Sex, Drugs, and American Jurisprudence: The Medicalization of Pleasure

Abstract: This paper explores the role of medical arguments in cases where courts have overturned statutes that burden pleasure-seeking behavior, such as non-procreative sexual intimacy or the use of endorphin-inducing substances. It speculates that the characterization of the individual interests at stake as medical rather than pleasure-related, and the framing of state interests as moral rather than medical, facilitates the judicial decriminalization of pleasure-seeking behavior. This approach to framing individual and state interests is explored and developed in the context of statutes that burden non-procreative sexual intimacy, including key cases on contraception, abortion, and “obscene devices.” After developing the paradigm of medicalization through the lens of the sexual intimacy cases, the paper investigates the conspicuous absence of any discussion of pleasure in these cases and in legal discourse more generally. Finally, the paper explores the continuing criminalization of pleasure-inducing substances and argues that the sexual intimacy cases may provide an effective model for using medicalization to challenge certain statutes that burden substance use.

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

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¹ The Declaration of Independence (1776).
³ See, e.g., Lionel Tiger, The Pursuit of Pleasure (1992); Kringelbach, supra note 2, at 479.
of certain neurotransmitters in the brain, causing a sense of euphoria, well-being, and happiness.\textsuperscript{5} A variety of activities can stimulate this kind of chemical pleasure response, including sexual stimulation,\textsuperscript{6} ingestion of food and other substances,\textsuperscript{7} listening to music,\textsuperscript{8} social interaction,\textsuperscript{9} gambling,\textsuperscript{10} and skydiving.\textsuperscript{11} Indeed, “[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.”\textsuperscript{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.

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, sexual intimacy has undergone a dramatic transition from being heavily regulated by criminal law to being largely decriminalized. In contrast, legal approaches to drug use remain primarily criminal. The courts have played a central role in the decriminalization and enablement of sexual intimacy by overturning statutes criminalizing the possession, sale, and promotion of contraception and other sexual devices. Yet while the courts have begun to favor individual interests in decriminalization in the realm of sexual intimacy, they have continued to defer to the state’s interests in the criminalization of narcotics. Indeed, in 2010, the United States spent $74 billion on criminal proceedings for drug offenders, compared to only $3.6 billion for drug

\begin{footnotes}
\item[5] Esch, supra note 5, at 239.
\item[6] Id. at 236.
\item[7] Id.
\item[9] Esch, supra note 5, at 243.
\item[12] Kringelbach, supra note 2, at 481.
\end{footnotes}
treatment programs. Unlike challenges to laws that burden sexual intimacy, challenges to statutes criminalizing narcotics or paraphernalia continue to be largely unsuccessful, and while sexual intimacy has been largely liberated from the criminal law, substance use remains firmly within its reach.

States have a legitimate interest in “promoting morality,” and they often criminalize even victimless pleasure-seeking behavior in furtherance of that interest. 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 interests can be reframed as health-related (receiving treatment or avoiding injury), then this interest can often outweigh the state's interest in morality.

In the marketplace of the American court, medicine sells. Although courts are often hesitant to engage in normative debates about the merits of pleasure, they are receptive to medical arguments. When judges balance interests, medical interests are often seen as weighty while an interest in pleasure can be largely ignored. This article claims when challenging a statute that criminalizes pleasure-seeking behavior, decriminalization can be facilitated by framing the individual’s interests as primarily medical and the state’s interests as moral. “Medicalizing” the individual's interest in this way is particularly important in the early stages of the transition away from criminalization because it allows the courts to expand individual rights.

14 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 nonprocreative 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) (“Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives, for 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.”).
and encourage decriminalization even while they avoid tackling the sticky underlying moral or philosophical issues. Once gains are made under a medicalized frame, then the court may eventually decide to take on the underlying moral issues more directly.

It should be noted from the outset that this paper does not address the merits of decriminalizing any given pleasure-seeking behavior. The question of whether criminal regulation is an appropriate response to a given type of victimless pleasure-seeking behavior is a complicated one on which a vast multidisciplinary 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 the existence of a constitutional right to sexual privacy, a number of states are currently exploring the medical use of marijuana, and the propriety of abstinence-only sex education draws fervent arguments from both sides. This paper shall not enter the normative fray.

Instead, this paper 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 the medicalization of individual interests and the demedicalization of state interests have facilitated courts’ decisions to invalidate these statutes. It also comments on the conspicuous absence of pleasure from the legal discourse around pleasure-seeking activities.

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15 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”); Automobile Workers v. Wisconsin Employment Relations Bd., 351 U.S. 266, 274, 76 S.Ct. 794, 100 L.Ed. 1162 (1956) (“The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern.”).
activities. Thus, rather than tackling the question of whether drugs (or gambling, or nonprocreative sex, or extreme sports) should be decriminalized, this paper explores how the medicalization or demedicalization of competing interests facilitates judicial decriminalization of pleasure-seeking behavior.

Part I of this paper develops the theory of medicalization by providing background on how the courts balance individual and state interests and explaining what is meant by medicalizing the interests of the individual. Part II explores the role of medicalization of individual interests and demedicalization of state interests in the liberation of sexual intimacy. In particular, this Part examines the use of medicalization in important contraception and “obscene devices” cases. Part III explores the conspicuous absence of pleasure in the legal discourse of the sexual intimacy cases and speculates about the reasons for the exclusion of pleasure from legal theory 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 fact that it is by no means apparent that criminalization is rationally related to public health. This Part argues that lessons from the case of sexual intimacy can potentially be used to effectively “demedicalize” the state’s interests, allowing the individual’s medicalized interest to triumph over what has been reframed as 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 has authority to regulate the behavior of its citizens in order to further legitimate state interests. The state may impose reasonable criminal sanctions to encourage compliance with valid state regulations. Legitimate state interests include traditional state concerns such as the regulation of morality, health, safety, and general welfare of the citizenry.

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 classes of people who are deemed to be disreputable. In some cases, states arguably criminalize a behavior because it is pleasurable (or, often interchangeably, because it is immoral). Thus, historically, states have at some point restricted a wide range of pleasure-seeking activities, including various aspects of nonprocreative sexual intimacy, adultery, homosexuality, drug use, alcohol use, and gambling.

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16 See, e.g., 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”) (internal citations omitted).
18 See, e.g., 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…”); Village of Euclid Ohio v. Ambler Realty Co., 227 U.S. 365, 395 (1926); see also Black’s Legal Dictionary (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.”).
20 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 distinction (between licit and illicit instances) are made”).
But the state’s power to criminalize is not without limits. Individuals are free to challenge criminal statutes on the grounds that they unduly burden individual rights, are vague or overbroad, or burden other protected interests, such as freedom of speech or equality. When evaluating the legitimacy of a criminal statute, courts examine the nature of state’s interests in enacting the criminal statute and the nature of the individual interests impacted by the statute. Where the statute does not implicate a fundamental right, the statute need only be rationally related to a legitimate state interest. Regulations that do burden fundamental rights must be narrowly tailored to serve a compelling government interest. Furthermore, the line between rational basis scrutiny and strict scrutiny is becoming increasingly blurred. Classifications based on quasi-suspect characteristics garner “intermediate scrutiny,” and courts often engage in balancing interests even in cases where no fundamental right is explicitly identified.

