

# PATHOLOGY FULL CIRCLE: A HISTORY OF ANTI-VIBRATOR LEGISLATION IN THE UNITED STATES

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In *The Technology of Orgasm*, Rachel Maines traces the electromechanical vibrator back to its inception in the late 1800s, when it was employed solely by medical professionals who sought to relieve symptoms of hysteria and various other ailments in their female patients.<sup>1</sup> For several decades, the vibrator remained largely uncontroversial, even when it began appearing outside the confines of the doctor's office and in private homes, because it was consistently marketed as a medical—and not overtly sexual—device.<sup>2</sup> After it began appearing as an instrument of sexual pleasure in pornographic films of the 1920s, the vibrator's primary function became impossible to deny, and it essentially disappeared from public (though not private) life until the 1960s, when it emerged in advertisements as an explicitly sexual commodity.<sup>3</sup> Maines, however, fails to explore extensively either contemporary attitudes towards the vibrator or its current status as a medical or pleasurable instrument.

This Article picks up where Maines leaves off, arguing that a modern-day legal emphasis on the vibrator's use as a treatment for female sexual dysfunction and the contemporary courts' repeated attestations that the device's worth lies in its therapeutic value bring us full-circle to an era when the device was legitimated only as a treatment. Part I describes the historical background of the vibrator up until the 1960s. Part II summarizes anti-vibrator legislation that has emerged in recent years in several states. Part III examines contemporary medical and therapeutic arguments advanced by plaintiffs who have been prosecuted for the sale of sex toys. Legislation to prohibit the distribution of the device in several states has been combated by arguments that have overwhelmingly emphasized the vibrator's efficacy as a therapeutic tool for anorgasmic women and women with other sexual "dysfunctions." This section posits that these defense

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<sup>1</sup> RACHEL MAINES, *THE TECHNOLOGY OF ORGASM* 3 (1999).

<sup>2</sup> *Id.* at 7.

<sup>3</sup> *Id.* at 20.

strategies legally legitimate vibrators solely as medical tools. Part IV summarizes the main epidemiological arguments that plaintiffs at these trials have employed to legitimate the sale of vibrators—chiefly that, used in lieu of intercourse, vibrators and other sex toys aid in the prevention of sexually transmitted diseases. The final section analyzes the implications of these anti-sex toy cases, concluding that the vibrator has, in a sense, legally resumed the guise of a primarily medical instrument. By validating the vibrator as a remedy for the sexually dysfunctional, and de-emphasizing or outright denying the rights of sexually-healthy women to use the device, the courts succeed in both criminalizing and pathologizing female masturbation.

### I. HISTORICAL BACKGROUND

In the late nineteenth century, prevalent notions about female sexuality, chiefly the fallacy that all women could achieve orgasm through vaginal penetration alone, both led to the invention of the vibrator and eliminated any moral controversy that could have potentially surrounded the device.<sup>4</sup> Symptoms of the disease paradigm “hysteria,” diagnosed in so many women of the Victorian era, were created, in part, by unreleased sexual tension.<sup>5</sup> Though this cause was not publicly acknowledged at the time, general practitioners essentially treated the malady by inducing orgasm.<sup>6</sup> Indeed,

[m]ore than 100 years ago women who displayed symptoms of irritability, depression, confusion, heart palpitations, forgetfulness, insomnia, headaches, muscle spasms, ticklishness or weepiness were thought to suffer from hysteria and were packed off to the GP. The good doctor’s treatment for such maladies often included an external pelvic massage with his fingers which induced ‘local spasms’—what we know as the orgasm.<sup>7</sup>

Dr. Joseph Mortimer Granville’s invention of the electromechanical vibrator as a purely medical device in 1880 made these spasms—dubbed, in the medical lexicon, “hysterical paroxysms”—easier for physicians to achieve.<sup>8</sup>

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<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.*

<sup>7</sup> Charmain Naidoo, *Rattle and Hum*, SUNDAY TIMES, Mar. 9, 1999 (on file with author).

<sup>8</sup> *Id.*

Because practitioners used the vibrator externally to stimulate the pelvic area (essentially, the clitoris), Granville's invention became codified as a purely medical instrument in a society that held the belief that only penetration could prove sexually arousing for women.<sup>9</sup> General practitioners of the late 1800s and early 1900s

did not lose status by providing sexual services, in part because the character of these services was camouflaged both by the disease paradigms constructed around female sexuality and by the comforting belief that only penetration was sexually stimulating to women. Thus the speculum and the tampon were originally more controversial in medical circles than was the vibrator.<sup>10</sup>

The vibrator's codification as a medical implement did not change, even in the early 1900s, when manufacturers began producing and marketing vibrators for personal, at-home use.<sup>11</sup> Maines notes that, ironically, female sexual pleasure and the perceived function of the vibrator were so disconnected—at least overtly—in the Victorian mindset that, “[b]y far the most widely advertised home vibrator of the early twentieth century” was the “White Cross” variety, a brand-name “drawn from the name of an Episcopalian sexual purity organization that flourished in Britain in the late 1880s.”<sup>12</sup> The mail-order vibrator business, hawking the “White Cross” and other brands, blossomed between 1900 and the late 1920s.<sup>13</sup> Vibrators were advertised in such publications as *Modern Priscilla*, *Sears Roebuck*, *Women's Home Companion*, *McClure's*, *Good Housekeeping*, and *Popular Mechanics*.<sup>14</sup>

Despite the overwhelming public denial about the vibrator's sexual utility, however, it is important to note the historical evidence that at least some practitioners were acutely aware that its stimulation contained a sexual component.

Some of [the early administrators of the hysteria treatment] knew exactly what was going on. There's a reference in a 17th century-

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<sup>9</sup> MAINES, *supra* note 1, at 99.

<sup>10</sup> *Id.* at 113.

