BALANCING INDIVIDUAL PRIVACY AND PROTECTING ADOLESCENTS IN FAMILY LAW

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Because private sexual conduct frequently has public consequences, most societies have regulated sexual activity or its outcomes to some extent. A summary of laws currently regulating sexual activity and its outcomes is beyond the scope of this paper, but would include age of consent to engage in sexual relations or to marry, statutory rape laws, incest

α Thanks to Samuel Beus, who provided terrific research assistance for this paper.

1 The procreation of children being the most obvious social consequence, but one might also include patterns of cohabitation and household economies as public consequences, as well as the spread of sexually transmitted infections ("STIs"), prostitution, the trafficking in women and children, and now, political advocacy related to sexual practices.

2 For example, see The Laws of Hammurabi, "127 (sexual slander against a votary-wife); "129, 133b (adultery); "130 (rape); "144-148 (dealing with votary-wives, concubines, and slave wives); "154-158 (prohibiting incest); "165-184 (inheritance laws related to wives, votary-wives, children, children of slave-souses); see also the Middle Assyrian Laws"Assur , "9, 12, 55 (rape); 13-16 (adultery); "17-20 (sexual slander); "23 (procurement/rape); "40 (different dress for wives, concubines, prostitutes); see also Hittite Laws, "31-33 (division of property and custody when unmarried slave and freeborn person dissolve household);" 187-188, 199-200a (prohibiting some types of bestiality); "189-195c (defining incest/unpermitted sexual pairing); "197 (rape/adultery), in MARTHA T. ROTH AND HARRY A. HOFFNER, JR., VOLUME EDITOR PIOTR MICHALOWSKI, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR (1995). See U.S. STATE DEPARTMENT, TRAFFICKING IN PERSONS REPORT 2005 (describing worldwide trends in forced prostitution, among other forms of slavery).

3 Several nations and states establish minimum ages of consent to sexual activity. China"s age of consent is 14 years old, France"s is 15 and Italy"s is 14. Available at <http://www.avert.org/aofconsent.htm#below>. The U.S. leaves age of consent laws to the states. California"s age of consent is 18 years old, Cal. Penal Code " 261.5 (2005); New York"s is 17 years old, NY CLS Penal " 130.05; Texas" age of consent is also 17 years old, Tex. Penal Code " 21.11 (2004).

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prohibitions, restrictions on child or other pornography; even support and inheritance laws are


5 Federal law regulates distribution of obscene material that involves minors. See 18 USC " 1466A (concerning obscene visual representations of the sexual abuse of a minor) and 18 USC " 1470 (concerning transfer of obscene material to minors under 16 years old). California prohibits obscenity on advertising structures or signs, Cal Bus & Prof. Code " 5402 (2005), prohibits distribution of obscene matter, Cal. Pen. Code " 311.2, and prohibits advertising or promotion of matter represented to be obscene, Cal. Pen. Code " 311.5. New York also criminalizes promotion or possession of obscene materials. NY CLS Penal " 235 et seq. It is estimated that the world porn industry generates over $57 billion of revenue. http://www.familysafemedia.com/pornography_statistics.html. 80% of prostitution survivors at the WHISPER Oral History Project reported that their customers showed them pornography "to illustrate the kinds of sexual activities in which they wanted to engage." 52% of these women stated that pornography played a significant role in teaching them what was expected of them as prostitutes, and 30% of these women reported that their pimps regularly exposed them to pornography in order to indoctrinate them into an acceptance of the practices depicted. WHISPER, "A Facilitator’s Guide to Prostitution: A Matter of Violence Against Women" (1990) (available at http://www.prostitutionresearch.com/factsheet.html). Child pornography has also been linked to abuse of children. The U.S. Postal Inspection Service has found that at least 80% of purchasers of child pornography are active abusers and nearly 40% of the child pornographers investigated over the past several years have molested children in the past. Candice Kim, "From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children," Child Sexual Exploitation Update (2004) (available at http://www.ndaa-apri.org/publications/newsletters/child_sexual_exploitation_update_volume_1_number_3_2004.html). Child molesters use adult pornography to arouse the victim, and use child pornography more to communicate the molester’s sexual fantasies to the child. Id. Of 1400 cases of reported child molestation in Louisville, KY between 1980 and 1984, pornography was connected with every incident, and child pornography was connected with most of them. Id. Several foreign countries also regulate various aspects of sexuality.

