existence of such interests. Instead, they focused single-mindedly on the individuals' interest in receiving treatment.

3. Demedicalizing the State Interest

Both courts stressed that there was no medical reason for regulating the devices at issue. In *Hughes*, the court noted that the expert "knew of no medical harm which could be caused by the use of a vibrator on the female genital organs."[245] In *Brenan*, meanwhile, the court turned to the legislative history to reject the State's contention that it was concerned with protecting minors and non-consenting adults from viewing the "obscene devices."[246] The court determined that the legislature was less concerned about protecting minors and non-consenting adults than it was with "waging a

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240. *Brenan*, 772 So. 2d at 76.

241. The courts generally focused on the medical uses of vibrators, despite the fact that both cases involved other devices as well. *Id*. at 75–76; *Hughes*, 792 P.2d at 1032.

242. *Brenan*, 772 So. 2d at 77 (Traylor, J., dissenting).

243. *Hughes*, 792 P.2d at 1025–26.

244. *Id*.

245. *Id*. at 1025.

246. *Brenan*, 772 So. 2d at 72–73.

general war on obscenity."[247] The court went on to conclude that the ban was designed "to promote morals and public order."[248]

4. Balancing the interests

Interestingly, the courts interpreted the legal nature of the individual's medical interest somewhat differently. In *Brenan*, the court acknowledged the individual's medical interest as important—but not fundamental—and therefore applied rational basis review.[249] In *Hughes*, the court asserted that the fundamental interest in privacy "encompasses therapy for medical and psychological disorders" and therefore applied heightened scrutiny.[250]

Despite the purportedly different levels of scrutiny, the results were the same. Each court concluded that the state could not burden an individual's right to medical treatment in an attempt to police morality.[251] In *Brenan*, the court concluded that the statute was not "rationally related" to the goal of promoting morality.[252] The court acknowledged that the statute, "which ban[ned] the promotion of obscene devices in order to promote morals and public order, indeed further[ed] a legitimate government interest." [253] But the court concluded that the statute was not rationally related to this interest because it "ignor[ed] the fact that, in some cases, the use of vibrators is therapeutically appropriate."[254] In other words, the court accepted the possibility that banning obscene devices could further a legitimate interest in morality, but such a ban could not sweep too broadly by proscribing therapeutic activity.[255] Thus, *Brenan* illustrates that the individual's interest in medical treatment may overcome a purported state interest in morality.[256]

Meanwhile, the *Hughes* court held "the dissemination and promotion of such devices for purposes of medical and psychological therapy to be a constitutionally protected activity."[257] The court conceived of the right at issue as explicitly medical, noting that "a statute is impermissibly overbroad when it impinges without justification on the sphere of constitutionally protected privacy which encompasses therapy for medical and

247. *Id*. at 73.
248. *Id.*
249. *Id*. at 72–73.
250. *Hughes*, 792 P.2d at 1031.
251. *Brenan*, 772 So. 2d at 76; *Hughes,* 792 P.2d at 1032.
252. *Brenan*, 772 So. 2d at 76.
253. *Id*. at 73.
254. *Id*. at 75.
255. *Id*. at 76.
256. *Id*. at 75–76.
257. *Hughes,* 792 P.2d at 1032.

psychological disorders."[258] Furthermore, the court observed that the "statute also restricts a doctor's freedom to exercise his or her medical judgment in providing medical services."[259] Under strict scrutiny, the state's interest in morality easily fell short of trumping the individual's interest in medical treatment.[260]

5. Takeaway

Reframing the individual's interest as a desire for treatment, rather than for pleasure, can help overturn a statute that criminalizes pleasure-seeking behavior in promotion of morality. Medicalizing the individual's interest relegates the pleasurable effects of the behavior or device to the status of side effects, allowing the court to ignore pleasure and focus solely on medicine. Instead of being forced to either find an explicit right to pleasure or sexual privacy or allow the statute to stand, the courts refocused the issue and overturned the statutes based on their interference with individuals' medical interests. Thus, characterizing the individual interest as a need for medical treatment allows courts to sideline pleasure and grant relief without straying into uncomfortable territory.

D. Where is Pleasure?

All of the cases in this section deal with statutes that burden sexual activity. And none of the contraception or abortion cases appears to consider abstinence as a viable option for avoiding unwanted pregnancy and sexually transmitted disease. But where is any discussion of why individuals engage in non-procreative sexual activity and why they cannot be expected to abstain from it? In other words, given that one of the primary reasons for engaging in non-procreative sex is arguably the pursuit of physical pleasure, why is pleasure so startlingly absent from the legal discourse on sex? Courts have assigned contraception and abortion legal value for their role in reducing disease and unwanted pregnancy, rather than for their ability to allow the pursuit of pleasure through sexual intimacy.[261] And courts have given sex toys protection only insofar as they provide curative, rather than merely pleasurable, sexual release.[262] In the case of contraception and abortion, why has the discourse focused on the medical

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258. *Id*. at 1031.
259. *Id*. at 1032.
260. *Id*.
261. *Supra* Part II.B.
262. *Supra* Part II.C.

harms of unprotected sex, rather than the pleasures of protected sex? And in the case of "obscene devices," why have the courts focused on the treatment of medical disorders, rather than the recreational benefits of sexual pleasure? In the numerous cases about sex, why has pleasure become an unmentionable? The next section explores the potential of pleasure as an individual interest and speculates about its conspicuous absence from the law.

III. THE LAWLESSNESS OF PLEASURE

The Declaration of Independence lists happiness as a fundamental right of the people.[263] Surely pleasure would constitute an important part of most people's understanding of happiness.[264] Yet, few courts seem to believe that their duty to uphold the Constitution and the laws of the United States obligates them to protect the individual pursuit of pleasure. Indeed, pleasure has fared poorly in the courts. [265] Despite the importance of pleasure in daily life, courts have been reluctant to recognize pleasure as a legitimate or meaningful individual interest. Indeed, the role of pleasure as an individual interest, if any, can only be inferred from the space between the lines. Regardless of the fact that the desire to experience pleasure is often a key underlying motivation for challenging statutes that criminalize or burden pleasure-seeking behavior, pleasure itself is rarely asserted or characterized as a compelling interest.

Courts have ignored the role of pleasure in a variety of cases where one might reasonably expect pleasure to be pertinent. For example, in the contraception and abortion cases discussed above, the court ignored the individual's interest in pleasure entirely. An interest in pleasure, if it existed

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263. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

264. *See* Paul Rozin, *Preadaptation and the Puzzles and Properties of Pleasure, in* WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 109, 114 (Daniel Kahneman et al. eds., 1999) (noting that, for Americans in particular, "doing what is pleasant is a major part of living a successful life").

265. Pleasure has fared poorly in the federal legislature as well:

> People engage in recreational drug use primarily because they are seeking happiness in the form of sensual or mind-altering pleasure. The federal government, through legislation such as the Comprehensive Drug Abuse Prevention and Control Act of 1970, continually makes judgments about the value of these types of happiness or pleasure. This judgment, the pleasure principle, is this: pleasure – in and of itself – has no inherent value. The government views the experience of pleasure as neutral at best, and as detrimental and morally condemnable at worst. Feelings of euphoria or of being "high" are, according to this concept, inherently undesirable.

Lisa Scott, *The Pleasure Principle: A Critical Examination of Federal Scheduling of Controlled Substances*, 29 SW. U. L. REV. 447, 450 (1999).

at all, might only be inferred from the fact that the court did not consider abstinence as a practical means for preventing pregnancy, implying that some pressing interest—such as, perhaps, the interest in pleasure—made abstinence an unreasonable solution.[266] But these kinds of close-lipped "endorsements" of pleasure do not constitute legal precedent. Furthermore, in the few cases where courts do explicitly discuss sexual pleasure, they often do so when *rejecting* the existence of a right; conversely, where the courts do find a right, they avoid discussing pleasure and issue their opinions in "grand and euphemistic nonsexual terms."[267]

Courts recognize a right under the Fourteenth Amendment to the "pursuit of happiness," but that right is limited.[268] Under the Fourteenth Amendment, liberty includes not only the freedom from bodily restraint,

> but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[269]

The list given in *Meyer* is not exhaustive, and modern courts have expanded and clarified it.[270] But it does illustrate two points. First, under the Supreme Court's understanding of liberty, the pursuit of happiness definitively includes the right to marry and the right to bear children.[271] It has thereby validated marital sex for the purposes of procreation as an important part of the pursuit of happiness, but has failed to provide such definitive protection for non-procreative or non-marital sex.[272] That distinction, implicitly observed by the *Meyer* Court in 1923, creates a normative and legal dichotomy between what is considered "good" or "valuable" sex—heterosexual marital sex for procreation—and sex that is in excess of the procreative imperative—sex for pleasure.[273]

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266. Glover, *supra* note 46, at 581.