<sup>11</sup> *Id.* at 100.

<sup>12</sup> *Id.* at 104-05, 107.

<sup>13</sup> *Id.* at 104.

<sup>14</sup> *Id.* at 107.

book by Nathaniel Hymore which basically says 'well folks this hysterical paroxysm is an orgasm, you can call it whatever you like but nevertheless it's our job to do this because the woman will get sick and feel terrible if we don't.' There's another reference in the 1880's by a French physician who says that it's important to provide this treatment even though we know it's sexual. But some doctors maintain it's an hysterical paroxysm. It was controversial.<sup>15</sup>

The vibrator became increasingly controversial as its increasingly overt role in the sex industry of the 1920s made it difficult to preserve the device's purely-medical veneer.<sup>16</sup> For instance, in the 1920s film, *Widow's Delight*, a woman places a vibrator against her genitals and clearly experiences sexual gratification.<sup>17</sup> Furthermore, increasing knowledge about human sexuality, specifically the notion that vaginal penetration may not serve as the source of all female sexual pleasure, made denial of the vibrator's sexual advantages impossible.<sup>18</sup> Among the factors that contributed to the disappearance of the vibrator from public life in the early 1930s was "the growing understanding by both men and women of female sexual function, making it difficult to disguise the use of vibrators by either physicians or consumers as a mere therapeutic measure."<sup>19</sup> Although "massager" ads continued to appear in ladies' magazines from the 1930s to the 1960s, the vibrator, specifically, disappeared from public view until several decades later.<sup>20</sup> In the 1960s, "when the vibrator reemerged in advertising from its mid-century eclipse, few efforts were made to camouflage its sexual benefits."<sup>21</sup> Manufacturers began marketing the device as "a frankly sexual toy."<sup>22</sup>

*The Technology of Orgasm* leaves off in the 1960s, with the rise of the vibrator as an overtly sexual commodity, and Maines does not delve into contemporary attitudes towards the device. Maines' book has been criticized for this lack of a current perspective; for instance, in a review of Maines' book, Nathalie Muller argues that the historical account is

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<sup>15</sup> Interview by Phillip Adams with Rachel Maines, May 11, 1999, <http://arts.abc.net.au/headspace/rn/lnl/vibrator/part2.htm>.

<sup>16</sup> *Id.*

<sup>17</sup> MAINES, *supra* note 1, at 108.

<sup>18</sup> *Id.* at 108-09.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 109.

<sup>22</sup> *Id.* at 108.

weakened because it makes “no real mention about how vibrators are now marketed and represented in the media.”<sup>23</sup> Maines additionally fails to address contemporary legal maneuvers to ban the device in several states.

## II. CONTEMPORARY LEGISLATION

While at this time no state explicitly prohibits the personal use of vibrators or other sex toys, in the late twentieth and early twenty-first centuries, several states put into effect legislation prohibiting the possession and distribution of these devices.<sup>24</sup> All states currently place at least one prohibition on the sale of vibrators and other sexual gadgets; in some states, individuals must be eighteen before they can “legally go into a sex shop and buy . . . a vibrator or a sex toy.”<sup>25</sup> In other states, individuals must be older.<sup>26</sup>

The number of states that effectually prohibit *all* vibrator sales as a part of their anti-obscenity legislation is almost impossible to assess accurately at any one time, due to spotty enforcement and the fact that these laws are continually in flux. As the twenty-first century began, vibrators were illegal in two states, Georgia and Texas.<sup>27</sup> According to another source at that time, “At least eight states are currently considering passing laws that ban the sale and/or possession of vibrators, dildos, and other sex toys.”<sup>28</sup> As of 1999, “[a]t least 14 states around the country have passed laws that prohibit the sale of sexual devices, according to adult toy sellers. . . . Some states have bans in only certain zip codes; others

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<sup>23</sup> Nathalie Muller, *Book Review*, CYBERSOCIOLOGY MAGAZINE: ISSUE FIVE, <http://www.socio.demon.co.uk/magazine/5/5orgasm.html> (last visited Nov. 7, 2005).

<sup>24</sup> These states include Alabama, Colorado, Georgia, Kansas, Louisiana, Mississippi, and Texas.

<sup>25</sup> John Illman & Rachel Newcombe, *Sex and the Law: How Does it Affect You?*, HEALTH MAG., June 2005, [http://www.channel4.com/health/microsites/0-9/4health/sex/sar\\_law.html](http://www.channel4.com/health/microsites/0-9/4health/sex/sar_law.html).

<sup>26</sup> *Williams v. Pryor*, 41 F. Supp. 2d 1257, 1262 (N.D. Ala. 1999) (noting that individuals must be at least twenty-one years old to enter an adult video store), *rev'd*, 240 F.3d 944 (11th Cir. 2001), *remanded to* 220 F. Supp. 2d 1257 (N.D. Ala. 2002), *rev'd sub nom.* *Williams v. Attorney Gen. of Alabama*, 378 F. 3d 1232 (11th Cir. 2004), *cert. denied sub nom.* *Williams v. King*, 125 S. Ct. 1335 (2005).

<sup>27</sup> *Time Capsule*, Ms., Dec. 1999/Jan. 2000, at 71, 77, *available at* <http://www.ms magazine.com/dec99/timecapsule6.asp>.

<sup>28</sup> *Legislative Alert!*, ABOUT SEXUALITY, May 10, 1999, <http://sexuality.about.com/library/weekly/aa051099.htm>.

lackadaisically enforce their law.”<sup>29</sup> More recently, another source observed that Texas law prohibits the possession of any device “designed or marketed as useful primarily for the stimulation of human genital organs,” and there are “similar laws on the books in Georgia, Louisiana, Mississippi, Kansas, Colorado, and Alabama.”<sup>30</sup> In fact, partially due to factors such as sex-industry zoning and lax enforcement, as well as the “wait and see” attitude towards enforcement that has prevailed as several states wait for legal precedents to emerge elsewhere, anti-vibrator laws have been publicly tested in only six states: Alabama, Louisiana, Kansas, Colorado, Georgia, and Texas. Legal challenges to vibrator bans in these states have arisen both as a result of specific acts of prosecution under the obscenity statutes and challenges from individuals who have called into question the constitutionality of the laws.