Because courts care about the nature of state and individual interests at stake, strategic framing of the relevant interests is of paramount importance. The way an interest is portrayed can have an enormous impact on how much weight the court places on it. Interests that are

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24 See, e.g., Lana D. Harris et al., Cannabis Use in the United States: Implications for Policy, Center for Drug and Alcohol Studies, University of Delaware (1995); Robert M. Hardaway, No Price Too High: Victimless Crimes and the Ninth Amendment 87-136 (2003).
25 See, e.g., U.S. Const. amend. XVIII.
27 In the context of due process challenges, this rational-basis test requires that the “law shall not be unreasonable, arbitrary, or capricious, and that means selected shall have real and substantial relation to object.” Nebbia v. People of New York, 291 U.S. 502 (1934). In the case of equal protection, the question is whether a state action that distinguishes between non-suspect classes “rationally furthers a legitimate state purpose or interest.” San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).
28 See, e.g., Roe v. Wade, 410 U.S. 113, 155 (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 the legislative enactments must be narrowly drawn to express only the legitimate interests at stake.”) (internal citations omitted).
30 See, e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988) (noting that classifications based on gender are subject to heightened scrutiny under the Fourteenth Amendment, requiring that the “statutory classification must be substantially related to an important governmental objective.”).
31 See, e.g. Lawrence v. Texas, 539 U.S. 558 (2003) (purporting to apply rational basis review to analysis of constitutionality of state sodomy law, but appearing to engage in a more detailed balancing of state and individual interests); see also Glover, supra note 29, at 583-584.
framed in ways that conflict with judges’ personal values or that implicate debates over social morays may be less valued, especially where uncontroversial legitimate state interests are present. In particular, courts are hesitant to second-guess what they see as a subjective legislative decisions related to contentious issues. Conversely, courts may be tempted to place great weight on interests that are seen as presumptively valid and important and that enjoy a great deal of public support or are unlikely to provoke moral outrage. In other words, while courts may not explicitly take public opinion into account when making decisions, the general public and political atmosphere surrounding an issue often operates in the background of the judicial process. Particularly where the issue at hand is highly controversial, judges may feel pressure to avoid valuing interests whose acceptance as legitimate would depart significantly from what judges believe to be the prevailing normative attitudes.

b. The Rock-Paper-Scissors of Balancing Interests

Courts manifest implicit preferences for some interests over others. In the context of evaluating the importance of medical interests versus interests in pleasure or morality, an unspoken hierarchy emerges. In particular, this hierarchy prioritizes concerns about physical health (corporeal concerns) and devalues considerations related spiritual/emotional health (incorporeal concerns).32

The individual has stakes in both incorporeal and corporeal well-being. In the context of a challenge to 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

32 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 (1993) (valuing religious freedom over asserted state concerns about public health and sanitation).
experience, and a state-mandated restriction of pleasure may quite plausibly reduce an individual’s sense of spiritual or incorporeal well-being. Thus, the denial of pleasure potentially impacts individuals’ spiritual or emotional well-being by cutting them off from a source of happiness to which they have become accustomed. 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 the moral character of its citizens. Courts view the promotion of morality as a legitimate state interest. 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 or prevent contamination of consumables. Courts have routinely accepted that public health is a legitimate state interest.

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 and a medical interest. The state, meanwhile, may have an interest in promoting morality and an interest in public health.

33 See, e.g., Barnes v. Glen Theater, 501 U.S. 560, 569 (1991) (upholding a public indecency statute and stating "[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.").
35 See, e.g., Cloverleaf Butter Co. v. Patterson, 315 U.S. 786 (1942).
36 See, e.g., Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905); note 18, supra.
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 the prioritization of corporeal concerns over incorporeal ones, 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 both assert an interest in morality and pleasure, respectively), the court is likely to defer to the state’s rational legislative determinations. This implicit hierarchy of interests can be seen in the examples that follow.

i. 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. While the state has a widely recognized legitimate interest in promoting morality, the individual’s legitimate interest in pleasure, if any, is much more contentious. This is particularly the case where the behavior at issue is primarily subject to a criminal paradigm and the process of decriminalization is in its infancy. Thus, prior to Lawrence v. Texas, courts routinely upheld statutes criminalizing adultery, fornication, and sodomy, and courts continue to uphold statutes criminalizing pleasure-seeking activities such as gambling.

ii. Moral (State) versus Medical (Individual)

When the state offers a moral justification for a statute that significantly impacts individuals’ medical interests, the regulation is often invalidated. Individual’s medical interests are often asserted as either an interest in freedom from bodily harm, or an interest in receiving

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medical treatment. The case of contraception can be seen as an example of an individual interest in avoiding bodily harm trumping a state interest in promoting morality. Cases involving the criminalization of “obscene devices” illustrate the case where an individual’s interest in receiving treatment outweighs the state’s interest in morality. Both of these cases will be explored in detail in the Part II of this paper.

**iii. 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 impact an interest in pleasure, the statute usually withstands scrutiny. In general, challenges to statutes criminalizing illicit drug use have been assumed to involve this distribution of interests. The state has generally been presumed to have a legitimate public health interest in criminalizing drug use, and the individual’s interest in using drugs has often been assumed to be primarily related to pleasure. In Part IV, this paper will propose a recharacterization of those interests.

**iv. 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 in keeping 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. In doing so, the court explicitly deferred to the legislature’s assessment of medical treatment. The case of contraception can be seen as an example of an individual interest in avoiding bodily harm trumping a state interest in promoting morality. Cases involving the criminalization of “obscene devices” illustrate the case where an individual’s interest in receiving treatment outweighs the state’s interest in morality. Both of these cases will be explored in detail in the Part II of this paper.

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competing medical interests. The defendant in Jacobson asserted that receiving the smallpox vaccination could result in adverse individual health consequences, while the state alleged that requiring vaccination furthered its interest in public health. The court deferred to the legislature’s determination of the correct course of action to prevent the spread of disease within the state.

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 their corporeal needs. In the case of challenging statutes criminalizing pleasure-seeking behavior, this 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’s 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) is itself therapeutic and that the state therefore impinges on the individual’s right to medical treatment by criminalizing the behavior or good.

The Sections that follow will explore the role of medicalization in the context of challenges to statutes that criminalize two particular pleasure-seeking behaviors – nonprocreative sex and illicit drug use. First, we will investigate the role of medicalization in the context of sexual pleasure, focusing on the contraception cases and the “obscene devices” cases. Next, we

41 Id.
will explore the conspicuous absence of pleasure in the legal discourse surrounding the sexual intimacy cases. Finally, using what we have learned from the sexual pleasure cases, we will speculate about the potential role of medicalization in the decriminalization of drug use.

II. Sexual Pleasure

a. Introduction

Sex for pleasure, or nonprocreative sex, has not always enjoyed protection under the law. On the contrary, the United States has a long 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, nonprocreative sex (often made possible by contraception), and sodomy. Over the past half-century or so, laws criminalizing many of these types of “illicit” pleasure-seeking behaviors have been overturned, ushering in a new era of decriminalization.

This paper argues that the decriminalization of nonprocreative sexual intimacy has been facilitated by the medicalization of the individual interests at stake and by the demedicalization of the state’s asserted interests. 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 the use of medicalization in the context of other criminalized pleasure-seeking behaviors, such as drug use.

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Both of these 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

i. 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*,44 *Roe v. Wade*,45 and *Carey v. Population Services International*46 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. These core cases provided a legal framework in which non-marital/non-procreative sexual behavior moved from being harshly criminalized to being regarded as within the sphere of individual decisional autonomy. Along with decriminalization came new policy approaches to sexual intimacy in which potentially risky pleasure-seeking sexual behaviors were regulated with harm reduction techniques and education, rather than fines and imprisonment.

