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## A Little Privacy, Please: Should We Punish Parents for Teenage Sex

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# A Little Privacy, Please: Should We Punish Parents for Teenage Sex?

BY SUSAN S. KUO\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	136
II. THE ILLINOIS CRIMINAL PARENTAL RESPONSIBILITY LAW: SECTION 150/5.1 .....	144
III. PUTTING SECTION 150/5.1 IN CONTEXT: TRADITIONAL APPROACHES TO PARENTAL RESPONSIBILITY LAWS .....	151
A. <i>The Parental Liability Trend</i> .....	151
B. <i>The Constitutional Quandaries</i> .....	157
IV. SECTION 150/5.1: A NEW DEVELOPMENT IN THE PARENTAL LIABILITY TREND .....	160
V. VIOLATION OF THE RIGHT TO PRIVACY IN FAMILY MATTERS ..	165
A. <i>Substantive Due Process Methodology</i> .....	165
1. <i>The Expansive Conception of Family Privacy</i> .....	167
2. <i>The Fundamental Nature of Parental Rights</i> .....	169
B. <i>Examining Section 150/5.1</i> .....	171
1. <i>Infringement on Parental Rights</i> .....	171
2. <i>Applying Strict Scrutiny</i> .....	176
a. <i>Illinois's Compelling Interest</i> .....	176
b. <i>The "Means-Ends" Fit</i> .....	187
i. <i>Accessories to Teenage Sexual Activity</i> .....	188

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ii. <i>Lack of Parental Control</i> .....	191
iii. <i>Harm to the Parent-Child Relationship</i> .....	194
iv. <i>Conflicting Statutes</i> .....	196
VI. CONCLUSION .....	198

## I. INTRODUCTION

Teenagers in the United States are having sex.<sup>1</sup> Sexual expression is an essential component of healthy human development;<sup>2</sup> sixty-three percent of the American public believes that adolescent sexual exploration is a natural part of growing up.<sup>3</sup> Indeed, four out of five people first engage in sexual intercourse as teenagers.<sup>4</sup>

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<sup>1</sup> Setting to one side the moral and political debate about the appropriateness of teenage sexual activity, according to a recent study conducted by Dr. Robert W. Blum, director of the Division of General Pediatrics and Adolescent Health at the University of Minnesota, "17 percent of a national sample of thousands of seventh- and eighth-graders said that they had had intercourse." Anne Jarrell, *The Face of Teenage Sex Grows Younger*, N.Y. TIMES, Apr. 2, 2000, at § 9 (Sunday Styles), at 1. Moreover, the earlier onset of puberty adds to the growing number of young sexual initiates. The average age of menarche has dropped to around twelve or thirteen years. D. Malcolm Potts, *Adolescence and Puberty: An Overview*, in ADOLESCENCE AND PUBERTY 269, 270 (John Bancroft & June Machover Reinisch eds., 1990). Though perhaps emotionally unprepared, adolescents are physically ready to initiate sexual activity at a very young age. This all-time low means that a greater proportion of teenage girls are at risk of becoming pregnant than in previous years. Seventy-eight percent of teen pregnancies are not planned. THE ALAN GUTTMACHER INST., TEEN SEX AND PREGNANCY (1999), [http://www.agi-usa.org/pubs/fb\\_teen\\_sex.html](http://www.agi-usa.org/pubs/fb_teen_sex.html). The consequences of adolescent pregnancy and childbearing are serious. When compared with their peers who delay childbearing, teenage mothers are less likely to graduate from high school and more likely to be "poor while in their 20s and early 30s." *Id.* "Children born to teenage mothers are more likely to suffer severe health problems, and are less likely to receive adequate health care. . . . [They are also] more likely to drop out of high school." THE ANNIE E. CASEY FOUND., WHEN TEENS HAVE SEX: ISSUES AND TRENDS (1998), <http://www.aecf.org/kidscount/teen/news/fact.htm>. Financial loss to society is also substantial; teen pregnancy and childbearing cost the nation an estimated seven billion dollars annually. *Id.*

<sup>2</sup> See PHILIP G. ZIMBARDO, *PSYCHOLOGY AND LIFE* (13th ed. 1992).

<sup>3</sup> *Public Support for Sexuality Education Reaches Highest Level, Survey Says*, SHOP TALK (Sexuality Info. and Educ. Council of the U.S., New York, N.Y.), June 11, 1999, at <http://www.siecus.org/pubs/shop/volume4/shpv40022.html>.

<sup>4</sup> THE ALAN GUTTMACHER INST., *supra* note 1. Another recent study found that "more than half of the females and three-quarters of the males ages 15 to 19 have

For boys, the average age at which they begin to have sexual intercourse is significantly younger than for girls: for boys, the average age is thirteen and one-half to fourteen and one-half and for girls, the average age is fifteen and one-half.<sup>5</sup> Research, furthermore, indicates that the face of teen sex is growing younger.<sup>6</sup> A recent press release from The Children's Hospital of Philadelphia reports that thirty percent of students entering the sixth grade already have had sexual intercourse.<sup>7</sup>

Although a majority of adults believe that adolescent sexual experimentation is normal,<sup>8</sup> the increasingly youthful face of teen sex is alarming. As a result, abstinence education initiatives are fast becoming commonplace across the country "In the last two years, the federal government and various states have co-funded 698 new programs."<sup>9</sup> President-elect George W. Bush has even taken the abstinence issue to the campaign trail, pledging to "elevate abstinence education from an afterthought to an urgent priority."<sup>10</sup> The programs vary widely in content, but federal funding is

experienced sexual intercourse." Ron Stodghill II, *Where'd You Learn That?*, TIME, June 15, 1998, at 52, 55.

<sup>5</sup> *Analysis: Teen Attitudes Toward Sex and Sexual Identity* (National Public Radio, Talk of the Nation, Apr. 27, 2000), 2000 WL 21458775 (citing Dr. Robert Blum, director of the Division of General Pediatrics and Adolescent Health at the University of Minnesota, who specializes in teen sexuality).

<sup>6</sup> See Jarrell, *supra* note 1. "There are no in-depth studies showing national trends in sexual activity [among] middle school [students], ages 10 to 13." *Id.* According to Dr. Robert W. Blum, director of the Division of General Pediatrics and Adolescent Health at the University of Minnesota, the lack of studies derives from political and privacy interests. See *id.* Researchers "fear the outcry from politicians who embrace an abstinence-only message and from parents wanting to protect their children's privacy." *Id.* Existing studies of national trends look only at high school students. *Id.* These studies show a "striking drop decade by decade in the age at which teenagers first engage in intercourse." *Id.*

A December 1999 study by the National Center on Addiction and Substance Abuse at Columbia University in New York noted that in the early 1970s, less than 5 percent of 15-year-old girls and 20 percent of 15-year-old boys had engaged in sexual intercourse. By 1997, the figures were 38 percent for girls, 45 percent for boys.

*Id.*

<sup>7</sup> News Release, The Children's Hospital of Philadelphia, Sex Among Young Teens Closely Tied to Peer Norms, Says Pediatrician at The Children's Hospital of Philadelphia (June 27, 2000), <http://www.pnnewswire.com/micro/CHOP>

<sup>8</sup> See *supra* note 3 and accompanying text.

<sup>9</sup> *The Naked Truth*, NEWSWEEK, May 8, 2000, at 58.

<sup>10</sup> Jodie Morse, *Preaching Chastity in the Classroom*, TIME, Oct. 18, 1999, at 79, 79. As Governor of Texas, Bush spent six million dollars on abstinence

contingent on educating children about "the 'harmful psychological and physical effects' of premarital sex."<sup>11</sup> Federal legislation does not mandate discussion of contraceptives, but any discussion on the topic must cast contraceptives as unreliable in preventing pregnancy and sexually transmitted diseases.<sup>12</sup>

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programs. As presidential candidate, Bush pledged to allocate \$135 million on abstinence education if elected president. *Id.* The abstinence-only approach gained support in 1996 with G.O.P. welfare-reform legislation, which set aside fifty million dollars over five years for states adopting the "just-say-no" perspective. *Id.* See 42 U.S.C.A. § 710(b)(2) (West Supp. 2000), for a listing of eight specific elements that, together, define the abstinence education that grantees must provide. Program implementation began in October 1997; state maternal and child health bureaus, in conjunction with governors' offices, are administering the federal funds. PLANNED PARENTHOOD FED'N OF AMERICA, INC., HELPING YOUNG PEOPLE TO DELAY SEXUAL INTERCOURSE (1997), <http://www.plannedparenthood.org/library/TEEN-PREGNANCY/HelpYoung.html>. According to a study by the Sexuality Information and Education Council of the U.S., approximately 700 schools and community groups in forty-eight states are participating in the program. Morse, *supra*, at 79.

<sup>11</sup> Morse, *supra* note 10, at 79.

<sup>12</sup> *Id.* "Abstinence advocates claim credit for a [national] decline in teen pregnancies, down 17% from 1990 to 1996. " *Id.* at 80. Published evaluations of these programs, however, "did not find a delay in the onset of sexual intercourse" among teens. *Id.* The Alan Guttmacher Institute investigated the decline in teenage pregnancy using data from the National Surveys of Family Growth ("NSFG"), "the major source of government data on population and reproductive health." Rebekah Saul, *Teen Pregnancy: Progress Meets Politics*, THE GUTTMACHER REPORT ON PUBLIC POLICY, June 1999, <http://www.agi-usa.org/pubs/journals/gr020306.html>. The NSFG data shows that the decline in overall teenage pregnancy rates "is due to lower pregnancy rates among sexually experienced teens." *Id.* Sexually active teenagers account for 80% of the decline in pregnancy rates, which indicates that these teens are learning to use contraception more frequently and effectively. See *id.*

Nevertheless, Douglas Kirby, a senior research scientist who has studied abstinence programs for ETR Associates, a California nonprofit health-education and research organization, remarks that "the jury is still out" and that "11 studies show [that] programs that combine an abstinence message with information about contraceptives either delayed teen sex or reduced its frequency." Morse, *supra* note 10, at 80. Although studies show that seventy-five percent of the decline in teenage pregnancy resulted from more effective contraceptive use, twenty-five percent of the decline was due to decreased sexual activity. News Release, The Alan Guttmacher Institute, U.S. Teenage Pregnancy Rate Drops Another 4% Between 1995 and 1996 (Apr. 29, 1999), <http://www.agi-usa.org/pubs/archives/newsrelease>

In an apparent attempt to join the ranks of the abstinence-only movement, Illinois authorities recently employed a rarely used criminal statute to charge a mother, Kathy Maness, for failing to prevent her thirteen-year-old daughter from consensually engaging in sexual intercourse with the daughter's seventeen-year-old boyfriend.<sup>13</sup> The law, section 150/5.1 of the Illinois Wrongs to Children Act, required parents "who knowingly allow[ ] or permit[ ] an act of criminal sexual abuse or criminal sexual assault" upon their child to take "reasonable steps to prevent its commission or future occurrences of such acts."<sup>14</sup> Although the daughter, Lynlee Jo Otten, and her boyfriend, Leonard A. Owens, Jr., were both teenagers, under Illinois law, the boyfriend was committing criminal sexual abuse because of the four-year difference in their ages.<sup>15</sup>

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\_teen\_preg.html. This Article does not seek to contribute to the morally and politically charged debate on sexuality education. Rather, it aspires to firmly outline those areas of family life into which the state cannot tread. *See infra* Part V

<sup>13</sup> *People v. Maness*, 732 N.E.2d 545, 547 (Ill. 2000). The State charged that: [Kathy Maness,] mother of Lynlee Jo Otten, a minor under the age of 17 years, knowingly allowed or permitted Leonard A. Owens, Jr. to commit an act of criminal sexual abuse upon Lynlee [Jo Otten], "in that Leonard A. Owens, Jr. committed an act of sexual penetration with Lynlee Jo Otten, who was at least 13 years of age, but under 17 years of age when the act was committed, in that Leonard A. Owens, Jr. placed his penis in the vagina of Lynlee Jo Otten, and Leonard A. Owens, Jr. was less than five years older than Lynlee Jo Otten, and the defendant did fail to take reasonable steps to prevent its commission."

*Id.* Leonard was seventeen years of age when he and Lynlee began dating each other and having sexual intercourse. *Id.* at 548. Lynlee was twelve years of age when the relationship began and thirteen years of age when she and Leonard began engaging in sexual intercourse. *Id.* Prosecutors could have instigated proceedings in the Illinois juvenile court system to determine whether Maness abused or neglected her daughter. Instead, the state opted to prosecute Maness pursuant to section 150/5.1. *See* 720 ILL. COMP. STAT. ANN. 150/5.1 (West Supp. 2000).

<sup>14</sup> 720 ILL. COMP. STAT. ANN. 150/5.1 (West Supp. 2000). Although, in *Maness*, the Illinois Supreme Court invalidated section 150/5.1 on the grounds that it was unconstitutionally vague, analysis of the statute remains important because any criminal parental liability law that requires parents to discourage teenage sexual activity would impermissibly infringe upon parental privacy rights. *See infra* Part V.B.

<sup>15</sup> Section 5/12-15(c) of the Illinois Criminal Code of 1961 provides that an "accused commits criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but

"At some point after the sexual relationship began, Lynlee told her mother that she and Leonard were having sexual intercourse."<sup>16</sup> Maness initially lectured Lynlee about the implications and possible consequences of sexual intercourse.<sup>17</sup> After realizing that she could not prevent Lynlee from continuing the sexual relationship, however, Maness then obtained birth control pills for Lynlee.<sup>18</sup> Maness also repeatedly "allowed Leonard . . . to spend the night at the family home."<sup>19</sup> She "was aware that, on some of these occasions, Leonard slept in Lynlee's bedroom and had sexual intercourse with Lynlee."<sup>20</sup>

Maness claimed "that she did not know what steps to take to prevent the sexual relationship between Lynlee and Leonard."<sup>21</sup> She "stated that Leonard 'was a nice boy and was better than most of the younger boys Lynlee was hanging around with' "<sup>22</sup>; "it was safer for Lynlee to be having sex with [Leonard] at home than [with] somebody else out of the home environment."<sup>23</sup> Maness felt that she had "some control" over her daughter's sexual activity if it occurred at home.<sup>24</sup>

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under 17 years of age and the accused was less than 5 years older than the victim." 720 ILL. COMP. STAT. ANN. 5/12-15(c) (West Supp. 2000). Leonard pleaded guilty to misdemeanor criminal sexual abuse pursuant to section 5/12-15(d). *Maness*, 732 N.E.2d at 548.

<sup>16</sup> *Maness*, 732 N.E.2d at 548. Lynlee and Leonard began dating in August 1996 and began engaging in sexual intercourse in December 1996. *Id.* Apparently, Lynlee had had other sexual relationships prior to becoming involved with Leonard. No evidence, however, indicates that Kathy Maness was aware that Lynlee was sexually active prior to her relationship with Leonard. Brief for Appellee at 7 n.2, *People v. Maness*, 732 N.E.2d 545 (Ill. 2000) (No. 86463).

<sup>17</sup> *Maness*, 732 N.E.2d at 548.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Leonard spent the night at the Maness home twenty or thirty times. Brief for Appellee at 5, *People v. Maness*, 732 N.E.2d 545 (Ill. 2000) (No. 86463).

<sup>20</sup> *Maness*, 732 N.E.2d at 548. When Leonard stayed at the Maness home, he would, at times, sleep on a chair in the living room. Brief for Appellee at 5, *People v. Maness*, 732 N.E.2d 545 (Ill. 2000) (No. 86463). At other times, he would stay in Lynlee's bedroom. *Id.* When he and Lynlee engaged in sexual intercourse, they usually did so in Lynlee's bedroom and usually while Mr. and Mrs. Maness were in the house. *Maness*, 732 N.E.2d at 552. During their nine-month relationship, Lynlee and Leonard had sexual intercourse fifteen to twenty times. *Id.* at 548.

<sup>21</sup> *Maness*, 732 N.E.2d at 548. This statement was taken from an investigative report from the Illinois Department of Children and Family Services. *Id.*

<sup>22</sup> *Id.* Leonard is the cousin of the prosecuting county's State's Attorney. Brief for Appellee at 6, *People v. Maness*, 732 N.E.2d 545 (Ill. 2000) (No. 86463).

<sup>23</sup> *Maness*, 732 N.E.2d at 548 (alteration in original).

