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Constitutional Protection of "Sexting" in the Wake of *Lawrence*: *The Rights of Parents and Privacy*

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ABSTRACT

This article discusses the adolescent practice of "sexting," which involves teens taking nude or explicit photographs of themselves with cellular phones and transmitting the images to romantic partners, friends, or classmates. Although this activity is legal when conducted by adults, minors risk prosecution for the creation and distribution of child pornography. The irony is that children are treated as criminals for violating laws that were written to protect them. This article adds to the current debate by taking a unique constitutional approach. Sexting should be protected as a right of privacy and as part of the fundamental rights of parents. The implications of this paper extend beyond sexting and examine how the Constitution and *Lawrence v. Texas* should protect the rights of individuals to engage in harmless behavior that runs against majoritarian moral judgments.

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I. INTRODUCTION

¶ 1 By taking a broad view of privacy and treating the Constitution as a defender of expanding liberties, this paper attempts to reconcile the criminalization of sexting with parental and privacy rights and the developing notion of sexual liberty after *Lawrence v. Texas*.[1] Section I provides a brief description of "sexting" and its alleged harms before presenting a framework that dismisses the idea that morality should justify government intervention into personal realms. Section II examines the current constitutional status of sexting established in recent case law. Although no court has affirmatively protected sexting, I argue that future courts must examine the rights of parents and privacy implicated by sexting prosecutions. Rather than merely determining if state interests are "worthwhile," courts should balance governmental regulations against their costs to individual liberty. *Lawrence* provides the ideal framework to rethink whether state interests justify encroachments on personal decision regarding teenage sexuality.

[1] Lawrence v. Texas, 539 U.S. 558 (2003).

¶ 2 Section III details two important rights implicated in sexting. First, I argue that the fundamental right of parents to guide the upbringing of their children supports parental choices concerning sexting and thus undermines the state's attempts to make "parenting" decisions. Second, I explain why, in the wake of *Lawrence*, teens should have a privacy right regarding their sexual activities, including sexting. I then apply these rights to the narrow and wide scopes of sexting to demonstrate how these two rights should protect teens from child pornography charges when they sext.

¶ 3 Section IV explains how this constitutional analysis can also be useful to prosecutors and legislators who deal with sexting issue before it becomes settled by courts. Finally, I discuss how the sexting debate influences the broader understanding of privacy rights. I conclude that sexting prosecutions may jeopardize other unpopular activities viewed as immoral by the cultural majority.

II. OVERVIEW OF A TEENAGE FAD IN A DIGITAL AGE

A. What is Sexting?

¶ 4 Teenage communication has fundamentally changed in the digital era. Until recently, the decision was essentially between making a landline phone call and sending a letter. Today, seventy-one percent of American teens between twelve and seventeen own cell phones.[2] These devices not only allow users to make phone calls on the go, but they also transmit user-created image and text messages. On its face, "texting" appears innocent and practical. What turns texting into "sexting?"

¶ 5 Consider this example: in the summer of 2007, a group of teenage girls from Pennsylvania used their cell phones to photograph themselves in their underwear.[3] The images then "somehow wound up on classmates' cell phones."[4] Rather than let this serve as an embarrassing lesson, the district attorney threatened the teens with child pornography charges unless they participated in a five-week after-school program followed by probation.[5] These images turned into a legal nightmare that drew national headlines. The district attorney's justification for his harsh response was simple: "we just wanted to protect these kids."[6]

¶ 6 While this example seems innocent and the law enforcement reaction overblown, similar behavior has wrought tragic consequences. In 2008, a high school senior named Jessica Logan snapped some provocative pictures using her cell phone and sent them to

[2] *Sound Off: Should Cell Phones Be Allowed in Schools?*, LINCOLN J.-STAR, Aug. 31, 2009, http://www.journalstar.com/news/opinion/mailbag/article_7dd5b4ec-963f-11de-a9b3-001cc4c03286.html.

[3] Michael Rubinkam, *Girls Threatened with Porn Charge Sue Prosecutor*, 6abc.com, Mar. 25, 2009, http://abclocal.go.com/wpvi/story?section=news/local&id=6727794. Note that this is the fact pattern for Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009), which is discussed in Section II.

[4] Rubinkam, *supra* note 2.

[5] *Id.*

[6] *Id.*

her boyfriend.[7] After they broke up, he sent the pictures to Jessica's classmates, who spread both the photos and vicious comments about Jessica.[8] Jessica chose to end her torment by taking her own life mere weeks after she graduated.[9] When Jessica's mother found her hanging in her bedroom, Jessica's cell phone, the same device that started this tragic chain of events, lay in the middle of the floor.[10]

¶ 7 These stories represent extreme legal and social consequences of sexting. While sexting can occur between individuals of any age, this paper will focus on sexting between teenagers.[11] I will define a sext as any digital transmission[12] of an explicit image created by a minor and sent to a recipient with whom the minor could otherwise engage in sexual activity under state law. The "narrow scope" of sexting involves only two parties and the images depict either the recipient or the sender. This primarily describes cases in which two teens, either as part of courtship or a relationship, act in a flirtatious or romantic manner. The pictures are consensually sent and received within the expected boundaries of the relationship. The "wide scope" of sexting covers instances when a minor sends a self-created image to multiple recipients, or sends an unsolicited sext that is not part of a romantic relationship.

¶ 8 Sexting presents a legal conundrum in that minors technically run afoul of state and federal law when they sext. Child pornography law broadly covers any visual depiction that involves a minor engaging in sexually explicit conduct.[13] There are no exceptions based on the context. Sexting-related images easily fall under these statutes[14] despite the fact that the laws were designed to combat "sexual exploitation and other abuse of children"[15] by predatory adults.[16] Yet, minors are being punished for intimate sexual decisions, not for conduct that abuses children.

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[7] Kimball Perry, *Lawsuit Filed Over 'Sexting' Suicide*, CINCINNATI.COM, May 12, 2009, http://news.cincinnati.com/article/20090512/NEWS0107/305120011/Lawsuit+filed+over++sexting++suicide.

[8] Mike Celizic, *Her Teen Committed Suicide Over 'Sexting': Cynthia Logan's Daughter was Taunted About Photo She Sent to Boyfriend*, TODAY PARENTING, Mar. 6, 2009, http://www.msnbc.msn.com/id/29546030/.

[9] *Id.*

[10] *Id.* A similar incident in which a teen girl committed suicide after her sexts became public occurred in September 2009. The 13-year-old girl had sexted a topless picture of herself. See Ross Ellis, *Sexting and Bullying Leads to Yet Another Teen Suicide*, EXAMINER.COM, Dec. 3, 2009, http://www.examiner.com/parenting-issues-in-new-york/sexting-and-bullying-leads-to-yet-another-teen-suicide.

[11] It should be noted that this paper does not address images that might be considered "obscene" in which case memorialization of a legal sex act might nonetheless be illegal. This paper perhaps highlights how obscenity law might need to change in view of teenage sexual activity that is hidden, yet pervasive.

[12] Although this practice is primarily conducted using a cellular phone, this study does not ignore instances in which such images are sent using the Internet or through other electronic methods.

[13] 18 U.S.C. § 2256(8)(A) (2006).

[14] *See, e.g.*, 18 U.S.C. § 2256 (8) ("'child pornography' means any visual depiction . . . where . . . the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.").

[15] This is the title of 18 U.S.C. Part I, Ch. 110.

[16] In fact, one eighteen-year-old who disseminated nude pictures of his sixteen-year-old girlfriend via email was prosecuted as a sex offender in Florida and attended a class that included rapists and child molesters. See Deborah Feyerick & Sheila Steffen, *'Sexting' Lands Teen on Sex Offender List*, CNN, Apr. 8, 2009, http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html.

¶ 9 Though sexting is technically criminal,[17] surveys suggest that it may be a common practice even among celebrities. In fact, one popular website created a list of the top five celebrity sexters.[18] One sexted as a minor and another did so when she was eighteen.[19] Furthermore, a 2009 study conducted by the Pew Internet & American Life Project found that 15 percent of cell-phone users between the ages of twelve and seventeen have received a sexually explicit photograph or video of someone they know.[20] The National Campaign to Prevent Teen and Unplanned Pregnancy reported that 19 percent of survey participants aged thirteen to nineteen had sent a sexually suggestive picture or video of themselves through email, cell phone or other mode, and 31 percent had received a nude or semi-nude picture.[21] A legal quandary arises in that approximately one in five teens partake in conduct that could result in substantial prison time and sex offender registration.

¶ 10 Despite these legal consequences, the National Campaign's 2008 survey suggests that sexting may be an important part of teenage life.[22] According to the study, the most common recipient of sexts was a significant other and the most common reason for sexting was an attempt to be fun or flirtatious.[23] In fact, a majority of teen recipients of sexts said they were amused or turned on.[24] Less than 10 percent said they were scared, angry, or disappointed, and only 15 percent said they were turned off.[25] After receiving a sext, 22 percent of recipients were more interested in dating compared to 13 percent that were less interested.[26] Sexting might actually be an effective method of courtship in the twenty-first century teenage world. Current laws, however, problematically view sexting

[17] There have been efforts by some states to decriminalize sexting when only teens are involved. *See, e.g.*, Megan DeMarco, *N.J. Lawmakers Approve Education Program for Teens Caught 'Sexting,'* NJ.COM, Mar. 15, 2011, www.nj.com/news/index.ssf/2011/03/nj_lawmakers_approve_education.html (explaining recent efforts by New Jersey lawmakers to pass a bill that would divert prosecution of teen sexting and instead require an education program).

[18] Dana Flax, *The Top Celebrity Sexters,* WONDERWALL, http://wonderwall.msn.com/movies/the-top-celebrity-sexters-5423.gallery. The list included Disney actress Vanessa Hudgens, reality star Jon Gosselin, recording artist Chris Brown, former Miss California Carrie Prejean, and Golf Pro Tiger Woods.

[19] Carrie Prejean admitted to sending an explicit video to her boyfriend when she was 17 years old. Mike Celizic*, Carrie Prejean: 'I was Not Having Sex in Video'*, TODAY PEOPLE, Nov. 10, 2009, http://today.msnbc.msn.com/id/33823079/ns/today-today_people. A nude picture of Vanessa Hudgens surfaced on the Internet when she was 18 years old. *Vanessa Hudgens 'Embarrassed,'* Apologizes for Nude Photo, PEOPLE, Sept. 8, 2007, http://www.people.com/people/article/0,,20055380,00.html.