Each of these cases unburdened statutes that exposed sexually active individuals to disease or unwanted pregnancy. In *Eisenstadt*, the Court overturned a Massachusetts statute criminalizing the provision of any contraceptive device to unmarried persons.\(^{47}\) In *Roe v. Wade*, the Court overturned a statute criminalizing the provision of abortions, with an exception for abortions deemed medically necessary in order to save the life of the mother.\(^{48}\) And in *Carey*, the Court overturned a NY statute that criminalized the dispensation of contraceptives to individuals under 16 years of age and required that a pharmacist dispense all contraceptives.\(^{49}\)

One of the critical elements of each of these three core cases was the turn to medical reasoning to support the argument for 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 imposed on them by the statutes. 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 attempted to assert that the statutes at issue furthered a legitimate public health interests, but the individual litigants were able to argue that the statutes at issue were actually morally motivated and were not rationally related to the asserted health interests. By reframing the

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\(^{47}\) *Eisenstadt v. Baird*, 405 U.S. 438 (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. The original statute was a complete bar on contraceptives and contained no such exceptions. The allowance for married individuals was a legislative response to the Court’s decree in *Griswold v. Connecticut*, which prohibited criminalization of the use of contraceptives by married persons because of the statute’s intrusion on marital privacy. The *Griswold* decision was premised entirely on the marital relationship and the protection of the marital bedroom from unwarranted intrusion by the state. *Griswold v. Connecticut*, 381 U.S. 479 (1965).


individual’s interest as medical, rather than as an interest in pleasure, 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 into 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.

ii. Medicalizing the Individual Interest

There is no reference whatsoever to sexual pleasure or enjoyment in the Eisenstadt, Roe, or Carey decisions. The court never acknowledges 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 engaged precisely for the purpose of producing feelings of pleasure and enjoyment, the court steadfastly refuses to discuss the nature or implications of individuals’ motivations for their behavior. Instead, the court’s attention is trained solely on the individual’s health interests, including their interest in controlling the occurrence of the bodily condition of pregnancy and avoiding disease.

Two conceptual developments were vital to the characterization of the individual interests at stake 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.50 Together,

50 See, e.g., Debran Rowland, The Boundaries of Her Body: The Troubling History of Women’s Rights in America (2004). Rowland notes that historically, women were valued primarily for their ability to produce children. Motherhood was seen not as a choice but as an obligation – in other words, women were subject to a procreative imperative. 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 women had been assigned the ‘divine mission’ of motherhood.” Id. at xxiv. See also Leslie Reagan, When Abortion was a Crime: Women, Medicine, and Law in the United States,
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 this 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. *Roe* illustrates the extreme medicalization of the bodily condition 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 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.51

All of these asserted rights were related to medical concerns. Appellants portrayed the entire experience of pregnancy and childbearing in a highly medicalized context.52 Appellants stressed the significant health risks and bodily intrusion posed by pregnancy.53 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 governmental mandate compelling her to serve as an incubator for months…”54 Furthermore, 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.\textsuperscript{55}

The highly medical nature of the interests at stake was further illustrated by the character of the \textit{amicus curiae} – 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.

Indeed, the court’s decision in \textit{Roe} rests entirely on a medicalized understanding of pregnancy. The court’s balancing of interests directly mirrors the scientific and statistical evidence presented by the parties and \textit{amici}. In particular, the court concluded that the state had no legitimate health interest in regulating first trimester abortions because the health risk imposed on the woman by undergoing an abortion was less than the risk imposed by bearing the fetus to term. From after the first trimester until viability, the state could only regulate insofar as such regulation furthered the state’s interest in maternal health. Only after viability could the state regulate to further the interests of fetal life, and even there, the state could not proscribe abortion where necessary to preserve the life or health of the mother.\textsuperscript{56} The court’s attention in \textit{Roe} is strictly focused on health interests, particularly the mother’s right to medical care and decision-making.

By accepting the conceptualization of pregnancy as a medical issue, the Court was able to analyze abortion as medical question rather than an ethical problem. The portrayal of pregnancy not as a “divine mission” but rather as a medical condition meant that the decision to keep or terminate a pregnancy need not implicate divine or moral law. Indeed, in their \textit{amici} briefs,

\textsuperscript{55} \textit{Id.} at 115-16.
medical professionals asserted that abortion was simply one of many medical decisions made in relation to the bodily condition of pregnancy. As such, abortion was relegated to the sphere of privacy between individual and physician, at least until the point that it became dangerous to the life of a third party (the viable fetus).

In *Eisenstadt v. Baird*, the Supreme Court invalidated a statute prohibiting the provision of any kind of contraceptive substance or device to unmarried individuals. William Baird had been convicted of giving spermicidal jelly to women after giving a lecture on contraception at Boston University, and he appealed his conviction on the grounds that the statute was unconstitutional. The Massachusetts Supreme Court sustained Baird’s conviction, so he filed for a write of *habeas corpus*. His application was denied by the District Court but sustained on appeal by the First Circuit, which held that the statute was unconstitutional. The state appealed and the case ended up at the United States Supreme Court, where Justice Brennan delivered the majority opinion invalidating the statute and overturning Baird’s conviction.

In his brief before the Supreme Court, the Appellee asserted that the challenged statute impinged on a variety of protected interests, including the right to privacy, but focused particularly on the statute’s impact on health. The Appellee seemed cognizant that the court might be inclined to favor the health interests of the individual over the state’s interest in morality:

> 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

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60 *Baird v. Eisenstadt*, 429 F.2d 1398 (1st Cir. 1970).
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.\(^63\)

Appellees went on to outline 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.\(^64\)

Because Massachusetts law already contained an exception for contraceptives sold for the purpose of preventing disease, Appellees were forced to focus on the health issues surrounding pregnancy, rather than the medical risks of sexually transmitted infections. This exception was the result of *Commonwealth v. Corbett*, in which the Court, while acknowledging the state’s legitimate interest in punishing promiscuity and promoting morality, still concluded that:

> ... it 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 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 ...\(^65\)

Thus, Appellees were forced to argue that pregnancy itself was a health issue that impacted individuals’ right to life and health.

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

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\(^{63}\) *Id.* at 6-7.

\(^{64}\) *Id.* at 8-13.

\(^{65}\) *Commonwealth v. Corbett*, 307 Mass. 7 (1940) (emphasis added).
complain for harm suffered as a result of engaging in such behaviors. “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.”

Appellants also argued that unmarried individuals had no health interest in consulting with physicians about family planning methods, as allowed by statute for married individuals, 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.

Thus, the state attempted to characterize the individual’s interest as simply the interest in 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 this interest, according to Appellants, held no legal weight.

Both the First Circuit and the Supreme Court accepted Appellee’s argument that individuals, including unmarried ones, had a significant interest in deciding whether or not to use their bodies for procreation. The Supreme 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

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67 Brief for Plaintiff-Appellant at 16-17, Eisenstadt v. Baird, 405 US 438 (1972). At the time of this litigation, Massachusetts had a statute making fornication a misdemeanor, which meant that unmarried individuals who engaged in sexual intercourse were technically violating the law.
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.68

While obviously reluctant to explicitly conclude that the married and unmarried had the same right to engage in sexual intercourse, the Court nonetheless concluded that the health interests stemming from sexual intercourse were the same, regardless of the marital status of the individuals involved.

In *Carey*, the court followed *Eisenstadt*’s understanding of the individual’s health interest in avoiding unwanted pregnancy and sexually transmitted diseases. In particular, the *Carey* court extended these interests to juveniles, despite the social and legal stigma applied to sexual promiscuity among the underage. The court overturned a NY statute that 1) criminalized the dispensation of contraceptives to 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.69

With respect to the individual interests implicated by the provision requiring that all contraceptives be dispensed by a pharmacist, the *Carey* court followed the lead of *Griswold*, *Eisenstadt*, and *Roe* and focused on “the constitutionally protected right of decision in matters of childbearing.”70 This right, as understood by *Carey* court, had little to do with any individual interest in sexual freedom. “Read in light of its progeny, the teaching of *Griswold* is that the

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69 *Carey v. Population Services Int’l*, 431 U.S. 678 (1977). *Carey* involved a challenge to the constitutionality of the New York statute brought by distributors of contraceptives. 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.69 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.
70 Id. at 688-89.
Constitution protects individual decisions in matters of childbearing from unjustified intrusion by
the State.”71 The majority in Carey did not depart from this understanding – indeed, the Court explicitly rejected the dissent’s contention that the majority holding endorsed a fundamental right
to sexual freedom.72 The majority declared that it 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.”73 The court therefore focused on the individual’s right to exercise control over her
physical health, specifically her interest in deciding whether to bear children.