267. *Id.* at 582 ("Judges define rights in sexual terms only when preparing to deny their existence; when protecting sexual liberty, judges deliver opinions in 'grand and euphemistic nonsexual terms.'").

268. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

269. *Id*.

270. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

271. *Id*. (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

272. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (failing to definitively include a right to sexual privacy as among the fundamental rights guaranteed under the Fourteenth Amendment).

273. This distinction is also present in the one area of law where courts do seem to assign value to sexual pleasure—loss of consortium. Loss of consortium claims are often limited to spousal partners, thus de-legitimizing sex that occurs outside of the marital relationship. For this reason, loss of

Second, in the eyes of the law, the pursuit of happiness is subject to an important restriction: the requirement that any such legitimate pursuit be *orderly*.[274] It is here that pleasure runs into trouble not just under Fourteenth Amendment jurisprudence, but in its treatment under the law more generally.[275] Law is, at heart, about order. And pleasure is, in its soul, disorderly. Pleasure floods the brain with excitatory chemicals. It flushes the skin, makes the heart beat faster, subverts reason for feeling. Indeed, pleasure is inextricably wrapped up in disorder, in chaos, and in danger. It is perhaps no great coincidence that the flush of pleasure is often indistinguishable from the flush of shame.[276] As Professor Katherine M. Franke observes:

> Desire is not subject to cleaning up, to being purged of its nasty, messy, perilous dimensions, full of contradictions and the complexities of simultaneous longing and denial. It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure so resistant to rational explanation. It is also what makes pleasure, not a contradiction of or haven from danger, but rather a close relation.[277]

While pleasure admittedly feels good, there is an overwhelming sense that it is also bad—and not only bad, but also dangerous and anarchic.

Pleasure provokes ambivalence. On the one hand, pleasure is of "undeniable importance" and "common appeal," and it can be characterized as a fundamental "need or aspiration that informs all manner of human activity."[278] It is an incontrovertible truth that, across generations and

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consortium may in fact be less about sexual *pleasure* as such and more about sex as an integral part of the marital or quasi-marital arrangement. *See generally* Lance McMillian, *Adultery as Tort*, 90 N.C. L. Rev. 1987, 2021-23 (2012); Anne E. Simerman, *Note: The Right of the Cohabitant to Recover in Tort: Wrongful Death, Negligent Infliction of Emotional Distress and Loss of Consortium*, 32 U. Louisville J. Fam. L. 531, 537-38 (1994).

274. *See Meyer*, 262 U.S. at 399 (listing rights that are "essential to the *orderly* pursuit of happiness by free men.") (emphasis added).

275. *See* Pat O'Malley & Mariana Valverde, *Pleasure, Freedom and Drugs: The Uses of 'Pleasure' in Liberal Governance of Drug and Alcohol Consumption*, 38 SOC. 25, 25 (2004) ("Diverse sociological discourses have raised the question of 'disreputable pleasures' and examined the tendency of government to identify the pleasures of the lower classes and the poor as problematic to good order.").

276. *See* E.M. FORSTER, A ROOM WITH A VIEW 51 (1908).

277. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire* , 101 COLUM. L. REV. 181, 207 (2001). Franke was discussing sexual desire and pleasure, but her discussion is equally applicable to other types of pleasure, from the most exotic to the more mundane. Consider the frequency with which chocolate is described as sinful.

278. RACE, *supra* note 29, at ix.

cultures, humans long for pleasure.[279] On the other hand, "the pursuit of pleasure is frequently projected onto others in order to expose them as intolerably indulgent—positioned as a vice pursued only by the marginal or the depraved. . . ."[280] One cannot talk about pleasure without triggering a staggeringly complex cascade of associations. Pleasure is linked to hedonism, to sin, to happiness, to enlightenment and salvation, and it is associated with activities as diverse as parenting, eating, shopping, having sex, praying, doing drugs, or skydiving. Indeed, while "anyone can relate to the need for pleasure . . . the precise content of what they are relating to remains an open question."[281]

The mystery surrounding pleasure—the fact that it can arise from a huge range of different activities and that precisely what is pleasurable varies from individual to individual—only adds to its disorderliness and makes it even more alarming. Even the most "vanilla" pleasures suddenly become perversions if they are practiced too much, or at the wrong time, or in the wrong way. Taking too much pleasure in eating, for example, can quickly become a disorder.[282] The line between good pleasure and bad pleasure is thin at best. [283] Although it is extremely difficult to articulate the precise contours of an area of sexual pleasure that is widely understood to be socially acceptable, it is easy to list all sorts of sexual behaviors that are deemed dangerous or shameful. Outside of heterosexual marital procreative sex, an enormous realm of sexual pleasure exists, but much of it is relegated to the status of perversion and subject to shame. [284] And frank discussion of sexual pleasure, licit or otherwise, remains taboo.[285]

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279. *See*, *e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1 (1789) ("Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.").

280. RACE, *supra* note 29, at ix.

281. *Id.*

282. Esch & Stefano, *supra* note 4, at 238–39, 248; *see also* Kent C. Berridge et al., *The Tempted Brain Eats: Pleasure and Desire Circuits in Obesity and Eating Disorders*, 1350 BRAIN RESEARCH 43, 58 (2010) (suggesting that taking pleasure in eating could result in binge eating disorders).

283. *See* Esch & Stefano, *supra* note 4, at 246 (observing that scientist do not yet understand the "crucial difference between good or bad (i.e., ameliorating or detrimental) pleasure phenomena and outcomes of pleasurable activities").

284. MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 21 (1999) ("Anglo-American culture has always been more prone to embarrassment about sex than most other cultures.").

285. One might counter that discussion of sex is pervasive in modern society, particularly in the popular media. However, talking about sex is not the same thing as embracing or accepting sexual *pleasure*. Indeed, much of the popular media treatment of sex is "driven not by a celebration of sexual pleasure and autonomy, but by erotophobia. . . . [E]rotophobia can take many forms besides silence, censorship, and repression." *Id.* at 23. Furthermore, the historic "shamefulness" of pleasure has stifled even purely scientific inquiry into the neurobiology of pleasure. Siri Leknes & Irene Tracey, *A Common*

Michael Warner posits that this "politics of sexual shame" acts to restrict sexual variation:

> Hierarchies of sex . . . create victimless crimes, imaginary threats, and moralities of cruelty. Rubin notes, "The criminalization of innocuous behaviors such as homosexuality, prostitution, obscenity, or recreational drug use is rationalized by portraying them as menaces to health and safety, women and children, national security, the family, or civilization itself." These rationalizations obscure the intent to shut down sexual variance.[286]

But, as Warner and Rubin intimate, this politics of shame does not just apply to suppressing sexual variation.[287] Indeed, the politics of shame works to suppress variation in the sources of pleasure including, *but not limited to*, sex. Thus, in the area of sex, certain sexual activities—such as procreative marital heterosexual intercourse—may be deemed "good, normal, natural" while other sexual activities, such as non-procreative, autoerotic, or sadomasochistic behaviors, are deemed "bad, abnormal, unnatural."[288] Similarly, certain substances, such as coffee, alcohol, and Viagra, may be deemed acceptable sources of pleasure, while other substances, such as marijuana, are considered unacceptable sources of pleasure. These distinctions attempt to categorize pleasure, to neuter its potential for disorderliness by separating it into good and bad. But the fact remains that pleasure transcends these artificial distinctions. Just because something is illicit doesn't mean it doesn't feel good; indeed, the effect of prohibition is often quite the opposite.