[20] AMANDA LENHART, PEW INTERNET & AMERICAN LIFE PROJECT, TEENS AND SEXTING: HOW AND WHY MINOR TEENS ARE SENDING SEXUALLY SUGGESTIVE NUDE OR NEARLY NUDE IMAGES VIA TEXT MESSAGING (2009), 2, 5, http://www.pewinternet.org/~/media//Files/Reports/2009/PIP_Teens_and_Sexting.pdf.

[21] NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 11 (2008), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf.

[22] *Id.*

[23] *Id*. at 12.

[24] *Id*. at 13.

[25] *Id.*

[26] *Id.*

from the perspective of adults, who link these types of images with child predators.[27] This narrow thinking leads prosecutors to criminally punish children for creating "child pornography" when, in reality, they might just be expressing their sexuality through a new medium.

B. The Alleged Harms of Sexting

¶ 11 One opponent of sexting argues that because there are negative consequences when minors are forced into child pornography, there must also be dangers when such pornography is self-made.[28] This argument pays little attention to the absence of adult exploitation in teen sexting and is premised on the assumption that teens are somehow abused when they create sexual images under their own free will.[29] Evidence of this thinking can be found in the way that the media and law enforcement describe sexting as criminal behavior.[30] Behind this façade, the concrete harms of sexting are not nearly as significant as those that justify the application of child pornography laws to adults.

¶ 12 There are three core arguments to the notion that sexting is harmful. First, authorities believe that teen sexual activity is always "abusive" because minors are incapable of consent. As one court noted, "individuals less than [the age of consent] do not accurately perceive all the ramifications of engaging in sexual activities . . . children who engage in sexual intercourse are victimized regardless if they see themselves as a victim."[31] This notion loses force when applied to sexting since there are no direct physical risks such as pregnancy or sexually transmitted diseases. Furthermore, any harms such as bullying and unintended dissemination are perpetrated by third parties, not the creators of the sexts. Additionally, this argument rests on the outdated assumption that teenage sexting is "perverse."[32] And, furthermore, if teens supposedly do not understand their actions, how is criminal punishment a justified response?

¶ 13 Second, there is the possibility that embarrassing images may be widely disseminated. Although this is a potential danger, criminalizing sexting is simply a legislative shortcut to address the actual risk. Instances of bullying or harassment could be tackled with laws aimed specifically at the wrongdoers. It is unpersuasive to contend expression is harmful because third parties might use it inappropriately in a social

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[27] Catharine MacKinnon, *Equality and Speech, in* PROSTITUTION AND PORNOGRAPHY: PHILOSOPHICAL DEBATE ABOUT THE SEX INDUSTRY 80, 94 (Jessica Spector ed., 2006) ("The law of child pornography . . . [is based on] the assumption that children are harmed by having sex pictures made of them . . . .")

[28] Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 9-20 (2007).

[29] *Id*. at 24-26.

[30] *E.g.* Teri Vance, *Students Learn Dangers of 'Sexting' and Other Criminal Behavior*, NEV. APPEAL, May 3, 2009, http://www.nevadaappeal.com/article/20090503/NEWS/905019923/1031/.

[31] *In re* Kevin S., 737 N.Y.S.2d 509, 510 (N.Y. Fam. Ct. 2001).

[32] Michael K. Curtis & Shannon Gilreath, *Transforming Teenagers Into Oral Sex Felons: The Persistence of the Crime Against Nature After* Lawrence v. Texas, 43 WAKE FOREST L. REV., 155, 215-16 (2008) (explaining that teenage sexual activity is more common than judges commonly think and thus hardly "unnatural," "depraved," or "perverted").

context.[33] Of course, a counter-argument could be made that it is far more efficient for the government to "nip the problem in the bud" and eliminate sexting wholesale rather than undertake the difficult task of identifying and punishing hard-to-find disseminators of the images. When something hits the Internet, there is almost no way to stop its spread. However, this point loses strength in light of the arguments made in this paper that sexting implicates important rights protected by the constitution.

¶ 14 Third, there is a contention made by Professor Mary Leary that *any* production of child pornography is dangerous because it may later be used to whet the appetites of predators or entice children into unwanted sexual activity.[34] Just because something may have harmful side effects, however, does not necessarily mean there is justification for blanket prohibition of an activity that implicates fundamental rights. Justice Kennedy, writing a majority opinion that invalidated a virtual child pornography law, explained "[t]here are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused."[35] The sexual abuse of children should be combated by targeting predatory adults rather than by suppressing of teenage sexual autonomy.[36] Stephen F. Smith suggests focusing on true sexual abuses while "leav[ing] the Romeos and Juliets of the world alone, even if their love happens to be memorialized in forms less appealing than iambic pentameter."[37]

C. A Framework for Thinking about Sexting

¶ 15 This paper attempts to reframe the sexting debate from a discussion on morality into a search for constitutional rights. This paper should remind the gatekeepers of legal processes that constitutional protection and the rule of law must not fold under moral panic and majoritarian social desire. My arguments require the reader to separate the concepts of morality and legality. Though certain conduct might be "wrong," it is not necessarily subject to government proscription. Likewise, though certain actions may be constitutionally protected, those actions may not necessarily be moral, ethical, or wise.

¶ 16 Furthermore, this paper argues that the Constitution is not locked into the narrow worldview of the Framers and ratifiers, but that it grows and reacts to a changing society. This perspective is especially important to overcome the assumptions in favor of government control over minors. Courts have recognized that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[38]

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[33] It is outside the scope of this paper, but this "harm" may also be protected by the First Amendment. U.S.CONST. amend. I.

[34] Leary, *supra* note 28, at 12-17.

[35] Ashcroft v. Free Speech Coal., 535 U.S. 234, 251 (2002).

[36] As mentioned above, the state obviously has the right to completely eliminate certain activities even if there may be non-harmful use (e.g., prohibition of marijuana). But sexting, as this paper contends, involves fundamental rights that prevent the state from establishing a total prohibition in the name of convenience.

[37] STEPHEN F. SMITH, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 544 (2008).

[38] *E.g.* Prince v. Mass., 321 U.S. 158, 170 (1944).

Although lawmakers may want to protect the welfare of minors, children are not creatures of the state,[39] and parents have the right and duty to nurture children and direct their upbringing.[40] Children enjoy a broad set of rights against the government, but parents may constitutionally act as gatekeepers to these rights in order to raise children that are prepared to assume their civic duties as adults.

¶ 17 The next Part examines the current constitutional status of the rights implicated in sexting prosecutions and presents a new way of thinking about private and parental rights following the Supreme Court's decision in *Lawrence v. Texas*.

III. OVERVIEW OF THE CONSTITUTIONAL LAW RELEVANT TO SEXTING

A. Comparison of *Miller v. Skumanick* and *A.H. v. State*

¶ 18 Though the media has reported various cases of teens prosecuted for sexting or threatened with prosecution for sexting, only a few cases have been addressed by courts. The issue has yet to be addressed on the state level by a supreme court and has been taken up by only one U.S. Court of Appeals.[41] However, at least two cases have addressed constitutional defenses advanced by teenagers who have been prosecuted by authorities for sexting.

¶ 19 Although decided on the state level, the leading opinion to uphold sexting criminalization is the 2007 case of *A.H. v. State*.[42] A 16-year-old girl ("A.H.") was charged under state child pornography laws for sending[43] digital photos to her boyfriend that depicted the couple naked and engaging in sexual behavior.[44] She advanced a state constitutional[45] challenge claiming, among other things, that her conviction was not a narrowly tailored means of protecting a compelling state interest and that the charges violated her right to privacy.[46] The premise of her privacy argument was that the Florida constitution should protect a minor's right to engage in sexual activity, including

[39] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[40] *Id.*

[41] On March 17, 2010, the United States Court of Appeals for the Third Circuit affirmed a district court's grant of preliminary injunction against a sexting prosecution. Miller v. Mitchell, 598 F.3d 139, 155 (3d Cir. 2010). The district court's decision in *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009) will be discussed below.

[42] A.H. v. State, 949 So.2d 234 (Fla. Dist. Ct. App. 1st Dist. 2007).

[43] Although this case involves email and not sexting, the fact pattern presents a situation that bears substantial similarity to cellular sexting.

[44] *Id.* at 235. Both the girl and her boyfriend were each charged with one count of "producing, directing or promoting a photograph or representation that they knew to include the sexual conduct of a child," in violation of FLA. STAT. § 827.071(3) (2005). Additionally, the boyfriend was also charged with a count of "possession of child pornography" under FLA. STAT. § 827.071(5) (2005).

[45] Unlike the United States Constitution, the Florida Constitution includes an explicit right to privacy. *See* FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.")

[46] *A.H.*, 949 So.2d at 235.

intimacy in the form of sexting.[47]

¶ 20 The court dismissed her claims and held that an expectation of privacy must consider "the individual in the context of a society and the values that the society seeks to foster."[48] The court apparently concluded that promoting social values could justify the state's intrusion of the teens' privacy, regardless of whether they could otherwise engage in sexual activity.[49] The court recognized the that the images might spread to the wider public, and accepted the state's asserted interest in making sure such images are never produced.[50] The court felt that teenagers were too young to decide to memorialize their sexual encounter and not mature enough to consider the possible implications.[51] The court made an unsubstantiated claim that producing such images may result in psychological trauma to the teens.[52] Sexting was not viewed by the court as an intimate, personal activity that deserves privacy protection.

¶ 21 The dissent, on the other hand, recognized that the statute was designed to *protect* children, but here "it was used . . . punish a child for her own mistake."[53] Besides this normative assessment, the dissent also contended that A.H.'s actions should be protected as part of a broad right to privacy. Judge Padovano boldly declared that the state effectively "criminalizes conduct that is protected by constitutional right of privacy."[54] As such, "there is always a possibility that something a person intends to keep private will eventually be disclosed to others . . . [b]ut we cannot gauge the reasonableness of a person's expectation of privacy merely by speculating about the many ways in which it might be violated."[55] In sharp contrast to the majority opinion, the dissent counseled that the analysis should center on the reasonableness of privacy rather than the reasonableness of the state's interests.

¶ 22 More recently, in March of 2009, the U.S. District Court for the Middle District of Pennsylvania granted a temporary restraining order halting prosecution of the teen defendants in Miller v. Skumanick.[56] School officials from Tunkhannock, Pennsylvania found photographs of "scantily clad, semi-nude and nude teenage girls" on the cell

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[47] *Id.* at 236; *see, e.g.*, B.B. v. State, 659 So.2d 256 (1995) (concluding that "that Florida's clear constitutional mandate in favor of privacy is implicated in B.B., a sixteen-year-old, engaging in carnal intercourse"). *But see A.H.*, 949 So.2d at 237 (contending that the right for minors to engage in sexual activity is unclear).