With regard to the provision criminalizing the dispensation of contraceptives to
individuals under sixteen years of age, the court’s emphasis on medical concerns becomes even
more explicit. While minors do possess constitutional rights, the protection offered by those
rights may not be as broad for minors as it is for adults.74 Furthermore, the state has greater
authority to control the conduct of children than it does to regulate adult behavior.75 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.76 However, the majority opinion identified the right to
control over procreation as extending fully to minors, even if, where minors are concerned,
scrutiny of regulations burdening that right is somewhat less than heightened.

In addition to the general right to make decisions related to the use of one’s body to beget
children, two other health related factors were argued by Appellees – the increased risk of injury

71 Id. at 687.
72 Id. at 689 n.5.
73 Id. at 688.
74 Id. at 692.
75 Id., see also Prince v. Massachusetts, 321 U.S. 158, 170 (1944); George v. United States, 196 F.2d 445, 453 (9th
Cir. 1952) (noting that “minority as a special classification has always had judicial sanction”).
76 Carey, 431 U.S. at 692.
to mother and baby posed by teen pregnancies and the transmission of venereal disease through unprotected sexual conduct. 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.”

Appellees 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… Infants of very young mothers who do survive are much more likely to suffer serious mental and physical defects.

Thus, for minors, the interest in decisions relating to procreation became much 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 of catastrophic health consequences for themselves and their offspring.

Appellees also contended that the use of contraceptives reduced the risk not just of pregnancy, but also of acquiring sexually transmitted diseases. 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. They concluded that “[t]he effect

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77 Brief for Planned Parenthood of America, Inc. as Amicus Curiae Supporting Appellees, Carey v. Population Services Int’l, 431 U.S. 678 (1977). 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.”).


79 Brief for the American Civil Liberties Union as Amicus Curiae Supporting Appellees at 8, Carey v. Population Services Int’l, 431 U.S. 678 (1977) (“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.
of this statute is to attempt to deter teenage sexual conduct by potentially punishing fornication with venereal disease..."  

And while the plurality focused primarily on minors’ interest in making decisions related to procreation, appellees’ additional medical arguments did not go wholly unheeded by the court. Interestingly, the concurring Justice who most conspicuously rejected minors’ interest in sexual pleasure also devoted the most attention to the minors’ medical interests. After concluding that the statute at issue failed even rational basis scrutiny, Appellees had 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.”  

The majority took note of Appellees’ assertion and left it an open question whether the State could legitimately legislate with the purpose of discouraging sexual activity.

Justice Stevens, on the other hand, 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.”  

After openly rejecting the contention that minors have any right to sexual 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.”  

He declared that the New York statute imposes on minors a greater risk of adverse health consequences, noting, “[t]he statutory prohibition denies them and their parents a choice which, if available, would reduce their exposure to disease or

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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.


81 *Id.* at 43.

82 *Carey*, 431 U.S. at 13 (Stevens, J. concurring).

83 *Id.* at 714.
unwanted pregnancy.” 84 Justice Stevens’ concurrence positioned this interest in avoiding increased health risks as the primary individual interest implicated by the statute.

Thus, the court’s assessment of the individual interests implicated by the New York statute was 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 on the individual’s interest in being able to decide whether or not use their bodies to bear children. As discussed above, this interest is, in large part, a physical one. Justice Stevens also focused on the increased health risks attendant on teenage pregnancy and the dangers posed by venereal disease. Thus, the individual interests involved were argued as primarily health-related, and the court adopted this medicalized understanding of the interests at stake.

iii. Demedicalizing the State Interest

In Eisenstadt and Carey, the state attempted to assert health rationales for the statutes at issue. And in each of these cases, the individuals argued that the state’s asserted health interests were not rationally related to the statutes. Instead, the asserted health interests were portrayed as mere pretenses for what was in truth moralistic legislation. And, in both of these cases, the court accepted the contention that the state’s real goals in enacting the statutes were moral, rather than public health related, despite the state’s protestations to the contrary. 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 that individuals seek medical

84 Carey, 431 U.S. at 714-15 (Stevens, J. concurring).
advice in order to avoid adverse health consequences. 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.” The state asserted that this concern extended to nonprescription contraceptives, such as condoms and spermicidal foams and jellies. 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.” Furthermore, even seemingly innocuous contraceptives like spermicidal jelly and condoms could cause “irritation,” which the state appeared to consider a notable medical risk. Indeed,

> 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 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.

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.

Second, while admitting that the proscription on contraception for unmarried persons primarily served a moral interest, the state asserted it also served the public health in a broad

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86 Id. at 12-13.
87 Id. at 13-14 (internal citations omitted).
sense by encouraging chastity amongst the unmarried. 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.\(^{88}\)

The suppression of non-marital promiscuity was thus portrayed as not only a moral interest but also a health interest.

The Appellee challenged the state’s contention that the statute furthered the state’s legitimate interests in public health. The Appellee noted that 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, other than in a tenuous concept of morality, that the use of a contraceptive itself results in any injury."\(^{89}\)

Furthermore, according to Appellee, the distinction between married and unmarried individuals bore no rational relationship whatsoever to health. The Appellee noted, “all of the Massachusetts cases have consistently taken the view that this legislation is designed to improve the public morals and prevent ‘sexual immorality.’”

The First Circuit and the Supreme Court agreed with Appellees and concluded that the statute was not, at heart, a health measure. The First Circuit declared, “it is impossible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to

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think of it as so intended even as to the married.”\textsuperscript{90} 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.\textsuperscript{91} Both courts concluded that “despite the statute's superficial earmarks as a health measure,” the statute actually served no legitimate health purpose.\textsuperscript{92}

The state in \textit{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 offered.\textsuperscript{93}

Appellees strongly challenged the State’s asserted medical interests in restricting contraceptive sales to pharmacies, and the court concluded that none of the State’s asserted medical interests rang true. As in \textit{Eisenstadt}, the court took notice of the fact that “not all contraceptives are potentially dangerous.”\textsuperscript{94} 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.\textsuperscript{95} With that out of the way, the court similarly eviscerated the State’s contention that dispensation by 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

\textsuperscript{90} \textit{Baird v. Eisenstadt}, 429 F.2d 1398, 1401 (1st Cir. 1970).
\textsuperscript{91} \textit{Id.}
\textsuperscript{94} \textit{Carey}, 431 U.S. at 690 n.8.
\textsuperscript{95} \textit{Carey}, 431 U.S. at 690.
are, why contraceptives are singled out for this special protection, is also unexplained. Thus, the court rejected all of the State’s asserted medical interests in requiring contraceptives to be dispensed by a pharmacist. The State had not asserted any other legitimate interest rationally related to the statute, so the State was left without any legitimate interest in requiring that pharmacies dispense nonmedical contraceptives.

With regard to the provision criminalizing the dispensation of contraceptives to persons under age sixteen, the State asserted an interest in preventing teen pregnancy and stemming the spread of venereal disease by reinforcing societal disapproval of promiscuous sex among the underage. Appellants 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. “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.” The state also used narcotics as an analogy 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. ‘Whether this is desirable or not is another question not pertinent here. The point is that legalizing it would enhance its chances of becoming a social institution.’