<sup>24</sup> *Id.*

As a result of Maness's prosecution, the Illinois Supreme Court had the opportunity to evaluate the constitutionality of the criminal parental liability statute.<sup>25</sup> On June 15, 2000, a divided Illinois Supreme Court dismissed the charge and struck down the law that allowed it, holding the statute unconstitutionally vague.<sup>26</sup> The court concluded that, because of the lack of direction in the statute and in its legislative history, parents have no way of knowing whether their actions meet the law's requirement to take "reasonable steps" to prevent criminal sexual abuse.<sup>27</sup> The court also held

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<sup>25</sup> Maness challenged the law on various grounds, including vagueness and infringement of privacy rights. *Id.* At the circuit court level, Maness moved to dismiss, arguing that the statute was unconstitutionally vague with respect to what constitutes "reasonable steps" to prevent the commission of future acts of sexual abuse and that the statute violated her "fundamental liberty right to raise her child free from undue state influence as guaranteed by the fourteenth amendment to the United States Constitution and article I, section 2 of the Illinois Constitution." *Id.* She contended that the statute exposed any parent "to prosecution if a child becomes pregnant, sires a child, asks for birth control devices, or seeks any counsel from the teenager's parents regarding sexual activity." *Id.*

Ruling from the bench, the circuit court granted Maness's motion to dismiss the charge, finding "that section 150/5.1 'may implicate first amendment concerns of the defendant or of a parent or guardian to effectively address the problem of underage teenage sex in their particular family situation.'" *Id.* The circuit court also held that section 150/5.1 was "unconstitutionally vague as to what constitutes 'reasonable steps' to prevent the commission of future acts of sexual abuse." *Id.* The State appealed the circuit court's ruling directly to the Illinois Supreme Court. *Id.*

<sup>26</sup> *Id.* at 551. Justice Bilandic delivered the opinion of the court. *Id.* at 546. Chief Justice Harrison, joined by Justices Miller and McMorro, dissented from the majority opinion. *Id.* at 551-53.

<sup>27</sup> *Id.* The dissent, however, argued that the statute's prohibition was sufficiently definite and that Maness's alleged actions fell clearly within the confines of section 150/5.1. *Id.* at 551-52. Chief Justice Harrison conceded that Maness had confronted the couple about their activities and expressed her disapproval. *Id.* at 552. The Chief Justice went on, however, to protest Maness's actions in facilitating the criminal sexual abuse by allowing Leonard to sleep with Lynlee in Lynlee's bedroom. *Id.* Recognizing that Maness thought that her actions ensured a safer environment for her daughter's sexual activity, the dissent, nevertheless, argued that "[a]ny person of ordinary intelligence would understand that such conduct constitutes a failure to take 'reasonable steps' to prevent criminal sexual abuse within the meaning of the law." *Id.* at 552-53. The dissent also took issue with the majority's finding that the statute's requirement of "reasonable steps" was vague, pointing out that a reasonableness standard "has been employed successfully in many other areas of the law," citing tort law as one example. *Id.* at 551-52.



that section 150/5.1 “risks arbitrary and discriminatory enforcement” because it lacks any standards to guide authorities charged with applying it.<sup>28</sup>

Although the Illinois law is no longer valid, the statute remains important because other states may seek to use it as a template for creating similar criminal parental liability legislation. Even in Illinois, lawmakers are likely to revitalize the parental responsibility law<sup>29</sup>—the General Assembly can redraft the statute to eliminate any ambiguities. The privacy concerns raised by the statute, however, are not as easily cured. Criminal parental liability laws that require parents to discourage teenage sexual activity present a dangerous threat to parental privacy rights.<sup>30</sup> The Illinois statute regulated parental decisions with respect to how to protect children from unwanted pregnancies and sexually transmitted diseases, mandating that parents impose an abstinence standard on their minor children. By striking section 150/5.1, the Illinois Supreme Court disposed of a law that was arguably vague and freed Kathy Maness of the criminal charge.<sup>31</sup> By declining to address Maness’s argument that the statute violated her right to privacy, however, the court overlooked the opportunity to speak to the impact of these types of statutes on family privacy rights—a significant issue of constitutional concern not just in Illinois, but nationwide.

The Illinois statute represents a new and disturbing development in the recent trend toward blaming parents for the misdeeds of their children. Parental liability laws have surged in popularity over the past decade as lawmakers have responded to constituents’ demands to punish parents who fail to control their children.<sup>32</sup> By attempting to hold parents accountable

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Additionally, the dissent declared that section 150/5.1 did not unduly infringe on Maness’s parental right to raise her child, reasoning that “a parent’s rights [must] yield to the state’s interest in protecting its children” from abuse and neglect. *Id.* at 553 (citing *Am. Fed’n of State, County & Mun. Employees v. Dep’t of Cent. Mgmt. Servs.*, 671 N.E.2d 668 (Ill. 1996)). Implicit in the dissent’s assertion is that sex among teenagers is sexual abuse, a conclusion that corresponds with one of the several definitions of criminal sexual abuse in section 5/12-15, and that parents who do not take some generalized concept of appropriate measures to prevent or discourage teenage sex are committing child abuse or neglect. Whether either supposition is appropriate is debatable. *See infra* notes 223-36 and accompanying text.

<sup>28</sup> *Maness*, 732 N.E.2d at 550.

<sup>29</sup> *See infra* note 50.

<sup>30</sup> Other problems with the statute include causation and control issues. *See infra* Part V.B.2.b.ii. and accompanying text.

<sup>31</sup> *See supra* notes 26-27 and accompanying text.

<sup>32</sup> *See infra* Part III.A.

for the consensual sexual activities of their children, however, Illinois manipulated the typical structure of the parental liability paradigm and put it to use in an unconventional manner.

In an attempt to dissuade other states from following Illinois's lead, this Article highlights the futility and unconstitutionality of using parental liability laws to address the problem of teenage sex. Teen sex occurs for reasons other than the lack of parental supervision and control; broad social forces underlie the rising tide of adolescent sexual activity.<sup>33</sup> Moreover, privacy problems arise when states attempt to regulate parental conduct through criminal statutes that penalize parental failures to prevent consensual sexual intercourse among teens.<sup>34</sup> At present, Illinois appears to be the only state to attempt to prosecute parents who do not take measures to stop the sexual activities of their children. Considering the public's concern about the sexual precocity of adolescents,<sup>35</sup> however, other states might enact legislation similar to the Illinois statute. Widespread adoption of the Illinois approach would transform a comparatively local privacy problem into a national one, thereby exacerbating the impact on family privacy rights. Accordingly, in examining the concept of compelling parents to prevent the sexual activity of their teenage children, this Article places particular emphasis on section 150/5.1 of the Illinois Wrongs to Children Act.<sup>36</sup>

Part II sets forth the Illinois law.<sup>37</sup> Part III compares section 150/5.1 to traditional forms of parental responsibility statutes.<sup>38</sup> This Part describes

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<sup>33</sup> See *infra* Part V.B.2.b.1.

<sup>34</sup> This Article does not address age-disparate sexual relationships between young teens and adults. Significant age-differentials are beyond the scope of chapter 720, section 5/12-15(c) of the Illinois Criminal Code of 1961, which is limited to adolescent pairings between individuals who are within five years of age of each other. See *infra* note 44. States typically punish sexual pairings between adults and minor children more severely because the greater differences in levels of intellectual and emotional development lead to a higher risk of sexual exploitation of the minor partner. *E.g.*, CAL. PENAL CODE § 261.5 (West Supp. 2000) (increasing the penalty in relation to the age disparity between the parties); 720 ILL. COMP. STAT. ANN. 5/12-15(d) (West Supp. 2000) (imposing a greater penalty on a perpetrator who is more than five years older than the victim when the victim is between the ages of thirteen and sixteen).

<sup>35</sup> *E.g.*, Jarrell, *supra* note 1, Morse, *supra* note 10; Susan Reimer, *Face it: Teens are Having Sex*, FLA. TODAY, May 17, 2000, at 1, 2000 WL 20211157; Stodghill, *supra* note 4.

<sup>36</sup> 720 ILL. COMP. STAT. ANN. 150/5.1 (West Supp. 2000).

<sup>37</sup> See *infra* notes 41-55 and accompanying text.

<sup>38</sup> See *infra* notes 56-104 and accompanying text.

the emergence of parental responsibility laws and their recent rise in popularity. Part III also argues that the current trend of holding parents criminally liable for failure to supervise their children signals a change in state approaches to the family and redefines the responsibilities of parents in response to public concern about the rising juvenile crime rate. This change in approach infringes on constitutionally protected parental privacy rights. Part IV asserts that section 150/5.1 is a variation on this familiar theme, a sign that Illinois has joined the recently revitalized parental accountability movement.<sup>39</sup> The statute, however, takes parental responsibility to a higher level and further opens the door to state invasion of the family home. Part V discusses the right to privacy in family matters and argues that criminal parental liability laws that penalize parents for failing to take reasonable steps to prevent teenage sex impermissibly interfere with the fundamental right of parents to make childrearing decisions.<sup>40</sup> This section focuses on the Illinois statute as an exemplar of these types of laws and attempts to explain the state interest in compelling parents to put a stop to teenage sexual behavior. The broad swath of the parental criminal liability statute, which condemns parents for tolerating not only sexual exploitation, but also sexual experimentation, strains the delicate link between state interest and objective. For this reason, these types of statutes violate constitutional guarantees of privacy

## II. THE ILLINOIS CRIMINAL PARENTAL RESPONSIBILITY LAW: SECTION 150/5.1

Section 150/5.1 of the Illinois Wrongs to Children Act prohibited "permitting the sexual abuse of a child."<sup>41</sup> Section 150/5.1 provided:

A. A parent, step-parent, legal guardian, or other person having custody of a child who knowingly allows or permits an act of criminal sexual abuse or criminal sexual assault as defined in Section 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the Criminal Code of 1961, upon his or her child, or knowingly permits, induces, promotes, or arranges for the child to engage in prostitution as defined in Section 11-14 of the Criminal Code of 1961, and fails to take reasonable steps to prevent its commission or future occurrences of such acts commits the offense of permitting the sexual abuse of a child. For purposes of this Section, "child" means a minor under the age of 17 years.

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<sup>39</sup> See *infra* notes 105-33 and accompanying text.

<sup>40</sup> See *infra* notes 134-286 and accompanying text.

<sup>41</sup> 720 ILL. COMP. STAT. ANN. 150/5.1 (West Supp. 2000).

'B. Any person convicted of permitting the sexual abuse of a child is guilty of a Class 1 felony.<sup>42</sup>

A Class 1 felony is punishable by a maximum sentence of fifteen years' imprisonment.<sup>43</sup>

Section 5/12-15(c), the underlying provision of the criminal sexual abuse statute in the charge against Kathy Maness, provides that "[t]he accused commits criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13

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<sup>42</sup> *Id.*

<sup>43</sup> 730 ILL. COMP. STAT. ANN. 5/5-8-1(a)(4) (West Supp. 2000). The sentencing range for a Class 1 felony is four to fifteen years. *Id.* Maness also expressed concern that, if convicted under the statute, she could be judged a sexual perpetrator pursuant to the Sex Offender Registration Act. Motion to Dismiss at 2, *People v. Maness*, (Ill. Cir. Ct., Sept. 28, 1998) (No. 97-CF-207).

The Illinois legislature, by means of the ill-fated Public Act 88-680, attempted to amend section 150/5.1 to add "legal guardian[ ] or other person having custody of a child" to the list of those subject to the statute. Pub. Act 88-680, art. 50, sec. 50-10, 1994 Ill. Legis. Serv. P.A. 88-680 (West, WESTLAW through 2000 Legis. Sess.). Public Act 88-680 also sought to add a provision to include within the statute's scope those designated who "knowingly permit[ ], induce[ ], promote[ ], or arrange[ ] for the child to engage in prostitution as defined in Section 11-14 of the Criminal Code of 1961." *Id.* Additionally, the Act elevated the offense of permitting sexual abuse of a child from a Class A misdemeanor to a Class 1 felony. *Id.* In *Maness*, however, the Illinois Supreme Court found Public Act 88-680 to be void *ab initio* "because it was enacted in violation of the single subject rule of the Illinois Constitution." *People v. Maness*, 732 N.E.2d 545, 547 (Ill. 2000) (citing ILL. CONST. art. IV, § 8(d); *People v. Cervantes*, 723 N.E.2d 265 (Ill. 1999) (finding Public Act 88-680 to be invalid)). A legislative enactment violates the single subject rule when the bill includes unrelated provisions that have no legitimate relation to one another. *Cervantes*, 723 N.E.2d at 267. The rule prevents the legislature from grouping unpopular measures with popular ones so as to ensure "that the legislature addresses the difficult decisions it faces directly and subject to public scrutiny, rather than passing unpopular measures on the backs of popular ones." *Johnson v. Edgar*, 680 N.E.2d 1372, 1379 (Ill. 1999).

In response to the *Cervantes* ruling, the Illinois General Assembly enacted Public Act 91-696 to re-enact certain criminal provisions of Public Act 88-680, including the amendments to section 150/5.1. The Act went into effect on April 13, 2000. *See* Pub. Act 91-696, art. 50, sec. 50-10, 2000 Ill. Legis. Serv. P.A. 91-696 (West, WESTLAW through 2000 Legis. Sess.) ("This Act re-enacts certain criminal provisions of Public Act 88-680, including subsequent amendments, to remove any question as to the validity or content of those provisions.").

years of age but under 17 years of age and the accused was less than 5 years older than the victim.”<sup>44</sup> As defined by this section, sexual conduct between teenage individuals who are between thirteen and sixteen years of age falls within the definition of criminal sexual abuse. For example, if two fifteen-year-old teenagers were involved in a sexual relationship, each teen could be charged with having committed criminal sexual abuse upon the other.<sup>45</sup> In *People v. Maness*,<sup>46</sup> the teenagers involved were thirteen and seventeen years of age, respectively.<sup>47</sup> Consequently, their sexual relationship was prohibited by section 5/12-15(c). Criminal sexual abuse is a Class A misdemeanor,<sup>48</sup> punishable by a maximum of 364 days in prison.<sup>49</sup>

In addition to the prohibition on permitting the sexual abuse of a child, section 150/5.1 also required a parent, step-parent, legal guardian, or any

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<sup>44</sup> 720 ILL. COMP. STAT. ANN. 5/12-15(c) (West Supp. 2000). The term “victim” includes consensual partners, such as Lynlee. The statute defines the following behaviors as criminal sexual abuse:

- (a) The accused commits criminal sexual abuse if he or she:
  - (1) commits an act of sexual conduct by the use of force or threat of force; or
  - (2) commits an act of sexual conduct and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent.
- (b) The accused commits criminal sexual abuse if the accused was under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who was at least 9 years of age but under 17 years of age when the act was committed.
- (c) The accused commits criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was less than 5 years older than the victim.

*Id.*

<sup>45</sup> See *In re T.W.*, 685 N.E.2d 631, 635 (Ill. App. Ct. 1997) (“[W]here two minors engage in a consensual sexual act, [section 5/12-15(b)] may validly be applied to prosecute both minors on the basis that each is the victim of the other.”). Although the court in *T.W.* was discussing section 5/12-15(b), its reasoning is equally applicable to the use of section 5/12-15(c). Two fifteen-year-olds involved in a sexual relationship could be charged under both sections of the statute.

<sup>46</sup> *People v. Maness*, 732 N.E.2d 545 (Ill. 2000).

<sup>47</sup> *Id.* at 548. During the sexual relationship, the seventeen-year-old turned eighteen. *Id.* The two dated for approximately four months before beginning the sexual relationship, which lasted another five months. *Id.*

<sup>48</sup> 720 ILL. COMP. STAT. ANN. 5/12-15(d) (West Supp. 2000).

<sup>49</sup> 730 ILL. COMP. STAT. ANN. 5/5-8-3(1) (West 1997).

other person with custody of a child to take "reasonable steps" to protect that child from the felonies of criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault, and aggravated criminal sexual abuse.<sup>50</sup> Criminal sexual assault includes acts of sexual penetration

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<sup>50</sup> 720 ILL. COMP. STAT. ANN. 150/5.1 (West Supp. 2000). Criminal sexual assault is a Class 1 felony. *Id.* at 5/12-13(b). Aggravated criminal sexual assault is a Class X felony. *Id.* at 5/12-14(d). Predatory criminal sexual assault of a child is a Class X felony. *Id.* at 5/12-14.1(b). Aggravated criminal sexual abuse is a Class 2 felony. *Id.* at 5/12-16(g). A Class X felony carries a sentence of six to thirty years, a Class 1 felony carries a sentence of four to fifteen years, and a Class 2 felony carries a sentence of three to seven years. 730 ILL. COMP. STAT. ANN. 5/5-8-1 (West Supp. 2000).

"In 1994, over 3 million children were reported for child abuse and neglect to child protective service agencies in the United States." National Committee to Prevent Child Abuse, *Child Abuse and Neglect Statistics from the National Committee to Prevent Child Abuse* (Apr. 1995), at <http://www.vix.com/pub/men/abuse/studies/child-ma.html>. Eleven percent of these cases were for sexual abuse. *Id.* In a 1998 report to the Illinois General Assembly, the Illinois Department of Children and Family Services announced that 162,537 children were identified in investigated reports of alleged abuse in 1997 ILL. DEP'T OF CHILDREN AND FAMILY SERVS., A REPORT TO THE GENERAL ASSEMBLY CONCERNING THE IMPLEMENTATION AND VALIDATION OF THE PROTOCOL (May 1, 1998), <http://www.state.il.us/dcfsc/cerap.html>.