[48] *A.H.*, 949 So.2d at 238 (quoting State v. Conforti, 688 So.2d 350, 358-59 (Fla. Dist. Ct. App. 4th Dist. 1997)).

[49] *Id.* at 237. The court noted that the question to be decided, "assuming that the privacy provision of article I, section 23 of the Florida Constitution extends to minors having sexual intercourse, [is] whether that right extends to them memorializing that activity through photographs." The issue of whether sexual intercourse between minors is protected under the state constitution was not decided because the matter could be decided on the grounds that the right of privacy did not exist.

[50] *Id.* at 237-238.

[51] *Id.* at 236-38, 239.

[52] *Id.* at 239.

[53] *Id.* at 239 (Padovano, J., dissenting).

[54] *Id.* at 241 (Padovano, J., dissenting).

[55] *Id.* at 240 (Padovano, J., dissenting).

[56] Miller v. Skumanick, 2009 U.S. Dist. LEXIS 27275 (M.D. Pa. 2009), *aff'd sub nom* Miller v. Mitchell, 2010 U.S. App. LEXIS 5501 (3d Cir. 2010).

phones of several students.[57] The images were turned over to the district attorney, who claimed that the sexts violated state child pornography laws[58] and that those found guilty would be subject to potentially lengthy prison sentences and sex offender status.[59] He threatened to prosecute unless the teens submitted to probation and completed a "re-education" program.[60] The teens in the case were to be charged as "accomplices in the production of child pornography" even though they did not disseminate the photographs.[61] Since the court only granted a temporary restraining order against prosecuting the teens, there was no definitive constitutional determination.[62]

¶ 23 Nonetheless, the court found that even if the conduct violated child pornography law, the argument that the teens did not disseminate the images was "reasonable" enough to halt prosecution.[63] The court did not disagree with the teens' contention that prosecuting the victims of the crime rather than actual child pornographers was odd. Furthermore, the court ruled that the parents were reasonably likely to succeed in arguing that the re-education program "violates the right to direct their children's education."[64] The program was a likely violation of the "interest of parents in the care, custody, and control of their children."[65] Although *Miller* does not fully protect transmissions of sexts, it is still a step away from the court in *A.H.*, which held that sexting is completely subject to state regulation. The *A.H.* dissent, however, provides the basic argument that sexting is a private activity protected from a state regulation lacking a legitimate interest.

B. The Fundamental Rights at Stake in Sexting

¶ 24 There are two fundamental rights implicated by sexting. Each will be discussed in greater detail in Section III, but a brief outline here will lay the framework for the argument that protected rights outweigh the government's justification for regulation. The first is the parental right to guide the upbringing of children. Parents should be free to guide children in making decisions regarding sexual activity and should have the ultimate power to control whether their children can sext and what the consequences, if any, should be. The second right is the right to be left alone when making decisions of sexual intimacy. Teens should be free from governmental control over private sexual activity when there is no exploitation or direct harm.

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[57] *Id.*

[58] 18 PA. CONS. STAT. § 6312.

[59] *Miller,* 2009 U.S. Dist. LEXIS 27275.

[60] *Id.*

[61] *Id.* One of the photographs at issue "showed Plaintiffs Marissa Miller and Grace Kelly from the waist up, each wearing a white, opaque bra. Marissa was speaking on the phone and Grace using her hand to make the peace sign." The second photograph depicted a girl "wrapped in a white, opaque towel. The towel was wrapped around her body, just below her breasts. It looked as if she had just emerged from the shower."

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* (internal citations omitted).

¶ 25 It is important to note the difficulty of defining a fundamental right.[66] One approach to identifying fundamental rights, the *Glucksberg* approach, searches for liberties deeply rooted in history and tradition.[67] This aims to limit judicial interpretation and ground analysis in objective evidence. Michael McConnell, for instance, contends that courts should "be wary about overturning duly enacted legislation on the basis of untried and uncertain moral and philosophical arguments" when the asserted right is not supported by constitutional text or national experience.[68] The competing view argues that courts may use broad definitions of fundamental rights to protect conduct that has not yet been legally established.[69] Laurence Tribe explains that "[w]hat is truly 'fundamental'. . . is not the *set of specific acts* that have been found to merit constitutional protection, but rather the *relationships* and *self-governing commitments* out of which those acts arise."[70] Tribe's theory would protect both traditional rights and those rights intertwined as part of a grander notion of personal liberty. While there may not be a fundamental "right to sext," this activity may still enjoy protection in the fundamental rights of parents and privacy.

¶ 26 As the debate between McConnell and Tribe illustrates, the Constitution does not include a specific method of defining fundamental rights. While the *Glucksberg* approach lends itself to supposed reliability because rights must have some basis in history and tradition,[71] it limits the recognition of hidden but nonetheless fundamental rights.[72]

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[66] *See* Ira Lupu, *Untangling the Strands of the Fourteenth Amendment,* 77 MICH. L. REV. 981, 1029-30 (1979):

> [M]odern substantive due process theory has a distinct all-or-nothing quality to it. Most liberties lacking textual support are of the garden variety—like liberty of contract—and thus their deprivation is constitutional if rationally necessary to the achievement of a public good. Several select liberties, on the other hand, have attained the status of 'fundamental' or 'preferred,' with the consequence that the Constitution permits a state to abridge them only if it can demonstrate an extraordinary justification.

[67] Wash. v. Glucksberg, 521 U.S. 702, 720 (1997).

[68] Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, UTAH L. REV. 665, 685-87 (1997).

[69] *See* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1921-25 (2004).

[70] *Id.* at 1955.

[71] Some may contend that even though a *Glucksberg* approach seeks to find fundamental rights from history/tradition and text, there is still an element of uncertainty and inaccuracy given the limits to historical research and the potential for bias in both defining the level of generality used to define the right. *See, e.g.,* Michael H. v. Gerald D., 491 U.S. 110, 139 (1989) (Brennan, J., dissenting) which noted that

> [a]pparently oblivious to the fact that this concept can be as malleable and as elusive as 'liberty' itself, the plurality pretends that tradition places a discernible border around the Constitution. The pretense is seductive; it would be comforting to believe that a search for 'tradition' involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history.

Yet, as Justice White observed in his dissent in Moore v. East Cleveland, 431 U.S. 494, 549 (1977),

> [w]hat the deeply rooted traditions of the country are is arguable. Indeed, wherever I would begin to look for an interest 'deeply rooted in the country's traditions,' one thing is

Justice Brennan noted that "[w]e are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies."[73] Implicit in Justice Brennan's words is the notion that certain rights that lie beyond observable traditions, such as sexting, might be unpopular and even immoral while nonetheless worthy of constitutional protection.

C. A Broad Approach to Identifying Protected Rights

¶ 27 Citizens acknowledge limitations to their natural liberties[74] and accept state regulation through the powers enumerated in the Constitution and by the states through their police powers.[75] Society enjoys more advantages in collective government compared to remaining in a natural, ungoverned state.[76] As the costs to personal liberty rise, however, this theory of regulatory consent weakens. On one end of the continuum, regulation is appropriate in cases where social benefits outweigh costs to individual liberty. On the other end, it is less clear that regulation is legitimate when the costs to individual liberty greatly outweigh the gains to society.

¶ 28 However, the glaring caveat to this discussion is the difficulty in accurately weighing costs to personal freedom against advantages to society. Such a determination abounds with value judgments that will vary considerably depending on the observer. The Supreme Court's decision in *Lawrence v. Texas* provides the most useful lens though which to analyze the rights implicated by sexting.

D. *Lawrence v. Texas* and a New Concept of Liberty

¶ 29 In 2003, the Supreme Court handed down *Lawrence v. Texas* and declared that

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> certain: I would not stop (as does the plurality) at Bracton, or Blackstone, or Kent, or even the American Law Reports in conducting my search. Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of 'liberty,' the plurality has not found the objective boundary that it seeks.

[72] It is hard to deny that the constitutional notion of fundamental rights changes over time. "Hidden" rights are those rights that would not be found through a search of history of tradition but may be "found" by later generations that constitutionally recognize a new fundamental right.

[73] *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

[74] *See* Joseph F. Kadlec, Note, *Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights*, 48 B.C. L. REV. 387, 397 (2007) (explaining that "[i]nherent in both the state and federal conceptions of government was the belief that people possessed their full natural rights before the formation of governments" and that "[t]he people handed over only certain rights and privileges upon the formation of government--enumerated powers to the federal government and broad, but not limitless, police powers to the state governments.").

[75] *See* Metropolitan Life Ins. Co. v. Mass., 471 U.S. 724, 756 (1985). The Court remarked that "[t]he States traditionally have had 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). *See also* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342 (2007).

[76] *See generally* THOMAS HOBBES, LEVIATHAN (1651).

"[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[77] Writing for the majority, Justice Kennedy invalidated a Texas statute criminalizing homosexual sodomy.[78] The Court found that it did not further a legitimate state interest to justify the intrusion into personal privacy.[79] Kennedy explained that the Framers and ratifiers of the Constitution and Fourteenth Amendment were deliberately broad in defining liberty.[80] According to Kennedy, "[t]hey knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[81]

¶ 30 *Lawrence* presents a concept of personal sexual liberty that dismantles the restrictive notion that protected rights are limited by majoritarian tradition. Protection of sexual rights under *Lawrence* essentially boils down to the determination of whether a state regulation is "legitimate." Legitimacy under *Lawrence*, first and foremost, demands that societal benefits involve more than just a mere codification of morality: the interest must justify encroachments on personal liberty. The Court ruled that private sexual conduct is a realm within which the government may not casually enter.[82] Although perhaps not strict scrutiny, this entails at least rational basis with a bite.

¶ 31 Post-*Lawrence*, adult sexting seemingly exists beyond the reach of state regulation. If two adults send and receive sexual images as a means of expressing intimacy, there are few arguments that justify intrusion into personal liberty.[83] It is doubtful that criminalization of "immoral" private behavior can stand. For example, in *Martin v. Ziherl*, the Virginia Supreme Court followed *Lawrence*'s in invalidating a fornication statute.[84] However, *Lawrence*'s application to consensual teen sexual activity is not as certain.