96 Carey, 431 U.S. at 691.
99 Id. at 18.
Appellees vigorously disputed the State’s contention that access to contraceptives would increase rates of teen sex, venereal disease among teens, or teen pregnancy. Appellees pointed to studies showing that teens’ decisions about sex were based on personal preferences and that laws had a negligible effect on sexual decision-making.\textsuperscript{100} Appellees also noted that the State had been forced to admit to the lower court that “there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives ...”\textsuperscript{101}

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.\textsuperscript{102} 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 interest in health.\textsuperscript{103} Thus, the only remaining interest at issue was the state’s interest in promoting morality.

\textit{iv. Balancing the Interests}

Once the courts in these cases determined whose version of the interests at stake to accept, they inquired into the relationship, if any, between those interests and the challenged legislation. Because the contraception statutes at issue impacted a fundamental right, in order to pass constitutional muster, the state had to demonstrate that the provision was narrowly tailored to further a compelling state interest.\textsuperscript{104} “‘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

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\textsuperscript{101} Id. at 13.
\textsuperscript{102} \textit{Carey}, 431 U.S. at 696-97.
\textsuperscript{103} \textit{Carey}, 431 U.S. at 690-700 (1977).
\textsuperscript{104} \textit{Carey}, 431 U.S. at 687-89 (1977).
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a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.\textsuperscript{105}

The Supreme Court in \textit{Eisenstadt} concluded that the statute at issue was not even rationally related to any state interest in health. Turning 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. In particular, the court took issue with the idea that the state would seek to punish immoral sexual behavior with pregnancy. “It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication.”\textsuperscript{106} The Court of Appeals concluded:

\begin{quote}
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.\textsuperscript{107}
\end{quote}

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 for married and unmarried individuals. And both courts soundly rejected the notion that the state could seek to punish “immoral” behavior by exposing wrongdoers to unwanted pregnancy and disease.

In \textit{Carey}, the court concluded that the pharmacy provision failed to pass constitutional muster. Indeed, under the court’s analysis, no legitimate state interest of any kind remained. The statute failed under any level of constitutional scrutiny because the provision served no

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\textsuperscript{105} \textit{Carey}, 431 U.S. at 686 (1977).
\textsuperscript{107} \textit{Baird v. Eisenstadt}, 429 F.2d 1398, 1402 (1st Cir. 1970).
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purpose aside from needlessly burdening the individual’s right to be free from disease and unwanted pregnancy.

The court had more trouble disposing of the provision criminalizing dispensation of contraceptives to minors under the age of sixteen and declined to make clear what standard of review it chose to apply. Regardless, a majority of justices on the court took issue with the idea that the state could impose health risks on children as a means of promoting the state’s moral agenda. As in Eisenstadt, the court rejected the argument that the state may attempt to deter sexual activity by increasing the hazards attendant on it. 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.”

In other words, despite the fact that states have a legitimate interest in enforcing morality, that interest was outweighed when the means of furthering the interest imposed significant health risks on individuals who refused to comply with the state’s moral inclinations. Importantly, deterring behavior by increasing the harms attendant upon it was illegitimate state action even where there was no constitutional right to engage in the activity in question (in this case, sex by minors).

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108 Carey, 431 U.S. at 694-95.
109 Carey, 431 U.S. at 715-16.
v. **Takeaway**

*Roe v. Wade* illustrates the medicalization of the conception of pregnancy, and demonstrates how the medical understanding of pregnancy can affect the perceived legitimacy or existence of state and individual interests. 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. The idea that a state could punish irresponsible sexual behavior by imposing unwanted pregnancy or disease on the participants was abhorrent to the courts. In other words, the state cannot punish pleasure-seeking activity by exposing individuals to increased medical risk.

c. **Treatment or Pleasure? – The “Obscene Devices” Cases**

i. **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.” These cases involve the second form of medicalization, in which an individual asserts that the statute impacts the individual’s interest in receiving treatment. These cases demonstrate how the legitimacy of criminalizing pleasurable behavior (or items) can turn on whether the behavior in question is seen as undertaken for the purpose of pleasure or, alternatively, is understood to be undertaken 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 this recharacterization of the individual

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interest and views the behavior as “therapeutic,” then its recreational or pleasurable consequences are relegated to the status of mere “side effects.”

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 that failed to provide any exception for medical or therapeutic use of the devices. Kansas v. Hughes and Louisiana v. Brenan invalidated these statutes on the grounds that they impermissibly burdened the use of such devices for therapeutic reasons. Two later “obscene devices” cases, Williams and Reliable Consultants, (each of which address statutes with express exemptions for the medical use of these devices) depart from a medicalized framework and reach differing conclusions.

Hughes and Brenan involve similar statutes that criminalize the distribution or promotion of “obscene devices.” Both challenges were brought by individuals who had been convicted of distributing obscene devices under the statutes. These individuals asserted the rights of their customers to have access to the devices. The obscene devices at issue in both cases included vibrators, dildos, and inflatable dolls. The similarity of the statutes at issue and the parallels between the courts’ analyses make it possible to explore both cases simultaneously. Hughes and

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111 “…the proposition that one might actually experience 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.” Race, supra note 21, at 2-9.

114 Williams v. Attorney General of Alabama, 378 F.3d 1232 (11th Cir. 2004).
115 Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008).
116 These cases will be explored in Part V, infra.
117 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.” Kansas v. Hughes, 246 Kan. 607, 611 (1990). 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.” Louisiana v. Brenan, 772 So.2d 64, 67 (2000).
*Brenan* both provide a valuable illustration of the effectiveness of recharacterizing an individual interest in pleasure as an interest in receiving medical treatment.

**ii. 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.\(^{118}\) There is no suggestion by either court that an individual interest in pleasure might present a legitimate obstacle to criminalization of these devices. Furthermore, the devices’ usefulness for provoking pleasure is largely sidelined.

Both courts also reject the contention that the statutes at issue implicate individuals’ right to sexual privacy.\(^{119}\) Instead, the individual interest embraced by the courts is thoroughly medical. Both courts rely heavily on expert testimony about the usefulness of vibrators and other devices in treating women with arousal dysfunction, pelvic floor diseases and/or atrophy, and incontinence.\(^{120}\) 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.\(^{121}\)

Indeed, the courts discuss orgasm only as it relates to sexual dysfunction. The court in *Hughes* relies heavily on the testimony of an expert, Dr. Mould, who asserted that “anorgasmic women may be particularly susceptible to pelvic inflammatory diseases, psychological problems,

\(^{118}\) 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. *Kansas v. Hughes*, 246 Kan. 607, 607.

\(^{119}\) 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.


and difficulty in marital relationships.”\textsuperscript{122} 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.\textsuperscript{123} In \textit{Brenan}, the court similarly declares, “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 inflammatory diseases, psychological problems, and difficulty in marital relationships.”\textsuperscript{124}

In both cases, the courts focus 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. Indeed, in \textit{Hughes}, the court ignores 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.”\textsuperscript{125} Furthermore, both \textit{Hughes} and \textit{Brenan} involved not only dildos and vibrators, but also blow up dolls, for which no medical purpose could be ascertained. Despite this elephant in the room, the courts were undeterred in their focus on the medical issues. The court in \textit{Brenan} simply ignored the existence of the blow up doll, while the court in \textit{Hughes} disposed of it succinctly:

\begin{quote}
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.\textsuperscript{126}
\end{quote}

Thus, both courts steadfastly refused to place weight on individuals’ nonmedical interests in the devices, despite the clear existence of such interests. They instead focused single-mindedly on the individual’s interest in receiving treatment.