Considering the public concern about the number of children who are sexually and physically abused, the Illinois General Assembly may seek to revitalize the now-defunct section 150/5.1. Moreover, given the urgency expressed in the Assembly's enactment of Public Act 91-696, broadening the scope of section 150/5.1 and raising the penalty for its violation from a Class A misdemeanor to a Class 1 felony, legislators would likely clarify any ambiguities and rejuvenate the statute. "The provisions amending the Wrongs to Children Act are of vital concern to the people of this State and legislative action concerning those provisions is necessary." Pub. Act 91-696, art. 50, sec. 50-10, 2000 Ill. Legis. Serv. P.A. 91-696 (West, WESTLAW through 2000 Legis. Sess.).

On May 4, 2000, Illinois Governor George H. Ryan created the Illinois Criminal Code Rewrite and Reform Commission. Exec. Order No. 2000-9, 24 Ill. Reg. 7755, 2000 WL 725928. The Commission's charge is to "[c]onduct a comprehensive study and analysis of the existing criminal laws" of Illinois and propose clear and simple language to clarify its wording and structure. *Id.* The Commission will review the criminal code to ensure that the laws are fair to both defendants and victims and will propose new provisions to account for the influx of technology in the modern world. *See id.*

Should the Commission and General Assembly decide to revise the statute, care should be taken to avoid treading on constitutional concerns beyond vagueness.

accompanied by the use of force or threat of force and situations in which the accused was a family member or a person who occupied a position of trust or authority with respect to the victim.<sup>51</sup> Aggravating circumstances that would elevate a charge of criminal sexual assault to aggravated criminal sexual assault include the use of a dangerous weapon during the commission of the offense or the causing of bodily harm to the victim.<sup>52</sup>

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Rewriting the statute to cure vagueness defects will not guarantee a stamp of constitutional purity. The statute may remain vulnerable to attack under the federal and Illinois constitutions for violating parental rights to privacy in family matters.

*See infra* Part V

<sup>51</sup> 720 ILL. COMP. STAT. ANN. 5/12-13 (West Supp. 2000). Section 5/12-13(a) provides:

The accused commits criminal sexual assault if he or she:

- (1) commits an act of sexual penetration by the use of force or threat of force; or
- (2) commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent; or
- (3) commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member; or
- (4) commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.

*Id.*

<sup>52</sup> *Id.* at 5/12-14. Section 5/12-14 provides:

(a) The accused commits aggravated criminal sexual assault if he or she commits criminal sexual assault and any of the following aggravating circumstances existed during, or for the purposes of paragraph (7) of this subsection (a) as part of the same course of conduct as, the commission of the offense:

- (1) the accused displayed, threatened to use, or used a dangerous weapon, other than a firearm, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon; or
- (2) the accused caused bodily harm, except as provided in subsection (a)(10), to the victim; or
- (3) the accused acted in such a manner as to threaten or endanger the life of the victim or any other person; or
- (4) the criminal sexual assault was perpetrated during the course of the commission or attempted commission of any other felony by the accused; or

Predatory criminal sexual assault of a child involves acts of sexual penetration between an accused over seventeen years of age and a victim under thirteen years of age.<sup>53</sup> Aggravated criminal sexual abuse covers a

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(5) the victim was 60 years of age or over when the offense was committed; or

(6) the victim was a physically handicapped person; or

(7) the accused delivered (by injection, inhalation, ingestion, transfer of possession, or any other means) to the victim without his or her consent, or by threat or deception, and for other than medical purposes, any controlled substance; or

(8) the accused was armed with a firearm; or

(9) the accused personally discharged a firearm during the commission of the offense; or

(10) the accused, during the commission of the offense, personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person.

(b) The accused commits aggravated criminal sexual assault if the accused was under 17 years of age and (i) commits an act of sexual penetration with a victim who was under 9 years of age when the act was committed; or (ii) commits an act of sexual penetration with a victim who was at least 9 years of age but under 13 years of age when the act was committed and the accused used force or threat of force to commit the act.

(c) The accused commits aggravated criminal sexual assault if he or she commits an act of sexual penetration with a victim who was an institutionalized severely or profoundly mentally retarded person at the time the act was committed.

*Id.*

<sup>53</sup> 720 ILL. COMP. STAT. ANN. 5/12-14.1 (West Supp. 2000). Section 5/12-14.1 provides:

(a) The accused commits predatory criminal sexual assault of a child if:

(1) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed; or

(1.1) the accused was 17 years of age or over and, while armed with a firearm, commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed; or

(1.2) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed and, during the commission of the offense, the accused personally discharged a firearm; or

(2) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when



broad spectrum of behavior, including an act of criminal sexual abuse accompanied by an aggravating factor such as the use of a dangerous weapon or causing physical harm to the victim.<sup>54</sup> The statute defining

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the act was committed and the accused caused great bodily harm to the victim that:

- (A) resulted in permanent disability; or
- (B) was life threatening; or
- (3) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed and the accused delivered (by injection, inhalation, ingestion, transfer of possession, or any other means) to the victim without his or her consent, or by threat or deception, and for other than medical purposes, any controlled substance.

*Id.*

<sup>54</sup> 720 ILL. COMP. STAT. ANN. 5/12-16 (West Supp. 2000). Section 5/12-16 provides:

- (a) The accused commits aggravated criminal sexual abuse if he or she commits criminal sexual abuse as defined in subsection (a) of Section 12-15 of this Code and any of the following aggravating circumstances existed during, or for the purposes of paragraph (7) of this subsection (a) as part of the same course of conduct as, the commission of the offense:
  - (1) the accused displayed, threatened to use or used a dangerous weapon or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon; or
  - (2) the accused caused bodily harm to the victim; or
  - (3) the victim was 60 years of age or over when the offense was committed; or
  - (4) the victim was a physically handicapped person; or
  - (5) the accused acted in such a manner as to threaten or endanger the life of the victim or any other person; or
  - (6) the criminal sexual abuse was perpetrated during the course of the commission or attempted commission of any other felony by the accused; or
  - (7) the accused delivered (by injection, inhalation, ingestion, transfer of possession, or any other means) to the victim without his or her consent, or by threat or deception, and for other than medical purposes, any controlled substance.
- (b) The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct with a victim who was under 18 years of age when the act was committed and the accused was a family member.
- (c) The accused commits aggravated criminal sexual abuse if:
  - (1) the accused was 17 years of age or over and (i) commits an act of

aggravated criminal sexual abuse also prohibits sexual conduct between an accused who is at least seventeen years of age and a victim under thirteen years of age and between a victim who is at least thirteen years of age and an accused who is at least five years older than the victim.<sup>55</sup>

### III. PUTTING SECTION 150/5.1 IN CONTEXT:

#### TRADITIONAL APPROACHES TO PARENTAL RESPONSIBILITY LAWS

##### A. *The Parental Liability Trend*

Punishing the parents of juvenile delinquents is not a concept novel to state criminal justice systems.<sup>56</sup> Colorado enacted the first law holding

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sexual conduct with a victim who was under 13 years of age when the act was committed; or (ii) commits an act of sexual conduct with a victim who was at least 13 years of age but under 17 years of age when the act was committed and the accused used force or threat of force to commit the act; or

(2) the accused was under 17 years of age and (i) commits an act of sexual conduct with a victim who was under 9 years of age when the act was committed; or (ii) commits an act of sexual conduct with a victim who was at least 9 years of age but under 17 years of age when the act was committed and the accused used force or threat of force to commit the act.

(d) The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was at least 5 years older than the victim.

(e) The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct with a victim who was an institutionalized severely or profoundly mentally retarded person at the time the act was committed.

(f) The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.

*Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Although the imposition of vicarious liability "is contrary to the basic Anglo-American premise of criminal justice that crime requires personal fault on the part of the accused," WAYNE R. LAFAVE, CRIMINAL LAW § 3.9, at 271 (3d ed. 2000), at least seventeen states have enacted legislation imposing vicarious criminal liability upon parents for the conduct of their children. *Id.* at 267 n.10.

parents criminally liable for their minor children's wrongful acts in 1903.<sup>57</sup> It has been suggested that the dramatic increase in juvenile delinquency during the 1950s and 1960s caused more and more states to enact parental liability laws in an attempt to curb this juvenile criminal behavior.<sup>58</sup> The rationale behind the laws is that parents are in the best position to prepare children to become productive members of society.<sup>59</sup> Accordingly, parents should instill into their children important societal values, including respect for authority and the law.<sup>60</sup> Parental liability advocates argue that inadequate parental control and guidance cause juvenile delinquency.<sup>61</sup> Thus, imposing fines or prison terms for poor parenting compels wayward

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Parental liability for the acts of minor children has also taken the form of vicarious tort liability. Early common law did not allow parents to be vicariously liable for the torts of their children. W PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 123, at 913 (5th ed. 1984). The judgment-proof status of most children, however, left many tort victims without recourse. *See id.* To compensate these victims, virtually every state adopted parental liability laws imposing civil liability on parents for property damages and personal injuries caused by their children. *See id.* *See also* Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621, 629-38 (1997) (discussing parental liability for the tortious acts of children).

<sup>57</sup> For a discussion of the Colorado law that made it a crime to contribute to the delinquency of a minor see Irving A. Gladstone, *The Legal Responsibility of Parents for Juvenile Delinquency in New York State: A Developmental History*, 21 BROOK. L. REV. 172, 173-74 (1955).

<sup>58</sup> "Punishing parents is presumed to have a deterrent affect on actions" of parents that could "cause" or create a "tendency" for a child to become a delinquent. Chapin, *supra* note 56, at 648. By 1961, forty-eight states had enacted so-called "contributing statutes." James A. Kenny & James V. Kenny, *Shall We Punish the Parents?*, 47 A.B.A. J. 804, 805 (1961). In the late 1960s, President Lyndon B. Johnson's "War on Poverty" focused on the social causes of delinquency. Acknowledging the role of parents in raising a child, Johnson's programs also stressed the role of social factors—including poverty, living environment, education, and employment opportunities—in producing the problem of juvenile delinquency. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 55-89 (1967); DAVID ZAREFSKY, *PRESIDENT JOHNSON'S WAR ON POVERTY* (1986).

<sup>59</sup> *See infra* Part V.A.2.

<sup>60</sup> *See* SANFORD N. KATZ, *WHEN PARENTS FAIL. THE LAW'S RESPONSE TO FAMILY BREAKDOWN* 12-13 (1971).

<sup>61</sup> Jerry E. Tyler & Thomas W. Segady, *Parental Liability Laws: Rationale, Theory, and Effectiveness*, 37 SOC. SCI. J. 79, 84-91 (2000).

parents to control their children, which would lead to a decrease in the incidence of juvenile crime.<sup>62</sup>

The most common types of criminal parental liability legislation are truancy and curfew laws<sup>63</sup> and “contributing” statutes.<sup>64</sup> Truancy laws, or compulsory school attendance laws, typically include provisions that hold a parent or other custodian accountable for a child’s failure to attend school. These statutes are fueled by state power to regulate schools and require children of proper age to attend;<sup>65</sup> they seek to assure regular school attendance.

The standard curfew law controls the presence of juveniles in public places at nighttime.<sup>66</sup> In addition, most curfew ordinances impose parental responsibility for the child’s compliance with the curfew.<sup>67</sup> The purpose of this added layer of liability is to encourage parental supervision of children so that fewer curfew violations will occur and so that minors are properly protected.<sup>68</sup>

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<sup>62</sup> *See id.*

<sup>63</sup> Truancy and curfew laws are commonly referred to as “status offenses” because the conduct underlying the charge would not be criminal if committed by an adult. ARNOLD BINDER ET AL., *JUVENILE DELINQUENCY: HISTORICAL, CULTURAL AND LEGAL PERSPECTIVES* 21-22 (2d ed. 1997).

<sup>64</sup> *See supra* note 58 and accompanying text. *See also* Eunice A. Eichelberger, Annotation, *Criminal Responsibility of Parent for Act of Child*, 12 A.L.R. 4th 673-700 (1994).

<sup>65</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (“No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school. ”). Although the Court struck down an Oregon truancy statute requiring all children to attend public schools, where states have provided for an alternative to public schooling, truancy laws have been upheld. *See, e.g., Stephens v. Bongart*, 189 A. 131 (N.J. 1937); *State v. Williams*, 228 N.W. 470 (S.D. 1929).

<sup>66</sup> These statutes typically forbid designated persons, usually minors, from being in certain places at night—such as public streets and public buildings—unless accompanied by a responsible adult or possessing a reasonable excuse for violating the curfew. *See, e.g., People v. Walton*, 161 P.2d 498 (Cal. App. Dep’t Super. Ct. 1945). At least one city has an ordinance that restricts the movement of children during the day. Cathy Werblin, *Seal Beach Daytime Curfew Approved*, L.A. TIMES (Orange County Edition), Oct. 1, 1996, at B5, 1996 WL 12741497.

<sup>67</sup> Few reported cases, however, address criminal parental liability for curfew violations. *See, e.g., McColester v. City of Keene*, 514 F. Supp. 1046 (D. N.H. 1981), *rev’d on other grounds*, 668 F.2d 617 (1st Cir. 1982); *Walton*, 161 P.2d at 501; *City of Eastlake v. Ruggiero*, 220 N.E.2d 126 (Ohio Ct. App. 1966).

<sup>68</sup> *Walton*, 161 P.2d at 501 (stating that “legislation peculiarly applicable to [minors] is necessary for their proper protection”). Although courts have not

Contributing statutes are found in virtually every jurisdiction in the United States.<sup>69</sup> Pursuant to these laws, adults, including parents and custodians, are criminally liable for contributing to the delinquency of a minor.<sup>70</sup> Punishing parents and other adults is presumed to deter them from adding to or encouraging juvenile delinquency, which is expected to decline in frequency.<sup>71</sup>

In recent years, criminal parental liability laws have experienced a revival of sorts, with legislatures expanding the scope of these statutes in an attempt to deter juvenile crime, which has increased in size and violence over the past decade.<sup>72</sup> This unsettling increase in juvenile crime and violence prompted the Select Committee on Children, Youth, and Families of the House of Representatives to hold a hearing in 1989 to determine the causes of the violence and to recommend a solution to the problem.<sup>73</sup> Many experts on juvenile delinquency testifying before the committee pointed to family breakdown as a major contributor to juvenile crime<sup>74</sup> and recom-

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directly discussed the rationale for punishing the parents of curfew violators, the reasoning for parental liability is implicit in opinions addressing the purpose of curfew laws. *See, e.g., id.*

<sup>69</sup> For a listing of many of these statutes, see Kathryn J. Parsley, Note, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 VAND. L. REV. 441, 447 n.41 (1991).

<sup>70</sup> *Id.* at 447. *See, e.g., State v. Ritchie*, No. 2000-CA-20, 2000 WL 1209276 (Ohio Ct. App., Aug. 25, 2000) (affirming conviction for contributing to delinquency of minor for providing marijuana to minor); *State v. McVay*, 612 N.W.2d 572 (S.D. 2000) (affirming conviction for contributing to delinquency of minor for furnishing alcohol to minor); *Bostic v. Commonwealth*, 525 S.E.2d 67 (Va. Ct. App. 2000) (affirming conviction for contributing to delinquency of minor for providing cigarettes and liquor to minor).

<sup>71</sup> *See State v. Gans*, 151 N.E.2d 709, 710 (Ohio 1958) (prosecuting parents for acting "in a way tending to cause [the] delinquency" of their daughter).

<sup>72</sup> *See* Press Release, Senator Dan Coats, Coats Says Federal Government Incomplete on Juvenile Crime (July 15, 1996), LEXIS, FDCH Congressional Press Releases. In 1994, the number of juvenile court cases increased by twenty-six percent. *Juvenile Crime Soaring, Justice Dept. Says*, S.F. CHRON., July 15, 1994, at A4, 1994 WL 4058669. Despite a two percent drop in the overall crime rate, the arrest rate for juveniles rose another eleven percent in 1994. Scott Glover, *National Crime Rate Drops, FBI Says Statistics Show Youth Offenses Still on the Rise*, SUN-SENTINEL (Ft. Lauderdale), Nov. 19, 1995, at 3A, 1995 WL 11385989.

<sup>73</sup> *Down These Mean Streets: Violence By and Against America's Children: Hearing Before the House Select Comm. on Children, Youth, and Families*, 101st Cong., 1st Sess. 1 (1989).