The understanding of pleasure as dangerous and disorderly is illustrated by the remarkable debate over access to information about pleasure-inducing activities. For example, sex education in American schools is a highly controversial issue. Most school sex education classes include only bare biological information and stress the risks and dangers inherent in sex.[289] There is usually no discussion whatsoever of the potential

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Neurobiology for Pain and Pleasure, 9 NATURE 314, 315 (2008) ("The strong historical association between shame, guilt, and pleasure might help explain a number of paradoxical human behaviors, as well as the historical preference for formulating scientific research questions in terms of behaviour rather than pleasure and other hedonic feelings.")

286. Warner, *supra* note 284, at 25 (quoting Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *reprinted in* CULTURE, SOCIETY AND SEXUALITY: A READER 143, 163 (Richard Parker & Peter Aggleton eds., 1999).

287. Warner, supra note 284, at 25 (citing Rubin, *supra* note 286, at 163).

288. Warner, supra note 284, at 25.

289. *See*, *e.g.*, JANICE M. IRVINE, TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN

for pleasure through sex.[290] As Janice Irvine puts it, sex education in America further "constricts the already minimal cultural space afforded to sexual pleasure."[291] Indeed, "there appears to be a belief or fear or both that when adults license and approve of sexual pleasure, this literally leads to licentiousness."[292] The mere mention of "the dreaded p-word" in the context of sex education is enough to cause public outcry.[293] There seems to be an overwhelming fear that teaching children about pleasure will inevitably lead them down a hedonistic path of no return.

The avoidance of pleasure is by no means limited to the realm of sex education.[294] Indeed, the role of pleasure is arguably under-explored in feminist legal theory. As Professor Franke puts it:

> The failure of legal feminists to articulate and press a viable positive domain of non-reproductive sexuality has left such a domain overdetermined as either lesbian territory or the site of surplus male sexuality that is in need of taming, if not excising altogether, through juridical means. The overwhelming attention we have devoted to prohibitions against bad or dangerous sex has obscured, if not eliminated, a category of desires and pleasure in which women might actually want to indulge.[295]

As discussed in the previous section, the legal discussion of rights to abortion or contraception is centered around the importance of avoiding harm and dependency, rather than on enabling sexual pleasure.[296] Similarly,

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THE UNITED STATES 121, 192–93, 263–64 (2002) (noting that most sex education programs are abstinence based and stress the risks of premarital sex); Chris Beasley, "The Challenge of Pleasure: Reimagining Sexuality and Sexual Health," Health Sociology Review 151-153 (2008).

290. *See* IRVINE, *supra* note 289, at 192–93, 263–64 (stating that most sex education focuses on abstinence and "has as its exclusive purpose teaching the social, psychological, and health gains to be realized by abstaining from sexual activity").

291. *Id*. at 137.

292. TIGER, *supra* note 3, at 5.

293. Susie Wilson, *Bringing the Dreaded P-word into Sex Education*, N.J. Newsroom, Jul. 21, 2009, http://www.newjerseynewsroom.com/style/bringing-the-dreaded-p-word-into-sex-education.

294. It is interesting to note that pleasure has also been relatively neglected by science—a field that, like law, values order and objectivity. *See* Esch & Stefano, *supra* note 4, at 236 ("Science has ever neglected positive sensations and mind states like satisfaction and contentment, solely focusing upon pathogenetic processes.") Esch and Stefano note that "a vast number of publications on depression and mental disorders exist, but only a few describe possible mechanisms underlying feelings of joy and bliss." *Id*.; Rozin, *supra* note 264, at 112 ("We know very little about pleasure from a natural science perspective. Few have tried to answer the basic questions.").

295. Franke, *supra* note 277, at 199–200.

296. *Id*. at 200–01; *see also* supra Part II. Indeed, Ariela Dubler speculates that the potential for contraception to enable sex for pleasure actually weighed against judicial support for contraception. There was concern that available contraception would lower the costs of sexual promiscuity, thereby allowing for wanton indulgence of sex for pleasure. Ariela Dubler, *Sexing Skinner: History and the*

opponents of female genital mutilation have based their arguments on medical concerns about infection, infertility, pain, or incontinence; but, the reduction or elimination of female sexual pleasure is rarely offered as a significant reason to oppose the practice.[297] "The effect that genital cuttings might have on a girl's capacity for sexual pleasure was not once invoked as among the justifications for federal legislation condemning so-called 'female genital mutilation.'"[298] Discussion of pleasure is avoided at all costs, and where loss or restriction of pleasure is at issue, advocates are reluctant to propose pleasure as a legitimate concern that those in authority should consider.

Thus, for courts, the prospect of embracing pleasure as an important and legitimate interest bristles with danger. The disorderliness of pleasure means that were the court to recognize a legitimate individual interest in pleasure, it would encounter great difficulty in discerning the precise boundaries of this interest. Furthermore, the paradoxical and often guilty nature of pleasure makes it uncomfortable and controversial to discuss. When pleasure comes into play, it brings shame, danger, and perversion along with it. Pleasure is thus uniquely ill-suited to the rigid rubric of legal reasoning. It cannot fit nicely into an ordered analysis that arrives at a neat resolution.[299] Law depends on the demarcation of good from bad, but pleasure respects no such boundaries. While the law strives at coherence, pleasure is undeniably, emphatically, incoherent. Thus, it is understandable that courts, as arbiters of reason and order, and advocates, who must necessarily shape their arguments around the dialectic of the courts, shy away from discussing pleasure, even where it underlies and informs the entire cause of action before them.

Politics of the Right to Marry, 110 COLUM. L. REV. 1348, 1360-61 (2010). Dubler posits that implicit in the *Skinner* court's rejection of the sterilization of convicts was a concern that sterilization might lead to sex merely for pleasure's sake and outside the acceptable bound of marital procreation. *Id*. Indeed, the state sought to support its sterilization protocols by asserting that convicts were not seriously harmed because the procedure, while rendering them infertile, still allowed them to engage in sexual congress and experience sexual pleasure. *Id.* at 1360. Skinner's lawyers rejected this suggestion that the ability to engage in sex for pleasure was a meaningful and important right, stating in their briefs, "There is something singularly obscene in this suggestion. It indicates a declaration that lascivious gratification is the chief reason why men and women are endowed with this urge and given the right to its proper fulfillment." *Id.*

297. Franke, *supra* note 277, at 200–01, n. 89.

298. *Id*.

299. For more on this, *see* Katharine M. Franke, *Eve Sedgwick, Civil Rights, and Perversion*, 33 HARV. J.L. & GENDER 313, 319 (2010) (discussing the complexity of shame and desire).

IV. PLEASURABLE SUBSTANCES

A. Introduction

While sexual intimacy has undergone a fairly dramatic transition from a paradigm of criminalization towards decriminalization and individual freedom, regulation of the use of illicit drugs has remained firmly entrenched in the criminal realm.[300] Given that the neurological response to sex and drugs is markedly similar,[301] and that many of the attendant risks overlap,[302] it seems remarkable that one activity has become primarily a public health issue while the other remains entrenched in the criminal sphere. Why hasn't the regulation of pleasure-seeking through substance use followed an arc of decriminalization facilitated by medicalization, as has occurred in the realm of sexual intimacy? What can we learn from the role of medicalization—and the suppression of pleasure—in the context of pleasure-seeking sexual behavior that might apply in the context of pleasure-seeking drug use?

This paper has laid out a framework for challenging criminal statutes in which the individual interest must be portrayed as primarily medical and the state interest must be characterized as predominantly moral. In the case of narcotics, both of these steps may be more difficult than in the context of sexual intimacy.

As discussed in Part III, pleasure is fraught with problematic implications. As such, pleasure-seeking activity implicates complicated issues that courts are loath to address directly. In successful challenges to sexual intimacy, the role of pleasure is often suppressed in legal discourse and the issue is reframed in terms of something else, often medicine. However, the role of pleasure in substance use may be more difficult to

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300. *See, e.g.*, GRAY, *supra* note 16, at 27–28 (charting the development of increasingly severe criminal prohibitions on drugs); Richards, *supra* note 18, at 607–08, n.4 (comparing the success of advocates for drug decriminalization with that of advocates seeking decriminalization of abortion and contraception); Todd Austin Brenner, Comment, *The Legalization of Drugs: Why Prolong the Inevitable?*, 18 CAP. U. L. REV. 237, 239 (1989) (noting that, since the passage of the Harrison Act in 1914, prohibition has been the dominant approach to addressing drug use); Noah Mamber, *Note: Coke and Smack at the Drugstore: Harm Reductive Drug Legalization: An Alternative to a Criminalization Society*, 15 CORNELL J.L. & PUB. POL'Y 619, 622 (2006) (noting that "the United States embraces criminalization as the sole model for dealing with the problems associated with illegal drugs").