\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Louisiana v. Brenan}, 772 So.2d 64, 76 (2000).
\textsuperscript{125} \textit{Id.} at 77.
iii. **Demedicalizing the State Interest**

Both courts stressed that no medical reason existed for regulating the devices at issue. In *Hughes*, the court noted that the expert “knew of no medical harm that could be caused by the use of a vibrator on the female genital organs.”\(^{127}\) In *Brenan*, meanwhile, the court turned to the legislative history to reject the state’s contention that it was concerned with protecting minors and unconsenting adults from viewing the obscene devices. The court determined that the legislature was less concerned about protecting minors and unconsenting adults than it was with “waging a general war on obscenity.”\(^{128}\) The court went on to conclude that the ban was designed “to promote morals and public order.”\(^{129}\) In both cases, the courts explicitly concluded that the state’s interests were moral, not medical.

iv. **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. In *Hughes*, the court asserted that the fundamental interest in privacy “encompasses therapy for medical and psychological disorders” and therefore applied heightened scrutiny.

Despite the purportedly different levels of scrutiny, the results were the same. Both courts concluded that the state court not burden an individual’s right to medical treatment in an attempt to police morality. In *Brenan*, the court concluded that the statute was not “rationally related” to the goal of promoting morality, not because the ban on obscene devices did not further the interest of promoting morality but because it was overbroad in its inclusion of

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127 Id. at 609.
129 Id. at 73.
therapeutic activity. Indeed, the court acknowledges that the statute, “which ban the promotion of obscene devices in order to promote moral and public order, indeed furthers a legitimate government interest” but concludes that the statute is not related to this interest because it “ignores the fact that, in some cases, the use of vibrators is therapeutically appropriate.” Thus, the state’s interest in morality fails to outweigh the individual’s interest in treatment even under rational basis review. Meanwhile, in Hughes, the state’s interest in morality easily falls short of outweighing the individual’s interest in treatment. The Hughes court therefore holds “the dissemination and promotion of such devices for purposes of medical and psychological therapy to be a constitutionally protected activity.”

v. Takeaway

Reframing the individual’s interest as an interest in therapy rather than an interest in pleasure can help overcome a statute that criminalizes pleasure-seeking behavior in furtherance of the state’s interest in promoting morality. Medicalizing the individual’s interest relegates the pleasurable effects of the behavior or device to the position 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/sexual privacy or allow the statute to stand, the courts here refocused the issue completely and overturned the statute based on its interference with individuals’ medical interests. Thus, the characterization of the individual interest as a need for medical treatment allows any consideration of pleasure to be sidelined, leaving the courts to focus solely on the medical aspects of the case.

130 Louisiana v. Brenan, 772 So.2d 64, 73 (2000).
131 Id. at 73-75.


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 appear to consider abstinence as a viable option for avoiding unwanted pregnancy and sexual 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? Contraception and abortion have been assigned 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. And sex toys have been given protection only insofar as they provide curative, rather than merely pleasurable, sexual release. In the case of contraception and abortion, why has the discourse focused on the medical 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 umpteen 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 under the law.

III. The Lawlessness of Pleasure

The Declaration of Independence lists happiness as a fundamental right of the people. Surely, the attainment of pleasure would constitute an important part of most people’s understanding of happiness. Yet, few courts seem to believe that their duty to uphold the
Constitution and the laws of the United States encompasses any obligation to protect the individual pursuit of pleasure. Indeed, pleasure has fared poorly in the courts. Despite the importance of pleasure in daily life, courts have been reluctant to recognize pleasure as a legitimate or meaningful individual interest. The United States Supreme Court’s treatment of pleasure has been an exercise in reticence. No court has recognized an explicit right to pleasure as such, and most courts have remained mum on the issue. 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 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. But these kinds of close-lipped “endorsements” of pleasure do not precedent make, and in general courts have completely avoided any explicit discussion of pleasure. Indeed, in the few cases where courts do explicitly discuss sexual pleasure, they often do so in the context of rejecting the existence of

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133 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 S.W.U. L. Rev. 448, 450 (1999).

134 Glover, supra note 29.
a right; conversely, where the courts choose to find a right, they avoid discussion of pleasure and issue their opinions in “grand and euphemistic nonsexual terms.”\(^{135}\)

Courts do recognize a right under the Fourteenth Amendment to the “pursuit of happiness,” but this right is limited. 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.”\(^{136}\) The list given in *Meyer* is not exhaustive and modern courts have expanded and clarified it, but it does illustrate two points. The first point is that, under the *Meyer* Court’s understanding of liberty, the pursuit of happiness includes the right to marry and the right to bear children, thus validating marital sex for the purposes of procreation as an important part of the pursuit of happiness, but failing to comment on non-procreative or non-marital sex. This 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).\(^{137}\)

The second point is that, 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*. It is here that pleasure runs into trouble – not just under Fourteenth Amendment jurisprudence, but also under jurisprudence in general. Law is, at heart, about order. And pleasure is, in its soul, disorderly.

\(^{135}\) *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.’”).


\(^{137}\) 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. Thus, loss of 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.
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, in danger. It is perhaps no great coincidence that the flush of pleasure is often indistinguishable from the flush of shame. 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.

While pleasure admittedly feels good, there is an overwhelming sense that it is also bad. And not only bad, but 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.” It is an incontrovertible truth that, across generations and cultures, humans long for pleasure. 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…” 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 going skydiving.

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139 Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire* at 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.
140 Race, *supra* note 21, at ix.
141 Id.
Indeed, while “anyone can relate to the need for pleasure … the precise content of what they are relating to remains an open question.”

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 exercising or eating can quickly become viewed as a disorder. And while 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. And the frank discussion of sexual pleasure, licit or otherwise, remains taboo.

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,

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142 Id.
143 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 that most other cultures.”).
144 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… erotophobia 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 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.”)
the family, or civilization itself.” These rationalizations obscure the intent to shut down sexual variance.\textsuperscript{145}

But, as Rubin intimates, this politics of shame applies not only to suppressing sexual variation. Indeed, the politics of shame works to suppress variation in the sources of pleasure including, \textit{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.”\textsuperscript{146} Similarly, certain types of substances, such as coffee, alcohol, and Viagra, may be deemed acceptable sources of pleasure, while other types of substances, such as marijuana, are considered unacceptable sources of pleasure. These types of 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.

This 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 sex education classes in school include only bare biological information and stress the risks and dangers inherent in sex.\textsuperscript{147} There is usually no discussion whatsoever of the potential for pleasure through sex. As Janice Irvine puts it, sex education in America further “constricts the already minimal cultural space afforded to sexual pleasure.”\textsuperscript{148} Indeed, “there appears to be a belief or fear or both that

\textsuperscript{145} Warner, \textit{supra} note 143, at 25.
\textsuperscript{146} Id.
when adults license and approve of sexual pleasure, this literally leads to licentiousness.”¹⁴⁹ The mere mention of “the dreaded p-word” in the context of sex education is enough to cause public outcry.¹⁵⁰ There appears to be an overwhelming fear that teaching children about pleasure will inevitably lead to sexual anarchy and disaster.

The avoidance of pleasure is by no means limited to the realm of sex education. 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.¹⁵¹

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.¹⁵² Similarly, opposition to female genital mutilation is argued on the grounds of 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. “The effect that genital cuttings might have on a girl’s capacity for sexual pleasure was

¹⁵¹ Franke, supra note 139, at 200.
¹⁵² Id., 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. 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. 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. 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.” Ariela Dubler, Sexing Skinner: History and the Politics of the Right to Marry 1348-1376, at 1360, Colum.L.Rev. (Jun. 2010).
not once invoked as among the justifications for federal legislation condemning so-called ‘female genital mutilation.’”