¶ 32 Kennedy specifically notes that the decision does not involve minors, but there is a possibility that the *Lawrence* framework could still apply to teens.[85] In addition to excluding minors, the Court also provided additional qualifications such as that the case does not apply to situations in which individuals are "injured or coerced."[86] Thus, the purpose for limiting the opinion might have been to quash any possibilities that crimes such as rape or statutory rape would be inadvertently constitutionalized. Yet, in interpreting *Lawrence*, most courts have been cautious and content with letting the

[77] Lawrence v. Texas, 539 U.S. 558, 562 (2003).
[78] *Id.*
[79] *Id.* at 578.
[80] *Id.*
[81] *Id.* at 579.
[82] *Id*. at 578.
[83] This would likely constitute traditional pornography, which is permissible as long as it is not obscene. *See* Miller v. California, 413 U.S. 15, 27 (1973) ("Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed.").
[84] Martin v. Ziherl, 607 S.E.2d 367, 370 (Va. 2005) ("[D]ecisions by married or unmarried persons regarding their intimate physical relationship are elements of their personal relationships that are entitled to due process protection.").
[85] *Lawrence*, 539 U.S. at 578.
[86] *Id.*

Supreme Court take responsibility for expanding the underlying logic of the opinion.[87]

¶ 33 After handing down *In re R.L.C.*, the Supreme Court of North Carolina became the first post-*Lawrence* high court to interpret a law prohibiting minors from engaging in a sexual "crime against nature."[88] Despite that a fourteen-year-old and a twelve-year-old are permitted in North Carolina to engage in sexual activities, N.C. Gen. Stat. § 14-177 criminalized oral sex between the two.[89] In *R.L.C.*, the court upheld the statute as applied to these youngsters on the grounds that the state had a rational basis to prevent sexual conduct between minors and promote a healthy young citizenry.[90] Although the standard required that there be a "conceivable legitimate purpose," the court still felt that the state was acting legitimately when it regulated teenage sexuality on moral grounds.[91]

¶ 34 While *R.L.C.* seems to cast doubt on post-*Lawrence* arguments that liberty protects juvenile sexual freedom, the results might have been different had the court either adopted a more progressive worldview on sexuality or declined to consider morality when determining if the state regulation was legitimate. Courts that stick to the traditional idea that sex is violative of a "healthy young citizenry" neglect to follow the expansive notions of liberty promulgated by *Lawrence*. Just as the legal system no longer agrees that gay sodomy and its alleged immorality amounts to a legitimate state interest, perhaps courts will begin to rethink teenage sexuality in the same way. It may be true that preventing teenage sexual activity is a worthwhile interest, but it does not necessarily justify intrusion into personal autonomy. As this paper argues, it may no longer be "legitimate," especially given the cultural norms of the twenty-first century. *Lawrence*'s seeming rational basis with bite should demand more justification from the government in the realm of teenage sexual regulation, justification that likely does not exist.

¶ 35 In light of the progressive lens *Lawrence* has placed on sexual rights, the next section details the specific rights implicated in sexting. If parents have a duty to guide the upbringing of their children and teen sexual autonomy is part of a protected right to privacy, it seems hard to argue that the state acts legitimately when it criminalizes sexting.

IV. THE FUNDAMENTAL RIGHTS IMPLICATED IN SEXTING

A. The Fundamental Rights of Parents

¶ 36 The Supreme Court recognized the fundamental right to "establish a home and

[87] Richard S. Myers, *Pope John Paul II, Freedom, and Constitutional Law*, 6 AVE MARIA L. REV. 61, 76 (2007).

[88] *In re* R.L.C., 643 S.E.2d 920, 921 (N.C. 2007); *see* Daniel Allender, *Applying Lawrence: Teenagers and the Crime Against Nature*, 58 DUKE L.J. 1825, 1831 (2009); *cf.* State v. Whiteley, 172 N.C. App. 772, 779 (N.C. Ct. App. 2005) (N.C. GEN. STAT. § 14-177 ruled unconstitutional as applied to adults as long as the conduct is consensual, non-coercive, and does not occur in a public place).

[89] *In re R.L.C.*, 643 S.E.2d at 923-24.

[90] *Id.* at 926.

[91] *Id.*

bring up children" in *Meyer v. Nebraska*.[92] While invalidating a state law that forbid the teaching of any language other than English to schoolchildren, the Court agreed that it may be "highly advantageous" if all youngsters spoke the same language but explained that even "a desirable end cannot be promoted by prohibited means."[93] The purpose of the statute was "to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals."[94] But as much as the state wanted to achieve its goal of promoting civic development, it could not overcome parents' rights to pursue their own child-rearing goals. Similarly, while commentators might argue that it would be desirable if teens did not engage in sexting, this does not necessarily grant legislatures the power to encroach on the personal rights that are involved. Accordingly, "the State may . . . improve the quality of its citizens, physically, mentally and morally . . . but the individual has certain fundamental rights which must be respected."[95]

¶ 37 The Court in *Meyer* explained that ideas of collective child-rearing, such as what can be found in the writings of Plato and the history of Sparta, contradict the fundamental rights of parents.[96] Not everything relating to children can be controlled by the state, even if minors are in a vulnerable category. Two years after *Meyer*, the Court again applied this framework in *Pierce v. Society of Sisters* to hold that the "child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[97] Absent a compelling state interest, many choices and decisions that affect children must be preserved for their parents regardless of how the state may judge the correctness of such decisions. Thus, it may be perfectly acceptable that the government would wish that the nation's teens would refrain from sexting, but it may lack the power to prohibit the activity through criminal sanction. There are, admittedly, constitutional "parenting" decisions the government can make through regulation; personal liberty can sometimes be outweighed by public benefit. It would be bizarre, for instance, to claim that children should be constitutionally guaranteed access to narcotics.[98]

¶ 38 A useful comparison, in order to gain a better understanding of fundamental parenting rights, is between the criminalization of sexting and state laws regulating consumption of alcohol by minors. Currently, all states restrict alcohol from children under the age of twenty-one (subject to some exceptions).[99] Even if parents disagree with

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[92] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[93] *Id.* at 401.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (invalidating a state law requiring children to attend public schools).

[98] State "parenting" decisions become more legitimate when the prohibition applies to both adults and children, thus eliminating any equal protection claims, or when there is a potential for substantial mental or physical harm. In the case of sexting it is true that child pornography laws currently apply to both adults and children, but the difference is that adults are not criminalized for exercising their sexuality; they are criminalized when they abuse children. Teen sexting is an expression of sexuality without any child abuse.

[99] *Alcohol Policy Information System: Highlight on Underage Drinking*, DEP'T. HEALTH & HUMAN SERVS. NAT'L INST. HEALTH, NAT'L INST. ON ALCOHOL ABUSE & PREVENTION,

these legislative enactments, their children face punishment if, for example, they consume alcohol at a house party or attempt to purchase alcohol at a liquor store.

¶ 39 There are, however, two main features that distinguish alcohol consumption from sexting. First, alcohol presents harms that are more numerous and dangerous. Drinking presents direct risks such as alcohol poisoning and indirect risks such as injury while operating a motor vehicle. In fact, the Center for Disease Control reports that nearly one out of three teens has ridden with a driver who has been drinking and one in ten has driven after drinking alcohol.[100] In states that increased their drinking age to twenty-one, there has been a median 16 percent decline in motor vehicle crashes.[101] States arguable have a compelling interest to regulate teen drinking to reduce drunk driving and traffic fatalities.

¶ 40 Besides the existence of documented harms, teen drinking is also distinguished from sexting on the basis that it is a very public and social activity. One study finds that teens between the ages of fifteen and seventeen drink alcohol with two or more people 80.2 percent of the time.[102] And when teen drinking takes place within the confines of home (without adult supervision), there is still the public threat that one of the intoxicated teens will put other members of the public at risk by driving. The substantiated harms and public nature of drinking makes government regulation far more legitimate than the criminalization of sexting. Yet, despite these differences, punishment for sexting is generally more severe than for underage drinking.[103]

¶ 41 Sexting, like teen drinking, might "feel wrong," but in the wake of *Lawrence* there needs to be more to justify state intrusion. There are harms related to sexting, as mentioned in Section I, but courts must determine if this makes regulation "legitimate." The Supreme Court noted in *Parham v. J.R.* that even if a parental decision involves some risk, this "does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."[104] However, the Court was certain to note

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http://www.alcoholpolicy.niaaa.nih.gov/UnderageDrinking.html (last visited Apr. 16, 2011); *see also Alcohol Policy Information System: Underage Drinking Maps & Charts*, DEP'T. HEALTH & HUMAN SERVS., NAT'L INST. HEALTH, NAT'L INST. ON ALCOHOL ABUSE & PREVENTION, http://www.alcoholpolicy.niaaa.nih.gov/Underage_Drinking_Maps_and_Charts.html (last visited Apr. 16, 2011) (thirty-one states have a "family exception" to the prohibition on underage consumption of alcohol).

[100] *Teen Drivers: Fact Sheet*, DEP'T. HEALTH & HUMAN SERVS., CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/MotorVehicleSafety/Teen_Drivers/teendrivers_factsheet.html (last visited Apr. 16, 2011).

[101] *Fact Sheet: Age 21 Minimum Legal Drinking Age*, DEP'T. HEALTH & HUMAN SERVS., CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/alcohol/quickstats/mlda.htm (last visited Apr. 16, 2011).

[102] *Underage Alcohol Use: Findings from the 2002-2006 NSDUH,* DEP'T. HEALTH & HUMAN SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., OFFICE OF APPLIED STUDIES, http://www.oas.samhsa.gov/underage2k8/Ch4.htm (last visited Apr. 16, 2011).

[103] In Virginia, for example, underage possession/consumption of alcohol is a misdemeanor while the possession of child pornography is a felony. *See* VA. CODE ANN. § 4.1-305 (2011) (prohibition on underage consumption of alcohol); VA. CODE ANN, § 18.2-374.1:1 (2011) (possession, reproduction, distribution, and facilitation of child pornography).

[104] Parham v. J.R., 442 U.S. 584, 603 (1979) (considering statutory scheme for voluntary commitment of juveniles).

in *Prince v. Massachusetts* that "[t]he state's authority over children's activities is broader than over like actions of adults" and that it is "particularly true of public activities."[105] The state has greater authority to regulate matters involving minors when it has an immediate impact on their health or if it is public in nature. With drinking, it makes sense for the state to intervene, but the same is not true with sexting. The harm from drinking occurs immediately, whereas the harm from sexting requires the intervention of third-party bullies and malicious disseminators.