<sup>74</sup> "I think to a large degree the deterioration of the family structure has played a significant part in [contributing to juvenile crime]." *Id.* at 44 (statement of Reggie

mended that parents be held accountable for the violent activities of their children.<sup>75</sup>

This expansion in the scope of parental responsibility laws is evident in some contributing statutes, which, in addition to general terms making it a crime to contribute to the delinquency of a minor, also contain specific language directing parental behavior. For example, contributing statutes in New York and Kentucky require parents "to exercise reasonable diligence in the control" of their children.<sup>76</sup> In Oregon, parents may be charged with "failing to supervise a child."<sup>77</sup> An act that has received much national attention is California's "gang-parent" liability statute, which was enacted to control violent criminal street gang activity.<sup>78</sup> The statute "enlist[s] parents as active participants in the effort to eradicate [street] gangs"<sup>79</sup> by imposing on parents a duty to "exercise reasonable care, supervision, protection, and control of their minor child[ren]."<sup>80</sup> Various other jurisdictions have also enacted local parental responsibility ordinances that impose criminal liability on parents for a variety of juvenile behavior.<sup>81</sup>

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B. Walton, Associate Judge, Superior Court of the District of Columbia). "Violence on the streets cannot be separated from what is happening in the home." *Id.* at 11 (statement of Representative Thomas J. Bliley, Jr.).

<sup>75</sup> "[T]he first step in reducing juvenile delinquency has to be to make negligent parents, who are just kind of not exerting themselves in a proper way, exert some control over their charges." *Id.* at 119 (statement of Karl Zinsmeister, Adjunct Research Associate, American Enterprise Institute for Public Policy Research). "[I]f the parent directly participates in the child's conduct or in some way encourages the commission of an act committed by a child, liability (civil or criminal) would seem appropriate." *Id.* at 165 (statement of Reggie B. Walton, Associate Judge, Superior Court of the District of Columbia).

<sup>76</sup> KY. REV. STAT. ANN. § 530.060(1) (Michie 1999); N.Y. PENAL LAW § 260.10(2) (McKinney 2000).

<sup>77</sup> OR. REV. STAT. § 163.577(1) (1999). This duty is limited to supervising children under the age of fifteen. *Id.*

<sup>78</sup> See CAL. PENAL CODE § 272 (West 1999). Those convicted under the statute may be sentenced to up to one year in jail and a \$2500 fine. *Id.* For commentary on section 272, see Chapin, *supra* note 56, at 654-62. See also Sharon A. Ligorsky, Note, Williams v. Garcetti: *Constitutional Defects in California's "Gang-Parent" Liability Statute*, 28 LOY. L.A. L. REV. 447 (1994); Toni Weinstein, Note, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Liability Statutes*, 64 S. CAL. L. REV. 859 (1991).

<sup>79</sup> Williams v. Garcetti, 853 P.2d 507, 510 (Cal. 1993) (discussing the purpose underlying section 272).

<sup>80</sup> CAL. PENAL CODE § 272 (West 1999). A person is considered a minor in California until he or she reaches the age of eighteen. *Id.*

<sup>81</sup> For instance, in January 1995, the rural community of Silverton, Oregon passed an ordinance making it a crime for parents and legal guardians to fail to

As applied to situations similar to that in *Maness*,<sup>82</sup> the Illinois statute operated as a traditional parental responsibility law, blaming parents for their offspring's juvenile delinquency.<sup>83</sup> The delinquent acts triggering parental prosecution were the consensual sexual acts of their teens.<sup>84</sup> Accordingly, the law resembled traditional parental responsibility laws that commanded parents to control and supervise their children.<sup>85</sup> Including

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supervise a child under the age of seventeen. See Maya Blackmun, *The Parent Trap*, OREGONIAN (Portland), Aug. 13, 1995, at C1, 1995 WL 9181486; *Parental Responsibility Laws*, OREGONIAN (Portland), Aug. 13, 1995, at C4, 1995 WL 9181373. Oregon's parental liability law, enacted in September of 1995, which charges parents with the supervision of children under fifteen, was partly modeled after this local law. See OR. REV. STAT. § 163.577 (1999); Blackmun, *supra*.

<sup>82</sup> *People v. Maness*, 732 N.E.2d 545 (Ill. 2000).

<sup>83</sup> Authorities could not have charged Lynlee for engaging in a sexual relationship with Leonard because Leonard had reached the statutory age of consent. The criminal sexual abuse statute, however, does not require the accused to be older than the victim. See 720 ILL. COMP. STAT. ANN. 5/12-15(c) (West Supp. 2000) (requiring only that the accused be less than five years older than the victim). Accordingly, if Leonard had been a year younger, both teens presumably could have been charged with the criminal sexual abuse of the other. See *id.* Certainly, if Lynlee and Leonard had been the same age (and under seventeen), they both could have been charged under section 5/12-15(c), and thus *Maness* could have been charged pursuant to section 150/5.1. See *supra* note 45 (citing *In re T.W.*, 685 N.E.2d 631 (Ill. App. Ct. 1997)) (endorsing the concept of same-age prosecutions). Ironically, even if Leonard's parents had been aware of their son's sexual relationship with Lynlee, they could not have been charged under the statute. See 720 ILL. COMP. STAT. ANN. 5/12-15(c) (West Supp. 2000); *id.* at 150/5.1. If, however, Leonard had been but a year younger and his parents had been cognizant of the sexual nature of the relationship, Leonard's parents could have been charged for violating section 150/5.1.

<sup>84</sup> See 720 ILL. COMP. STAT. ANN. 5/12-15(c) (West Supp. 2000) (criminalizing sexual conduct including consensual adolescent sexual activity).

<sup>85</sup> Admittedly, the Illinois statute differed from more traditional forms of parental liability statutes because it appeared to impose liability on parents for failing to protect their children from certain harms. In general, protecting one's child from harm is a basic parental obligation. See, e.g., *State v. Williquette*, 385 N.W.2d 145 (Wis. 1986) (stretching the language of the state's child abuse statute to apply to parent who knowingly permitted another person to abuse child). That a child may be a willing participant in what the law deems a harm to that child does not alter or affect this parental obligation. For example, a parent must seek medical care for a seriously ill child even if the child does not wish to obtain medical care. The distinction between the Illinois statute and statutes that require parents to protect and provide for their children is that teenagers engaging in consensual

adolescent sexual conduct as a trigger for parental liability revealed the legislature's perception of the responsibility of parents to control the sexual conduct of their children. Sexual activity with a minor or among minors below the age of consent constituted delinquent behavior.<sup>86</sup> By marking the age of consent at seventeen,<sup>87</sup> Illinois lawmakers identified a wide range of adolescent sexual activity—as well as a large number of adolescent perpetrators of this activity—as criminal. The wide-ranging scope of potential juvenile liability would have perforce translated into an equally extensive span of potential parental liability had section 150/5.1 not been ruled unconstitutional.<sup>88</sup>

### B. *The Constitutional Quandaries*

Criminal parental responsibility laws deviate from the deference legislatures and courts have traditionally given to the family and encroach upon constitutionally recognized parental authority to make childrearing decisions.<sup>89</sup> The courts have consistently held that the primary responsibil-

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sexual activities are volitional actors who perceive the risks of their conduct in much the same way as adults would, unlike a child who refuses to see the doctor. Trying to prevent a teenager from having sex is less like trying to protect a child from a hazard and more like trying to prevent a teenager from stealing. Accordingly, in *Maness*, the Illinois statute functioned as a parental liability law, commanding parents to control and supervise their children.

<sup>86</sup> See 720 ILL. COMP. STAT. ANN. 5/12-15(c) (West Supp. 2000).

<sup>87</sup> *Id.* at 5/12-15(b)-(c) (defining a criminal sexual abuse victim as a person at least nine years of age but under seventeen years of age if the accused was under seventeen years of age, or a person at least thirteen years of age but under seventeen years of age if the accused is less than five years older than the victim).

<sup>88</sup> Relevant to this Article is parental liability for the sexual relationships of teens between the ages of thirteen and sixteen and their adolescent partners between the ages of thirteen and twenty. See *infra* note 224 (listing the age pairings punishable under section 5/12-15(c)).

<sup>89</sup> See *infra* Part V.A. These statutes have also been attacked on grounds of vagueness, overinclusiveness, violation of due process rights, violation of criminal principles regarding omissions and causation, and contravention of the Eighth Amendment guarantee against cruel and unusual punishment. For commentary on these issues, see S. Randall Humm, Comment, *Criminalizing Poor Parenting Skills as a Means to Contain Violence By and Against Children*, 139 U.P.A.L. REV. 1123, 1138-42, 1145-51 (1991) (discussing vagueness, overinclusiveness, criminal omissions and causation); Ligorsky, *supra* note 78, at 452-68 (discussing vagueness and overbreadth); Parsley, *supra* note 69, at 448-71 (discussing vagueness and due process); Weinstein, *supra* note 78, at 885-91, 894-900



ity for childcare belongs to parents.<sup>90</sup> With the exceptions of abuse or severe neglect,<sup>91</sup> courts have been unwilling to scrutinize particular parenting styles.<sup>92</sup> By contrast, parental liability laws seek to penalize parents when outside authorities deem their manner of supervision to be deficient.<sup>93</sup> These laws represent a shift in the delicate balance between state interest in protecting children and family privacy. Implicit in these laws is a legislative rejection of the judicial policy favoring parental discretion and an assumption that the state is better suited than parents to define appropriate responses to juvenile behavior. These laws also differ from most regulations affecting family relationships in that they assign *criminal* liability to parents who fail to meet governmental expectations.<sup>94</sup>

Criminal parental liability statutes are constitutionally troublesome because the efficacy of these statutes in preventing the delinquent acts of children is questionable.<sup>95</sup> The only recognized study of the effect of these laws was conducted by Judge Paul W. Alexander, a juvenile court judge in Toledo, Ohio.<sup>96</sup> Judge Alexander analyzed the effect of Toledo's contributing ordinance on juvenile delinquency and concluded that punishing

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(discussing Eighth Amendment and vagueness).

<sup>90</sup> See generally *infra* Part V.A.

<sup>91</sup> See, e.g., *infra* note 197

<sup>92</sup> See *infra* notes 172-76 and accompanying text.

<sup>93</sup> Professor Erwin Chemerinsky, of the University of Southern California Law School, considers parental responsibility laws to be "frightening" because they allow the state to "inquire into parenting through criminal liability." Scott Armstrong, *Antigang Law Targets Parents*, CHRISTIAN SCI. MONITOR, May 9, 1989, at 8.

<sup>94</sup> The reluctance of states to employ criminal statutes in the family context is a consequence of the deference shown to family autonomy. See *infra* Part V.A.2.

<sup>95</sup> See Chapin, *supra* note 56, at 632-38.

<sup>96</sup> See Judge Paul W. Alexander, *What's This About Punishing Parents?*, FED. PROBATION, Mar. 1948, at 23. Judge Alexander's research, however, did not incorporate accepted social science methodology. See Chapin, *supra* note 56, at 654 n.184 (explaining that Judge Alexander's study was based on an informal review of the decisions in his court).

Evidence indicates that civil parental liability statutes also fail to deter juvenile crime. The Department of Health, Education, and Welfare in 1963 examined the crime rates of sixteen states that had enacted civil parental liability statutes. Alice B. Freer, *Parental Liability for Torts of Children*, 53 KY. L.J. 254, 264-65 (1964) (citing the Department's study). The study revealed that the rate of juvenile delinquency in those states was slightly higher than the national average during 1957-1962. See *id.*

parents did not deter juvenile criminal behavior.<sup>97</sup> Even more disturbing, he discovered that application of the statute did not encourage other parents to improve their parenting skills.<sup>98</sup> Although empirical research suggests that juvenile delinquency may be related to poor parental supervision, the findings are neither conclusive nor consistent.<sup>99</sup> Other contributors to juvenile crime include drug abuse, school failure, antisocial values, educational level, living conditions, and peer groups.<sup>100</sup>

Despite its modern trappings, the Illinois statute shares the same defects inherent in the other parental responsibility laws. Juvenile delinquency—and, in particular, adolescent sexual activity—results from more than just bad parenting.<sup>101</sup> While inadequate or irresponsible parenting may be one cause of delinquency, other factors also contribute to juvenile sexual behavior, including the growth of dual-income families, thus increasing the number of latch-key children, and the influence of community and public institutions such as schools.<sup>102</sup> Peer pressure and the absence of other adults in the community to monitor children when they are away from their parents also impact a teen's decision to initiate sexual activity.<sup>103</sup>

Even if teenage sexual activity were a direct result of bad parenting, laws that punish parents are not guarantors of better parenting. Like the causes of adolescent sexual activity, the causes of inadequate parenting are multiple and complex—chronic stress, financial considerations, and

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<sup>97</sup> Alexander, *supra* note 96, at 28 (finding “no evidence that punishing parents has any effect whatsoever upon the curbing of juvenile delinquency”).

<sup>98</sup> *See id.*

<sup>99</sup> For information about current empirical studies on the role of parents in juvenile delinquency, see Chapin, *supra* note 56, at 669-71. Chapin discusses three studies that test the relationship between parenting and juvenile criminal activity *Id.*

<sup>100</sup> *See Youth and the Justice System: Can We Intervene Earlier?*· Hearing Before the House Select Comm. on Children, Youth, and Families, 98th Cong., 2d Sess. 92-93 (1984) (statement of James Austin, Director of Research, National Council on Crime and Delinquency) (reiterating expert findings linking juvenile delinquency to combinations of predictive factors and stating that association with delinquent peers is, perhaps, the greatest contributor); Thomas A. Nazario, *What Do We Know About Delinquency?*, UPDATE ON LAW-RELATED EDUC. at 8-9 (Spring 1988) (stating that experts cannot agree on a single cause of juvenile delinquency).

<sup>101</sup> *See generally supra* note 100 and accompanying text.

<sup>102</sup> *See infra* Part V.B.2.b.

<sup>103</sup> *See infra* Part V.B.2.b.

physical or mental disability among family members are just a few of the many factors underlying lax parenting.<sup>104</sup>

#### IV SECTION 150/5.1: A NEW DEVELOPMENT IN THE PARENTAL LIABILITY TREND

Despite being ruled unconstitutional on vagueness grounds, the Illinois criminal parental responsibility statute<sup>105</sup> signifies an alarming expansion of the parental liability trend. The statute departed from traditional parental responsibility laws with respect to the particular juvenile acts the state sought to deter. States typically employ criminal parental liability laws to discourage deviant juvenile acts, such as juvenile violence or curfew violations, which society generally views as instances of delinquent conduct.<sup>106</sup> The American public as a whole, however, does not perceive consensual sexual activity between teenage contemporaries as deviant conduct.<sup>107</sup> Accordingly, the purpose of the Illinois law diverged significantly from that of traditional parental liability laws: Illinois sought to use section 150/5.1 to shape societal norms and alter the sexual behavior of its youth.

This new development in the ongoing parental liability trend is especially distressing because of its aggressive intrusion into the sanctity of family life. While states have been willing to impose criminal liability on parents who fail to protect their children from egregious acts such as severe neglect or abuse,<sup>108</sup> never before have states attempted to inspect and evaluate ordinary parental supervision.<sup>109</sup> The use of parental liability laws to define the role of parents in helping young people prepare for mature sexual relationships exposes the relationship between parent and child—one of the most private and personal of human relationships—to scrutiny by the criminal justice system.<sup>110</sup>

The most disconcerting aspect of the Illinois law is its enormous potential to usher in a host of state laws or municipal ordinances granting broad authority to police and prosecutors to intervene in the affairs of the

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<sup>104</sup> See Harnett Wilson, *Parental Supervision: A Neglected Aspect of Delinquency*, 20 BRIT. J. CRIMINOLOGY 203, 233-34 (1980); *infra* Part V.B.2.b.1.

<sup>105</sup> 720 ILL. COMP. STAT. ANN. 150/5.1 (West Supp. 2000).

<sup>106</sup> See *supra* Part III.A.

<sup>107</sup> See *supra* note 3; *infra* notes 119-26, Part V.B.2.a.

<sup>108</sup> See *infra* note 197.

<sup>109</sup> See *infra* Part V.A.2.

<sup>110</sup> See *infra* Part V.B.1.

family.<sup>111</sup> The American public is very interested in the voluminous amount of research tracking adolescent sexual activity;<sup>112</sup> the statistics generated by these studies have refocused the media spotlight on the role of parents in juvenile sexual behavior.<sup>113</sup> Public concern and confusion about the apparent epidemic of teenage sex could therefore motivate other states to draft their own versions of the Illinois parental responsibility law, which would exact a heavy toll on parental rights nationally.<sup>114</sup>

Illinois's attempt to use the criminal justice system to reduce adolescent sexual behavior reveals a larger societal problem: our inability to cope with the phenomenon of teenage sexuality. In a society that is constantly pushing the envelope, sexual experimentation begins at a younger age.<sup>115</sup> The emergent portrait of youthful promiscuity and sexually savvy youngsters has left many parents feeling baffled and alarmed.<sup>116</sup> Most parents who are aware of this teen "sexual revolution" are torn between two seemingly contradictory choices—preaching abstinence or proposing prophylactics:

In one breath, parents say they perceive it as a public-health issue and want more information about sexual behavior and its consequences, easier access to contraceptives and more material in the media about responsible human and sexual interaction. And in the next breath, they claim it's a moral issue to be resolved through preaching abstinence and the virtues of virginity and getting the trash off TV.<sup>117</sup>

Part of the problem for many adults is that they are unsure about how they feel about teen sex.<sup>118</sup> Sexual conduct among teen contemporaries is a sensitive issue with adults.<sup>119</sup> A study by the Alan Guttmacher Institute

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<sup>111</sup> See *infra* Part V.B.1.

