



astrachan gunst thomas

a professional corporation
attorneys at law
baltimore . washington, d.c.
www.agtlawyers.com

Warning: Adult Legal Content

By: Jim Astrachan

If we're all adults, we should be able to discuss anything, especially the successful constitutional challenge of Texas a statute brought in a United States Circuit Court of Appeals. Right? Okay. Here we go.

You gotta love the State of Texas. It allows almost anyone to pack a concealed .45, but it banned the sale and advertisement of sex toys. Did the Texas legislature think the "dildo is mightier than the gun"? At any rate, the legislature, in an effort to regulate morality, made it a crime to promote or sell sexual devices any place in Texas. The statute was challenged in 1985 but the Texas Court of Criminal Appeals, holding that there is no constitutional right to "stimulate. . . another's genitals with an object designed or marketed as useful primarily for the purpose," upheld an advertiser's conviction, refusing to find a constitutional violation. Trust me, I'm not making this stuff up.

Alabama, Mississippi and Virginia also have similar laws. The Mississippi Supreme Court upheld its statute against First and Fourteenth Amendment challenges. And while neither the Alabama nor Virginia Supreme Courts have heard a challenge to their states' statutes, the Eleventh Circuit Court of Appeals has rejected a Fourteenth Amendment challenge to Alabama's statute. Louisiana, Kansas and Colorado had similar laws prohibiting the advertisement and sale of "obscene" devices, but each was struck down by their state courts on Fourteenth Amendment grounds. Georgia's obscene-device statute was struck down by the Eleventh Circuit.

In Texas, Le Rouge Boutique operated several stores that advertise, stock and sell these devices, intended for off-premises private use. Adam and Eve sells the devices only by Internet and some of its customers live in Texas. Both wanted to drive sales by advertising sex toys, but because they feared prosecution under the Texas statute if they promoted the devices they filed a declaratory judgment action in the United States District Court asking the court to declare that the ban violated the

Fourteenth Amendment. The District Court refused to find the law unconstitutional, and plaintiffs appealed.

Sometimes it's the most frivolous activities, or those state actions that affect a small percentage of the population, that become the subject of challenges. This case was no different, and the appeal was decided on the simple question of whether people who might buy sex toys from the plaintiffs had the right to engage in intimate private conduct in their home without the need to check under the bed for a Texas Ranger.

The Lone Star state's lawyers argued that the plaintiffs were improper parties to the action because they were attempting to assert individual rights on behalf of their customers. Unfortunately for the state of Texas, this assertion regarding individual rights ignored a United States Supreme Court precedent holding that product bans can indeed unconstitutionally burden the individual's right to buy the product, and that the seller of the product has standing to challenge the oppressive statute. This precedent arose out of a not dissimilar case where Connecticut tried to ban the use of contraceptives by preventing their sale by pharmacies.

The court's evaluation of the Texas case began with an analysis of what right was at stake. Not surprisingly, the parties had different views. On one hand, the plaintiffs asserted that at stake was a person's right to engage in private intimate conduct free from government intrusion. The state, on the other hand, trivialized this right by characterizing it as "the right to stimulate one's genitals for non-medical purposes unrelated to procreation or outside of an interpersonal relationship." Again, the government lawyers ignored Supreme Court precedent – this time it was a case that struck down Texas' earlier ban on sodomy. That decision held:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.

The critical difference between the two positions, the court explained with patience, was that the recognized right was not simply to engage in a sexual act, but instead was the right to be free from government intrusion regarding "the most human contact, sexual behavior." To engage in this behavior has been recognized as a constitutional right because a ban would violate a person's substantive due process rights.

Thus the court held, an individual who wants to use a safe sexual device during private intimate moments alone or with another should be permitted to do so. Banning this right, or inhibiting the ability of a vendor to advertise such products violates this right. Incredibly, the state's justification for the ban were morality based, intended to "discourage prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and prohibit the commercial sale of sex." In addition, the state asserted it was trying to protect minors and unwilling adults from exposure to sexual devices and their advertisements.

Even the concern for children does not allow this overreaching state conduct; the concern for unwilling adults was absurd – an adult must visit the store to buy the product or go to a website and make a purchase.

Could the legislature ban the advertising of these devices? Yes, if the advertisements are considered to be obscene, as an advertiser has no right to publish obscene material. But, the ads must truly be obscene, as that word has been defined by the Supreme Court. Texas can't ban advertisements by declaring them obscene by content.

There is a solution. If Texas can't legislate morality it can at least tax it. That way everyone will be pleased.

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.