Canada also criminalizes producing, distributing, accessing and possessing child
linked to the sexual or procreative activity of the obligor or decedent. Historically, U.S. laws against prostitution, bigamy, incest, seduction, fornication, adultery, and sodomy discouraged sexual behavior outside of the marriage relationship, which had special legal protection because it benefits society by encouraging family members to care for each other across the life span.6

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6 See WENDELL BERRY, SEX, ECONOMY, FREEDOM AND COMMUNITY 120 (1993); William C. Duncan, The State Interests in Marriage, 2 AVE MARIA LAW REVIEW, 153 (2004); Monte N. Stewart, _______________ Canadain Law Journal ; Lynn D. Wardle, ____________; Bruce
Those laws may reflect moral or religious beliefs, but also reflect a prudent regard for the prevention of the problems of unrestrained sexuality: sexual exploitation (including prostitution and trafficking), nonmarital pregnancies, which are related to poverty, and the plight of


7 The United Nations specifically condemns prostitution, calling on its members to "take all appropriate measures . . . to suppress all forms of traffic in women and exploitation of prostitution of women," and as of March 2004 had 176 States parties, including Canada, China, France, Germany, Russia and the United Kingdom. United Nations, Convention on the Elimination of All Forms of Discrimination against Women, Article 6 (adopted 1979) (available at http://www.un.org/womenwatch/daw/cedaw/cedaw.htm). The United States has criminalized setting up a house of prostitution near military bases. 18 USC " 1384 (2005). California criminalizes acquiring a prostitute (Cal. Pen. Code " 266e), selling a prostitute (Cal. Pen. Code " 266f), abducting a minor for prostitution (Cal. Pen. Code " 267), admitting or keeping a minor in a prostitution house (" 309), convincing a person to visit a place for prostitution (" 318), loitering with intent to engage in prostitution (" 653.22), and supervising a prostitute (" 653.23). New York also criminalizes prostitution in various ways. NY CLS Penal "' 230 et seq. (2005). It has been estimated that 45,000 to 50,000 women and children are trafficked annually to the United States for the sex industry. Amy O'Neill Richard, International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime iii (Nov. 1999) (available at http://www.cia.gov/csi/monograph/women/trafficking.pdf). In one case from February 1996 to March 1998, 25 to 40 young Mexican girls were trafficked to Florida and South Carolina for prostitution. Id. at 21. The State Department has recognized the inevitable connection between prostitution and trafficking: "Prostitution and related activities . . . fuel the growth of modern-day slavery by providing a façade behind which traffickers for sexual exploitation operate. Where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery." U.S. Department of State, "The Link Between Prostitution and Sex Trafficking" (available at http://www.state.gov/documents/organization/38901.pdf). The State Department also estimates that the six to eight hundred thousand people trafficked across international borders annually, 80% of them are female and up to 50% are minors. Id. The State Department also links prostitution with increased instances of rape, physical assault, and mental disease. Id. "Prostitution leaves women and children physically, mentally, emotionally, and spiritually devastated." Id. In fact, the link between prostitution and human trafficking is so strong that the
abandoned infants and children. Societies with significant rates of risky sexual activity also face the additional costs of the medical care of persons suffering or dying from sexually transmitted

Deputy Prime Minister of Sweden has stated; "Without prostitution, there would be no trafficking in women." U.S. Department of State, "Pathbreaking Strategies in the Global Fight Against Sex Trafficking" 35 (2003) (available at http://www.state.gov/documents/organization/20942.pdf). Sweden has aggressively prosecuted customers, pimps and brothel owners and has seen a 50% decrease in women prostituting and a 75% decrease in men buying sex, and has witnessed a resulting decrease in trafficking. Id. (citing Ekberg, G.S., "Prostitution and Trafficking: The Legal Situation in Sweden" (2001)). In addition, the 2003 Deputy of the DHHS stated that "we cannot separate trafficking and prostitution." U.S. Department of State, "Pathbreaking Strategies in the Global Fight Against Sex Trafficking" 43 (2003) (available at http://www.state.gov/documents/organization/20942.pdf). The U.S. State Department has also received a recommendation to increase investigation into Internet pornography because it is linked to trafficking (p. 14), and to investigate and subpoena records of ISPs whose customers transmit and receive pornographic materials involving minors (p. 5). U.S. Department of State, "Pathbreaking Strategies in the Global Fight Against Sex Trafficking" 5 (2003) (available at http://www.state.gov/documents/organization/20942.pdf).

8 The CDC estimates that in 2002, unmarried mothers gave birth at the rate of 34.0 births per 1,000 women. The total fertility rate was 64.8 per 100,000, so over half of births in the United States in 2002 were to unmarried women. CDC, National Vital Statistics Reports, Volume 52, Number 10, Table 14, page 50 (December 17, 2003) (Available at http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_10.pdf).