<sup>112</sup> See, e.g., *supra* notes 1-7 and accompanying text.

<sup>113</sup> See, e.g., *supra* notes 1-7 and accompanying text.

<sup>114</sup> See *infra* Part V.B.1.

<sup>115</sup> See *supra* note 6 and accompanying text.

<sup>116</sup> See Stodghill, *supra* note 4.

<sup>117</sup> *Id.* at 58.

<sup>118</sup> See *id.*

<sup>119</sup> In many ways, the issue of teen sex is analogous to the issue of consumption of alcohol by minor children. Although all states have laws restricting the possession and consumption of alcohol by minors, many states allow minors to possess or consume alcohol with their parents' permission. See, e.g., ALASKA STAT. § 04.16.051 (Michie 1998) (providing that parents can provide alcohol to their children); CAL. VEH. CODE § 23224 (West Supp. 2000) (providing that a minor can

reveals that one-third of adults believe that adolescent sexual activity is wrong.<sup>120</sup> A majority of adults, however, are not opposed to it and think that, under certain conditions, adolescent sexual conduct is normal, healthy behavior.<sup>121</sup>

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possess alcohol with a parent in a car); COLO. REV. STAT. ANN. § 18-13-122 (West 1999) (providing that a minor can consume alcohol on private property with the consent of the owner and the consent of a parent who is present); CONN. GEN. STAT. ANN. § 30-89 (West 1990) (providing that a minor can possess alcohol in a parent's presence); GA. CODE ANN. § 3-3-23 (Supp. 2000) (providing that a minor can consume alcohol in a parent's home if a parent is present); HAW. REV. STAT. § 712-1250.5 (1993) (providing that a defendant may raise an affirmative defense to providing liquor to a minor if the minor's parent gave express consent and the provider had a reasonable belief that alcohol would be consumed in the parent's home); 235 ILL. COMP. STAT. ANN. 5/6-20 (West Supp. 2000) (providing that a minor may consume alcohol under the direct supervision and with the approval of a parent in the privacy of the parental home); KAN. STAT. ANN. § 41-727 (Supp. 1999) (providing that a minor can consume cereal malt beverage when permitted and supervised by parent); LA. REV. STAT. ANN. § 14:93.13 (West Supp. 2000) (providing that a parent can buy alcohol for a minor); MASS. ANN. LAWS ch. 138, § 34 (Law. Co-op. Supp. 2000) (providing that a parent can purchase alcohol for a minor child); MONT. CODE ANN. § 16-6-305 (1999) (providing that a parent can provide alcohol in non-intoxicating quantity to a minor child); NEV. REV. STAT. 202.020 (2000) (providing that a minor can possess alcohol in presence of a parent); N.H. REV. STAT. ANN. § 265:81-a (1993) (providing that a minor can have alcohol in a car if parents are present); N.Y. ALCO. BEV. CONT. LAW § 65-C (McKinney 2000) (providing that a minor can possess alcohol with intent to consume if provided by a parent); N.D. CENT. CODE § 5-01-08 (Supp. 1999) (providing that a minor may drink alcohol in a restaurant if parents are present); OHIO REV. CODE ANN. § 4301.631 (Anderson Supp. 1999) (providing that a minor may consume low-alcohol beverages if accompanied by parent); OR. REV. STAT. § 471.430 (1999) (providing that a minor may possess alcohol in a private residence with parent's presence and consent); R.I. GEN. LAWS § 3-8-9 (1998) (providing that a minor can have alcohol in a car if parents are present); S.D. CODIFIED LAWS § 35-9-1.1 (Michie 1999) (providing that a minor between the ages of eighteen and twenty may purchase alcohol in the presence of a parent); TEX. ALCO. BEV. CODE ANN. § 106.05 (Vernon Supp. 2000) (providing that a minor may possess alcohol in the presence of a parent); WASH. REV. CODE § 66.44.270 (1998) (a parent may give alcohol to a minor child if it is consumed in the parent's presence).

<sup>120</sup> See Stodghill, *supra* note 4, at 58.

<sup>121</sup> See *id.* This uncertainty extends to situations in which an adolescent and his or her sexual partner are not contemporaries. The law condemning consensual intercourse between adults and minors illustrates our confusion. The legal

Society's uncertainty with respect to the issue of teenage sexual activity is also apparent in court decisions. The words of a California Appeals Court are illustrative of this ambivalence. The court was reviewing a civil case involving a sixteen-year-old girl who had been impregnated by her boyfriend, also a minor.<sup>122</sup> The girl's parents brought the suit against the parents of the girl's boyfriend, charging them with the "willful misconduct" of their son.<sup>123</sup> Denying the claim that the boy's parents were responsible for his conduct,<sup>124</sup> the court stated that it was "not inclined to dwell on outdated legal fictions concerning the ability of underage females to consent to sex."<sup>125</sup> The court further stated: "The fact of the matter is that in the latter part of the Twentieth Century, a substantial percentage of minors of both sexes are engaging in sexual activity . . . . To cling to vestiges of a bygone era is to ignore the contemporary realities of nature."<sup>126</sup>

The varying speeds at which adolescents move across the continuum between childhood and adulthood compound the uncertainty about the propriety of teenage sexual activity. The differing ages of consent from state to state are evidence of this lack of consensus over the point at which a sexual relationship becomes harmful to one or both teens and the relative arbitrariness of any number. For example, in Hawaii the age of consent is fourteen.<sup>127</sup> Other states, however, have set it as high as eighteen years of age.<sup>128</sup>

Moreover, the infusion of subjective standards of morality and sexuality into the criminal law could provide lawmakers with a tool to impose sweeping changes to societal norms and to reform the sexual behavior of all Americans, not just teens. For example, a state or local government might seek to adopt the role of bedfellow to its citizenry by

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definition of rape has covered this type of sexual abuse since the sixteenth century. *See* 18 Eliz. c. 7, § 4 (1576). Today, most states continue to classify it as a form of rape. "Yet in common parlance, we hedge, calling the offense 'statutory rape.' This everyday expression is a term of ordinary language, not of law. The term 'statutory rape' is not found in the penal codes themselves, and technically it has no legal meaning." STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 101-02 (1998) (footnote omitted).

<sup>122</sup> *Cynthia M. v. Rodney E.*, 279 Cal. Rptr. 94, 95 (Cal. Ct. App. 1991).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 98.

<sup>125</sup> *Id.* at 98 n.14.

<sup>126</sup> *Id.*

<sup>127</sup> HAW. REV. STAT. § 707-730(1)(b) (1993).

<sup>128</sup> *See, e.g.,* CAL. PENAL CODE § 261.5(a) (West Supp. 2000).

enacting laws consistent with the federal welfare reform law that funds abstinence-only education efforts for American schoolchildren. In addition to discouraging teen sex, the federal statute contains elements broad enough to encompass the sexual activities of much of the American public. For instance, the law also disapproves of sexual activity for all unwed persons and firmly establishes that "the expected standard of human sexual activity" is found in the "context of marriage."<sup>129</sup> Furthermore, the law requires that state abstinence programs teach "the importance of attaining self-sufficiency before engaging in sexual activity."<sup>130</sup> This implies that people should refrain from entering into sexual relationships if they do not have enough money to support themselves and any offspring. Another concern is the type of conduct that the welfare reform statute targets. The law supports abstinence from "sexual activity," but does not provide a definition for this term.<sup>131</sup> Taken to an extreme, the law could be used to discourage a variety of sexual behavior, including kissing.<sup>132</sup>

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<sup>129</sup> 42 U.S.C.A. § 710(b)(2)(D) (West Supp. 2000) ("[A] mutually faithful monogamous relationship in [the] context of marriage is the expected standard of human sexual activity."); *see id.* § 710(b)(2)(E) ("[S]exual activity outside of the context of marriage is likely to have harmful psychological and physical effects[.]").

<sup>130</sup> *Id.* § 710(b)(2)(H).

<sup>131</sup> *See id.* § 710(b)(2).

<sup>132</sup> An existing example of state regulation of adult sexual activity is Louisiana's sodomy statute. *See* LA. REV. STAT. ANN. § 14:89 (West 1986). The law criminalizes certain private homosexual and heterosexual acts, including sexual conduct among married couples. Despite several challenges to the law, the Louisiana Supreme Court continues to hold the statute constitutional. *See* *State v. Baxley*, 633 So. 2d 142 (La. 1994); *State v. Neal*, 500 So. 2d 374 (La. 1987); *State v. Woljar*, 477 So. 2d 80 (La. 1985); *State v. Lindsey*, 310 So. 2d 89 (La. 1975). The statute defines sodomy, or crimes against nature, as:

(1) The unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S. [§] 14:41 [rape defined], [§] 14:42 [aggravated rape], [§] 14:42:1 [forcible rape] or [§] 14:43 [simple rape]. Emission is not necessary; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.

(2) The solicitation by a human being of another with the intent to engage in any unnatural carnal copulation for compensation.

LA. REV. STAT. ANN. § 14:89(A) (West 1986).

Public concern and anger about what might be considered the moral deterioration of modern society might lead to more laws and ordinances establishing standards for human sexual activity.<sup>133</sup> A one-size-fits-all conception of morality and sexuality could enable state governments to climb into bed with the populace. Accordingly, lawmakers must carefully weigh the Illinois prototype against constitutional assurances of privacy to prevent further erosion of the bar to state intrusion into the family home.

## V VIOLATION OF THE RIGHT TO PRIVACY IN FAMILY MATTERS

Intertwining abstinence-only initiatives with parental liability laws provides a new twist on an old trend; the combination presents a new and serious threat to privacy rights. Although in *Maness*<sup>134</sup> the Illinois Supreme Court overturned section 150/5.1<sup>135</sup> on the ground of vagueness, the privacy ramifications of the statute are, without a doubt, far more troubling.<sup>136</sup> Considering the possibility that other states will utilize the Illinois statute as a blueprint for similar parental liability legislation, section 150/5.1 retains its potential to seriously undermine parental privacy rights. As explained in the following sections, legislative attempts to require parents to prevent their teens from having sex may chronically run afoul of the fundamental right of parents to raise their children.

### A. Substantive Due Process Methodology

State and federal governments cannot deprive citizens of life, liberty, or property without due process of law.<sup>137</sup> The Due Process

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<sup>133</sup> The poem "The Second Coming" by William Butler Yeats is often quoted to depict the "immoral delinquency" of modern society. In particular, the third line of the poem illustrates this concern: "Things fall apart; the centre cannot hold." WILLIAM BUTLER YEATS, *The Second Coming*, THE COLLECTED POEMS OF W.B. YEATS 215 (Macmillan 1935).

<sup>134</sup> *People v. Maness*, 732 N.E.2d 545 (Ill. 2000).

<sup>135</sup> 720 ILL. COMP. STAT. ANN. 150/5.1 (West Supp. 2000).

<sup>136</sup> Much can be done to tighten the imprecision of section 150/5.1; the legislature can make clear what the "reasonable steps" are that a parent must take to comply with the statute. For example, the Illinois General Assembly could direct parents to notify the police or a state agency of conduct prohibited by the enumerated acts in the statute. Legislators can also provide explicit guidelines to be used by authorities in applying the law. Further, the legislative record can be drafted so as to unmistakably convey the purpose of the law.

<sup>137</sup> U.S. CONST. amend. V; *id.* amend. XIV, § 1. See *Roe v. Wade*, 410 U.S. 113, 152-56 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965); *Meyer*



Clause<sup>138</sup> affords citizens both procedural<sup>139</sup> and substantive<sup>140</sup> protections from governmental interference. Under substantive due process doctrine, a statute is unconstitutional if it impermissibly restricts a person's life, liberty, or property interest.<sup>141</sup> In most cases, a court will uphold a statute challenged under the Due Process Clause if it has a rational basis<sup>142</sup> and if it is reasonably related to a legitimate legislative objective.<sup>143</sup> If the statute impinges on a life, liberty, or property interest that is a fundamental right, however, the statute is subject to strict scrutiny review.<sup>144</sup> To survive such review, the governmental interest must be compelling and the statute must

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v. Nebraska, 262 U.S. 390, 399-403 (1923). Our modern notions of substantive due process are founded upon Justice Stephen J. Field's dissent in the *Slaughter-House Cases*, 83 U.S. 36, 83-111 (1873). Justice Field looked beyond the spare language of the Due Process Clause of the Fourteenth Amendment and saw inalienable individual liberties:

Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States.

*Id.* at 97, 109-10 (Field, J., dissenting). Field's concern was the protection of free-labor ideology, but substantive due process took on a life of its own. *See id.* at 83 (Field, J., dissenting). Beginning in the 1960s, a new class of substantive due process suits made its way onto the Supreme Court's docket. These suits raised "social" substantive due process issues pertaining to the freedom of personal choice and privacy. *See, e.g., Roe*, 410 U.S. at 154-56 (addressing the legality of abortion); *Griswold*, 381 U.S. at 485-86 (addressing the right to contraception).

<sup>138</sup> U.S. CONST. amend. XIV, § 1.

<sup>139</sup> *See Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) (granting unwed, biological fathers the right to a hearing before state agencies could remove their children on charges of parental unfitness).

<sup>140</sup> *See Wisconsin v. Yoder*, 406 U.S. 205, 234-36 (1972) (reaffirming the liberty interest of parents to raise and educate their children without undue government interference); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (upholding the right of a parent to direct his or her child's education).

<sup>141</sup> *See, e.g., Kelley v. Johnson*, 425 U.S. 238, 244 (1976) (addressing a due process challenge to a county regulation).

<sup>142</sup> *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

<sup>143</sup> *See id.* at 488.

<sup>144</sup> *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.1.2, at 640 (1997).

be narrowly tailored to achieve this compelling interest.<sup>145</sup> In a due process challenge involving a fundamental right, the government must prove that less burdensome alternatives to its chosen method would not achieve its objective.<sup>146</sup> Fundamental rights are those rights that are “implicit in the concept of ordered liberty,”<sup>147</sup> or “deeply rooted in this Nation’s history and tradition.”<sup>148</sup>

### 1. *The Expansive Conception of Family Privacy*

The United States Supreme Court “has long recognized that freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”<sup>149</sup> In

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<sup>145</sup> See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

<sup>146</sup> See *id.*, CHEMERINSKY, *supra* note 144, § 10.1.2, at 643.

<sup>147</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>148</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion). The definition of “fundamental right” has been a subject of much dispute. The Court consistently has looked beyond the text of the Constitution to determine which fundamental rights the Due Process Clause protects. See, e.g., *Roe*, 410 U.S. at 155, 165-66 (discussing childbearing); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (discussing marriage). Recently, the Court has stated that the Due Process Clause protects only those interests traditionally protected by society. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (Scalia, J., plurality opinion) (“In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ . . . , but also that it be an interest traditionally protected by our society.”). The tradition rationale did not always prevail in older cases. See, e.g., *Roe*, 410 U.S. at 164-66 (recognizing the right to have an abortion despite traditional restrictions on obtaining abortions). But see *Bowers v. Hardwick*, 478 U.S. 186, 192-95 (1986) (finding that society traditionally has not protected the right to engage in homosexual sodomy); *Moore*, 431 U.S. at 503 (Powell, J., plurality opinion) (“[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (grounding protection of contraception privacy in marriage on traditional respect for marital privacy and the status of marriage in American society). The parental right to raising children is entrenched in tradition. See *infra* note 158.

<sup>149</sup> *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); see *Michael H.*, 491 U.S. at 123 (Scalia, J., plurality opinion) (noting the “historic respect. . . [and] sanctity . . . traditionally accorded to [family] relationships”). For most of its history, the Supreme Court has steered clear of the American family, leaving the primary responsibility for family laws with the states. Perhaps an

*Meyer v. Nebraska*, the Court recognized the right of citizens to conduct their own lives when it invalidated a Nebraska law that prohibited the teaching of modern languages other than English to children who had not passed the eighth grade.<sup>150</sup> Maintaining that the statute violated the liberty protected by the Due Process Clause of the Fourteenth Amendment, the Court described that liberty as an individual's right "to marry, establish a home and bring up children, and generally to enjoy privileges essential to the orderly pursuit of happiness by free men."<sup>151</sup> In *Pierce v. Society of Sisters*, the Court struck down an Oregon initiative requiring nearly every parent to send a child between the ages of eight and sixteen to public schools.<sup>152</sup> Citing *Meyer*, the Court held that the initiative unreasonably interfered with the liberty of parents to direct the education and upbringing of their children.<sup>153</sup>

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explanation for the Court's previous cautionary stance toward tackling family issues is found in the following statement by Justice Potter Stewart: "Issues involving the family are among the most difficult that courts have to face, involving as they often do serious problems of policy disguised as questions of constitutional law." *Parham v. J.R.*, 442 U.S. 584, 624-25 (1979) (Stewart, J., concurring) (judging the legality of a state law empowering parents to commit their children to mental institutions).