301. Esch & Stefano, *supra* note 4, at 236.

302. Both sex and drugs can expose individuals to disease, including HIV and other blood-borne pathogens, and can have negative social consequences. EVVIE BECKER ET AL., HIGH-RISK SEXUAL BEHAVIOR: INTERVENTIONS WITH VULNERABLE POPULATIONS 12–15 (1998); *Medical Consequences of Drug Abuse HIV, Hepatitis and Other Infectious Diseases*, NATIONAL INSTITUTE ON DRUG ABUSE, (last visited Sept 1, 2012), http://www.drugabuse.gov/related-topics/medical-consequences-drug-abuse/hiv-hepatitis-other-infectious-diseases.

conceptually suppress and replace with a medical interest than in the case of sexual intimacy.

At first blush it may seem dispositive that sex, unlike drug use, has an unassailable biological purpose. Sex is necessary for procreation, and thus for the propagation of the species.[303] Recreational drug use, on the other hand, serves no fundamental biological function. Thus, it might seem as though pleasure can be more easily sidelined in the case of sex because sex serves another vital function, procreation, while illicit drugs have no other easily discernible purpose besides inducing pleasure. But this distinction, although superficially appealing, is relatively unimportant in the present context. The cases involving contraception and abortion necessarily dealt with *non*-procreative sex, while cases involving sex toys similarly involve no procreative possibility.[304] It is difficult to posit a biological imperative for the existence of a vibrator or blow up doll. Thus, the issue of biological necessity does not provide a meaningful distinction between the roles of pleasure in sex and drugs, nor does it explain why courts more easily ignore the role of pleasure in the former than in the latter.

Perhaps more important than the biological imperative of procreation is the significance of privacy in relation to sex.[305] Although the pleasure of non-procreative sex and the pleasure of drugs may perhaps be similarly sinful, the actual sex act is shameful to look at in a way that drug use is not. Sex is, in theory, something that happens "behind closed doors" and away from prying eyes. As Leo Bersani puts it: "Displacement is endemic to sexuality . . . . Desire, by its very nature, turns us away from its objects."[306] Thus, in the haste to avert our eyes from the sexual act, the individual's reasons for engaging in sex, including his interest in pleasure, are more easily swept under the rug and into the sphere of privacy. Indeed, sex loses

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303. Sexual intercourse has recently become uncoupled from procreation as a result of technological developments, but it seems safe to say that procreation on a large scale still relies heavily on traditional sexual intercourse.

304. *Supra* Part II.B, II.C; *see generally* Carey v. Population Services Int'l, 431 U.S. 678, 681 (1977) (holding unconstitutional a statute barring the sale of contraceptives to anyone under the age of sixteen); Roe v. Wade, 410 U.S. 113, 159 (1973) (overturning a statute criminalizing abortion); Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (overturning s statute criminalizing distribution of contraceptives to unmarried individuals); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (overturning a statute criminalizing contraception); Louisiana v. Brenan, 772 So.2d 64, 76 (La. 2000) (overturning a statute criminalizing the dispensation of "obscene devices"); Kansas v. Hughes, 792 P.2d 1023, 1025, 1032 (Kan. 1990) (overturning a statute criminalizing the dispensation of "obscene devices").

305. This insistence on privacy may be the result of viewing sex as shameful or, alternatively and perhaps paradoxically, of viewing it as sanctified.

306. Leo Bersani, *Is the Rectum a Grave?* 43 AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM 197–222 (Winter 1987).

its constitutional protection as soon as it is brought into the public forum.[307] Drug use, on the other hand, is somehow less shameful to look at, even though it can be seen as weak or immoral. The physical act of taking drugs is not considered "obscene" in the same way as the sexual act.[308] The image of an individual injecting heroin is not pornographic, despite the fact that, like sexual intercourse, it involves penetrating the body and abandoning the self to pleasure.

It may be this very censorship of sex—this removal of the sexual act from the public and legal eye—which allows courts to more easily ignore the pleasure of sex. Indeed, to inquire too deeply into the feelings and motivations of the sexual actor might itself seem perverted. Instead, in the interest of propriety, a curtain is drawn over the entire scene. Substance use, on the other hand, is not removed from this scrutiny. Drug use is not obscene in the same way, and therefore there is no need to avert the eye. Because there is nothing wrong with looking, the pleasure of the user becomes obvious, conspicuous, and unavoidable. Thus, the reluctance to look closely at the sexual act may obscure its underlying motivations, allowing pleasure to recede more easily into the background. Meanwhile, the relative willingness to focus on the act of substance use may bring the motivating influence of pleasure more easily into focus.

Even where the individual's interest in pleasure can be successfully subverted and recharacterized as an interest in avoiding disease or receiving treatment, difficulties persist. In particular, the state asserts that criminalization of drug use or paraphernalia furthers its own interest in public health, and this assertion can be difficult to challenge.[309] In order to maximize courts' willingness to overturn statutes criminalizing pleasure-seeking behavior, the asserted state health interests must be exposed as disingenuous and re-characterized as primarily moral.

For a variety of reasons, this may be harder to do in the context of drug use than in the context of sexual intimacy. First and foremost, the idea that

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307. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (carving out constitutional protection for private consensual sodomy but noting specifically that the case "does not involve public conduct or prostitution . . . ."). "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id*.

308. *See, e.g.*, Miller v. Cal., 314 U.S. 15, 24 (1973) (defining obscene material as "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value").

309. *See*, *e.g.*, Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 791–92 (2004) (noting that the "rights-based paradigm," which "rejects the purported moral neutrality of the public-health and cost-benefit perspectives, and finds hidden (and perhaps dubious) moral judgments in their counting and weighing of social harms" has had the least influence on federal drug policy).

the criminalization of drug use and drug paraphernalia furthers a state interest in public health is often simply accepted as a given.[310] And second, drugs do pose obvious risks that are absent (or at least not apparent) in the case of sexual intimacy. For example, some drugs pose a significant risk of addiction, a factor that is arguably absent from sex.[311] Furthermore, some kinds of drug use may negatively impact individual health.[312] But this fact alone does not differentiate sex from drugs. Indeed, unprotected sex also poses significant health risks,[313] as do cigarettes,[314] alcohol,[315] prescription drugs,[316] and junk food.[317] Sex can be incredibly hazardous. Sex can expose individuals to diseases such as HIV, syphilis, HPV, gonorrhea, and hepatitis and can result in unwanted pregnancy, economic and social hardship, and widespread negative societal impacts.[318] Thus, as with sex, the fact that drug use may itself pose health risks does not render medicalization of the individual interest ineffectual, nor does it necessarily imply that the state has a legitimate health interest in criminalization.

The sexual intimacy cases offer a precedent for reframing the state's interests as moral, rather than medical. In the contraceptive cases, states asserted that the challenged legislation related to state health interests by

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310. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 438 (2006) (expressing no doubt that the government has a "general interest in promoting public health and safety by enforcing the Controlled Substances Act").

311. Some scholars and scientists posit that addiction can occur with respect to a wide range of pleasure-seeking activities, including sex. *See* Deana A. Pollard, *Sex Torts*, 39 MINN. L. REV. 769, 813 n.212 ("Illegal drug use, which is similar to sexual promiscuity in that both entail pleasure-seeking behavior that may become addictive, is controlled by rational decision-making as well."); Lawrence J. Hatterer, *Pleasure Addicts* at 16 (1980) ("Today we extend the concept of addiction to almost any substance or activity. People say that they others are addicted not only to drugs or alcohol, but to food, smoking, gambling, buying, or some form of work, play, or sex . . . . In true addiction there is almost always excessive use of pleasurable activities to cope with unmanageable internal conflict, pressure, stress, and confrontation.").
Id.