Alabama has criminalized the distribution of obscene material since 1975, but in 1998 the state legislature revised the statute to include sex toys. The statute provides that

[i]t shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer to agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal.<sup>31</sup>

First-time offenders faced a fine of up to \$10,000 and one year in prison, accompanied by hard labor, and second-time violators faced a maximum fine of \$50,000.<sup>32</sup> In 1998, six women contested the statute’s constitutionality and sought an injunction to prohibit enforcement of the statute in *Williams v. Pryor*.<sup>33</sup> The plaintiffs included women who owned

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<sup>29</sup> Jenifer Joseph, *Sexual Buzzzzz Killer: States Banning Vibrators and Other Marital Aids*, ABCNEWS, <http://abcnews.go.com/sections/living/HealthyWoman/healthywoman/> (last visited Dec. 12, 2002) (on file with author).

<sup>30</sup> Tristan Taormino, *Dallas Dildo Defiance: Have Dildo, Will Travel*, THE VILLAGE VOICE, Feb. 17, 2002, available at <http://www.villagevoice.com/people/0221.taormino,34944,24.html>.

<sup>31</sup> ALA. CODE § 13A-12-200.2 (2005).

<sup>32</sup> *Id.*

<sup>33</sup> *Williams v. Pryor*, 41 F. Supp. 2d 1257, 1260 (N.D. Ala. 1999), *rev’d*, 240 F.3d 944 (11th Cir. 2001), *remanded to* 220 F. Supp. 2d 1257 (N.D. Ala. 2002), *rev’d sub nom. Williams v. Attorney General of Alabama*, 378 F. 3d 1232 (11th Cir. 2004), *cert. denied sub nom. Williams v. King*, 125 S. Ct. 1335 (2005).

and operated stores selling sex devices and women who used such devices for sexual pleasure.<sup>34</sup> The district court granted the injunction, finding that the statute was overly broad and bore no rational relation to a legitimate state interest.<sup>35</sup> On appeal, the Eleventh Circuit reversed, holding that the statute was rationally related to the State's legitimate government interest in public morality, but remanded for consideration of plaintiffs' fundamental rights challenges.<sup>36</sup> The appellate court "did not laugh at the state of Alabama's argument that 'a ban on the sale of sexual devices and related orgasm stimulating paraphernalia is rationally related to a legitimate interest in discouraging prurient interests in autonomous sex.'"<sup>37</sup> Instead, the court quoted the State's brief approvingly: "[I]t is enough for a legislature to reasonably believe that commerce in the pursuit of orgasms by artificial means for their own sake is detrimental to the health and morality of the State."<sup>38</sup> On remand, the district court again held the statute unconstitutional.<sup>39</sup> The Eleventh Circuit again reversed.<sup>40</sup>

In Louisiana, anti-vibrator legislation specifically prohibits the promotion of "obscene devices" and defines these terms as follows:

- (1) "Obscene device" means a device, including an artificial penis or artificial vagina, which is designed or marketed as useful primarily for the stimulation of human genital organs.
- (2) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, distribute, circulate, disseminate, present, or exhibit, including the offer or agreement to do any of these things, for the purpose of sale or resale.<sup>41</sup>

Christine D. Brennan, the proprietor of an adult business, was arrested under this statute for promoting obscene devices, including vibrators.<sup>42</sup> The jury

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1293.

<sup>36</sup> 240 F.3d at 956.

<sup>37</sup> Wendy Kaminer, *Bad Vibes in Alabama*, 11 THE AMERICAN PROSPECT 25, 25 (2000), available at <http://www.prospect.org/print/V11/25/kaminer-w.html>.

<sup>38</sup> 240 F.3d at 949.

<sup>39</sup> 220 F. Supp. 2d at 1260.

<sup>40</sup> 378 F. 3d at 1250.

<sup>41</sup> LA. REV. STAT. ANN. § 14:106.1 (2005).

<sup>42</sup> *State v. Brennan*, 98-2356 (La. App. 1 Cir. 7/1/99), 739 So. 2d 368, 369, *aff'd*, 99-2291 (La. 5/16/00), 772 So. 2d 64.

found her guilty on both counts, and the trial court sentenced her to two years at hard labor and a \$1,500 fine for each count.<sup>43</sup> The sentences were suspended, and Brennan was placed on probation for five years and fined \$1,500 for each violation.<sup>44</sup> The appellate court reversed, holding that the statute lacked a reasonable, rational relationship to a legitimate state interest.<sup>45</sup> Even though the Louisiana Supreme Court affirmed the decision,<sup>46</sup> the law remains on the books in the state.

Similarly, in Kansas, the anti-vibrator statutes were ruled unconstitutional in *State v. Hughes*,<sup>47</sup> but an amended version of the statute still remains on the books. At the time, the statute prohibited the sale of “a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.”<sup>48</sup> In *Hughes*, defendant was charged with selling “The Sexplorer Pleasure System,” a vibrator kit with a dildo attachment, and “Miss World,” an inflatable doll with an artificial vagina, to undercover police officers.<sup>49</sup> The trial court held that the statutes prohibiting the dissemination of devices declared to be obscene were unconstitutional, and the appellate court affirmed.<sup>50</sup> After the court’s decision, the statute was amended to prohibit the sale of “a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs, except such devices disseminated or promoted for the purpose of medical or psychological therapy.”<sup>51</sup>

Yet, similar obscenity statutes have withstood legal challenges in several other states. For instance, in the Colorado case *People v. Seven Thirty-Five East Colfax*, the Adult Literary Guild, an adult book and novelty store, had third-person standing to challenge the law because the consumers’ privacy right implicated in the use of devices was inextricably bound with the vendors’ supply of the devices, and because vendors were forced to choose between the economic injury suffered by conformance to

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<sup>43</sup> The trial court suspended the sentences and placed defendant on probation for five years. *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 371.