Over the course of the twentieth century, however, the Court shed its earlier reluctance and began to assume a greater supervisory role. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing the private realm of family life protected from state intervention absent substantial justification); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (upholding the parental right to direct a child's education); *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923) (upholding the parental right to direct a child's education). Significant transformations in American family life likely convinced the Court to become more active in constructing family law rules. For example, the Court likely considered the dramatic increase in divorce, the growing numbers of women entering the workforce, the increased availability of contraception and abortion, the greater involvement of government in family life via programs like Social Security and Aid to Families with Dependent Children, and alternative family arrangements that challenged the existing definition of families. *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 275 (Kermit L. Hall et al. eds., 1992).

<sup>150</sup> *See Meyer*, 262 U.S. at 397-403. Meyer taught in a parochial school and used a German bible history as a text for reading. *Id.* at 397

<sup>151</sup> *Id.* at 399.

<sup>152</sup> *Pierce*, 268 U.S. at 530.

<sup>153</sup> *Id.* at 534-35 ("[W]e think it entirely plain that the [statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing of children under their control."); *see Meyer*, 262 U.S. at 401 (holding invalid a state

The emphasis in *Meyer* and *Pierce* on fundamental rights not expressly articulated in the Constitution and on family autonomy gave birth to a line of privacy decisions<sup>154</sup> protecting various liberty interests pertaining to matters of family life, including childrearing,<sup>155</sup> abortion rights,<sup>156</sup> and access to contraceptives.<sup>157</sup> These rulings on family matters have greatly expanded the legal conception of family privacy

## 2. *The Fundamental Nature of Parental Rights*

The parental right to make childrearing decisions is included within the concept of family privacy and is an essential and basic civil right.<sup>158</sup> The Court has “consistently recognized that parents’ claim to authority in their own household to direct the rearing of their children is basic in the

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law that prohibited the instruction of foreign languages to children as “interfer[ing] with . . . the power of parents to control the education of their own”). The Court did not, however, determine that all compulsory education laws violated the liberty right of parents to direct the education of their children. *See Pierce*, 268 U.S. at 534-35. Instead, the “*Pierce* compromise” recognizes that the state may compel school attendance, but that parents have the right to choose to send their children to private or public schools. *See id.*

<sup>154</sup> The right of privacy is “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>155</sup> *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (finding valid the state interest in enacting laws to aid parents in discharging their responsibility for the well-being of children).

<sup>156</sup> *See Roe v. Wade*, 410 U.S. 113 (1973).

<sup>157</sup> *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>158</sup> *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Court remarked:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. . . The right[ ] to raise one’s child[ ] [has] been deemed “essential” [and one of the] “basic civil rights of man” . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment.

*Id.* at 651 (citations omitted). The right of parents to make childrearing decisions is rooted in tradition. *See Parham v. J.R.* 442 U.S. 584, 603 (1979) (“The statist notion that governmental power should supersede parental authority is repugnant to American tradition.”); *Meyer*, 262 U.S. at 401-02 (finding that Plato’s ideas of normalizing the upbringing of children touch the “relation between individual and state” in a manner “wholly different from those upon which our institutions rest”).

structure of our society";<sup>159</sup> families occupy a private realm of society that the state cannot enter without substantial justification.<sup>160</sup> A parent's fundamental liberty interest in raising his or her child deserves deference unless the state can show a compelling countervailing interest.<sup>161</sup> One commentator has argued that:

[T]he right to marry and the right to decide whether or not to have children would have much less value if parents had no right to direct the rearing of their children. The parents' interest stems from the importance that raising a child may have in a full and rewarding life. Imparting values and beliefs to one's children, responding to their constantly changing demands, ensuring that they will realize their full potential as they grow into adulthood—these are some of the opportunities that make the right to control a child's upbringing so significant.<sup>162</sup>

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<sup>159</sup> *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); see *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (stating that the Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected") (citations omitted); see also W. NORTON GRUBB & MARVIN LAZERSON, *BROKEN PROMISES* 45-47 (Univ. of Chicago Press 1988) (1982) (discussing the decline of public responsibility and the ensuing enlargement of private responsibility for children over the course of the eighteenth and nineteenth centuries); LYNN D. WARDLE ET AL., *CONTEMPORARY FAMILY LAW* §§ 1.08-1.09 (1988) (discussing the courts' recognition of family autonomy and the right of parents to raise their children without state interference).

<sup>160</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing "the private realm of family life which the state cannot enter"). Although the Court in *Prince* found in favor of the state and upheld the conviction of a guardian who had allowed her wards to sell religious leaflets in violation of child labor laws, it made clear that there exists a realm of family life into which the state cannot venture absent substantial justification. *Id.* at 166-71. The Court affirmed the conviction based on the state's independent interest in the welfare of children within its borders. *Id.* at 168-69. Though upholding the statute, the Court cautioned that its holding was limited to the facts of the case. *Id.* at 171.

<sup>161</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (reaffirming that the Court's "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment") (citations omitted); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (remarking that previous cases have "made plain beyond the need for multiple citation" that the parental right deserves deference "absent a powerful countervailing interest") (citation omitted).

<sup>162</sup> *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1353 (1980) (footnotes omitted).

Protecting parental rights is of paramount importance because of the profound role that parents play in their children's development. The parental role is essential to the creation of socially responsible citizens and largely beyond the competence of a large impersonal institution.<sup>163</sup> Accordingly, our national order mandates that the right of parents to direct the care and training of their children be granted the highest respect. As one court has noted:

The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious than property rights.' 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'<sup>164</sup>

### *B. Examining Section 150/5.1*

Illinois presently stands alone in its attempt to prosecute parents for failing to take steps to prevent consensual teen sex. Any other criminal parental liability law that required parents to discourage teenage sexual activity, however, would suffer from similar privacy problems.

#### *1. Infringement on Parental Rights*

Section 150/5.1<sup>165</sup> unreasonably impinged on the fundamental right of parents to privacy in the affairs of family life. The wide latitude afforded to parents in deciding how to raise their children stands in sharp contrast to the section's constraining edict with respect to the enumerated act of

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The Court has also upheld parents' authority over their children in the context of challenges to that authority by the child. *See, e.g., Parham v. J.R.*, 442 U.S. 584, 602-04 (1979) (upholding a state law giving parents the right to commit their children to mental institutions). "Several lower federal courts explicitly have recognized a fundamental right to family integrity based on these Supreme Court cases." Parsley, *supra* note 69, at 463.

<sup>163</sup> Parental control usually serves the interests of the child as well because a parent can fulfill a child's needs in ways that an institution cannot. *See Francis Barry McCarthy, The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 1017-20 (1988).

<sup>164</sup> *People v. R.G.*, 546 N.E.2d 533, 540-41 (Ill. 1989) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) (alteration in original) (citations omitted).

<sup>165</sup> 720 ILL. COMP. STAT. ANN. 150/5.1 (West Supp. 2000).

section 5/12-15(c).<sup>166</sup> Considering the deference that lawmakers and courts typically have shown to parents in matters related to the family,<sup>167</sup> the creation of a new duty for parents to follow in raising their children and the subsequent imposition of criminal liability for any ensuing breach is remarkable. By directing a parent to take "reasonable steps" to halt a teenage sexual relationship prohibited by section 5/12-15(c), the state substituted its judgment for that of the parent and effectively usurped the parental right and obligation to nurture and direct the destiny of the child.<sup>168</sup>

Moreover, children possess the right to be prepared by parents for the responsibilities of adult life.<sup>169</sup> The family is "vital in the crucial areas of individual motivation, personality structure, and creativeness."<sup>170</sup> To the extent that application or the threat of application of a parental liability statute such as section 150/5.1 discourages a child from confiding in the parent regarding information of a sexual nature or from seeking advice from the parent about matters relating to ongoing or possible future sexual activity, the statute interferes with the right of the child to be raised by his or her parent.<sup>171</sup>

By entrusting childcare to parents, the state fosters social pluralism and diversity—important ideals in a society that is committed to sustaining individual liberties.<sup>172</sup> The parental right to childrearing advances not only

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<sup>166</sup> *Id.* at 5/12-15(c).

<sup>167</sup> See *supra* Part V.A.

<sup>168</sup> "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." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

<sup>169</sup> For a discussion of a child's interest in maintaining certain relationships see Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships With Parent-Like Individuals*, 53 MD. L. REV. 358, 385-89 (1994).

<sup>170</sup> Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 474 (1983).

<sup>171</sup> *But cf.* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (Scalia, J., plurality opinion) (noting that the Court has "never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship").

<sup>172</sup> *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (Powell, J., plurality opinion) ("Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice."). Some

the interests of a specific parent but also the interest “of all citizens in preserving a society in which the state cannot dictate that children be reared in a particular way.”<sup>173</sup> Allowing the state to dictate childrearing bears a discomfiting similarity to the ancient Greek version of an ideal society that sought to indoctrinate and homogenize children.<sup>174</sup> Warning against any such attempt by the state to commandeer parental childrearing authority, the Court, in *Pierce v. Society of Sisters*,<sup>175</sup> declared, “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children.”<sup>176</sup>

In an apparent departure from constitutional assurances of individual liberties, section 150/5.1’s command that parents take “reasonable steps” to prevent teen sex presumes that there exists a universal model of adequate parenting that is generally applicable. This broad language ignores a host of factors, such as race, ethnicity, social class, economic status, or other personal or socioeconomic factors that underlie and motivate childrearing decisions. In *People v. Maness*,<sup>177</sup> the defendant exercised her discretion as a parent and chose to protect her daughter by taking three steps.<sup>178</sup> First, she attempted to dissuade her daughter and her daughter’s boyfriend from engaging in further sexual activity. Second, because she lacked confidence in her ability to halt her daughter’s sexual relationship, Maness helped her daughter obtain birth control pills. Third, she allowed the boyfriend to stay with her daughter overnight at the house. The mother recognized her daughter’s resolve to maintain the sexual relationship and feared that an

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commentators rationalize the protection given parental decisions through generalized analogies to the Bill of Rights. By guaranteeing these rights, the Constitution makes a “statement about the form of government” and society in the United States. The Constitution protects certain individual rights in part to guarantee the freedom of citizens to make certain personal decisions unfettered by conventional norms. Under this theory, parental autonomy in childrearing decisions flows directly from the individual right to decide to have children. *See* McCarthy, *supra* note 163, at 1026-28.

<sup>173</sup> *Developments in the Law—The Constitution and the Family*, *supra* note 162, at 1354.

<sup>174</sup> In *Meyer v. Nebraska*, the Court rejected Plato’s suggestions that children be raised communally by the state and the Spartan group-education system that was designed to develop ideal citizens. *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923).

<sup>175</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

<sup>176</sup> *Id.* at 535.

<sup>177</sup> *People v. Maness*, 732 N.E.2d 545 (Ill. 2000).

<sup>178</sup> *See id.* at 548.



order to cease the relationship would only spur the daughter to take her sexual activity underground.<sup>179</sup> Accordingly, she resigned herself to accepting that her parental responsibilities had moved out of the area of control and into the area of concern for the safety of her child. Maness felt that Lynlee was safer having sex with her boyfriend at home, where Maness had "some control" over the situation.<sup>180</sup>

Although another parent might have taken a different course of action, Maness had the right to raise her children according to her own judgment, given the circumstances as she believed them to be.<sup>181</sup> As she contended:

Rarely do two parents agree on the best way to raise children. Rarely do two parents agree on how best to deal with a sexually active daughter.

Although it can be argued that it is better to order a daughter to stop having sex than it is to allow her to have sex in a safe environment, how best to safely raise that daughter is more a question of art than of science.<sup>182</sup>

The approaches taken to educate, discipline, and guide a child are infinite in variation.<sup>183</sup> Parents are assumed to be in a position to know what is best for their children<sup>184</sup> in a world in which the effects of parental discipline and guidance are limited by sometimes overwhelming forces in the community at-large.<sup>185</sup> Parental authority is a basic presupposition of a free society.<sup>186</sup> As the Supreme Court has noted:

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<sup>179</sup> See *id.* Mrs. Maness also was averse to terminating all contact between the two because she did not wish her daughter to become involved with some of the "unsavory males" with whom her daughter had previously spent time. See *id.*

<sup>180</sup> See *id.*

<sup>181</sup> See generally *supra* Part V.A.2. (discussing the constitutional deference accorded to parental discretion to make childrearing decisions).

<sup>182</sup> Brief for Appellee at 9, *People v. Maness*, 732 N.E.2d 545 (Ill. 2000) (No. 86463).

<sup>183</sup> Not all parents would choose the same route as Kathy Maness. For example, in *People v. Hall*, the parents of a teenage daughter involved in a sexual relationship forbade her from seeing her twenty-two-year-old boyfriend. *People v. Hall*, 204 N.E.2d 40, 41 (Ill. App. Ct. 1965). Paying no heed to her parents' admonition, the daughter crept from the house at night and rendezvoused with her boyfriend. *Id.* at 41.

<sup>184</sup> See *Parham v. J.R.* 442 U.S. 584, 602-03 (1979) (articulating a presumption that parents act in the best interests of their children).

<sup>185</sup> See *infra* Part V.B.2.b.1.

<sup>186</sup> *Bellotti v. Baird*, 443 U.S. 622, 638 (1979).

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.<sup>187</sup>

The challenged provision, at least as the state sought to apply it in *Maness*, authorized law enforcement authorities to second guess parental decisions concerning sexual education and sexual conduct if a parent made a "wrong" choice—as perceived by an unforgiving police officer or prosecutor after the fact. Hence, the Illinois General Assembly's passage of section 150/5.1 was an impermissible attempt to standardize parental conduct.<sup>188</sup> The law was inconsistent with the deference that the Supreme Court has shown toward parents in matters involving childrearing.<sup>189</sup>

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<sup>187</sup> *Parham*, 442 U.S. at 602. Although the Court has also noted that a parent may, at times, act against the interests of his or her children and that this "creates a basis for caution," the existence of this possibility "is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority is repugnant to American tradition." *Id.* at 602-03 (citation omitted).

<sup>188</sup> See *supra* notes 172-76 and accompanying text.

<sup>189</sup> A joint commission of the Institute of Judicial Administration and the American Bar Association has argued that state intervention in family matters should be limited because of our society's commitment to individual freedom and diversity. STANDARDS RELATING TO ABUSE AND NEGLECT, Standard No. 1.1 cmt. at 49-50 (Inst. of Judicial Admin.-American Bar Ass'n Joint Comm. on Juvenile Justice Standards 1981).

The statute was also inconsistent with the importance that the Supreme Court has assigned to the right of intimate family association. The Supreme Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue governmental intrusion because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. Thus, freedom of association receives protection as a fundamental element of personal liberty. Statutes impinging on the fundamental liberty of intimate association are subject to strict scrutiny review. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 504-06 (1977); see also *CHEMERINSKY*, *supra* note 144, § 10.2.3, at 652. The *Moore* Court held that a family's right of intimate association was infringed by a housing ordinance that defined "family" narrowly, so as to preclude a grandmother from living in the same home as her son and her two grandsons. *Moore*, 431 U.S. at 504-06 (Powell, J., plurality opinion).

## 2. *Applying Strict Scrutiny*

The fundamental nature of the parental right to childrearing should trigger strict scrutiny in review of section 150/5.1.<sup>190</sup> The United States Constitution does not preclude Illinois from limiting the liberty interest of parents in raising children. Under strict scrutiny review, however, a statute "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."<sup>191</sup> Notwithstanding the state's compelling interest in preventing sex-related crimes against children,<sup>192</sup> the Illinois statute was not sufficiently tailored to effectuate that interest.<sup>193</sup> Section 150/5.1—this Article argues—was therefore invalid not only because it was impermissibly vague, but also because it violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

### a. *Illinois's Compelling Interest*

The purpose of section 150/5.1 is not apparent from the text of the statute.<sup>194</sup> State power to intervene in the family setting derives from two sources—the police power and the *parens patriae* power. The police power provides the state with the power to "prescribe regulations to promote the health, peace, morals, education, and good order of the people,"<sup>195</sup> as well

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<sup>190</sup> See *supra* Part V.A.2.

<sup>191</sup> *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). In *Meyer v. Nebraska*, the Court apparently applied a mere rational basis test. *Meyer v. Nebraska*, 262 U.S. 390, 401-03 (1923). Even applying the state-accommodating rational basis test, the Court nonetheless concluded that the statute was "arbitrary and without reasonable relation to any end within the competency of the state." *Id.* at 403. Subsequent decisions, however, have undoubtedly confirmed the fundamental nature of the childrearing right. See *supra* Part V.A.2.

<sup>192</sup> See *infra* Part V.B.2.a.