312. *Commonly Abused Drugs*, NAT'L INST. ON DRUG ABUSE (Oct. 2010), http://www.drugabuse.gov/sites/default/files/cadchart.pdf.

313. *Facts on Sexually Transmitted Diseases*, THE GUTTMACHER INSTITUTE (June 2009), http://www.guttmacher.org/pubs/FIB_STI_US.html.

314. ANDY MCEWEN ET AL., MANUAL OF SMOKING CESSATION at 15–32 (2008).

315. Kerstin Damström Thakker, *An Overview of Health Risks and Benefits of Alcohol Consumption*, 22 Alcoholism: Clinical and Experimental Research 285 (1998).

316. *Research Report Series: Prescription Drugs: Abuse and Addiction*, NAT'L INST. ON DRUG ABUSE 1 (Oct. 2011), http://www.drugabuse.gov/sites/default/files/rrprescription.pdf.

317. Michele Simon, APPETITE FOR PROFIT: HOW THE FOOD INDUSTRY UNDERMINES OUR HEALTH AND HOW TO FIGHT BACK at xiv (2006).

318. *See*, *e.g.*, BECKER, *supra* note 302, at 28 (nothing that risky sexual behavior can have "devastating costs to the individual and to society . . . ."). "STDs, including AIDS, take their toll in human suffering, health care costs, loss of productivity, illness, and death. Pregnancy that comes too soon in a mother's life and is unplanned or unwanted costs the mother and the child in economic and psychological outcomes." *Id.* at 28.

discouraging sexual activity and regulating contraceptives.[319] The opposing parties argued that the states' asserted interest in health was disingenuous and demonstrated that criminalization failed to promote health or actually resulted in increased risk of injury.[320] Despite the risks inherent in engaging in pleasure-seeking sexual behavior, the Court rejected the states' contention that the criminal statutes at issue furthered state interests in health because criminalization had no rational relationship to public health.[321] Instead, the Court concluded that the states' real interest in criminalization was primarily moral, or, in some cases, that the criminal legislation was entirely unrelated to any legitimate state interest.[322]

The sexual intimacy cases also provide precedent for reframing the individual's interest as medical.[323] In the contraceptive cases, the individual interest was portrayed not as a desire to engage in sex-for-pleasure, but rather as an interest in avoiding unwanted pregnancy and disease.[324] In the "obscene devices" cases, the individual interest was framed as an interest in receiving medical treatment for physical or emotional dysfunction, rather than as an interest in obtaining sexual satisfaction and pleasure.[325] Both of these forms of medicalization—the avoidance of harm and the desire for treatment—could also apply in the context of pleasure-seeking substance abuse.

The sections that follow explore the applicability of these models to substance use in more detail. In the first section, the "obscene devices" cases provide a model of the second form of medicalization, in which the individual asserts that the right to treatment is thwarted by the criminal legislation. This model is applied to the context of medical marijuana to argue that the criminalization of marijuana may deny individuals access to treatment. In the second section, the contraception cases provide a model for the first form of medicalization, in which the individual asserts an interest in avoiding bodily harm and alleges that the criminal legislation serves the implicit purpose of discouraging pleasure-seeking activity by increasing the risks attendant on the behavior. This model is applied to drug paraphernalia laws to argue that, insofar as these laws criminalize provision of clean needles, they unacceptably impose heightened health risks on users in an attempt to deter drug use.

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319. *Supra* Part II.B.3.
320. *Id*.
321. *Supra* Part II.B.3, 4.
322. *Id.*
323. *Supra* Part II.B.2.
324. *Id*.
325. *Supra* Part II.C.2.

B. Pleasure as Medicine: Medical Marijuana

The "obscene devices" cases illustrate the distinction between behaviors or objects that are viewed as medical treatment versus those seen as merely related to pleasure. Where an object or behavior has an important medical use, a flat-out ban on its distribution will likely be difficult to sustain if one can demonstrate that the ban unacceptably burdens individuals' right to treatment.[326]

The line between treatment and pleasure is fuzzy at best. Indeed, Kane Race speculates that:

> Pleasure is more or less absent from serious talk within public health, though it is a common motive for, and element of, human activity. When it comes to drugs, it could be said to provide the basis upon which legal and moral distinctions (between licit and illicit instances) are made. Taking drugs for pleasure would appear to transgress the moral logic of "restoring health" that guarantees their pharmaceutical legitimacy.[327]

Arguably, many drugs are considered illicit precisely because they produce pleasure. Given the fraught nature of pleasure, the fact that certain drugs produce pleasure in large doses may be morally unsettling.[328] Whatever the case, it is clear that attempting to rationally distinguish between "licit" and "illicit" drugs can be an exercise in frustration.

The line between pleasure and treatment becomes even more blurry when "licit" pharmaceuticals begin producing pleasure themselves. Take, for example, drugs like Viagra, Adderall, oxycodone, and benzodiazepines (such as Valium). All are pleasure-inducing and potentially habit-forming drugs with significant risks for serious adverse side effects.[329] All are designed to treat rather vaguely-defined or recently-recognized medical

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326. *Supra* Part II.C.4.

327. RACE, *supra* note 29, at ix.

328. *See supra* Part IV.

329. *See*, *e.g.*, Joseph S. Alpert, *Viagra: The Risks of Recreational Use*, 118 Amer. J. Med. 569 (2005) (detailing recreational use and potential risks of Viagra); Monifa Thomas, *Prescription Drug Abuse is Fastest-Growing Drug Problem in Country*, CHI. SUN TIMES, Dec. 29, 2010 http://www.suntimes.com/lifestyles/2989811-423/drug-prescription-abuse-daniel-drugs.html?print=true (noting the abuse of oxycodone and other prescription painkillers); Christian J. Teter et al., *Illicit Use of Specific Prescription Stimulants Among College Students: Prevalence, Motives, and Routes of Administration*, 26 PHARMACOTHERAPY 1501, 1501 (2005) (exploring the illicit use of Adderall and other prescription stimulants among college students); GAIL WINGER, VALIUM: THE TRANQUIL TRAP 61–69 (1986) (exploring the dangers of Valium abuse); *see generally* NAT'L INST. ON DRUG ABUSE [PRESCRIPTION DRUGS], *supra* note 316 (describing the most commonly abused prescription drugs and their negative effects).

conditions—sexual dysfunction, attention deficit disorder, and anxiety.[330] And all these drugs are widely used or abused recreationally.[331] Viagra in particular could be expected to face criminalization because, like the "obscene devices" at issue in the previous section, it enables or enhances sexual pleasure.[332] Yet, because Viagra has been sufficiently cloaked in medical legitimacy, it escapes criminal sanction. This is despite the fact that, unlike sex toys, Viagra actually does pose the risk of significant adverse health effects.[333]

Meanwhile, several "illicit" drugs reputedly have significant therapeutic potential. Marijuana, in particular, arguably has significant therapeutic benefits for cancer patients and glaucoma-sufferers, among others.[334] Furthermore, marijuana has a relatively low risk of adverse effects, making it one of the least individually and socially harmful psychoactive substances.[335] Indeed, a massive effort to medicalize the debate over marijuana by characterizing it as a therapeutic agent—rather than a recreational, pleasure-inducing substance—is currently underway.[336] Fifteen states plus Washington D.C. have all enacted statutes legalizing so-called "medical marijuana."[337]

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330. NAT'L INST. ON DRUG ABUSE [PRESCRIPTION DRUGS], *supra* note 316, at 2, 4, 6; Alpert, *supra* note 329, at 569.

331. *See* Alpert, *supra* note 329, at 569 (detailing recreational use and potential risks of Viagra); Thomas, *supra* note 329 (noting the abuse of oxycodone and other prescription painkillers); Teter, *supra* note 329, at 1501 (exploring the illicit use of Adderall and other prescription stimulants among college students); WINGER *supra* note 329, at 61–69 (exploring the dangers of Valium abuse); NAT'L INST. ON DRUG ABUSE [PRESCRIPTION DRUGS], *supra* note 316, at 2, 4, 6.

332. Alpert, *supra* note 329, at 569; *supra* Part II.C.

333. Alpert, *supra* note 329, at 569; *Viagra Risks 'Bigger Than First Thought'*, BBC NEWS, (Sept. 3, 1998), http://news.bbc.co.uk/2/hi/special_report/1998/viagra/163915.stm.