<sup>46</sup> 772 So. 2d at 65.

<sup>47</sup> 792 P.2d 1023 (Kan. 1990).

<sup>48</sup> *Id.* at 1027.

<sup>49</sup> *Id.* at 1025.

<sup>50</sup> *Id.* at 1032.

<sup>51</sup> KAN. STAT. ANN. § 21-4301 (2004).



the statute or possible criminal prosecution through disobedience.<sup>52</sup> The court found that sections 18-7-102(3) and (4) violated the due process clause of the federal and state constitutions because the language was overbroad, but it held that these sections could be severed from the rest of the statute.<sup>53</sup> The court upheld the remaining parts of the statute, noting that “the primary goal of the General Assembly was to regulate obscenity and this purpose should not be disturbed because of an unconstitutional flaw in the exception statute.”<sup>54</sup>

Georgia courts also have upheld an anti-vibrator statute.<sup>55</sup> The defendant operated an adult book store and was arrested after selling a sexually explicit magazine and an artificial vagina.<sup>56</sup> The appellate court affirmed defendant’s conviction, holding that the statute, which provided that “any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material,” was not unconstitutionally vague or overbroad.<sup>57</sup> Violation of the current statute constitutes a “misdemeanor of a high and aggravated nature,”<sup>58</sup> and offenders may incur a fine of up to \$10,000 or up to three years in prison, or both.<sup>59</sup>

Texas has a comparable statute, which bans the sale of any “device designed and marketed as useful primarily for stimulation of the human genital organs”<sup>60</sup> and prohibits the simultaneous possession of “six or more obscene devices or identical or similar obscene articles,” classifying such possession as indicative of intent to sell.<sup>61</sup> This statute has withstood at

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<sup>52</sup> *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 356, 368 (Colo. 1985).

<sup>53</sup> *Id.* at 373.

<sup>54</sup> *Id.* at 372.

<sup>55</sup> *See, e.g., Sewell v. State*, 233 S.E.2d 187 (Ga. 1977).

<sup>56</sup> *Id.* at 188.

<sup>57</sup> *Id.* (citing CODE 1933 § 26-2101 (current version at GA. CODE ANN. § 16-12-80 (2005))).

<sup>58</sup> § 16-12-80. Other crimes which constitute misdemeanors of a high and aggravated nature include keeping a place of prostitution, pimping, and pandering.

<sup>59</sup> § 16-12-81.

<sup>60</sup> TEX. PENAL CODE ANN. § 43.21 (2005).

<sup>61</sup> § 42.23.

least two legal tests.<sup>62</sup> In *Red Bluff v. Vance*, several entrepreneurs of the adult entertainment business brought suits seeking declaratory judgments that the statute was unconstitutional.<sup>63</sup> The lower courts upheld the constitutionality of the obscenity statutes, and the appellate court affirmed the judgments in all but three instances: the portions of each judgment upholding the constitutionality of sections 43.21(a)(4), 43.21(a)(5), and 43.23(e) and (f) were vacated, and the court refused to determine the constitutionality of these provisions on the merits.<sup>64</sup> There was no constitutional problem with prohibiting devices designed to stimulate the human genital organs.<sup>65</sup> The court did, however, leave open the possibility that it might recognize a constitutional right for a handicapped person to use sexual devices grounded on the “constitutional guarantee of personal autonomy.”<sup>66</sup>

In *Yorko v. State*, the defendant was arrested and convicted of possession with intent to sell a dildo, and the appellate court affirmed.<sup>67</sup> The court held that “the State may criminalize promotion of and possession with intent to promote obscene devices,” and that the statute does not violate the state constitution.<sup>68</sup> It further found that “the rationale justifying the State’s exercise of the police power against obscene expression—that is, the protection of the social interest in order and morality—also justifies the

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<sup>62</sup> See *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir. 1981); *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985).

<sup>63</sup> 648 F.2d at 1024-25.

<sup>64</sup> *Id.* at 1025.

Section 43.21(a)(4) provided, “‘Patently offensive’ means so offensive on its face as to affront current community standards of decency.”

Section 43.21(a)(5) provided, “‘Promote’ means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.”

Section 43.23(e) provided, “A person who promotes or wholesale promotes obscene material or an obscene device or possesses the same with intent to promote or wholesale promote it in the course of his business is presumed to do so with knowledge of its content and character.

Section 43.23(f) provided, “A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.”

<sup>65</sup> 648 F.2d at 1028.

<sup>66</sup> *Id.*

<sup>67</sup> 690 S.W.2d at 261.