¶ 42 However, relating to matters of general teen sexuality, courts have yet to affirm a parent's total right in this area to guide their children without state involvement. In 2000, the Supreme Court of Illinois upheld a vagueness challenge to a statute[106] criminalizing the offense of "permitting the sexual abuse of a child" as applied to a mother, Kathy Maness, who allowed her 13-year-old daughter to have sexual intercourse with her 17-year-old boyfriend.[107] Maness said that she knew her daughter was having a sexual relationship but thought it would be safer if it took place in a home environment.[108] In deeming the statute unconstitutionally vague, the court neglected to rule on whether it infringed on parental rights.[109] The dissent, however, addressed this point and argued that parental autonomy is not absolute, and "[i]n matters concerning child abuse and neglect, a parent's rights yield to the state's interest in protecting its children."[110] Rather than assume parental decisions that promote or permit teenage sexuality are a form of "abuse and neglect," perhaps courts should think critically about what makes a harm legitimate and whether it truly justifies state intervention into a private realm.

¶ 43 Since the court *Maness* ruled in favor of parental rights only on vagueness grounds, Susan Kuo noted that the statute is important because other states may use it as a template for criminalizing parental decision-making over teenage sexual matters.[111] She recognizes that the court missed the chance to address the larger constitutional issue and describe the boundaries of parental freedom to guide the sexual upbringing of their children.[112] Kuo contends that under constitutional protection of the fundamental rights of parents, a "state may restrict parental discretion when necessary to protect the child's welfare only when the means used to limit the fundamental liberty interest in raising children are closely fitted to that end."[113] Punishing private, consensual sexual expression created and transmitted from the privacy of the adolescent bedroom hardly meets these criteria. Of course, sexting prosecution does not target parents. But if the Constitution

[105] Prince v. Mass., 321 U.S. 158, 168 (1944) (affirming a conviction against a parent for violating state child labor laws for engaging her child in street preaching).

[106] 720 ILL. COMP. STAT. 150/5.1 (2010).

[107] People v. Maness, 732 N.E.2d 545, 548 (Ill. 2000).

[108] Id.

[109] Id. at 551.

[110] Id. at 553.

[111] Susan S. Kuo, *A Little Privacy, Please: Should We Punish Parents for Teenage Sex?*, 89 KY. L.J. 135, 142 (Fall 2000/2001).

[112] *Id.*

[113] *Id.* at 187 (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982)). Even a compelling interest does not give states free license to interfere in family life. *See* Parham v. J.R., 442 U.S. 584, 603 (1979) (stating that the "notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition" (emphasis in original)).

protects parents from being contributorily liable for promoting such behavior, it would seem illogical that the underlying behavior could be prohibited. It would be as if the state responded to the decision in *Meyer* by circumventing the Court's holding and punishing children who learned foreign languages in disregard of the parents' rights.

¶ 44 Some parents may find sexting distasteful and punish their children, while other parents may actually embrace sexting as part of their children's natural sexual exploration. The Supreme Court noted in *Bellotti v. Baird* that

> there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood . . .. Deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children.[114]

Absent some compelling state interest that involves more than moral judgment, there is little reason why the state should intervene on behalf of parents and punish children with laws meant to capture child predators.

¶ 45 An interesting case that helps to elucidate the potential scope of parental rights is the Fifth Circuit's opinion in *Qutb v. Strauss*.[115] In that case, the court analyzed a constitutional challenge to a juvenile curfew ordinance in Dallas, Texas that "prohibit[ed] persons under seventeen years of age from remaining in a public place or establishment from 11 p.m. until 6 a.m. on week nights, and from 12 midnight until 6 a.m. on weekends."[116] The court upheld the ordinance since it was narrowly drawn and respected the rights of the affected minors.[117] The ordinance permitted various defenses such as traveling with an adult or traveling because of an emergency—it was not a strict liability offense.[118] Furthermore, because it only applied to public spaces and only took effect during the evening, it was "a minimal intrusion into the parents' rights" to rear their children without undue governmental interference.[119]

¶ 46 Unlike the street crime and violence addressed by curfew laws[120], the threats attributed to sexting are hardly as dire and can be addressed through various less intrusive means. In some cities, youngsters may face an immediate threat when stepping onto the streets past dark, whereas most harms attributed to sexting arise only if images are leaked to third parties. The urgency of these harms is not comparable. The court in *Qutb* was very careful to explain that the state may not employ an overbroad ordinance but could only, as here, implement a narrowly drawn curfew with the least infringement on

[114] Bellotti v. Baird, 443 U.S. 622, 638 (1979).
[115] Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993).
[116] *Id.* at 490.
[117] *Id.* at 494.
[118] *Id.*
[119] *Id.* at 495.
[120] *Id.* at 492 ("The city's stated interest in enacting the ordinance is to reduce juvenile crime and victimization, while promoting juvenile safety and well-being.").

fundamental rights.[121] Most significantly, the ordinance regulated the public decision to allow children on the streets and did not prohibit any activity conducted in privacy.

¶ 47 Although the government can take steps to provide for the safety and well-being of children, in certain areas, parents have dominion over the rights and activities their children can exercise. As noted, this is especially true when potential harms are minimal and the activity is private. If courts adhere to a more progressive view of teenage sexuality, perhaps they will come to find that determinations of what leads to a "healthy young citizenry" should be governed by parents. Although courts commonly accept legislative assessments when it comes to the vulnerability of minors, the boundaries that define the legitimacy of a state interest should change since teenage sexual activity, including sexting, is commonplace and the harms from sexting generally come from malicious third-parties. *Lawrence* should require courts to make a more concerted effort to determine whether sexual regulation is legitimate.[122] This principle should apply to parenting decisions and demand justification for intrusion just as it does with curfew laws. Yet, unlike the public nature of curfew laws and the violence they are targeted to prevent, sexting regulation seeks to regulate private behavior that lacks direct or immediate harm.

¶ 48 Substituting state policy for parental choice is a slippery slope that requires thoughtful judicial inquiry. Without requiring government regulation to be justified, one could argue that the state may criminally punish students who do not complete homework on the basis that a lack of discipline in schooling can lead to lower lifetime financial achievement and even a shorter life span.[123] However, in recognizing protected rights, society should leave certain matters in the hands of parents. Just because there may be a rational basis for insisting that students complete their homework, it does not mean the state can encroach into a wholly private domain. By criminalizing sexting, the state substitutes itself for parents on a moral basis into a private matter without a truly compelling state interest. One might question parents such as Kathy Maness[124] who embrace a liberal stance on teenage sexuality. Her decision as a parent appears superficially wrong because it is different and non-traditional. But the essence of parenting is the freedom to use one's own judgment and instincts (within reason of

[121] *Id.* at 494. The court explained that it had previously struck down curfew laws that were overbroad. One such curfew law prohibited minors from attending certain activities such as religious or school meetings.

[122] Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating a prohibition on homosexual sodomy because it did not further a "legitimate state interest which can justify its intrusion into the personal and private life of the individual").

[123] Gina Kolata, *A Surprising Secret to a Long Life: Stay in School*, N.Y. TIMES, Jan. 3, 2007, at A1; *see also* Peter McPherson and David Shulenburger, *Yes, We Can Expand Access to Higher Ed*, WALL ST. J., Jun. 20, 2009, at A11. Of course, state-run schools can punish students who do not complete their assignments. This, however, is narrowly tailored to the state interests and does not involve criminal sanctions. The power of schools to stand in the place of parents validates remedies such as detention or failing grades for inferior academic performance. *See* Morse v. Frederick, 551 U.S. 393, 412 (2007) (Thomas, J., concurring). In the same way, schools could use discipline to keep students from sexting on school grounds or possessing such images.

[124] This is the defendant mother from the aforementioned People v. Maness, 191 Ill. 2d 478, 482 (2000).

course) rather than march to the drum of a Spartan state.[125] The Supreme Court, in *Troxel v. Granville*, invalidated a state custody statute the essentially allowed "a court to award visitation whenever it thought it could make a better decision than a child's parent had done."[126] Sexting, conducted in the privacy of the teenage bedroom, is likewise a matter better handled by parents and the unique understanding of their own children rather than through government legislation that perpetuates an apparent moral panic.

B. Teen Rights to Privacy and Sexual Intimacy

¶ 49 The dissent in *A.H. v. State*, one of the two major sexting cases highlighted in Section II, presents the basic argument that sexting should be immune from government regulation as part of the right of privacy. The judge explained that "[a]lthough I do not condone the child's conduct in this case, I cannot deny that it is private conduct. Because there is no evidence that the child intended to show the photographs to third parties, they are as private as the act they depict."[127] The dissent recognized that the teens aimed to keep the images private and that there was no abuse or exploitation.[128] Essentially, if a legal act is memorialized in a private manner by the parties, it is simply a private extension of the legal act and not an activity worthy of criminalization.[129] Although sending images through text message entails certain potential risks of dissemination, the dissent noted that "we cannot gauge the reasonableness of a person's expectation of privacy merely by speculating about the many ways in which it might be violated."[130]

¶ 50 As evinced by this dissent and commentary on *Lawrence*, there are strong arguments that consensual, private sexual conduct between minors should be protected. One such argument reasons that if minors enjoy the same privacy rights as adults when making procreation decisions,[131] the protections of *Lawrence* should likewise be

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[125] *See* Meyer v. Nebraska, 262 U.S. 390, 402 (1923):

> Sparta assembled the males at seven into barracks and intrusted [sic] their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius[,] their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

[126] Troxel v. Granville, 530 U.S. 57, 78 (2000) (Souter, J., concurring).

[127] A.H. v. State, 949 So. 2d 234, 239-40 (Fla. Dist. Ct. App. 1st Dist. 2007).

[128] *Id.* at 241.

[129] *Id.* at 239. The dissent argues "[i]f a minor cannot be criminally prosecuted for having sex with another minor . . . it follows that a minor cannot be criminally prosecuted for taking a picture of herself having sex with another minor."

[130] *Id.* at 240.