334. *See, e.g.,* James MacDonald, *Medical Marijuana: Informational Resources for Family Physicians*, 80 AMER. FAM. PHYSICIAN 779, 783 (2009); Sean Chung, *The Fight for Medical Marijuana*, 3 NEUROLOGY NOW 8, 10 (2007), *available at* http://patients.aan.com/resources/neurologynow (observing that marijuana may help alleviate symptoms in patients suffering from glaucoma, cancer, HIV, and amyotrophic lateral sclerosis).

335. David Nutt et al., *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 369 THE LANCET 1047, 1051 (2007). Another "illicit" drug with potential therapeutic effects is MDMA (commonly known as Ecstasy). Lisa Jerome, *(+/)-3,4-methylenedioxymethamphetamine ("MDMA") Investigator's Brochure*, MULTIDISCIPLINARY ASSOCIATION PSYCHEDELIC STUDIES 17–20 (Dec. 2007), http://www.maps.org/mdma/mt1_docs/ ib_mdma_12_07_final.pdf. MDMA may be useful in treating anxiety and post-traumatic stress disorder, and research suggests that it poses a relatively small risk of adverse reactions when used in a controlled setting. *Id*. at 3–4.

336. *See* Troy E. Grandel, *One Toke Over the Line: The Proliferation of State Medical Marijuana Laws*, 9 U. N.H. L. REV. 135, 140–49, 152 (2010) (discussing the movement towards legalizing marijuana for medical purposes).

337. Alaska, Arizona, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and Washington D.C. have all passed various forms of medical marijuana legislation. *See Medical Marijuana: 17 Legal Medical Marijuana*

The therapeutic potential of marijuana suggests that statutes imposing a flat-out ban on distribution may be vulnerable to challenge on the grounds that such a ban unduly restricts individuals' right to treatment. The "obscene devices" cases offer a model of how these challenges might proceed under a medicalized framework. Like the vibrators at issue in the "obscene devices" cases, marijuana has a long history of medical use.[338] Thus, the individual's interest in treatment can be established by showing that marijuana is the most effective treatment for one or more bodily ailments. The state's interest in criminalizing marijuana must then be recharacterized as primarily motivated by moral concerns. The relatively low risk of adverse health effects of marijuana, particularly as compared to "licit" substances such as cigarettes and alcohol, lends credence to the contention that a flat out ban is unrelated to public health.[339] If the court accepts the contention that an individual has a significant interest in legitimate medical treatment using marijuana, the state's interest in policing morality will likely be insufficient to justify the burden on the individual's access to treatment.

C. Pleasure as Punishment: Drug Paraphernalia Laws and Clean Needles

Many states have drug paraphernalia laws that criminalize the possession or distribution of various items associated with drug use.[340] Often, these laws include objects that may be part of harm reduction strategies, such as clean hypodermic syringes.[341] Some laws also do not

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States and DC, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last updated Aug. 13, 2012).

338. *See* Grandel, *supra* note 336, at 135–36 (noting that "[m]arijuana has been used for medicinal purposes for at least five thousand years" and "was used medicinally in the United States up until the twentieth century").

339. Courts have historically been reluctant to weigh in on the question of whether the health benefits outweigh the health risks of marijuana. Michael D. Moberty & Charitie L. Hartsig, *Arizona's Medical Marijuana Act: A Pot Hole For Employers?*, 5 PHX L. REV. 415, 416 (2012). This approach, however, asks courts not to decide whether the benefits outweigh the risks, but instead, to look at the motivation underlying the criminal statute and declare it to be primarily moral, rather than health-related. The courts were willing to do precisely that in cases like *Eisenstadt* and *Carey*, based on the weak evidence that the statutes at issue were enacted with public health in mind or functioned to serve that goal. Eisenstadt v. Baird, 405 U.S. 438, 450 (1972); Carey v. Population Services Int'l, 431 U.S. 678, 690–91 (1977).

340. Evan D. Anderson et al., *Racial Disparities in Injection-Related HIV: A Case Study of Toxic Law*, 82 TEMP. L. REV. 1263, 1296–97 (2010) ("Every state except Alaska currently has some form of paraphernalia law.").

341. *See id*. at 1288, 1297 (exploring the effect of drug paraphernalia laws on the availability of syringe exchange programs and on drug users' willingness to carry their own syringes).

contain exceptions for needle exchange programs (SEPs)[342] and, until recently, Congress banned all federal funding for any such programs.[343] Some states allow greater access to clean syringes, but still require that they be obtained only with a prescription or from a pharmacist.[344]

Nonprofit groups and individuals who seek to run needle exchanges without being subjected to prosecution have challenged these statutes, but successes have been few and far between.[345] Some courts have refused to bend even where municipalities seeking to establish their own needle exchanges have sought exemption from state criminal drug paraphernalia laws.[346]

Drug paraphernalia laws that fail to exempt needle exchanges burden individuals' access to clean needles. When strictly applied, these criminal drug paraphernalia statutes expose drug users to increased risk of overdose, poisoning, and serious diseases such as HIV and Hepatitis.[347] Not only do

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342. *See*, *e.g.*, Zita Lazzarini, *An Analysis of Ethical Issues in Prescribing and Dispensing Syringes to Injection Drug Users*, 11 HEALTH MATRIX 85, 86 (2001); Anderson, *supra* note 341, at 1288.

343. Anderson, *supra* note 341, at 1288 (noting that most SEPs were founded without positive, legal authorization to do so).

344. *Id*. at 1293–97.

345. *See, e.g.*, State *ex rel.* Atl. Cnty. Pros. v. Atl. City, 879 A.2d 1206, 1207 (1998) (refusing to exempt municipal needle exchange program from criminal drug paraphernalia ordinance and permanently enjoining municipal ordinance authorizing city health officials to distribute clean syringes); State v. McGague, 714 A.2d 937 (N.J. Super. Ct. App. Div. 1998) (refusing to enjoin enforcement of drug paraphernalia statute against members of Chai Project, a nonprofit needle exchange program); Commonwealth v. Leno, 616 N.E.2d 453 (Mass. 1993) (affirming conviction of two individuals for distributing clean needles with the intention of preventing the spread of HIV); *but see* Spokane Cnty Health Dist. v. Brockett, 839 P.2d 324, 328 (Wash. 1992) (issuing declaratory judgment exempting county needle exchange program from prosecution under drug paraphernalia statute based on the broad powers vested in the state health board to authorize public health programs rather than on any finding of infringement of individual rights).

346. *Atl. Cnty. Pros.*, 879 A.2d at 1209 (citing State v. Crawley, 447 A.2d 565 (N.J. Sup. Ct. 1982)).

347. Lazzarini, *supra* note 342, at 86. Lazzarini writes that:

> An estimated 1.1 to 1.5 million persons in the United States use injection drugs. Injection drug users [IDUs] risk contracting viral diseases, such as hepatitis B and C, and HIV, parasitic infections, including malaria, and bacterial illnesses, such as endocarditis from using contaminated injection equipment. Injection drug use may cause as many as half of all new HIV infections nationwide. Injection drug use has been the leading risk factor associated with new AIDS cases in the northeast since 1988. As a consequence, public health officials, clinicians, and policy makers have sought effective means to reduce injection drug use, get active IDUs into treatment, and reduce the risk that IDUs not in treatment will contract HIV or transmit it to their sexual partners, children, and other IDUs. Active IDUs can take relatively simple steps to avoid blood-borne infections by using a sterile syringe for each injection, not sharing drug preparation equipment with other IDUs, and not mixing drugs with other IDUs.

such laws stifle the establishment of SEPs, but they also encourage addicts not to carry their own needles. This, in turn, encourages addicts to engage in the risky practice of sharing needles with other users.[348] In other words, a state's criminalization of possession of clean needles serves to increase the harm attendant upon drug use.[349]

Drug paraphernalia laws can plausibly be likened to the New York statute at issue in *Carey*.[350] Both statutes burden the distribution of items associated with potentially risky pleasure-seeking behaviors—in *Carey*, the statute burdened distribution of condoms, while in the case of paraphernalia the statutes burden the distribution of clean needles.[351] The items at issue in both cases reduce the harms attendant on the pleasure-seeking behavior—condoms reduce the risk of sexually transmitted diseases and unwanted pregnancy while clean needles reduce the risk of blood-borne diseases.[352] Thus, criminalizing these items serves to increase the health risks associated with the pleasure-seeking behavior.[353]

Carey therefore provides a useful model for challenging statutes that criminalize the distribution of clean needles. Following *Carey*'s lead, challenges to drug paraphernalia statutes must clearly medicalize the individual's interest and demedicalize the state's interest. Instead of asserting an individual interest in privacy, pleasure, or decisional autonomy, the challengers must assert a medical interest. The individual's interest in obtaining clean needles is clear. Clean needles, like condoms, allow the individual to engage in the pleasure-seeking behavior with a significantly

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> Structural impediments in most states (laws, regulations, and policies), however, make it dangerous or impossible for IDUs to obtain and carry sterile syringes, despite the fact that these syringes might save their lives.