<sup>68</sup> *Id.* at 266.

protection of the social interest in order and morality—also justifies the State in criminalizing the promotion of objects designed or marketed as useful primarily for the stimulation of human genital organs.”<sup>69</sup>

These laws still exist in Texas. In 2002, a woman was charged with obscenity after police officers located several sex toys inside her car during a traffic stop.<sup>70</sup> The police chief “said the items were mostly lotions and objects defined in a dictionary as having the shape and often the appearance of the male genitalia, used in sexual stimulation.”<sup>71</sup>

### III. CONTEMPORARY MEDICAL AND THERAPEUTIC ARGUMENTS

Parties in several of the preceding cases asserted that the vibrator is a legitimate medical instrument. For instance, plaintiffs in *Williams*, the Alabama case, included

individuals who have experienced some level of sexual dysfunction or inhibition as defined by the therapeutic community . . . Each of these plaintiffs uses a vibrator or other sexual aid to achieve orgasm where she was previously unable to do so. . . . At least one plaintiff has acted at the direction of her medical doctor while a second plaintiff was encouraged in her use of sexual aids by a therapist.<sup>72</sup>

Even the category of vendors included an individual who affirmed the vibrator’s ability to assuage a physiological malady. *Williams* was “a 48-year-old divorcee who first began using sexual devices while she was still married, after her medical doctor advised her that it could bring an end to a five-year inability to climax.”<sup>73</sup> Plaintiffs’ counsel introduced several medical experts to support the notion that “experts in the area of sex therapy . . . overwhelmingly recognize the therapeutic benefits of using devices to overcome sexual dysfunction.”<sup>74</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> John Lynch, 11-21, local: Police find 17 sex toys in local woman's car during DUI traffic stop, NEWS-JOURNAL, Nov. 11, 2002, available at <http://www.news-journal.com/news/newsfd/auto/feed/news/2002/11/21/1037856026.03162.8221.2870.html>.

<sup>71</sup> *Id.*

<sup>72</sup> Brief of Plaintiffs-Appellants at 5, *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 1999) (No. 99-10798-E).

<sup>73</sup> Joseph, *supra* note 29.

<sup>74</sup> Brief of Plaintiffs-Appellants, *supra* note 72, at 8.

A similar line of argument evolved in *Sewell v. State*.<sup>75</sup> Dr. Sandor Gardos, a sex therapist and expert witness in that case, paraphrases his testimony as follows:

**DA:** Now, Professor Doctor Gardos, you stated that these devices have therapeutic value. Is that correct?

**Gardos:** Yes.

**DA:** And have you ever prescribed a device similar to this one?

**Gardos:** Uh, no, I must admit that I have never prescribed that a patient attach a dildo to his or her chin.<sup>76</sup>

In both Alabama and Georgia, the prosecutors attacked the alleged value of specific devices as medical instruments rather than the idea that the statute infringes upon personal freedoms, irregardless of the devices' medical legitimacy.<sup>77</sup> The cases thus devolved into examinations of the vibrator as a treatment—a phenomenon that also occurred during the proceedings of *Hughes*, but in *Hughes*, the State did not attempt to controvert the body of scientific evidence that was presented.<sup>78</sup>

Dr. Douglas Mould attested to the efficacy of the vibrator in helping to cure anorgasmic women, who “may be particularly susceptible to pelvic inflammatory diseases, psychological problems, and difficulty in marital relationships.”<sup>79</sup> Mould likened this sexual remedy to a treatment commonly employed in cerebral palsy patients:

In treating cerebral palsy, the vibration has a specific effect on the sensory and motor enervation of the muscle. A vibrator is used in sex therapy to cause vibration to go through the pubic bone to the sensory endings called muscle spindles within the pelvic musculature. This helps lower the physiological threshold for initiating the spinal reflex.<sup>80</sup>

Additionally, Mould testified that vibrators were commonly prescribed to women with “relaxed pelvic muscles” and women suffering “urinary stress incontinence” so that they could perform a form of therapy known as

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<sup>75</sup> *Sewell v. State*, 233 S.E.2d 187, 188 (Ga. 1977).

<sup>76</sup> Sandor Gardos, *Vibrators in Georgia: Part II*, ABOUT SEXUALITY, Oct. 13, 1997, <http://sexuality.about.com/library/weekly/aa101397.htm> (on file with author).

<sup>77</sup> Brief of Plaintiffs-Appellants, *supra* note 72, at 28.

<sup>78</sup> *State v. Hughes*, 792 P.2d 1023, 1030-31 (Kan. 1990).

<sup>79</sup> *Id.* at 1025.

<sup>80</sup> *Id.*

Kegel's exercise.<sup>81</sup> The exercise, "in which the circumvaginal muscles are contracted and strengthened, is universally acknowledged as the most effective way of avoiding urinary stress incontinence, short of surgery."<sup>82</sup> Consequently, the unavailability of the devices would cause anorgasmic women to be "substantially impacted" and "would put a very serious block in the way of effective treatment."<sup>83</sup> Plaintiffs' counsel in *Williams* stated that "[i]f nothing else," *Hughes* establishes "that it is common knowledge today that trained experts in the field of human sexual behaviors use sexual aids . . . in their endeavors to cure their patients' sexual problems"<sup>84</sup> and asked, "[i]f the State may not deny access to contraceptive devices, how can it deny access to human sexual devices, that as a matter of common knowledge, have much therapeutic value, and are harmless in and of themselves?"<sup>85</sup> Yet the importance of the vibrators' harmlessness in these cases seems to have been subordinated to the vibrator-as-treatment paradigm. The challengers argue predominantly not for the rights of sexually-healthy women but for those with dysfunctions that require physical therapy.

This medical paradigm can be seen most strikingly in *Red Bluff*, where the plaintiff sought to legitimate the vibrator solely as a treatment.<sup>86</sup> Plaintiff Henry Gullick alleged that, because he was handicapped and needed "obscene" devices, the prohibition against them violated his constitutional right to privacy.<sup>87</sup> The court found that "the evidence is inadequate to support the contention that, assuming such a right exists, it is burdened by the statute."<sup>88</sup> The court thus acknowledged the possibility that treatment-related use of such devices may represent a right not shared with purely recreational employment of the devices.

Though the *Red Bluff* court acknowledged the potential of such a treatment-related right, lawyers combating similar laws in other states have attested that the plaintiff's argument in *Red Bluff* was faulty precisely because he did not offer enough evidence of the vibrator's therapeutic

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Brief of Plaintiffs-Appellants, *supra* note 72, at 48.

<sup>85</sup> *Id.* at 48-49.

<sup>86</sup> *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir. 1981).