[131] *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) ("the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults"); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) ("the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy").

extended[132] to minors.[133] The premise is that "the state's interest in prohibiting sodomy is no greater than its interest in prohibiting minors from engaging in traditional sexual activity," since *Lawrence* held that "morality by itself does not justify infringing the due process liberty interest in sexual privacy."[134] In other words, government cannot intrude "on the fundamental right to individual autonomy regarding matters of childbearing and procreation, and is unconstitutional, absent a compelling state interest."[135]

¶ 51 Another argument for teenage sexual privacy is simply that when deciding what is "unnatural" and "depraved," courts should take notice of modern understandings of teenage sexuality.[136] Professors Kent Curtis and Shannon Gilreath, for example, observe that "by the social facts of today, oral sex is simply another form of sexual expression and ought to be treated as such."[137] Similarly, the self-creation of explicit images by teens is quite common. The National Center for Missing and Exploited Children reports that 20 percent of teens have sexted, and of the teens engaging in this practice, 80 percent are below the age of eighteen.[138] This figure is not far off from the percentage of teens that engage in sexual intercourse. According to the CDC, 31.8 percent of males and 33 percent of female between fifteen and seventeen have had sex with an opposite-sex partner.[139] To make sexting criminal, while permitting vaginal intercourse, can really only be based on "some vague notion of public morality."[140] By allowing minors to engage in vaginal intercourse, state legislatures essentially admit that sexual activity between minors is permissible as long as they are both within a specified age range.[141] In the wake of *Lawrence*, it would seem that intrusion into the private lives of individuals on grounds of morality can no longer stand as legitimate.[142]

¶ 52 In light of these two arguments, the right to privacy is essentially two-fold. First, as long as legislatures permit sexual intercourse between minors, it is impermissible to prohibit other forms of sexual conduct based on morality. Second, state legislatures should not have a right in the first place to regulate certain private sexual conduct of adolescents, especially when there is an absence of abuse and exploitation. This reframes

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[132] This might seem like an equal protection argument that sees regulation of teenage sexual conduct to be an unfair application of the law when adult sexuality is left unregulated. However, the crux of this argument is that after *Lawrence* no sexual activity can be burdened by the state (i.e., sodomy regulation cannot be justified by prohibition of taboo), and this teenage sexual regulation cannot be based on majoritarian social mores.

[133] Allender, *supra* note 88, at 1846.

[134] *Id.* at 1847.

[135] Juhi Mehta, *Prosecuting Teenage Parents Under Fornication Statutes: A Constitutionally Suspect Legal Solution to Teenage Pregnancy*, 5 CARDOZO WOMEN'S L.J. 121, 140 (1998).

[136] Curtis & Gilreath, *supra* note 32, at 215-16.

[137] *Id.* at 216.

[138] *Startling New Statistics About Teen "Sexting"*, WBTV, June 24, 2009, http://www.wbtv.com/Global/story.asp?S=10590438.

[139] Anjani Chandra, William D. Mosher, & Casey Copen, DEP'T. HEALTH & HUMAN SERVS., CTR. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS, NO. 36, SEXUAL BEHAVIOR, SEXUAL ATTRACTION, AND SEXUAL IDENTITY IN THE UNITED STATES: DATA FROM THE 2006-2008 NATIONAL SURVEY OF FAMILY GROWTH 36-37 (2011), http://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf.

[140] *Id.* at 216.

[141] Allender, *supra* note 88, at 1847.

[142] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

current age of consent laws from statutory guidelines into constitutionally protected boundaries defining the permissible scope of sexual legislation.[143] Within this range, minors should be allowed to express their sexuality both through sexual activity and—as argued here—sexting. Any regulation into this private realm, as *Lawrence* explains, would require a legitimate justification.

¶ 53 A general expansion of teenage sexual liberty would obviously be a departure from many current lines of legal thought. For example, in a case interpreting the validity of statutory rape laws applied to consenting minors and their adult partners, a Florida court held that a "minor's right to consensual sex is not substantially burdened by requiring a delayed exercise of such right."[144] In another case involving statutory rape, the Supreme Court of Vermont noted that "the state has a compelling interest in protecting the well-being of minors" and that "minors are particularly vulnerable and in need of protection."[145] Of course, the difference in these analyses is that they examined circumstances in which the state attempted to protect teens "from being taken advantage of by someone who, because he or she is significantly older, may be able to persuade the victim to engage in physically consensual sexual intercourse."[146]

¶ 54 Unlike a situation in which there is a significant age disparity between the minor and his or her adult partner, sexting does not necessarily involve the same threat of exploitation. Nonetheless, the Supreme Court of Nebraska upheld the application of a child pornography law to a 17-year-old girl and an adult male even though the couple satisfied the state's age of consent laws.[147] The court dismissed privacy claims, warning that "[i]t is reasonable to conclude that [minors], although old enough to consent to sexual relations, may not fully appreciate that today's recording of a private, intimate moment may be the Internet's biggest hit next week."[148] Furthermore, a California court broadly held that "there is no privacy right among minors to engage in consensual sexual intercourse" regardless of the couple's ages.[149] These cases demonstrate that there may be significant legal deadwood to sweep away before there is an expansion on teenage sexual rights.

¶ 55 Juvenile curfew law cases such as those discussed in the previous sub-section provide an apt analogy for understanding the potential scope of the teenage right to sexual privacy are the.[150] In the case of *State v. J.P.*, the Supreme Court of Florida analyzed a juvenile curfew law to determine whether, among other things, it

[143] This paper assumes that current age of consent laws roughly correspond to the ages in which teens can engage in consensual sexual activity without emotion or developmental harm. If this is the case, the government should not regulate when there is a right of private intimacy.

[144] Jones v. State, 619 So.2d 418, 422 (Fla. Dist. Ct. App. 5th Dist. 1993).

[145] State v. Barlow, 160 Vt. 527, 528-30 (Vt. 1993).

[146] State v. Jason B., 248 Conn. 543, 553-54 (Conn. 1999).

[147] State v. Senters, 270 Neb. 19 (Neb. 2005).

[148] *Id*. at 26.

[149] *In re* T.A.J., 62 Cal. App. 4th 1350, 1361 (Cal. App. 1st Dist. 1998).

[150] The previous sub-section used the curfew law cases to understand how they related to parental rights whereas this section analyzes their implication on teenage rights of privacy.

unconstitutionally infringed on minors' freedom of movement and right to privacy.[151] The court ruled that the minors did enjoy these rights and demanded the ordinance be supported by narrowly tailored methods and a compelling state interest. The court relied on two Supreme Court cases to establish that minors possess constitutional rights.[152] First, in *Planned Parenthood v. Danforth*, the Court held that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[153] Second, in *Bellotti v. Baird*, the Court held that a "child's right [to constitutional protection] is virtually coextensive with that of an adult."[154] The court in *J.P.*, however, did note that *Bellotti* permits the state to treat minors differently than adults in instances of particular vulnerability to children.[155]

¶ 56 With these precedents, the *J.P.* court explained that the state's attempt to ensure the welfare of minors was a sufficient interest, but that the ordinance was invalid because it was not narrowly tailored.[156] The court explained that: (1) statistical data failed to establish the necessary nexus between the state interest and classifications created by the ordinance; (2) the broad sweep of the ordinance included otherwise innocent and legal conduct by minors; and (3) the ordinance imposed criminal penalties for violations.[157] Although this opinion does not yet represent the current landscape of jurisprudence on teen privacy, it provides a promising legal framework that allows us to work through the *Lawrence* test and determine if government regulation is justified.

¶ 57 The criminalization of sexting is quite similar to juvenile curfew laws. In both instances, legislatures attempt to protect minors by limiting their freedom and criminalizing innocent conduct. The "perpetrators" are the same as the "victims." To apply the first prong of the *J.P.* test to sexting, there is no real nexus between the private activity of sexting and child abuse. Any harm requires the intervention of malicious third party into a private realm. Looking at the second prong, the broad application of child pornography laws to minors punishes innocent activity in the sense that in sexting there is no direct exploitation. And finally, applying the third prong of the *J.P.* test, the sexting prosecution imposes criminal penalties. The court in *J.P.* thought it was nonsensical for an ordinance aimed at protecting youth to punish infringing behavior with severe consequences.[158] The curfew law in that case involved only a possible fine and incarceration, whereas criminal prosecution of sexting has proven to involve drastic penalties such as being listed as a sex offender.[159] If the *J.P.* court applied this privacy test to protect public juvenile movement, a post-*Lawrence* court could apply a similar test to a wholly private activity such as sexting.[160]

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[151] State v. J.P., 2004 Fla. LEXIS 2101 (Fla. 2004). *See generally* Calvin Massey, *Juvenile Curfews and Fundamental Rights Methodology,* 27 HASTINGS CONST. L.Q. 775, 791, for an overview of the subject.

[152] *J.P.*, 2004 Fla. LEXIS 2101, at *20.

[153] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

[154] Bellotti v. Baird, 443 U.S. 622, 634 (1979).

[155]

[156] *J.P.*, 2004 Fla. LEXIS 2101, at *43-44.

[157] *Id*.

[158] *Id.*

[159] *Id*. at *49-50.

[160] Although, as mentioned in Section II, a Florida court upheld the prosecution of sexting, it would appear possible that on appeal such a case could turn the other way if interpreted through the progressive

¶ 58 The glaring caveat to this proposition is the assumption that a court would even agree that there is a right of sexual privacy to be had by minors. In Florida, where *J.P.* was decided, the state constitution guarantees that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."[161] The Florida Supreme Court has explained that "[u]nlike the implicit privacy right of the federal constitution, Florida's privacy provision is, in and of itself, a fundamental one that, once implicated, demands evaluation under a compelling state interest standard."[162] This raises the question of whether teenage sexual privacy rights would be recognized in jurisdictions that do not enumerate privacy rights. However, at least one commentator finds that, in reality, the right to privacy in the Florida Constitution is actually no greater in scope than the federal guarantee encompassed in due process.[163] Furthermore, although *Lawrence* did not use a strict scrutiny standard, it still held that sexual legislation demands some sort of justification before it is legitimate.[164] This would seem to entail at least some requirement that courts weigh costs of liberty against state interests rather than merely look for any possible rational basis.

¶ 59 Of course, the United States Constitution does not contain an explicit, written guarantee of a right to privacy. Although the Supreme Court has found rights of privacy from time to time,[165] there will inevitably be a judicial crossroad[166] when a court hears a sexting case argued on grounds of substantive due process. It is at this point where the progressive framework of *Lawrence* can help persuade the current generation of legal scholars to adopt a broad approach to analyzing rights of privacy. Yet, it is unclear how the current Supreme Court might ultimately reinterpret *Lawrence* and whether it would actually vindicate a right of teenage sexual privacy should such a sexting case come before the Court.[167]

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lens of the *J.P.* test. It is easy and non-controversial for courts to vindicate minors' privacy rights in vanilla cases that simply challenge a curfew law. The biggest challenge would be to convince a court to ignore the "yuck factor" of sexting cases and focus on the rights at stake.

[161] FLA. CONST. art. I, § 23.

[162] City of N. Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995).

[163] Joseph Beatty, *Constitutional Law: Is the Expectation of Privacy Under the Florida Constitution Broader in Scope Than it is Under the Federal Constitution?*, 47 FLA. L. REV. 287, 297 (1995).

[164] See Witt v. Dep't of the Air Force, 527 F.3d 806, 817 (9th Cir. 2008) ("We therefore conclude that *Lawrence* applied something more than traditional rational basis review.").