9 Although there seem to be no official statistics on abandoned children, The Human Rights Watch says that throughout the world the number of abandoned children is likely in the millions, and that these children "were provided with inhumane care," and that "many were left to die." Human Rights Watch, Orphans and Abandoned Children (available at <http://www.hrw.org/worldreport99/children/child5.html>). In addition, many of these children "suffered from inadequate food, housing, clothing, medical care, lack of stimulation or education, and neglect." Id. In 1996, HRW documented a "secret world of starvation, disease, and unnatural death"a world into which thousands of Chinese orphans and abandoned children disappeared each year." Id.
diseases.  

On the whole, in the United States, private sexual conduct has not been regulated in an oppressive manner. Usually prosecution has been in the context of stopping sexual predators, establishing the right of dependents to legal support, keeping public places free of sexual activity, or protecting the public from sexually transmitted diseases. These are compelling state interests pursued through rational means.

Currently, however, there is at least a nascent a movement toward decriminalizing what


11 See Brian Hansen, Cyber-Predators: Can Internet Child sexual exploitation be Controlled, 12 CQ Researcher, March 1, 2002 (No. 8), at
is called consensual adult-adolescent sex and consensual adult-child sex.  

The work of some psychologists is used to contend that such activity may not harm adolescents or children, and in some ways, may be beneficial. Additionally, theorists using queer theory challenge the belief that any specific sexual desire or activity is innate or normative, which might be used to challenge age-restrictions. Their aim is to destabilize cultural ideas of normality and sexuality, undermining the status quo and fostering what they might call the freedom people need to create their own sexualities.

In the U.S., the concept of the child as lacking capacity to understand and conform to the law consistently, has resulted in strong commitments both to protecting and developing children, as evidenced by the public school system and the nation's juvenile courts. Throughout this era, the concept of minority legal status has protected children from their own temporary lack of capacity. Rather than discriminating against children, this tradition sought to give children advantages designed to protect them from abuse and nurture them toward maturity.

A survey of law reviews and other publications shows a conflict in law applied to adolescents between what might be called "sexual autonomy advocacy" and "sexual


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protectionism,¹⁵ both of which can be seen in law.¹⁶ It is unclear how both of these approaches can be accommodated in family law, but likely that the topic will remain for some years a part of the debate about regulation of sexual activity by law. It is my contention that the laws protecting adolescents from their own less mature decisions and from being exploited by each other or adults should be strengthened, rather than relaxed, or at the least, the law should support social practices which would discourage early sexual experience. By definition, a society which refuses to protect its daughters and sons, is dying: it has no future.

Neither Infant nor Adult. Adolescence is considered a transitional period during which most individuals experience tremendous physical, intellectual, social, and emotional development. Growth in these areas can be uneven and inconsistent, so age is used as a substitute for judgment of the maturity of minors on an individual basis. [L]egal scholarship has drawn meaningful distinctions between younger and older children, showing that adolescence is a "learner's permit" stage of life in which parents and the state should and do grant children

¹⁵ Bruce C. Hafen and Jonathan Hafen, refer to the clash between "autonomy right" of children and "protection rights" of children in U.S. law and in the U.N. Convention on the Rights of the Child, Id.

¹⁶ A third category might be called "corrective," in that authors tend to characterize the protectionism as overzealous, but do not necessarily endorse child-adult or adolescent sexual relations. See Dana M. Northcraft, Book Review: A Nation Scared: Children, Sex, And The Denial Of Humanity: A Review Essay On Judith Levine's Harmful To Minors: The Perils Of Protecting Children From Sex, 12 AM. U.J. GENDER SOC. POL'Y & L. 483;
increasing degrees of freedom as a way of developing their capacities."\(^\text{17}\)

Adolescents" Autonomy Rights. U.S. Supreme Court decisions extended at least minimal autonomy rights to teens. In some instances those rights have the potential to collide with the practical reality that although an adolescent may have the interest and the physical capacity to participate in sexual activity, as a general rule, they do not have the maturity to enter into sexual relationships without a high risk of negative outcomes, nor do minors generally have the ability to support the children engendered from those relationships. "The conundrum of adolescent autonomy reverberates beyond pediatric offices and hospitals, generating uncertainty, especially among those who regularly deal with adolescents. The crux of the conundrum is decisional capability, a complex concept that eludes precise definition. At best, it is defined as the ability to "perform a task," entailing an ability to understand information, deliberate, and decide. In contrast to adults, who are presumed decisionally capable, minors are presumed incapable by law. With regard to adolescents (approximately 14 through 17 years), this legal presumption is problematic for a host of reasons."\(^\text{18}\)

Adolescents" Protection Rights. Correlating with this increased autonomy has been an increase in crime by teens,\(^\text{19}\) and crime against teens, high nonmarital birth rates, and high rates

\(^{17}\) Hafen, at 456.
of STIs. These negative outcomes have prompted efforts to discourage early sexual activity, and nonmarital childbearing, and to encourage safer sexual practices to reduce the transmission of STIs, albeit frequently in an approach which assumes that adolescent abstinence is unrealistic.