Discussion of pleasure is avoided at all costs, and where loss or restriction of pleasure is at issue, advocates are reluctant to bring up pleasure as a legitimate value that should be taken into consideration by those in authority.

Thus, for judges, 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, the precise boundaries of this interest would be very difficult to discern. Furthermore, the paradoxical and often guilty nature of pleasure makes it uncomfortable and controversial to discuss. When pleasure comes to 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. 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 becomes understandable why judges, as arbiters of reason and order, and advocates, who must necessarily shape their arguments around the dialectic of the court, shy away from any discussion of pleasure, even where it underlies and informs the entire cause of action before them.

IV. Pleasurable Substances

a. Introduction

While sexual intimacy has undergone a fairly dramatic transition from a paradigm of criminalization towards a paradigm of decriminalization and individual freedom, regulation of

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153 Franke, supra note 139, at 200-201, n. 89.
154 For more on this, see Katharine M. Franke, “Eve Sedgwick, Civil Rights, and Perversion,” 33 Harv. J.L. & Gender 313-321 (Winter 2010).
the use of illicit drugs has remained firmly entrenched in the criminal realm. Given that the neurological response to sex and drugs is markedly similar, and many of the attendant risks overlap, 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, similar to judicial treatment of regulations burdening pleasure-seeking through sex? 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 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

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155 Both sex and drugs expose individuals to blood borne pathogens, including HIV and hepatitis.
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 drugs have no other easily discernable 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. It is hard 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 can 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. Although the pleasure of 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.” 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, as soon as sex is brought into the public forum, it loses its constitutional protection.

Sexual intercourse has recently become uncoupled from procreation as a result of technological developments, but it still seems safe to say that procreation on a large scale still relies heavily on traditional sexual intercourse. This insistence on privacy may be the result of viewing sex as shameful or, alternatively and perhaps ambivalently, of viewing it as sanctified. Leo Bersani, *Is the Rectum a Grave?* 43 AIDS: Cultural Analysis/Cultural Activism 197-222 (Winter 1987). See, e.g. *Lawrence v. Texas*, 539 U.S. 558 (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.”).
as weak or immoral, is somehow less shameful to look at – the physical act of taking drugs is not considered “obscene” in the same way as the sexual act. The image of an individual injecting heroin is not pornographic, despite the fact that, like sexual intercourse, it involves penetration of the body and abandonment of 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 the court 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 the eye need not be averted. 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 because the state itself asserts that criminalization of drug use or paraphernalia furthers its own interest in public health, and this assertion often goes largely unchallenged. In order to maximize courts’ willingness to overturn statutes criminalizing pleasure-seeking behavior, the asserted state health interests must exposed as disingenuous and re-characterized as primarily moral.

For a variety of reasons, this move may also be harder to make in the context of drug use than in the context of sexual intimacy. First and foremost, the idea that the criminalization of
drug use and drug paraphernalia furthers a state interest in public health is often simply accepted as a given. There is little reason, aside from habit, that this should be the case. And secondly, 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.\textsuperscript{160} Furthermore, some kinds of drug use may negatively impact individual health. But this fact alone does not differentiate sex from drugs. Indeed, unprotected sex also poses significant health risks, as do cigarettes, alcohol, prescription drugs, and junk food. 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.\textsuperscript{161} 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 this kind of reframing of the state's interests as moral, rather than medical. In the contraceptive cases, the state attempted to assert that the challenged legislation related to the state's health interests by discouraging sexual activity and regulating contraceptives. The opposing party argued that the state's asserted interest in health was disingenuous or unconvincing and demonstrated that criminalization failed to promote health or actually resulted in increased risk of injury. Despite the risks inherent in

\textsuperscript{160} 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, \textit{Sex Torts}, 39 Minn.L.R. 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, \textit{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.”).

\textsuperscript{161} See, \textit{e.g.}, Evvie Becker et al., \textit{High-Risk Sexual Behavior: Interventions with Vulnerable Populations} (1998). 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.”) \textit{Id.} at 28.
engaging in pleasure-seeking sexual behavior, the court rejected the state's contention that the
criminal statutes at issue furthered the state's interest in health because criminalization had no
rational relationship to public health. Instead, the court concluded that the state's real interest in
criminalization was primarily moral, or, in some cases, that the criminal legislation was entirely
unrelated to any legitimate state interest.

The sexual intimacy cases also offer precedent for reframing the individual’s interest as
medical. 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.
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. 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 and pill testing kits, they unacceptably impose heightened health risks on users in an attempt to deter drug use.

\textit{a. Treatment or Pleasure? – Medical Marijuana}

The obscene devices cases illustrate that the distinction between behaviors or objects that are seen as having a legitimate use as a medical treatment versus those seen as merely related to pleasure. Where an object or behavior is seen as having important medical uses, a flat-out ban on its distribution will likely be difficult to sustain if it can be demonstrated that the ban unacceptably burdens individuals right to treatment.

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 moral and legal 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.\textsuperscript{162}

It is certainly arguable that 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.\textsuperscript{163} Whatever the case, it is clear that attempting to rationally distinguish between “licit” and “illicit” drugs can be an exercise in frustration.

And the line between pleasure and treatment becomes even blurrier 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. All are

\textsuperscript{162} Race, \textit{supra} note 21, at ix.
\textsuperscript{163} See Part IV, \textit{supra}.
designed to treat rather recent and vaguely defined medical conditions – sexual dysfunction, attention deficit disorder, and anxiety. And all are widely used recreationally and/or abused.\textsuperscript{164} Viagra in particular could be expected to face attempts at criminalization, since males use it for the very same purposes as females use many of the “obscene devices” at issue in the previous section. Yet, because Viagra has been sufficiently cloaked in medical legitimacy, it escapes criminal sanction, despite the fact that, unlike sex toys, Viagra actually does pose the risk of significant adverse health effects.

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.\textsuperscript{165} Furthermore, marijuana has a relatively low risk of adverse effects, making it one of the least individually and socially harmful psychoactive substances.\textsuperscript{166 167} There is currently a massive effort to medicalize the debate over marijuana by focusing on its potential as a therapeutic agent and shifting attention from its role in as a recreational pleasure-seeking substance. Fifteen states plus Washington D.C. have all enacted statutes legalizing so-called “medical marijuana.”\textsuperscript{168}


\textsuperscript{166} David Nutt et al., \textit{Development of a rational scale to assess the harm of drugs of potential misuse}, 369 THE LANCET 1047, 1051 (2007)

\textsuperscript{167} Another “illicit” drug with potential therapeutic effects is MDMA (commonly known as Ecstasy). MDMA was (and in Europe, still is) one of the most effective known pharmaceutical treatments for posttraumatic stress syndrome, and it also poses a relatively small risk of adverse reactions when used in a controlled setting. See, e.g., Lisa Jerome, (+/2-3,4-methylenedioxymethamphetamine (MDMA, “MDMA”) Investigator’s Brochure 17-20 (2007)

The therapeutic potential of marijuana suggests that statutes imposing a flat-out ban on the distribution of marijuana 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. 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 the contention that a flat out ban is unrelated to public health. If the court accepts the contention that individual’s have 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.

b. Pleasure as Punishment - Drug Paraphernalia Laws: Clean Needles and Pill Testing Kits

Many states have drug paraphernalia laws that criminalize the possession or distribution of various items associated with drug use. Often, these laws include objects that may be part of harm reduction strategies, such as clean hypodermic syringes or pill testing kits that can help establish whether a drug is contaminated. These laws frequently do not contain exceptions for programs such as needle exchanges or nonprofit pill testing centers.169

Nonprofit groups and individuals who seek to run needle exchanges or pill testing centers without being subject to prosecution have challenged these statutes, but successes have been few and far between.\textsuperscript{170} Courts have refused to bend even where municipalities seeking to establish their own needle exchanges have sought exemption from state criminal drug paraphernalia laws.\textsuperscript{171}

The refusal by courts to exempt nonprofit or municipal needle exchanges or pill testing centers from drug paraphernalia laws burdens individuals’ access to clean needles and to information about whether their drugs are contaminated. When strictly applied, these criminal drug paraphernalia statutes therefore expose drug users to increased risk of overdose, poisoning, and serious diseases such as HIV and Hepatitis.\textsuperscript{172} In other words, the state’s criminalization of clean needles and pill testing kits serves to increase the harm attendant upon drug use.