[165] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) ("[The] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.").

[166] *See generally* Risa L. Golubuff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361 (2010) (explaining how the Supreme Court, in Papachristou v. Jacksonville, 405 U.S. 156 (1972), decided the case on grounds of vagrancy although original drafts revealed the Court came close to deciding it based on grounds of substantive due process).

[167] In his nomination hearings, Chief Justice Roberts explained his current views on privacy in light of a 1981 memo in which he referred to the "so-called right to privacy" by testifying that all the justices acknowledge constitutional protection of privacy "to some extent or another." Bob Egelko, *Roberts Keeps Views Under Wraps: Top Court Nominee Says Neutrality is Vital*, SAN FRAN. CHRON., Sept. 18, 2005, at C-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/09/18/INGG5EO58I1.DTL. Justice Alito mentioned during his nomination hearings that "[p]eople have a right to privacy in their homes and in their papers and in their persons." Jill Zuckman, *Alito Affirms Right to Privacy*, CHICAGO TRIB, Jan. 11, 2006, at C-1, *available at* http://articles.chicagotribune.com/2006-01-

¶ 60 In a post-*Lawrence* world, will the landmark 2003 case stand for the narrow cause of gay rights in the bedroom or the broad notion that individuals enjoy a fundamental right to be "let alone" when deciding how to express intimacy in private? The Supreme Court of Nebraska recognized the confusing influence of *Lawrence*, remarking that the "decision has unleashed a controversy over its holding."[168] Some courts understand the decision to stand for a right to sexual autonomy[169] while others still maintain that no such right exists.[170] While *Lawrence* provides the foundation for a potential general right of teenage sexual privacy, it is still surrounded by great constitutional uncertainty. The ultimate outcome will be highly influenced by legal academics and litigators who have the power to shape how judges will think of privacy and teen sexuality. If courts have come to understand that homosexual conduct is beyond the reach of the state, then perhaps modern norms and cultural reality will also change the ways courts look at conduct such as sexting.

¶ 61 There are, in conclusion, two routes through which the right of privacy can protect minors from the harsh criminal penalties that can result from sexting prosecutions. First, *Lawrence* can be used as persuasive authority against criminalizing one form of intimate conduct simply because it is repulsive to majoritarian standards, even though teens can engage in other traditional sexual activity. Although sexting involves minors, there must still be grounds other than naked morality to justify criminal prohibition. Courts have to locate some legitimate basis that makes sexting more dangerous than other lawful sexual activity. Second, *Lawrence* could prompt courts to search for a truly legitimate right before intruding on teens' sexual privacy. Courts' reliance on the interest of promoting a "healthy young citizenry" could succumb to the reality that regulation of teenage sexual activity may not be a "legitimate" state interest in a post-*Lawrence* world that values the right to be left alone. There are many indirect ways that the state may further its interests of protecting minors without criminalizing their private behavior.

11/news/0601110204_1_pennsylvania-law-requiring-women-abortion-supreme-court. In *Lawrence*, Justice Scalia boldly referred to privacy as a "so-called right" in his dissent. Lawrence v. Texas, 539 U.S. 558, 596 (2003) (Scalia, J. dissenting). Additionally, Justice Thomas recognized in his short *Lawrence* dissent that there is no general right to privacy in either the Bill of Rights or the Constitution. *Id.* at 605-606 (2003) (Thomas, J. dissenting). During her 2009 nomination hearings, Justice Sotomayor testified that the Constitution, "contains, as has been recognized by the courts for over 90 years, certain rights under the liberty provision of the due process clause that extend to the right to privacy in certain situations." *Senator Franken Questions Judge Sotomayor at Supreme Court Nomination Hearings*, WASH. POST, July 15, 2009. http://www.washingtonpost.com/wp-dyn/content/article/2009/07/15/AR2009071503145.html.

[168] State v. Senters, 270 Neb. 19, 23 (2005).

[169] Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1253 (11th Cir. Ala. 2004) (Barkett, J. dissenting) ("In invalidating the sodomy statute at issue in *Lawrence*, the Court reaffirmed this right to sexual privacy, finding that private homosexual conduct is likewise encompassed within it.").

[170] *Id*. at 1234-35:

> [N]o Supreme Court precedents, including the recent decision in [*Lawrence*], are decisive on the question of the existence of such a right. Because the ACLU is asking us to recognize a new fundamental right, we then apply the analysis required by [*Glucksberg*]. As we explain, we conclude that the asserted right does not clear the *Glucksberg* bar.

C. Application of the Substantive Due Process Analysis to the Scopes of Sexting

¶ 62 As described in Section I, there is both a narrow and wide scope of sexting. The narrow scope involves sexting between two individuals, in which the activity is an extension of modern courtship or a teenage couple's intimate relationship; it is a private matter confined to the adolescent bedroom and personal cell phone. The wide scope of sexting represents instances in which teens send images to an audience that is not confined to an intimate, monogamous relationship, such as when a teen sends a self-created explicit images to his or her entire class.

1. Application to the Narrow Scope

¶ 63 The narrow scope of sexting seems to implicate most obviously the rights of parents and teen sexual privacy. This scope is personal and intimate; the only eyes intended to see the images are those of the two sexual partners. The conduct takes place in the privacy of the teenage bedroom and remains within the confines of a personal cell phone: a digital version of teens' legal right to display their nudity and express their sexuality. Even without a broad right to engage in sexual activity, teen sexting still does not warrant criminalization following *Lawrence*. Although there are risks, the primary risk is that such images will be a source of ridicule or end up in the hands of an adult. By the same token, the choice of a teen to disclose his or her homosexuality may involve ridicule, but few would argue the state could regulate such disclosures justified by the interest of minimizing adolescent embarrassment.

¶ 64 Furthermore, although sexting ostensibly creates "child pornography," it does not directly cause exploitation or abuse of the juveniles involved. *Lawrence* requires that the government justify its intrusion into the realm of sexual privacy. To punish victims and label them as sex offenders hardly seems like a legitimate means to justify the states interest of protecting teens from predators. This is especially true given that the threat from child predators is so indirect. Images from sexting *might* reach unintended persons who *might* be inspired to harm children. A narrowly tailored approach would directly punish those who improperly intercept images from sexting and adults who exploit vulnerable teens by forcing or convincing them to pose for explicit images.[171] Attenuated and unsubstantiated harms are hardly justifications for entering an established realm of privacy.

¶ 65 The decision to engage in sexting touches on issues of sexuality and social acceptance. Some youngsters may find sexting to be the wrong way to begin or compliment a sexual relationship while others may find it to be beneficial. Furthermore, like many other decisions faced by youngsters, the best source of guidance is the tradition of good parenting. Sexting is not so dangerous that the state could expect all reasonable parents to forbid their child to partake. This is unlike teen drug use where government intervention is simply a codification of the only reasonable way to parent.

[171] Presumably, a minor could also run afoul of the law if he or she improperly coerced another minor to pose for explicit images.

¶ 66 It does not make sense for the government to brand children as criminals for making private decisions that are "immoral" with a law designed to protect children. Sexting might be child pornography according to statutory definition, but it is not "child pornography" in the context of its creation and transmission. This is a private matter between two teens and a private matter between teens and their parents. State intervention into this moral panic would impose great costs on personal liberty with little societal benefit. If two teens choose to express their intimacy through sexual imagery, prohibition of this private activity should not pass muster following *Lawrence*. Additionally, the attenuated harms and the assumption of immorality are not legitimate justifications to intrude on parental decisions regarding this matter.

2. Application to the Wide Scope

¶ 67 While the case for protecting the narrow scope of sexting is strong, there is more difficulty applying the rights of parents and teen sexual privacy to the wide scope. It is more reasonable to assume that citizens surrender rights relating to public activities rather than rights that are entirely personal in nature. Additionally, courts have more legitimacy intervening in teenage activity and parental decisions that are public or harmful in nature. If, for example, a young girl sends multiple friends nude pictures that she self creates, there is a stronger argument that she waives a "reasonable expectation of privacy,"[172] and there is an increased likelihood that the image will cause great embarrassment or "end up in the wrong hands." Not only do privacy expectations decrease in the wide scope of sexting, the activity is less "intimate" in nature and may seem outside the scope of activities protected by *Lawrence*. Sexting in the wide scope arguably may not even require the *Lawrence* analysis of whether government instruction is legitimate since there may not really be a claim of sexual privacy.

¶ 68 However, although the intended audience might be larger, the activity is still quite private. In recognizing a right to privacy, the Supreme Court explained its "revulsion at the thought of nighttime searches of the marital bedroom to discover evidence of illegal contraceptive use."[173] Likewise, the teenage bedroom should be seen as a similar "sacred precinct[]," protected by a high wall that demands a legitimate state interest.[174] Even if teens might sext with large numbers of peers, there should still be some concrete reasons, beyond morality, to justify government intrusion.[175] If, as *Lawrence* recommends, costs to personal liberty must be outweighed by societal benefits, the moral panic of sexting, with little real harm, renders prosecutions improper even in the wide scope.

¶ 69 Using a similar approach on First Amendment grounds, an Illinois federal court vindicated parental rights when it invalidated a law that levied criminal penalties for

[172] *See* A.H. v. State, 949 So.2d 234, 237 (Fla. Dist. Ct. App. 1st Dist. 2007).

[173] Gooding v. United States, 416 U.S. 430, 462 (1974) (Marshall, J., dissenting) (citing Griswold v. Conn., 381 U.S. 479, 485-86 (1965)).

[174] Griswold v. Conn., 381 U.S. 479, 485 (1965).

[175] Although outside the scope of this paper, sexting may be protected as a form of free speech. *See* John A. Humbach, *'Sexting' and the First Amendment*, 37 HASTINGS CONST. L. Q. 433 (2010).

selling or renting violent or sexual video games to minors.[176] The court first found evidence that video games could cause destructive behavior dubious and then observed that parents have significant control over their children's video game consumption.[177] In resisting the forces of another moral panic that surrounds video games, the court held that, "if controlling access to 'dangerous' speech is important in promoting the positive psychological development of children, in our society that role is properly accorded to parents and family, not the State."[178] Just as parents can control the video games teens play in their bedroom, they can control their children's access to and use of cell phones. The dangers of sexting, just as in video games, are not so severe as to render parental tolerance unreasonable.