<sup>193</sup> See *infra* Part V.B.2.b.

<sup>194</sup> For the full text of the statute, see *supra* notes 41-43 and accompanying text.

<sup>195</sup> *Barbier v. Connolly*, 113 U.S. 27, 31 (1885). This statement, however, was not intended to be an affirmation of plenary discretion. In the years following *Barbier*, the Court limited state use of the police power in the areas of social and economic regulation. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (accepting freedom of contract as a limit on state police power and overturning a statute restricting hours of work in bakeries). The Court's review of regulatory legislation affecting important social and economic interests, however, was far

as aesthetics and family values.<sup>196</sup> The state's position as *parens patriae*

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from consistent. *See, e.g.,* Noble State Bank v Haskell, 219 U.S. 104 (1911) (upholding state authority to compel bank contributions to a state insurance fund); Muller v. Oregon, 208 U.S. 412 (1908) (upholding state law establishing maximum hours for female workers). In recent years, the Court has dismantled antiquated barriers to state regulatory measures. *See, e.g.,* Berman v. Parker, 348 U.S. 26 (1954) (upholding an urban renewal statute that allowed the city to condemn land and to sell it to private developers to be redeveloped according to a renewal plan); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (sustaining a state minimum wage law for women). Some of its latest decisions, however, have curtailed the traditionally wide latitude given regulation of property interests. *See, e.g.,* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (resurrecting protection for property rights by requiring that a state show a clear "nexus" between regulation and reasonable legislative purpose); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (ordering compensation for a temporary taking).

<sup>196</sup> Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). The concept of the "police power" defies clear definition. "An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations. " *Berman*, 348 U.S. at 32. The power has been defined as:

[T]he due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*162. By means of the police power doctrine, state legislatures and administrative agencies have sought to regulate a wide range of activities. *See, e.g.,* Webster v Reproductive Health Servs., 492 U.S. 490 (1989) (reviewing a law forbidding the use of public funds and facilities for abortions); Johnson v. Santa Clara County, 480 U.S. 616 (1987) (addressing the legality of a sex-based voluntary affirmative action plan); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (considering a medical school affirmative action plan that assigned a specified number of places in its entering class to members of minority groups); Green v County Sch. Bd., 391 U.S. 430 (1968) (concerning a challenge to "freedom of choice" plans, under which parents have the right to choose where to send their children to school); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (addressing the validity of state-imposed racial segregation in education); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (addressing a state law authorizing state courts to exempt property from foreclosure).

empowers it to protect and promote the welfare of individuals who lack the capacity to act in their own best interests, including minors.<sup>197</sup>

Illinois called upon both police and *parens patriae* powers when enacting the Wrongs to Children Act in general as well as when enacting and amending section 150/5.1.<sup>198</sup> The Act<sup>199</sup> holds liable individuals, including parents and guardians, who cause or fail to prevent<sup>200</sup> certain harms to children.<sup>201</sup> In amending section 150/5.1 to expand its scope and enhance the punishment for its violation, the Illinois General Assembly

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<sup>197</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 168-69 (1944) (discussing the state's independent interest in the welfare of children within its borders). The *parens patriae* power exists because parental rights are accompanied by duties. See *Lehr v. Robertson*, 463 U.S. 248, 257-58 (1983); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). The constitutional protection afforded family decisions is predicated on the presumption that a parent will act in the best interests of his or her child. See *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979); see also *supra* Part V.A.2. When parental conduct is at odds with that belief, the state may intervene to protect the child. *Parham*, 442 U.S. at 603. For example, a parent's abuse of his or her child opens the door to state involvement because such activity is beyond the scope of the fundamental liberty right accorded to parental childrearing decisions. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 792 n.2 (1986) (White, J., dissenting); see also McCarthy, *supra* note 163, at 1027-28 (discussing Justice White's dissent). State authority to intervene in family affairs to protect children from parental abuse is well established. See, e.g., WARDLE, *supra* note 159, § 1.09 (discussing state intervention in family matters).

<sup>198</sup> 720 ILL. COMP. STAT. ANN. 150/5.1 (West Supp. 2000).

<sup>199</sup> *Id.* at 150/0.01-5.1 (West 1993 & Supp. 2000).

<sup>200</sup> Liability for failing to prevent the specified harms is limited to persons having care, custody, or control of the child alleged to have been injured. See *id.* at 150/1 (West 1993) (listing as possible parties any person having the care, custody, or control of any child under the age of fourteen); *id.* at 150/5.1(A) (West Supp. 2000) (listing as possible parties a parent, step-parent, legal guardian, or other person having custody of a child). Knowledge of the threatened or actual harm is required for legal responsibility to attach. See *id.* (requiring that a parent, step-parent, legal guardian, or other person having custody of a child *knowingly* allow or permit an enumerated act upon his or her child).

<sup>201</sup> See *id.* at 150/0.01-5.1 (West 1993 & Supp. 2000). Potential violations include selling or employing a child for the purpose of singing, playing on musical instruments, dancing, or peddling. *Id.* at 150/1 (West 1993). Another potential violation is the willful abandonment of a school bus containing children by any school bus driver. *Id.* at 150/4.1. The Wrongs to Children Act also provides for the transfer to the court of custody of a child whose guardian has been convicted under a provision of the Act. *Id.* at 150/3.

stated that the changes “are of vital concern to the people of this state and legislative action concerning [the changes] is necessary.”<sup>202</sup> Pursuant to its police power, a state can prevent and punish acts that threaten the safety of its citizens.<sup>203</sup> Thus, Illinois can defend section 150/5.1 as necessary to safeguard Illinois children from harm caused by the wrongful acts of third parties or the wrongful acts or omissions of their parents or those having child custody.<sup>204</sup> In addition, if the welfare of Illinois children is at stake, Illinois, acting as *parens patriae*, may circumscribe the privacy right of parents to raise their children by means of section 150/5.1.

Notwithstanding the legislature’s general proclamation that the provision is of “vital concern” to the people of Illinois, the legislative record sheds little light on the Assembly’s particular rationale for extending its mandate to parents whose adolescent children have adolescent sexual partners.<sup>205</sup> The Illinois Supreme Court has stated that the purpose of section 5/12-15(c),<sup>206</sup> the statute that criminalizes teen sex, “is to protect children who are 13 to 16 years old from the consequences of premature sexual experiences.”<sup>207</sup> Senate discussions about the criminal sexual abuse

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<sup>202</sup> Pub. Act 91-696, art. 50, sec. 50-10, 2000 Ill. Legis. Serv. P.A. 91-696 (West, WESTLAW through 2000 Legis. Sess.).

<sup>203</sup> See *supra* notes 195-96 and accompanying text.

<sup>204</sup> Although the provision punishes parents and others having custody of children for “permitting the sexual abuse of a child,” it also aims to prevent the abuse and assault from occurring. 720 ILL. COMP. STAT. ANN. 150/5.1 (West Supp. 2000) (requiring parents and those with custody to take “reasonable steps” to prevent abuse or assault). The latter goal indirectly protects children from the wrongful acts of third parties.

<sup>205</sup> See Pub. Act 91-696, art. 50, sec. 50-10, 2000 Ill. Legis. Serv. P.A. 91-696 (West, WESTLAW through 2000 Legis. Sess.).

<sup>206</sup> 720 ILL. COMP. STAT. ANN. 5/12-15(c) (West Supp. 2000).

<sup>207</sup> *People v. Reed*, 591 N.E.2d 455, 458 (Ill. 1992). In *Reed*, the defendant challenged the constitutionality of section 5/12-15(d), Illinois’s aggravated criminal sexual abuse statute. The defendant argued that the statute violated the equal protection rights of older perpetrators because it imposed a more severe penalty for criminal sexual assault of persons between the ages of thirteen through sixteen where the perpetrator is five or more years older than the victim. The penalty is more harsh than that imposed under section 5/12-15(c), which applies when the perpetrator is less than five years older than the victim. *Id.* at 458. The court determined that classifications based on age need only bear a rational relationship to a legitimate state goal and held that the Illinois legislature could rationally conclude that adults who are five or more years older than their minor sexual partners pose a greater risk of harm than offenders closer in age to their victims. See *id.* at 458-59.

law, however, indicated concern about the reach of that statute, which, as pointed out by Senator David Barkhausen, extended to situations that do not involve the use of force by the perpetrator.<sup>208</sup> Discussion about the statutes criminalizing sexual conduct with minors centered on the need to raise the age of consent in Illinois from fifteen to sixteen years of age.<sup>209</sup> The record reveals that the impetus for this change was the large number of sixteen-year-old sexual assault victims seen by law enforcement personnel or crime victim counselors.<sup>210</sup>

Nonetheless, concern for the physical and emotional well-being of young adolescents likely spurred state legislators to include teenage sexual activity in the prohibitions of the parental responsibility statute.<sup>211</sup> In particular, current studies on teenage sexual activity tracking the substantial drop in the age at which teenagers first engage in sexual intercourse<sup>212</sup> may

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<sup>208</sup> S. 85-569, at 82 (Ill. 1987) (on file with author) ("My basic concern are those situations . . . that do not . . . involve force in which case we're going all the way up to a Class II felony."). The Senator was also worried about the application of the statute to situations that involve sexual conduct other than sexual intercourse. *Id.*

<sup>209</sup> *See id.* at 80-81.

<sup>210</sup> *See id.* at 80. In particular, Senator Netsch was concerned about the frequency of assaults perpetrated against sixteen-year-olds by adult authority figures, such as teachers, and opined that, "with respect to sixteen-year-olds generally, there need[s] to be some adjustment in the ages involved in the more serious of the crimes involving criminal sexual abuse." *Id.* at 81. Senator Netsch was also troubled by the numbers of sixteen-year-olds assaulted by those in charge of institutions. *See id.* Senator Barkhausen agreed with Senator Netsch's comments about strengthening the penalties for sexual assault by authority figures, but urged the Senate to direct the legislation toward those taking advantage of their influence over a child, as opposed to defining crimes simply in terms of age differentials. *See id.* at 82.

<sup>211</sup> Health professionals and school officials are concerned about the health and emotional ramifications of sexual experimentation for young people between the ages of ten and thirteen. *See Jarrell, supra* note 1.

<sup>212</sup> For a comparison of percentages of sexually-active fifteen-year-olds in 1999 and the early 1970s, see *supra* note 6. According to Dr. Robert Blum, a physician and the director of the Division of General Pediatrics and Adolescent Health at the University of Minnesota: "There are significant numbers of youngsters who are engaging in sexual activity at earlier ages. Besides intercourse, they are engaging in oral sex, mutual masturbation, nudity and exposure as precursors to intercourse." Jarrell, *supra* note 1. Richard Gallagher, director of the Parenting Institute at New York University's Child Study Center, has said: "I see no reason not to believe that soon a substantial number of youths will be having intercourse

in the middle-school years. It's already happening." *Id.* Although the Centers for Disease Control and Prevention reports that, since 1991, the number of high school teens who have had sexual intercourse has dropped from fifty-four percent to forty-eight percent, Gallagher believes that these numbers distract us from the increase in sexual activity among middle school students. He noted: "You can get 16- to 18-year-olds who will be very conservative sexually. And then you can get right below them a group of 14- to 16-year-olds who say those older students are too conservative, let's party." *Id.*

Additionally, half of the nation's high school kids say that they lack basic information on sexually transmitted diseases and forty percent said they do not know enough about birth control. *See* Lillian Lee Kim, *Study: Teens Lack Facts on Sexual Health*, ATLANTA J. & CONST., Oct. 20, 1999, at C3, 1999 WL 3806010. This, coupled with the fact that a high percentage of young people have multiple sexual partners, has led to several disturbing trends. *See* Verna Noel Jones, *Sexually Transmitted Diseases: A Ticking Time Bomb for Teens*, CHI. TRIB. (Southwest Edition), July 25, 1999, at Family 3, 1999 WL 2895827

First, this country's teen pregnancy rate remains the highest in the industrialized world. Jarrell, *supra* note 1. The United States teenage birth rate is twice as high as the United Kingdom's birth rate, three times as high as Australia's, four times as high as Germany's, six times as high as France's, and fifteen times as high as Japan's. THE ANNIE E. CASEY FOUND., WHEN TEENS HAVE SEX: ISSUES AND TRENDS (1998), <http://www.aecf.org/kidscount/teen/overview/overview.htm>. Annually, almost one million teenagers become pregnant, though not all of these pregnancies result in childbirth, because of abortions and miscarriages. THE ALAN GUTTMACHER INSTITUTE, *supra* note 1. Seventy-eight percent of teen pregnancies are not planned, accounting for one-quarter of accidental pregnancies annually. *Id.* Although the teen birth rate has been falling since 1991, anxiety over teenage pregnancy has continued. *See* Elizabeth Hollenberg, Note, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y REV. 267, 269 (1999). One commentator has suggested that the persistence of this anxiety shows that society's true concern is "not fundamentally about babies, but about farther-reaching demographic changes occurring over the same period, such as increased sexual activity among teenagers." *Id.* Illinois in particular has experienced a problem with teen pregnancies. In Illinois, there were 42,510 pregnancies among women between the ages of fifteen and nineteen in 1996. THE ALAN GUTTMACHER INSTITUTE, TEENAGE PREGNANCY: OVERALL TRENDS AND STATE-BY-STATE INFORMATION (1999), [http://www.agi-usa.org/pubs/teen\\_preg\\_stats.html](http://www.agi-usa.org/pubs/teen_preg_stats.html). This figure placed Illinois in the top five states with the highest number of pregnancies among adolescent women. *Id.* The number of pregnancies among Illinois women between fifteen and seventeen years of age was 17,380, among eighteen and nineteen-year-olds the number was 25,130. *Id.* That same year, the pregnancy rate statewide for women in this age group was 106 pregnancies per 1000 women. *Id.* In 1985, the rate among those between fifteen and nineteen years of age was 103 pregnancies per 1000 women—in both 1988 and



explain the state interest in expanding the parental liability statute. News reports and articles releasing these figures have drawn the attention of the public eye, and the American public has reacted with concern and disbelief. One response has been a crackdown on teenage sex with abstinence-only initiatives.<sup>213</sup> Over the past few years, the abstinence-only movement has gained momentum.<sup>214</sup> Advocates of these programs argue that “an unambiguous abstinence message will curb teen pregnancies, decrease the spread of sexually transmitted diseases[,] . . . and make for ‘sexually healthier’ adults.”<sup>215</sup> The growth of these initiatives may have fueled legislative interest in including teenage sexual activity within the scope of the parental liability law

At its core, the law embodied the unassailable goal of protecting the welfare of children.<sup>216</sup> The tragic consequences of sexual mistreatment,

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1992, 112 per 1000. *Id.*

A second disturbing trend is the outbreak of AIDS cases. In 1998, 1798 new AIDS cases were, nationwide, among individuals below the age of twenty-five. Leonard Pitts, Jr., *Too Scared to Talk About Sex to Teens*, OREGONIAN (Portland), June 5, 2000, at E11, 2000 WL 5407744.

Finally, the incidence of sexually transmitted diseases is on the rise. Of the estimated fifteen million sexually transmitted diseases diagnosed each year (excluding AIDS diagnoses), two-thirds afflict young people. *See Jones, supra.*

<sup>213</sup> *See supra* notes 9-12 and accompanying text.

<sup>214</sup> *See supra* note 10. One of these programs is sponsored by Project Reality, an Illinois-based organization that promotes and distributes abstinence-only curricula. *See Project Reality, at* <http://www.projectreality.org>. Project Reality has programs in more than 300 Illinois schools. *Id.* Moreover, Illinois law requires that:

All public elementary, junior high, and senior high school classes that teach sex education and discuss sexual intercourse shall emphasize that abstinence is the expected norm in that abstinence from sexual intercourse is the only protection that is 100% effective against unwanted teenage pregnancy, sexually transmitted diseases, and acquired immune deficiency syndrome (“AIDS”) when transmitted sexually.

105 ILL. COMP. STAT. ANN. 5/27-9.1(b) (West 1998).

<sup>215</sup> Morse, *supra* note 10, at 79.

<sup>216</sup> *See supra* notes 50-55 and accompanying text (discussing the statute’s imposition of parental liability if a parent knowingly allows or permits criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault of a child, or aggravated criminal sexual abuse). Disappointed that the Illinois Supreme Court invalidated the statute, Lisa Hoffman, supervisor of the state attorney general’s criminal appeals division, said, “There are other situations that people might find more abhorrent [than that in *Maness*]. The [law] is no longer available in those cases either. Prosecutors are without a tool under which they

exploitation, or assault for a child victim give rise to the compelling state interest that justifies the legislative action.<sup>217</sup> The Illinois Supreme Court, in *In re Walter B.*<sup>218</sup>—the only case other than *Maness* that invokes section 150/5.1—confirmed this governmental goal.<sup>219</sup> In this case, the court reviewed the state's petition for adjudication of the wardship of a five-year-

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can charge people who are permitting sexual abuse of their children." Christopher Wills, *Court Strikes Law Requiring Parents to Prevent Some Teen Sex*, ASSOCIATED PRESS NEWSWIREs, June 15, 2000, WESTLAW, 6/15/00 APWIREs 18:24:00 (second alteration in original).