<sup>87</sup> *Id.* at 1028.

<sup>88</sup> *Id.*

value.<sup>89</sup> These lawyers noted that “[n]either [*Red Bluff* nor *Sewell*] considered any evidence or discussion . . . of the therapeutic value the use of those aids may have . . . .”<sup>90</sup> Likewise, in *Yorko*, there was no discussion of the legitimate use of sexual aids as a basis for challenging the constitutionality of these devices.<sup>91</sup> This critique is indicative of a legal atmosphere in which emphasis on the medical value of sexual devices proves crucial in determining whether or not such devices fall under obscenity statutes.

Court rulings in these cases have reflected the mentality that places the medical pragmatism of such devices in the forefront of the debate over the statutes’ constitutionality—more so than, for instance, right-to-privacy issues. In *Hughes*, for example, the court ruled,

We hold the dissemination and promotion of such devices for purposes of medical and psychological therapy to be constitutionally protected activity. . . . The State has demonstrated no interest in the broad prohibition of distributing the devices in question sufficiently compelling to justify the infringement of the rights of those seeking to use them in legitimate ways.<sup>92</sup>

Legitimate uses of the vibrator were thus tied exclusively to medical and psychological situations and all recreational use essentially illegitimated. The *Hughes* court, relying on Mould’s testimony, effectively validated the vibrator only as a remedy,<sup>93</sup> legally placing the device fully back in the realm of medicine, where it had resided one hundred years earlier. The Kansas statute was later amended to prohibit the sale of “a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs, *except such devices disseminated or promoted for the purpose of medical or psychological therapy*.”<sup>94</sup> Similarly, the court in *Seven Thirty-Five East Colfax* considered “the right implicated by the broadly worded statute proscribing sexual devices as within the sphere of constitutionally protected privacy which encompasses the intimate medical problems associated with sexual activity.”<sup>95</sup> Here, too, the court legalized

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<sup>89</sup> See, e.g., Brief of Plaintiffs-Appellants, *supra* note 72, at 30 n.3.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 50 n.9.

<sup>92</sup> *State v. Hughes*, 792 P.2d 1023, 1032 (Kan. 1990).

<sup>93</sup> *Id.* at 1032.

<sup>94</sup> KAN. STAT. ANN. § 21-4301 (2004) (emphasis added).

<sup>95</sup> *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 356, 368 n.26 (Colo. 1985); see also *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 127

the device specifically for individuals with sexual dysfunctions; consequently, it became legally codified as a medical instrument.

The devices' medical value seems to have been a salient issue even in rulings that did not take such explicit stances on the legitimacy of the vibrator as a therapeutic tool.<sup>96</sup> For instance, the *Brenan* court ruled that the very possibility that any specific device retained any medical value rendered the ban an unconstitutional violation of due process.<sup>97</sup> It stated: "Given these therapeutic uses we cannot say that the State's action in banning all devices that are designed or marketed primarily for the stimulation of the human genitals without any review of their prurience or medical use is rationally related to the 'war on obscenity.'"<sup>98</sup> These holdings, which differentiate between obscenity and legitimate operation of the device, starkly polarize these concepts but do not specify where the line between the two lies. For example, a sexually-healthy woman using a vibrator not prescribed by a doctor to relieve sexual tension is, by definition, either engaging in an obscene activity, or is medically or psychologically dysfunctional; yet the verdicts in these cases do not clarify under which classification she would fall. Thus, autonomous female sexuality is either criminalized or pathologized.

This legal emphasis on the vibrator's therapeutic value has pervaded media coverage of the cases as well as affected the facades of the vibrator companies themselves.<sup>99</sup> As Nadine Strossen, the President of the American Civil Liberties Union, noted, "[e]ven the U.S. Government has officially validated these devices. The Food and Drug Administration has issued regulations certifying 'powered vaginal muscle stimulators' and 'genital vibrators' for the treatment of sexual dysfunction."<sup>100</sup> The underlying implication here, that the devices are "valid" not solely because individuals in these states should have the right to choose how they wish to achieve orgasm when they are alone, but because vibrators possess medical value, has also been adopted by the vibrator manufacturers themselves.

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n.4 (1973) (noting that an individual cannot "rely on any other sphere of constitutionally protected privacy, such as that which encompasses the intimate medical problems of family, marriage, and motherhood").

<sup>96</sup> See, e.g., *State v. Brennan*, 99-2291 (La. 5/16/00), 772 So. 2d 64.

<sup>97</sup> *Id.* at 72.

<sup>98</sup> *Id.*

<sup>99</sup> See, e.g., Nadine Strossen, *Liberties: Bad Vibes in Alabama*, THE POSITION, <http://www.theposition.com/takingpositions/liberties/00/06/05/badvib> (last visited Dec. 5, 2002) (on file with author).

<sup>100</sup> *Id.*

According to another writer, the Hitachi Magic Wand Household Electric Massager “harks back to the first era of inconspicuous home appliances.”<sup>101</sup> Gerry Corbett, Hitachi’s head of Corporate Communications, has stated, “Clearly, [the Wand] is a straightforward product. There are no implications of anything beyond standard health-care use.”<sup>102</sup> Additionally, companies that sell vibrators through the Internet cloak their products under the veils of medicine and education.

Some stores, like Austin’s women-owned Forbidden Fruit ([www.forbiddenfruit.com](http://www.forbiddenfruit.com)), require customers to sign a release form declaring that they are purchasing toys for educational purposes only. While there isn’t a Commission to Crack Down on Dildo Distribution (well, none that we know of), Forbidden Fruit’s diligence is a result of being raided and shut down in the ‘90s.<sup>103</sup>

This obfuscation of the nature of these products by the manufacturers and distributors themselves in the face of obscenity statutes is indicative of a stark contemporary contrast to the post-1960s era described by Maines, when vibrators were marketed as “frankly sexual toy[s].”<sup>104</sup> Instead, it seems that, in recent years, we have returned full-circle to the time of the vibrator’s proliferation in ladies’ magazines, when users of the device cloaked themselves in the shroud of medicine, and vibrator manufacturers failed to publicize candidly the true intended uses for their products.