Family Law Norms. The law governing families has had the natural family as a norm, with the expectation that mom and dad would protect and train and socialize the child. The crucial factors for childrearing have been summarized as attachment, supervision and discipline, which together help the child move from "an impulsive, self-interested individual to one who thinks about the consequences" of his or her behavior.\(^\text{20}\) The absence of these factors, and even the deviant acts of a parent, can increase the risk that the child will have low self-control, and be more likely to engage in risky behaviors ranging from unprotected, promiscuous sexual activity, to substance abuse, or crime.\(^\text{21}\) The focus in American society and law on individual rights may have resulted in parents' willingness to allow greater autonomy for teens, or to lower parental commitment to teaching their children that "adult" activities such as sex are to be postponed until adulthood.

Sexual Libertarians. The sexual revolutionaries of the 60s have taken a toll on the authority of any institution to set a norm or to regulate behavior, particularly if the activity can


\(^{21}\) Hope, at 26-28.
be categorized as private. Perhaps the belief that any authority is inherently oppressive has weakened the enculturating effects of family, church, and state. The predilection for tolerance over good judgment appears to be at its zenith (or perhaps its nadir) when a teacher encounters the practical reality of finding a good bad example, with a student opining in apparent sincerity that maybe Hitler shouldn't be judged too harshly, since he may have been acting according to his own value system. Such people object to norms, and advocate a normless respect for individuals and their choices, perhaps as an overreaction to our nation's history of discrimination against some subgroups of the citizenry.

Our sexualized society finds adolescent autonomy today to be what Rhonda Gay Hartman calls a “conundrum” Adolescent Autonomy: Clarifying an Ageless Conundrum 51 Hastings L.J. 1265 (2000), in that the “presumptional incapacity”22 of traditional law has given way in the area of sexual privacy especially to allow, for example, a minor to consent to medical treatment such as prescription for contraceptives, abortion, or treatment for mental health needs or treatment for sexually transmitted infections (“STIs”), but not to refuse medical attention her parents may direct, or to make end of life decisions, generally speaking. In part because of these anomalous results, Hartman calls for “recognition of adolescence as a distinct legal category,” and proposes to revolutionize the “juvenile justice system in a way that retains its special distinction, recognizes the enormous value of family and social institutions in the lives of

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22 Rhonda Gay Hartman, Adolescent Autonomy: Clarifying an Ageless Conundrum, 51 HASTINGS
adolescent, and optimizes adolescent freedom for personal development.” While Hartman’s focus is much broader than privacy issues, privacy issues loom large in the area of potential parent-adolescent conflict.

This has been a contentious area in which sex-educators and parents have frequently clashed, and in which differing worldviews have clashed. As Robert George points out however, the prudential considerations may be an area of agreement—reducing teen pregnancy, for example. But without a robust discussion and perhaps, broader consensus, about the deeper notions of what constitutes human flourishing, “intrinsic goods” we will make only limited progress, and in privacy areas may continue the divisiveness that has characterized abortion discussion for more than thirty years.

The push in U.S. society and law to “facilitate and honor young people’s rights to explore their incipient sexuality in an environment that is free from coercion, exploitation and nonvoluntary sexual encounters,” has made prosecution under statutory rape and other protective laws uneven, at best.23

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Such approaches are really only half-way measures that are likely to be only half successful. We need to communicate to our children a richer vision of the human person and of the meaning and purpose of human relationships of which sexual activity is a part. One fundamental notion that U.S. society has nearly sublimated, is the reality that sexual activity is relational: it is not simply an individual matter, and is therefore to be treated with care in consideration of the generations who preceded us and the generations who will follow us. This follows from the fact that we are more than bundles of muscles, neurons, and desires: we are volitional creatures, meaning-makers, or as Richard Williams points out, we must understand that human beings are agents and that sexuality is agentive action. And “the hallmarks of agency are giving assent, having reasons, making justifications, and having and expressing concern.”

Without this deeper understanding of who we are, who our children are, we have limited not only our capacity to protect vulnerable youth, but we have also limited their genuine autonomy.

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24 NARTH paper.