¶ 70 Admittedly, one additional factor in the wide scope is the increased possibility that sexting-related images may fall into the hands of an adult. However, an adult possessing such images could still be punished under child pornography laws. Prosecution of minors is unnecessarily broad when there are narrowly tailored methods. Additionally, schools and prosecutors can use other laws and methods to punish teens who purposely humiliate their peers. If an activity implicates fundamental rights, it should not be regulated simply because third parties may be more likely to commit indirectly related crimes. It makes sense for the government to pry into the sexual privacy of adult child predators because there is a legitimate state interest in preventing sexual abuse and exploitation. In this context, child pornography is a form of abuse. But in the context of teens, even in the wide scope, "child pornography" is a form of private sexual expression.

¶ 71 At a minimum, the narrow scope of sexting is protected as a whole by substantive due process because of the strong sexual privacy arguments. The wide scope of sexting may require individual as-applied challenges to determine whether the specific act of sexting was public enough and risky enough to justify state intervention. For instance, a court might find there is a protected right to privacy when a juvenile delivers an image to a group of intimate friends but may rule otherwise if it were sent to dozens of distant acquaintances. The idea would be for courts to permit state intrusion when behavior is truly risky. Such a compromise ensures protection when conduct is personal, but allows government intervention when sexting becomes more public and thus more likely to end up in unintended hands. This also makes sense in the context of parental rights. If a teen, for example, sends a nude picture to a publicly accessible server or a group of strangers, presumably no reasonable parent would allow such behavior. In such a situation, the chance of humiliation might be large enough and the activity might be public enough for the state to make a legitimate "parenting" decision. If the goal is to protect children, then at least this approach reserves criminal punishment for conduct that is truly dangerous.

[176] Entertainment Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd* 469 F.3d 641 (7th Cir. 2006).
[177] *See id*. at 1074-1075.
[178] *Id*. at 1075.

V. THE VALUE OF THIS ANALYSIS AMIDST CONSTITUTIONAL UNCERTAINTY AND A GROWING DEBATE

A. Prosecutorial Discretion and Ground-Level Constitutional Interpretation

¶ 72 Even before sexting cases come to courts with polished constitutional challenges, law enforcement and prosecutors might be persuaded to limit their prosecutorial urges if they better understand the rights at stake. Although legislators write laws and judges provide legal interpretation, the truth is that prosecutors wield significant power in defining the boundaries of what the law really means and how citizens interpret the "law on the streets" rather than the "law on the books." Law enforcement is more democratic if state agents consider the constitutional implications of their actions before they arrest and prosecute citizens rather than always wait for issues to be decided by courts. Judges are not the only government actors with sworn duties to uphold the Constitution. Prosecutors can strive to uphold the constitution by limiting their enforcement when a matter appears to be on the border of constitutional protection.

¶ 73 From a public policy perspective, it is arguably better if prosecutors err on the side of committing Type I rather than Type II errors when handling sexting cases.[179] If prosecutors commit a Type I error and refuse to pursue charges when the activity is *not* actually constitutionally protected, the result merely allows young victims to avoid serious punishment for an activity without serious direct harms. The societal detriment would be minimal despite the fact that "perpetrators" would escape prosecution. If prosecutors commit a Type II error and bring charges when the activity *is* constitutionally protected, it would subject young citizens to illegitimate legal burdens. This calculus is especially important when it comes to sexting since the price to individual liberty is significant considering both the intrusion to personal sexual privacy and the potential jail time that could result from a conviction.

¶ 74 The optimal result would be for teens to avoid prosecution in the first place rather than have to go through the ordeal of challenging an arrest in the court system. Even if ultimately victorious, the process could take years and effectively chill future activity regardless of whether the conduct was "legal." To demand an explanation for unpopular activity, even if the implicated rights are ultimately vindicated by a court, might have nearly the same suppressive effect as outright prohibition. This observation is especially true given the severe potential consequences of sexting prosecutions. Even if prosecutors come to respect the rights implicated in sexting and curtail their application of child pornography laws to minors, the strongest protection of freedom will come from a constitutional *guarantee* of substantive due process protection recognized by the courts.[180]

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[179] A Type I error incorrectly assumes something is true when it is actually false, whereas a Type II error incorrectly labels something as false when it is actually true.

[180] *See Va. Commission Refuses 'Sexting' Recommendation*, WBOC NEWS, Dec. 15, 2009, http://www.wboc.com/Global/story.asp?S=11681419. In December 2009, the Virginia State Crime Commission opted to leave decisions regarding sexting to prosecutorial discretion rather than propose a legislative solution. Given that these prosecutors are elected, it is hard to imagine that they will defy

B. Legislative Solutions Can Benefit from a Thorough Constitutional Perspective

¶ 75 Currently, the most common response to the sexting debate has been through legislation. The problem with relying on lawmakers to solve this issue is that legislative responses are not necessarily designed with fundamental rights in mind. Legislative bodies often reflect the moral values of the regime in power rather than consider the privacy rights of minority interests. In Vermont, the legislature passed a statute in 2009 that allows minors charged with their first sexting offense to be declared delinquent in juvenile court and sent to a diversion program rather than facing more serious charges.[181] Although the criminal penalties are ameliorated, the language of the statue clearly states that "[n]o minor shall . . . use a computer or electronic communication device to transmit an indecent visual depiction of himself or herself to another person."[182] This bill, like the current criminalization of sexting, does not respect the fundamental rights of parents and teen sexual privacy. In a sense, this response could be interpreted as merely an attempt to minimize backlash from "criminalizing teens" while still punishing sexting and promoting majoritarian standards.

¶ 76 The Nebraska state legislature, on the other hand, created an affirmative defense to child pornography that is designed to excuse innocent teens from a "net meant to catch sex offenders."[183] One state legislator commented that "[n]obody wants to criminalize immature behavior by teenagers and so we were very careful in crafting the wording to prevent that."[184] This legislative solution specifically provides a defense when the defendant is a minor, the visual depiction was knowingly and voluntarily self-made, and if the defendant has not disseminated the image.[185] However, even this progressive response to the sexting debate does not fully protect teenage sexual privacy. For instance, the statute requires that the visual depiction only contain one child.[186] This means that memorialization of a consensual sex act between two willing partners could still be criminalized. In a way, this amounts to legislative approval of certain sexual activity and criminal prohibition of other allegedly undesirable sexual activity. Although the Nebraska legislature has realized teens should not be branded as criminals for their innocent curiosity, this still appears an attempt to legislate morality.

¶ 77 Lawmakers, in their future attempts to address the growing sexting issue, could benefit from a perspective that looks past morality and respects the rights of parents and privacy. Even if legislatures believe that sexting is contrary to promoting a healthy young citizenry, they can craft narrowly tailored laws that achieve the same result. For instance, lawmakers in New Jersey have proposed legislation that would require school districts to

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majoritarian cultural standards and protect teens' privacy and sexual autonomy. Although such a position would vindicate fundamental rights, it would not make for good press in the face of a potential reelection.

[181] VT. STAT. ANN. tit. 13, § 2802(b) (2010).

[182] VT. STAT. ANN. tit. 13, § 2802(b)(a)(1) (2010).

[183] *Teen-to-Teen 'Sexting' Exception Advances*, 1011 NOW.COM, April 22, 2009, http://www.1011now.com/political/headlines/43430447.html.

[184] *Id.*

[185] NEB. REV. STAT. § 28-813.01 (2009). Sec. 15. Section 28-813.01(B)(I).

[186] *Id.*

disseminate information to students and parents about the dangers of sexting.[187] It would also prohibit retail stores from selling cellular phones unless they provide informational brochures about sexting to customers.[188] Of course, these educational measures must accompany amendments to child pornography laws that eliminate application to minors or provide an unconditional affirmative defense to teen sexting.[189] This approach combats the harms of sexting while respecting parental rights and teen sexual privacy. If legislatures understand these rights, they can craft constitutionally legitimate statutes and minimize the need for legal challenges that might chill adolescent conduct. Additionally, legislative action can set the tone for how courts and society might come to interpret the legitimacy of regulating teenage sexual privacy. Society's view on sexuality is changing, and legislators can lead the way in dismantling the notion that laws intruding on privacy can be justified by morality.

C. This Isn't Just about the Right for Two Teens to Swap Dirty Pictures

¶ 78 The current criminalization of sexting might unfortunately be a red herring that distracts our attention from the read harms against children. The media is infatuated with salacious stories about teens spreading nude pictures around schools and the thought of the nation's youth engaging in such a "dirty" practice. Not only does this red herring throw us off the track from the real harms of child exploitation and abuse that continue to occur in this country, but it helps to perpetuate the moral panic that surrounds sexting. The more sexting is branded as "criminal," the more society will begin to accept governmental intrusion into this area and the easier it is for majoritarian culture to be codified as law. Such thinking equates the idea of something being "criminal" as necessitating state regulation.

¶ 79 The importance of identifying and upholding unpopular but constitutitionally-protected private activities goes far beyond the sexting issue, however. The sexting debate challenges society's sense of rights consciousness and serves as a potential catalyst for a new trend in expanding the rights of privacy, parenting, and intimacy in the wake of *Lawrence*. If society can come to see that the domain of sexual privacy should be immune from unjustified state control, perhaps this pragmatic thinking could be applied to other minority activities and conduct that are prohibited merely because they upset the majoritarian regime. Encroachments on personal liberty must be weighed against the legitimate state interests. The state cannot simply step in and control private, intimate activities.

¶ 80 Admittedly, there will be a fundamental disagreement over how to measure the costs to personal liberty and the societal benefits of government intervention. Some readers may not agree that teenage sexuality is a private matter that should be kept from state regulation. Weighing personal liberty costs and societal benefits is not an exact

[187] *2009 Legislation Relating to "Sexting,"* NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/?tabid=17756 (last visited April 16, 2011).

[188] *Id.*

[189] *Cf.* DeMarco, *supra* note 17 (article on New Jersey's current efforts to keep sexting official illegal but offer teens a chance to divert their prosecutions if they enter an education program on sexting).

science. What this paper counsels against is defining rights so narrowly as to grant the majority culture a backdoor to define which rights should be deemed fundamental. In other words, if the analysis merely examined a "right to sext," it might not be difficult to determine that a "reasonable person" would value the benefits of regulation to society over the costs to personal liberty. If the reasonable person is similar to the majority, the practice of sexting would be seen as perverse. In contrast to this approach, rights should be defined more broadly so as to offer real protection rather than uphold cultural norms. Thus, analysis of a broad right such as a "right to intimacy" rather than a "right to sext," offers general protection to a class of activities. Using a broad definition of rights recognizes that had the Framers "known the components of liberty in its manifold possibilities, they might have been more specific."[190] The current generation of legal thinkers must work to expand the modern contours of liberty and the various types of conduct that it protects.

[190] Lawrence v. Texas, 539 U.S. 558, 578 (2003).