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<sup>101</sup> David Kushner, *Inside Orgasmatron: A Closer Look at the Motor of Joy*, LA WEEKLY, Mar. 26, 1999, <http://www.laweekly.com/ink/99/18/cyber-kushner.php>.

<sup>102</sup> *Id.* (alteration in original).

<sup>103</sup> Taormino, *supra* note 30. Legal disclaimers of various kinds are now almost standard on websites that sell sexual products. Lady Bliss, for instance, which advertises “sex toys, erotica, vibrators, and kama sutra products” in the wake of anti-vibrator legislation, has now included a document on its site that reads, in part:

Accessing this site, and services, products or contents available on this site, except as expressly allowed through instructions and truthful statements by the User in regard to use of this site, from places outside the U.S. or where their contents are illegal, is prohibited. Those who choose to access this site from other locations do so knowingly on their own initiative and voluntarily at their own risk and are responsible for compliance with local laws.

Ladybliss Legal Policies, [http://www.ladybliss.com/legal\\_policies.html](http://www.ladybliss.com/legal_policies.html) (last visited Nov. 9, 2005).

<sup>104</sup> MAINES, *supra* note 1, at 108.



#### IV. CONTEMPORARY EPIDEMIOLOGICAL ARGUMENT

One potential medical argument is epidemiological: vibrators function as safe sexual alternatives in the era of AIDS. In *Williams*, plaintiffs' counsel argued that the anti-vibrator statute in Alabama "will seriously impact the sexual health of the plaintiffs," a group including "individuals who use sexual aids as an alternative to sexual intercourse for a variety of reasons—fear of sexually transmitted diseases or when a partner is not otherwise available to them."<sup>105</sup> Additionally, critics of the legislation who have expressed their opinions through the media have emphasized the epidemiological benefits of such devices. As sex therapist Dr. Gardos asserts, "[s]ex aids are an excellent form of safer sex and assist in the prevention of the spread of all sexually transmitted diseases including HIV and AIDS. Such devices are also commonly used to demonstrate the proper means of condom application and usage."<sup>106</sup> Thus, vibrators are portrayed as epidemiologically sound on dual levels—as alternatives to risky sex and safe-sex educational tools.

The irony involved in the employment of vibrators to help quell the spread of sexually transmitted diseases ("STDs") is that, in the face of diseases such as AIDS, the sex industry in this country is simultaneously reviled and emerging as a prevention.

[S]trategies and mechanisms specific to late capitalism have helped contribute to the fact that sexual products and services are a growth area in the contemporary economy even at a time when there is an explicit cultural agenda to limit sexual circulation. Indeed, one of the ironies of the contemporary situation is that many products and services are being marketed as safer alternatives to genital sex, or as safeguards against epidemic conditions.<sup>107</sup>

Despite this irony, and the fact that these devices do function legitimately as sexual alternatives and educational devices, the vibrator should not be validated solely because of its medical value. By putting forth primarily medical arguments, the supporters of these statutes make the tacit concession that the statutes are partially valid, and that a female's personal choice to masturbate with a toy does not exist as a right in and of itself.

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<sup>105</sup> Brief of Plaintiffs-Appellants, *supra* note 72, at 5.

<sup>106</sup> Sandor Gardos, *The Dangers of Vibrators?!*, ABOUT SEXUALITY, May 12, 1997, <http://sexuality.about.com/library/weekly/aa051297.htm> (on file with author).

<sup>107</sup> LINDA SINGER, EROTIC WELFARE: SEXUAL THEORY AND POLITICS IN THE AGE OF EPIDEMIC 45 (Judith Butler & Maureen MacGrogan eds., 1993).

Denial of this right is, of course, exactly what these statutes seek. Alabama Attorney General Bill Pryor declared that there was no “constitutional right to purchase a product to use in pursuit of having an orgasm.”<sup>108</sup> Claims that stress the concept of medical uses and STD prevention, by nature, downplay the civil liberties argument that a woman, in the privacy of her own home, should have the right to choose the manner in which she achieves orgasm. As one expert asserts, “I don’t want any state legislature telling me how I can or cannot come.”<sup>109</sup>

This particular type of legislation is, in essence, solely about regulating how an individual woman may come. Another scholar has asserted that in America “there seems to be no sexual practice, except ‘normal’ relations between husband and wife and solitary acts of masturbation, which is not forbidden by the law of some state.”<sup>110</sup> Now, under the anti-vibrator statutes, certain “solitary acts of masturbation” have now been threatened in some states, as well. These anti-vibrator laws, specifically those that prohibit mere possession of the devices, are, in one sense, the most lethal to our personal freedom of all sexuality-focused laws. Because vibrator use, unlike other sexual acts, does not necessarily affect anyone other than the user herself, vibrator bans are wholly bound up in the deprivation of individual liberties.

## V. IMPLICATIONS

One difficulty with examining some of these cases is that all of the anti-vibrator laws in this country have been part of anti-obscenity statutes, and in order to combat anti-obscenity states, the challenger must specifically prove that the material in question contains non-prurient value—hence the therapeutic arguments. Other arguments, however, such as the idea that masturbation with a vibrator does not specifically constitute prurience, could have been emphasized in these cases, in lieu of an emphasis on medical pragmatism; they were, in these cases, subordinated to medical arguments. Additionally, the traits of some of the individuals who challenged the statutes may have led other challengers particularly towards medical arguments, as the parties in question suffered from particular physiological and psychological maladies for which the vibrator had proven effective treatment.<sup>111</sup> But, challengers in these cases repeatedly raised the

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<sup>108</sup> Press Release, Libertarian Party, Libertarians Urge: Pull the Plug on Silly Alabama Law That Bans Vibrators (Mar. 4, 1999) (on file with author).