Drug paraphernalia laws can plausibly be likened to the New York statute at issue in\textit{Carey}. Both statutes burden the distribution of items associated with potentially risky pleasure-

\textsuperscript{170} See, e.g.,\textit{State ex rel. Atlantic County Prosecutor v. City of Atlantic City}, 379 N.J.Super. 515 (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); \textit{New Jersey v. McGague}, 314 N.J.Super. 254 (1998) (refusing to enjoin enforcement of drug paraphernalia statute against members of Chai Project, a nonprofit legal exchange program); \textit{Massachusetts v. Leno}, 616 N.E.2d 453 (1993) (affirming conviction of two individuals for distributing clean needles with the intention of preventing the spread of HIV); \textit{but see Spokane County Health District v. Brockett}, 120 Wash.2d 140 (1992) (issuing declaratory judgment exempting county needle exchange program from prosecution under drug paraphernalia statute. The court based its holding 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.).


\textsuperscript{172} Zita Lazzarini, \textit{An Analysis of Ethical Issues in Prescribing and Dispensing Syringes to Injection Drug Users}, 11 Health Matrix 85, 86 (2001) (“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. 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.”).
seeking behaviors – in *Carey*, the statute burdened distribution of condoms while in the case of paraphernalia, the statute burdens the distribution of clean needle and pill-testing kits. The items at issue in both cases function to 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-born diseases and pill testing kits can reduce the risk of overdose or poisoning. Thus, the criminalization of these items serves to increase the health risks associated with the pleasure-seeking behavior.173

*Carey* therefore provides a useful model for challenging statutes that criminalize the distribution of clean needles and pill testing kits. 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 or pill testing kits is clear. Clean needles, like condoms, allow the individual to engage in the pleasure-seeking behavior with a significantly reduced risk of adverse health consequences. Pill testing kits allow an individual to engage in the behavior with a reduced risk of overdose or poisoning. 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 taken as a given that drug paraphernalia statutes are rationally related to public health. But this is not

173 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, 216 (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. Zita Lazzarini, *An Analysis of Ethical Issues in Prescribing and Dispensing Syringes to Injection Drug Users*, 11 Health Matrix 85, 86 (2001)
necessarily the case.\textsuperscript{174} For one thing, the items at issue here are not intrinsically hazardous. Just as condoms are not inherently dangerous, neither are hypodermic syringes or pill testing kits. Hypodermic syringes are distributed freely to civilians for veterinary and other purposes; they are only criminalized insofar as they can be considered drug paraphernalia. Pill testing kits also pose no threat to safety. And the fact that the items can be used in furtherance of a potentially risky pleasure-seeking behavior does not make the items dangerous in and of themselves.\textsuperscript{175}

Thus, the criminalization of clean needles and pill testing kits is not rationally related to the state’s interest in public health. Instead, the criminal statute seeks to deter drug use by increasing the harms attendant on it. And this is precisely the type of regulation that the majority in \textit{Carey} found so unconscionable.\textsuperscript{176} Justice Steven’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.\textsuperscript{177} Furthermore, even if the court concludes that there is no fundamental right to obtain a clean needle to inject heroin, this

\textsuperscript{174} Indeed, it is quite likely that limiting distribution of sterile needles under criminal paraphernalia laws has no public health justification whatsoever. “Substantial scientific evidence suggests that increasing access to syringes can reduce HIV infections and does not increase drug use or related crime. Also, legal restrictions on access to syringes have not been shown to reduce drug use or to have any direct public health benefit.” Zita Lazzarini, \textit{An Analysis of Ethical Issues in Prescribing and Dispensing Syringes to Injection Drug Users,} 11 Health Matrix 85, 94 (2001).

\textsuperscript{175} 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 \textit{Carey} and other contraceptive cases.

\textsuperscript{176} 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 \textit{Roe v. Wade}, that “no court or commentator has taken the argument seriously.” The reason for this unanimous rejection was stated in \textit{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.” \textit{Carey v. Population Services Int’l}, 431 U.S. 678, 694-95 (1977) (internal citations omitted).

does not mean that the state can discourage heroin use by increasing the harms attendant on it. 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.” Regardless of the existence or nonexistence of a constitutional right, 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*. The individual’s interests must be framed as purely medical. And, the challenger must assert that the state’s interest is simply masquerading as an interest in public health when in reality, the statute fails to further a public health goal and “is in fact an anti-health measure.” Finally, the statute must be characterized as an attempt by the state 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

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178 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., *New Jersey v. McGague*, 314 N.J.Super. 254 (1998).


180 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. 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. Echoing the spirit of Justice Stevens’ 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.” Justice Pittfield’s ruling was affirmed by the B.C. Court of Appeals in 2010. *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCSC 661, aff’d by *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCSC 661. 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.

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 framework may open the door for later courts to expand decriminalization beyond the medical context.

In the context of sexual intimacy, *Lawrence v. Texas* may be an example of later court’s willingness to extend protections into new spheres. In *Lawrence*, the court overruled its previous decision in *Bowers v. Hardwick* and invalidated a statute prohibiting same-sex sodomy.\(^{182}\) In so doing, the Court relied on the line of contraception and abortion cases, including *Griswold*, *Eisenstadt*, *Roe*, and *Carey*. 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 by the state to police morality. 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.\(^{183}\) However, if indeed the *Lawrence* court was suggesting that the state interest in morality could no longer justify regulation of private consensual sexual intimacy, the court failed to make this determination explicit.\(^{184}\)

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*. The fact that both statutes contained explicit medical exception

\(^{183}\) See Part I(c), supra.
distinguishes these cases from *Hughes* and *Brenan*, which were discussed in Part II(c) above. In one of the cases, the court invalidated the statute, while in the other case, the statute was upheld.

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 mortality was an insufficient justification for a law that restricted ‘adult consensual intimacy in the home.’”185 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.

By contrast, the court in *Williams v. Attorney General of Alabama* upheld a statute banning distribution of obscene devices for nonmedical purposes. The court declined to read *Lawrence* broadly and narrowly construed the right at issue in its own case. The court insisted that states had a broad right to criminalize behaviors in order to promote public morality, and refused to find a fundamental right to sexual privacy186. The court’s analysis examines the very same precedent as the court in *Reliable* and comes to the opposite conclusion. 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 take that leap.

Thus, medicalization may result in disingenuous reasoning. One could argue that the early obscene device cases were not really decided on medical grounds, but rather because the court felt that the state was intruding too far into the private sexual decisions of its citizens. However, by relying explicitly on medical justifications, however, those court may have

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degraded the precedential value of these cases for expanding individual rights more generally. Indeed, if earlier courts really intended to protect individuals from such intrusion, then the court in *Williams* was able to easily thwart that intention because the courts had failed to make that intention explicit.

Furthermore, by refocusing the debate on medical issues and ignoring the underlying moral and normative issues, courts may create law that *only* places value on medicine and ignores individuals’ interest in pleasure. This may perpetuate a normative understanding of pleasure as unimportant, dangerous, or taboo. And, by catering to the implicit prioritization of the state interest in promoting morality over the individual’s interest in pleasure, medicalization may inadvertently eternalize that hierarchy.