Id. (footnotes omitted).

348. *See* Anderson, *supra* note 340, at 1268 (noting that criminal drug paraphernalia laws deter drug users from carrying sterile syringes).

349. The arguments in this section could be applied to other health-related items that are sometimes criminalized by state paraphernalia laws, such as pill-testing kits that can help users determine whether their drugs are contaminated.

350. Carey v. Population Services Int'l, 431 U.S. 678, 681 (1977); *see also supra* Part II(b).

351. *Carey*, 431 U.S. at 681.

352. Anderson, *supra* note 340, at 1272–84 (2010).

353. Access to condoms and clean needles is arguably not only an individual health concern, but also a public health matter. Indeed, "numerous public health groups including the American Medical Association, the National Institutes of Health, the Centers for Disease Control and Prevention, and the Institute of Medicine, have endorsed needle exchange programs." Lynn M. Paltrow, *The War on Drugs and the War on Abortion: Some Initial Thoughts on the Connections, Intersections and the Effects*, 28 S.U. L. REV. 201, 217 (2001). As of the early twenty-first century, intravenous drug use involving tainted needles accounted for as many as half of all new HIV infections nationwide. Lazzarini, *supra* note 342, at 86.

reduced risk of adverse health consequences. The medical character of these interests is apparent.

The challenger must also strongly attack the state's inevitable contention that drug paraphernalia laws further the state's interest in public health. Previous cases have assumed that drug paraphernalia statutes are rationally related to public health. But this is not a forgone conclusion. For one thing, the items at issue are not intrinsically hazardous. Just as condoms are not inherently dangerous, neither are hypodermic syringes. Indeed, many states allow possession of syringes as long as that possession is for a lawful purpose.[354] That the items can be used to further potentially risky pleasure-seeking behavior does not make the items dangerous in and of themselves.[355]

Thus, the criminalization of clean needles is not rationally related to the state's interest in public health. Instead, the criminal statute seeks to deter drug use by increasing the attendant harms. And this is *precisely* the type of regulation that the majority in *Carey* found so unconscionable.[356] Justice Stevens's motorcycle analogy is apt—surely we would object if the state, in an attempt to discourage the risky pleasure-seeking behavior of motorcycle riding, chose to criminalize the distribution of helmets.[357] Furthermore, even if the court concludes that there is no fundamental right to inject heroin, this does not mean that the state can discourage heroin use by

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354. Anderson, *supra* note 340, at 1297.

355. The same thing is true of condoms—the fact that they can be used in potentially risky or unwise sexual activity does not automatically render them dangerous, a point that was clearly elaborated in *Carey* and other contraceptive cases. There has been some concern (analogous to the concern that availability of contraceptives would increase non-marital sex) that availability of clean needles would increase intravenous drug use, but research has not shown that to be the case. *Id*. at 1276.

356. Carey v. Population Servs. Int'l, 431 U.S. 678, 694–95 (1977). The Court stated:

> The argument is that minors' sexual activity may be deterred by increasing the hazards attendant on it. The same argument, however, would support a ban on abortions for minors, or indeed support a prohibition on abortions, or access to contraceptives, for the unmarried, whose sexual activity is also against the public policy of many States. Yet, in each of these areas, the Court has rejected the argument, noting in *Roe v. Wade*, that "no court or commentator has taken the argument seriously." The reason for this unanimous rejection was stated in *Eisenstadt v. Baird*. "It would be plainly unreasonable to assume that [the State] has prescribed pregnancy and the birth of an unwanted child [or the physical and psychological dangers of an abortion] as punishment for fornication." We remain reluctant to attribute any such "scheme of values" to the State.

Id. (citations omitted) (quoting Roe v. Wade, 410 U.S. 113, 148 (1973); Eisenstadt v. Baird, 405 U.S. 438, 448 (1972)).

357. *Id*. at 715–16 (Stevens, J., concurring).

increasing the harms attendant on it.[358] As Justice Stevens put it: "One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse."[359] Regardless of whether a constitutional right exists, the state can no more attempt this kind of unscrupulous regulation in the context of drugs than it can in the context of sex or motorcycles.

Thus, it may be useful to challenge criminal paraphernalia laws using the model of the first form of medicalization illustrated in *Carey*. [360] The individual's interests must be framed as purely medical. And the challenger must assert that the state's interest in health is simply a masquerade, because the statute fails to further a public health goal and "is in fact an *anti*-health measure."[361] Finally, the challenger must characterize the statute as the state's attempt to discourage a behavior by increasing the medical risks attendant on the behavior, in violation of the ethical standards enunciated in *Carey*.

V. THE POTENTIAL COSTS OF MEDICALIZATION

In the context of challenges to statutes criminalizing pleasure-seeking behaviors, medicalization of the individual interests and demedicalization of the state interests allows the court to move towards decriminalization while ignoring any underlying moral or normative debate. This means that medicalization can be useful for facilitating decriminalization of pleasure-seeking behaviors. Furthermore, early decisions based on a medicalized

358. Some courts have, in fact, concluded that there is no constitutional right to obtain a clean needle to inject heroin and that the right to life does not include the right to use prohibited substances at decreased risk. *See, e.g.*, State v. McGague, 714 A.2d 937 (N.J. Super. App. Div. 1998).

359. *Carey*, 431 U.S. at 715.

360. This argument has been persuasive in Canada. In 2008, the B.C. Supreme Court refused to close a supervised injection facility in Vancouver, B.C. that provides clean syringes and an on-site nurse. PHS Cmty Servs. Soc'y v. Att'y Gen. of Canada, 2008 BCSC 661 (Can.). The court allowed the site to remain open, holding that laws prohibiting possession and trafficking of drugs are unconstitutional insofar as they deny addicts health care and subject them to unnecessary harm. *Id*. Echoing the spirit of Justice Stevens's concurrence in *Carey*, Justice Pittfield declared, "While there is nothing to be said in favour of the injection of controlled substances that leads to addiction, there is much to be said against denying addicts health care services that will ameliorate the effects of their condition . . . . I cannot agree with the submission that an addict must feed his addiction in an unsafe environment when a safe environment that may lead to rehabilitation is the alternative." *Id*. Justice Pittfield's ruling was affirmed by the B.C. Court of Appeals in 2010. *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCSC 15 (Can.). *See also* Donald G. McNeil Jr., *An HIV Strategy Invites Addicts In*, N.Y. TIMES at D1, Feb. 8, 2011; *Drug Laws Unconstitutional: B.C. Supreme Court*, C.B.C. News, May 27, 1998, http://www.cbc.ca/news/canada/british-columbia/story/2008/05/27/bc-supreme-court-insite.html.

361. Brief for Appellee at 34 n.14, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (No. 75-443).

framework may open the door for later courts to expand decriminalization beyond the medical context. But medicalization does not guarantee future expansion of individual rights and, in some circumstances, may even stifle such developments.