<sup>109</sup> Taormino, *supra* note 30.

<sup>110</sup> H.L.A. HART, LAW, LIBERTY, AND MORALITY 26 (photo. reprint 1969) (1963).

<sup>111</sup> See, e.g., *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1028 (5th Cir. 1981) (“Plaintiff Gullick raises an equal protection claim on behalf of handicapped persons against prohibition on sales of sexually-oriented devices.”); *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1265-66 (N.D. Ala. 2002) (noting that some plaintiffs received therapy because they were

treatment argument, even in instances where the specific challengers of the law did not suffer from such maladies.<sup>112</sup>

By espousing medical arguments when there was no legal burden to prove the medical advantages of the devices, the challengers in these cases insinuated that female sexual gratification, in and of itself, was not a valid objective. This is precisely the same message that the statutes themselves sent in their discouragement of autonomous female sexuality. After testifying in *Sewell* as an expert witness on vibrators, Gardos wrote:

I had a very hard time explaining why a woman not being able to have an orgasm was a problem. The assistant DA kept repeatedly asking me under cross-examination what the real harm was of women being unable to have orgasms! Mind you this was a young woman, and I kept wondering whether she truly believed what she was asking and saying.<sup>113</sup>

The legally-validated insinuation that the vibrator cannot be legitimated by its ability to provide female orgasms is a blow to women's sexual rights in this country. Unsurprisingly, various sexual aides designed predominantly for men, such as *Playboy* and *Viagra*, do not fall under the same codes. Indeed,

Since the majority of people who use dildos, vibrators, and other insertable sex toys are women, making them contraband is another institutionalized form of controlling female sexuality. There's also an insidious double standard at play: A much higher percentage of men than women . . . masturbate to orgasm with their . . . hands.<sup>114</sup>

An expert witness in *Hughes* testified that twenty percent of all sexually-active women have used a vibrator at least once.<sup>115</sup> A study from as early as 1975 yielded similar data, finding that, of the over 100,000 women who responded to a questionnaire in the magazine, twenty-one percent have used

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anorgasmic and were instructed to use vibrators), *rev'd sub nom.* Williams v. Attorney General of Alabama, 378 F. 3d 1232 (11th Cir. 2004), *cert. denied sub nom.* Williams v. King, 125 S. Ct. 1335 (2005).

<sup>112</sup> See, e.g., State v. Hughes, 792 P.2d 1023 (Kan. 1990); State v. Brennan, 99-2291 (La. 5/16/00), 772 So. 2d 64.

<sup>113</sup> Gardos, *supra* note 76.

<sup>114</sup> Taormino, *supra* note 30.

<sup>115</sup> Hughes, 792 P.2d at 1025.

such devices for sexual stimulation.<sup>116</sup> A more recent study found that nearly fifty percent of sexually-active women have used a vibrator.<sup>117</sup>

Given the significant number of American women who use the devices, the pathologizing of vibrator users appears even more insidious. Maines suggests that the treatment paradigm that has surrounded vibrator use in recent decades is bound up in male anxieties about their own obsolescence: "The chief difficulties of the device in the latter half of the twentieth century seem to have been male dismay at its efficacy compared with their own efforts and female ambivalence about the possibility of 'addiction' to the multiple orgasms the device so effortlessly produced."<sup>118</sup> By classifying the vibrator as a medical tool for women who cannot achieve orgasms via intercourse, these court decisions assuage such male anxieties. According to these courts, women who use vibrators are subsequently either in violation of the law or in some sense dysfunctional—aberrations who step outside of the boundaries of male/female relations to achieve sexual satisfaction.

In essence, the problem with the prevalence of medical arguments in these cases, other than the fact that they create the appearance of an assumption that masturbation with a vibrator is inherently a criminal act unless therapeutically validated, is that they generate an unfair duality. By insinuating that legitimate use is bound up in medical benefit, they succeed in either criminalizing or pathologizing all women who use the device to achieve orgasm. In effect, the women (and the one man) in these cases have fought for the legal right not only to achieve orgasm but, more importantly, to achieve orgasm without a man. The courts in several of these cases have allowed women that right, with the caveat that the need to achieve orgasm without a man is, in a sense, pathological. The repeated assertion that a woman who is anorgasmic during intercourse with a male partner, and who then turns to a vibrator to better explore and understand her own sexuality, is employing a treatment strategy is a throwback to the origins of the device, when women—frustrated because they could not achieve gratification through intercourse alone, as their society told them they should be able to do—went to the GP to relieve their "hysterical paroxysms."

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<sup>116</sup> CAROL TAVRIS & SUSAN SAID, *THE REDBOOK REPORT ON FEMALE SEXUALITY* 83 (1975).

<sup>117</sup> Laura Berman, *A Study By Dr. Laura Berman On Female Use of Vibrators*, NETWORK FOR EXCELLENCE IN WOMEN'S SEXUAL HEALTH, Nov. 2004, [http://www.newshe.com/articles/article\\_retrieve.php?articleid=160](http://www.newshe.com/articles/article_retrieve.php?articleid=160).

<sup>118</sup> MAINES, *supra* note 1, at 109.

## VI. CONCLUSION

Unlike vibrator usage one hundred years ago, currently many therapeutic uses of the vibrator, such as the treatment of anorgasmic women, openly relate to sexual life. Yet, in a sense, by inextricably binding the vibrator's legitimacy to medical advantages, rather than its pleasurable capacities, these cases have succeeded in sending the vibrator back into the medical closet, thus essentially bringing us full circle to the Victorian epoch of the vibrator's inception.

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