In the context of sexual intimacy, *Lawrence v. Texas* may be an example of later courts' willingness to extend protections into new spheres.[362] In *Lawrence*, the Court overruled its previous decision in *Bowers v. Hardwick* and invalidated a statute prohibiting same-sex sodomy.[363] In so doing, the Court relied on the line of contraception and abortion cases, including *Griswold, Eisenstadt, Roe,* and *Carey*.[364] But because of the nature of the statute at issue in *Lawrence*, no individual medical interest could be posited. Despite this difference, the Court invalidated the anti-sodomy statute as an unacceptable attempt to police morality.[365] Given the absence of any individual medical interest, there is a plausible reading of *Lawrence* as reversing the hierarchy of morality and pleasure in the context of sexual intimacy.[366] However, if the *Lawrence* Court was indeed suggesting that the state interest in morality could never justify regulation of private consensual sexual intimacy, the Court failed to make this determination explicit.[367]

The expansion of gains originally made under a medicalized framework is by no means guaranteed. Indeed, the medicalization of the debate may actually serve to stifle further expansion. The later (post-*Lawrence*) "obscene devices" cases offer an interesting study in both alternatives. Both cases involved statutes criminalizing the distribution of "obscene devices" *for nonmedical purposes*.[368] That both statutes contained explicit medical exceptions distinguished them from the statutes in *Hughes* and *Brenan*, which were discussed in Part II(c) above.[369] In one of the post-

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

363. *Id*.

364. *Id*. at 564–66.

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

366. *See supra* Part I(c).

367. Furthermore, although *Lawrence* appeared to recognize a right to sexual privacy, it did not label that right as fundamental. Chai R. Feldblum, *The Right to Define One's Own Concept of Existence: What* Lawrence *Can Mean for Intersex and Transgender People*, 7 GEO. J. GENDER & L. 115, 119 (2006).

368. Reliable Consultants v. Earle, 517 F.3d 738, 741 (5th Cir. 2008); Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1233 (11th Cir. 2004).

369. *Supra* Part II(c).

Lawrence cases, the court invalidated the statute,[370] while in the other case, the statute was upheld.[371]

In *Reliable Consultants v. Earle*, the court interpreted *Lawrence* as having in fact reversed the hierarchy of morality and pleasure in the context of sexual intimacy. The court concluded that *Lawrence* had established that "public morality was an insufficient justification for a law that restricted 'adult consensual sexual intimacy in the home. . . .'"[372] Applying this holding to the Texas statute criminalizing distribution of "obscene devices," the court concluded that the state's interest in policing morality could not justify the ban on "obscene devices," despite the statute's built-in medical exception.[373]

By contrast, the court in *Williams v. Attorney General of Alabama* upheld a statute banning distribution of "obscene devices" for nonmedical purposes.[374] The court declined to read *Lawrence* broadly, and instead narrowly construed the right at issue.[375] The court insisted that states have a broad right to criminalize behaviors in order to promote public morality and refused to find a fundamental right to sexual privacy.[376] The court's analysis examined the very same precedent as the court in *Reliable* and came to the opposite conclusion.[377] Where one court was willing to take the leap from a medicalized framework to a broader endorsement of individual rights, another court refused—and in theory was not compelled by precedent to do so.

Thus, medicalization may result in disingenuous reasoning. One could argue that the early "obscene devices" cases were not really decided on medical grounds, but rather because of the feeling that the state had intruded too far into the private sexual decisions of its citizens. By relying explicitly on medical justifications, however, those cases provide weak precedent for vindicating individual sexual rights. As *Williams* demonstrates, if earlier courts really intended to protect individuals from such intrusion, they failed to do so by declining to make that intention explicit.

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370. *Earle*, 517 F.3d at 740.
371. *Williams*, 378 F.3d at 1250.
372. *Earle*, 517 F.3d at 745 (quoting Lawrence v. Texas, 539 U.S. 558, 564 (2003)).
373. *Id*. at 747.
374. *Williams*, 378 F.3d at 1250.
375. *Id*. at 1238, 1241–42.
376. *Id*. at 1238, 1242–43.
377. *See, e.g., Earle*, 517 F.3d at 747; *Williams*, 378 F.3d at 1233 (holding that *Lawrence* does not support a right to sexual privacy).

Furthermore, scholars have argued that *Roe v. Wade*'s focus on medical reasoning left it particularly vulnerable to future attack.[378] Indeed, *Roe v. Wade* has proven to be one of the most contentious decisions in Supreme Court history.[379] Justice Ginsberg has criticized the medical nature of the decision:

> I earlier observed that, in my judgment, *Roe* ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures. In place of the trend 'toward liberalization of abortion statutes' noted in *Roe*, legislatures adopted measures aimed at minimizing the impact of the 1973 rulings, including notification and consent requirements, prescriptions for the protection of fetal life, and bans on public expenditures for poor women's abortions.
>
> Professor Paul Freund explained where he thought the Court went astray in *Roe*, and I agree with his statement. The Court properly invalidated the Texas proscription, he indicated, because '[a] law that absolutely made criminal all kinds and forms of abortion could not stand up; it is not a reasonable accommodation of interests.' If *Roe* had left off at that point and not adopted what Professor Freund called a 'medical approach,' physicians might have been less pleased with the decision, but the legislative trend might have continued in the direction in which it was headed in the early 1970s.[380]

Roe's reliance on the trimester framework rigidly fixed the balance of interests at a single point in the evolution of medical knowledge and technology, without allowing for scientific advancement:

> Justice O'Connor, ten years after *Roe*, described the trimester approach as 'on a collision course with itself.' Advances in medical technology would continue to move *forward* the point at which regulation could be justified as protective of a woman's health, and to move *backward* the point of viability, when the

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378. *E.g.,* Ruth Bader Ginsberg, *Some Thoughts On Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381–82 (1985).

379. *See, e.g.*, JACK M. BALKIN ET AL., WHAT ROE V. WADE SHOULD HAVE SAID 3 (2005) (observing that *Roe* is the Supreme Court's "most controversial" decision); Ginsberg, *supra* note 378, at 379 (noting that *Roe* "has occasioned searing criticism of the Court, over a decade of demonstrations, a stream of vituperative mail addressed to Justice Blackmun (the author of the opinion), annual proposals for overruling *Roe* by constitutional amendment, and a variety of measures in Congress and state legislatures to contain or curtail the decision").

380. Ginsberg, *supra* note 378, at 381–82 (footnotes omitted).

> state could proscribe abortions unnecessary to preserve the patient's life or health. The approach, she thought, impelled legislatures to remain *au courant* with changing medical practices and called upon courts to examine legislative judgments, not as jurists applying 'neutral principles,' but as 'science review boards.'[381]

History has borne out these concerns, and later cases have relied on changes in medical technology to eviscerate *Roe*'s trimester framework and allow greater incursions into women's access to abortion.[382] The importance of the woman's right to control procreation has retreated into the background of recent abortion decisions, while highly medicalized analysis has remained front and center.[383]

Thus, by refocusing the debate on medical issues, courts may produce weak precedent that does little to advance individual rights more generally. Furthermore, by ignoring the underlying moral and normative issues, courts may create law that leaves little room for consideration of those issues. In their reluctance to address individuals' underlying motivations for engaging in victimless pleasure-seeking behaviors, or at least to grant them a general right of privacy to engage in such behaviors, courts may fail to fully comprehend and articulate the individual interests at stake. This may perpetuate a normative understanding of pleasure as unimportant, dangerous, or taboo. By relying on medical reasoning to sanction private hedonistic behavior, legal discourse may forever keep pleasure under the covers.

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381. *Id*. at 381–82 (quoting City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 458 (1983) (O'Conner, J., dissenting) (footnotes omitted)).

382. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 64 (1976) (holding that the actual point of viability is a matter for the physician to determine); *see also* Colautti v. Franklin, 439 U.S. 379, 396–97 (1979) (holding that the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician, and state abortion regulation that impinges on this determination must allow the attending physician to use his best medical judgment); Webster v. Reproductive Health Serv., 492 U.S. 490, 518–19 (1989) (noting that "the trimester framework has left this Court to serve as the country's '*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States'" (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 99 (1976) (White, J., concurring in part and dissenting in part))); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874–76, 878 (1992) (abandoning the trimester framework and requiring only that abortion regulations not impose an "undue burden" on the woman).

383. *See, e.g.* Gonzales v. Carhart, 550 U.S. 124 (2007) (barely mentioning the woman's liberty interest and devoting most of the opinion to a medical analysis of particular D-and-E procedures); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (implying that the interest at stake in abortion cases may not be fundamental by requiring only that the state not impose an "undue burden" on the woman's access to abortion).