Many states hold parents criminally liable for failing to protect their children from abuse. See Anne T. Johnson, Note, *Criminal Liability for Parents Who Fail to Protect*, 5 LAW & INEQ. 359, 365-68 (1987) (discussing child abuse laws in the United States). "As the problem of child abuse continues to grow in this country, states are willing to take more drastic measures to stop harm to children." *Id.* at 375. In most cases, courts have upheld the constitutionality of these laws. See, e.g., *United States v. Webb*, 747 F.2d 278 (5th Cir. 1984) (upholding conviction of a mother for failing to seek medical attention for her son after her husband fatally beat him); *Michael v. State*, 767 P.2d 193 (Alaska Ct. App. 1988) (upholding the conviction of a father for failing to prevent child abuse by his wife), *rev'd on other grounds*, 805 P.2d 371 (Alaska 1991); *State v. Williquette*, 385 N.W.2d 145 (Wis. 1986) (upholding the conviction of a parent for leaving the children with the other parent, who physically and sexually abused them).

<sup>217</sup> In his dissent in *People v. Maness*, Chief Justice Harrison stated that the parental liability law was justified because the parental interest in making childrearing decisions must give way to the state's interest in combating child abuse and neglect. *People v. Maness*, 732 N.E.2d 545, 553 (Ill. 2000) (Harrison, C.J., dissenting). The dissent developed its rationale for this particular finding by likening the consensual sex between Lynlee and Owens to the use of illicit substances. *Id.* The dissent acknowledged the "'fundamental liberty interest [of parents] in the care, custody, and management of their child[ren].'" *Id.* (second alteration in original) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982)). The dissent, however, maintained:

The right to be a parent does not encompass the right to abuse one's child or to allow one's child to be abused. If *Maness* had knowingly allowed Owens to inject her daughter with heroin and provided the couple with a place in her home where the drugs could be injected, there would be no question that *Maness* could be prosecuted for child endangerment or worse, without offending the constitution. The result should not be different because the abuse involves illegal sex rather than illegal drugs.

*Id.* (citation omitted).

<sup>218</sup> *In re Walter B.*, 592 N.E.2d 274 (Ill. App. Ct.), *appeal demed sub nom. People v. Walter B., Sr.*, 602 N.E.2d 473 (Ill. 1992).

<sup>219</sup> See *In re Walter B.*, 592 N.E.2d at 279.

old child based on alleged sexual abuse, neglect, and physical abuse of the child by his parents.<sup>220</sup> According to the facts of the case, the father was orally sodomizing the boy and the mother was aware that this was happening.<sup>221</sup> The court stated that the mother had violated section 150/5.1 by permitting the sexual abuse of her five-year-old son.<sup>222</sup>

Sexual mistreatment, exploitation, or assault of children, however, bears little resemblance to situations involving consensual sexual activity among adolescents. The degree of difference is evident in the criminal sexual abuse statute itself: an accused who commits an act of sexual misconduct by physically threatening the victim or by intentionally taking advantage of an unconscious victim commits a Class 4 felony,<sup>223</sup> while a fourteen-year-old who engages in consensual sexual intercourse with another fourteen-year-old commits a Class A misdemeanor.<sup>224</sup> By assigning violations of section 5/12-15(c) misdemeanor status, Illinois legislators attest to society's appreciation for this difference and signal our instinct that consensual sexual activity among teen contemporaries is not really sexual abuse.<sup>225</sup> It is only deemed equivalent to sexual abuse by operation of the statute.<sup>226</sup> Breaches of section 5/12-15(c) by teens engaging in consensual sex resemble status offenses like truancy and curfew violations. A child may be charged and adjudged delinquent for these acts, whereas there would be no chargeable offense at all if the child were an adult; prosecution is based solely on the child's "status" as a minor.<sup>227</sup>

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<sup>220</sup> See *id.* at 276.

<sup>221</sup> See *id.* at 276-79.

<sup>222</sup> *Id.* at 279.

<sup>223</sup> 720 ILL. COMP. STAT. ANN. 5/12-15(d) (West Supp. 2000) (designating violations of section 5/12-15(a)(1) & (2) as a Class 4 felony).

<sup>224</sup> *Id.* (designating violations of section 5/12-15(c) as a Class A misdemeanor). Pursuant to this provision, consensual sexual conduct between a thirteen-year-old and a person between thirteen and seventeen years of age, a fourteen-year-old and a person between fourteen and eighteen years of age, a fifteen-year-old and a person between fifteen and nineteen years of age, or a sixteen-year-old and a person between sixteen and twenty years of age is a misdemeanor. See *id.* at 5/12-15(c)-(d).

<sup>225</sup> Cf. *supra* note 34 (discussing situations in which an adolescent and his or her sexual partner are not contemporaries).

<sup>226</sup> See *supra* note 121 (discussing statutory rape). Similar treatment is accorded violations of section 5/12-15(b), which forbids consensual sexual activity between individuals between nine and sixteen years of age and a partner under seventeen years of age. See 720 ILL. COMP. STAT. ANN. 5/12-15(b) (West Supp. 2000). A breach of section 5/12-15(b) is also a Class A misdemeanor. *Id.* at 5/12-15(d).

<sup>227</sup> See BINDER ET AL., *supra* note 63, at 21-26.

The issue of consensual sex among teen contemporaries is also distinguishable from situations involving adults who are five or more years older than their minor partners. Age-disparate pairings pose a greater risk of harm because of "the significant difference[s] in levels of intellectual and emotional maturity between an adult and his or her minor sexual partner."<sup>228</sup> Consequently, "an age difference of five or more years between an adult and his or her minor sexual partner may in itself constitute overreaching."<sup>229</sup> The penalty imposed for relationships with significant age-differentials bears out this distinction: if the accused is five or more years older than the victim, the offense is a Class 2 felony.<sup>230</sup>

The lack of reported cases prosecuted under sections 150/5.1 and 5/12-15(c) further highlights the difference between consensual teen sex and sexual mistreatment, exploitation, and assault. The rare enforcement of these statutes reflects not only society's reluctance to punish teenagers who engage in sexual conduct, but also our unwillingness to brand as criminals parents who do not espouse or who do not enforce an abstinence-only point of view. Since the law's effective date of January 11, 1989, no cases prosecuting parental failures to discourage teen sex have been reported, other than the *Maness* case.<sup>231</sup>

The virtual non-enforcement of section 150/5.1 and the spotty enforcement of section 5/12-15(c) reflect society's inner conflict about the point at which teenagers are able to consent meaningfully to sexual activity.<sup>232</sup> Age-of-consent laws represent a governmental determination of the point at which consent between age-disparate partners is not possible.<sup>233</sup> Legislative attempts to establish this cut-off point, however, are necessarily

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<sup>228</sup> State v. Reed, 591 N.E.2d 455, 459 (Ill. 1992).

<sup>229</sup> *Id.*

<sup>230</sup> 720 ILL. COMP. STAT. ANN. 5/12-16(g) (West Supp. 2000). A Class 2 felony is punishable by three to seven years in prison. 730 ILL. COMP. STAT. ANN. 5/5-8-1(a)(5) (West Supp. 2000).

<sup>231</sup> See 720 ILL. COMP. STAT. ANN. 150/5.1, Historical and Statutory Notes (West Supp. 2000).

<sup>232</sup> In the context of sexual relations, "the best-known example [of a source of a defect in consent] is immaturity: the law has long prohibited consensual intercourse with [an individual] . . . below the legally prescribed age of consent." Schulhofer, *supra* note 121, at 101. *But cf.* B.B. v. State, 659 So. 2d 256 (Fla. 1995) (holding that minors do have a privacy right to engage in consensual sex, in a case involving consensual sex between two sixteen-year-olds).

<sup>233</sup> Legislatures created "age of consent" laws in the late 1800s to deal with child prostitution. MIKE A. MALES, THE SCAPEGOAT GENERATION: AMERICA'S WAR ON ADOLESCENTS 49 (1996).

fraught with difficulties, given the tremendous variation in both physical and psychosexual development among adolescents.<sup>234</sup> The Illinois Supreme Court articulated this ambivalence toward teenage sexual activity in *People v. Reed*.<sup>235</sup>

We agree with the State that what may be considered sexual experimentation by a 15-year-old girl and her 18-year-old boyfriend may be sexual exploitation if the boyfriend is 20. When young sexual partners are less than five years apart in age, their levels of maturity are more nearly equal and the opportunity for overreaching is diminished.<sup>236</sup>

If moral questions about sexual intimacy among young teens provoked the legislation at issue, Illinois's interest in enforcing the parental responsibility provision may not be a compelling one. Considering the lack of societal consensus as to whether adolescent sexual experimentation is illegal or immoral, any governmental interest in monitoring teenage sexual activity is arguably less than vital and, when pitted against the constitutional right of parents to raise their children free from the prying eyes of the state, folds under strict scrutiny.<sup>237</sup>

If, however, the General Assembly has determined that sexual experimentation among teens under seventeen years of age jeopardizes the well-being of those adolescents,<sup>238</sup> then Illinois may have a compelling

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<sup>234</sup> See *id.* at 58-59. These difficulties explain the conflicts that often exist between laws establishing age of consent to engage in sexual conduct and laws establishing age of consent to marry. While "some states will allow a minor to marry with parental permission at an age when the minor cannot engage in legal sexual activity, others allow a minor to engage in sexual activity years before he or she can marry without parental approval." RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 45 (1996).

<sup>235</sup> *People v. Reed*, 591 N.E.2d 455 (Ill. 1992).

<sup>236</sup> *Id.* at 458-59.

<sup>237</sup> Further calling into question the propriety of section 150/5.1, the American Medical Association has adopted a policy endorsing the view that "the primary responsibility for family life education is in the home" and supporting "the concept of a complementary family life and sexuality education program in the schools at all levels." AM. MED. ASS'N, REPORT 7 OF THE COUNCIL ON SCIENTIFIC AFFAIRS (I-99) (1999), [http://www.ama-assn.org/apps/pf\\_online/pf\\_online](http://www.ama-assn.org/apps/pf_online/pf_online). In a joint-effort with the United States Surgeon General, the American Medical Association will design programs consistent with this policy for communities of color and youth in high-risk situations. *Id.*

<sup>238</sup> See *supra* notes 206-15 and accompanying text.

reason for requiring parents to prevent their teens from engaging in such behavior. Assuming that such a compelling reason exists, the statute's mandate to parents must then be evaluated within the confines of the tension between the state's duty to respect the fundamental privacy interest of parents in directing the upbringing of their children and maintaining the integrity of the family without intrusion from government, and the state's purpose in protecting children in particular and the best interests of society in general. In effect, the application of a parental liability statute to a situation similar to that in *Maness* represents a legislative judgment that the state's interests surpass those of the parent or family with respect to adolescent sexual experimentation. The foremost motivating factors leading to this conclusion are likely an amalgam of concern for the emotional and physical health of the nation's youth,<sup>239</sup> and moral outrage over and condemnation of sexual activity out of wedlock.<sup>240</sup>

*b. The "Means-Ends" Fit*

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.<sup>241</sup> Assuming that Illinois's compelling interest in regulating parental conduct through section 150/5.1 is to protect adolescents from the health and emotional risks of sexual experimentation caused by violations of section 5/12-15(c),<sup>242</sup> the

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<sup>239</sup> Federally funded abstinence-only education requires that children be taught the "'harmful psychological and physical effects' of premarital sex." Morse, *supra* note 10, at 79.

<sup>240</sup> The primary goal of abstinence-only education programs is to persuade teenagers to delay sexual conduct until marriage. *See id.* Robert Rector, a senior research fellow at the Heritage Foundation who helped draft the G.O.P. welfare-reform legislation that created these programs, explains: "The programs simply tell [children that] the more sex they have outside of marriage, the less will be their prospects for human happiness." *Id.*

<sup>241</sup> *See supra* notes 137-48 and accompanying text. Mere failure to be a model parent or guardian does not, however, strip the custodian of his or her fundamental liberty interest in childrearing. *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"). Rather, the state must show that its interference will further its goal of protecting children. *See Roe v. Wade*, 410 U.S. 113, 155 (1973).

<sup>242</sup> *See supra* notes 206-15 and accompanying text.

question is whether policing parental behavior is closely related to that goal. The answer must be a resounding "no."

As illustrated in the following discussion, prosecuting parents of teens involved in consensual sexual relationships with other teens falls short of satisfying the means-ends test because pursuing parents and those with legal custody over teens is unlikely to dissuade teenage sexual activity. Teens decide to have sex for reasons that are multiple and complex;<sup>243</sup> targeting parents to quiet state concerns about the welfare of teenagers will have little effect on teenage decisions to initiate sexual activity.<sup>244</sup> Moreover, directing prosecutorial interest at parents could also adversely affect the family unit and leave the teen without parental assistance and advice.<sup>245</sup> In addition, the Illinois parental liability statute is inconsistent with other Illinois laws that cede to parents authority over decisions regarding birth control and sexual education—accentuating the poor fit between state interest and goal.<sup>246</sup> The resulting conflict of laws frustrates efforts by parents to exercise their rights and meet their obligations as parents.

### 1. *Accessories to Teenage Sexual Activity*

Adolescent sexual activity is not necessarily a function of lack of parental supervision and training. A recent study by the Children's Hospital of Philadelphia reveals that the driving force behind teen sexual activity is peer pressure.<sup>247</sup> Students who believed that most of their peers had already had sex were two and one-half times more likely to report a high intention to initiate sexual intercourse in the upcoming school year.<sup>248</sup> "As adolescents perceive their peers to be initiating a new behavior, they alter their own behavior to reflect their perceptions of normative behavior."<sup>249</sup> "The

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<sup>243</sup> See *infra* Part V.B.2.b.i.

<sup>244</sup> See *infra* Part V.B.2.b.ii.

<sup>245</sup> See *infra* Part V.B.2.b.iii.

<sup>246</sup> See *infra* Part V.B.2.b.iv.

<sup>247</sup> See News Release, The Children's Hospital of Philadelphia, *supra* note 7. The study was published in the November 1998 issue of PEDIATRICS. Sara B. Kinsman et al., *Early Sexual Initiation: The Role of Peer Norms*, 102 PEDIATRICS 1185 (1998).

<sup>248</sup> Kinsman et al., *supra* note 247, at 1189. Using confidential questionnaires, researchers surveyed 1389 adolescents in Philadelphia public schools at the beginning and end of the sixth grade. *Id.* at 1187

<sup>249</sup> *Id.* at 1190.

main motivation for adolescents to participate in sexual activity is not because 'it's cool' but because they don't want to be left behind."<sup>250</sup>

The media also shape teen attitudes toward sex. Research clearly links watching programs high in sexual content with early initiation of adolescent sexual intercourse.<sup>251</sup> Teenagers watch an average of three hours of television a day.<sup>252</sup> In the United States, approximately one in four television programs contains a scene primarily devoted to depicting sexual behavior;<sup>253</sup> one in eight contains a scene in which intercourse is either depicted or strongly implied.<sup>254</sup> The negative consequences of sexual behavior and the taking of sexual precautions, however, are rarely shown.<sup>255</sup>

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<sup>250</sup> News Release, The Children's Hospital of Philadelphia, *supra* note 7. The study also found that thirty percent of the students entering the sixth grade had already experienced sexual intercourse; five percent reported having initiated sexual intercourse during the sixth grade school year; and fifty percent of the sexually-experienced reported a high intention to have sex at some point during the school year. Kinsman et al., *supra* note 247, at 1187

Initiation of sexual activity other than intercourse is occurring among very young adolescents, including those in their pre-teen years. In particular, adolescents are engaging in oral and anal sex because they can remain sexually active, but without the risk of pregnancy. Marsha Levy-Warren, a psychologist, says,

I see girls, seventh- and eighth-graders, even sixth-graders, who tell me they're virgins, and they're going to wait to have intercourse until they meet the man they'll marry. But then they've had oral sex 50 or 60 times. It's like a goodnight kiss to them, how they say goodbye after a date.

Jarrell, *supra* note 1.

<sup>251</sup> See Dale Kunkel et al., *Sexual Messages on Television: Comparing Findings from Three Studies*, 36 J. SEX RES. 230 (1999), 1999 WL 18685878.

<sup>252</sup> Victor C. Strasburger, *Tuning in to Teenagers*, NEWSWEEK, May 19, 1997, at 18. In addition, teenagers "listen to the radio for an additional one to two hours [per day] and often have access to R-rated movies and even pornography." *Id.* A study from the late 1980s shows that teenagers view "almost 15,000 sexual jokes, innuendoes, and other references on TV each year." *Id.*

<sup>253</sup> Kunkel et al., *supra* note 251.

<sup>254</sup> *Id.* "Sex is everywhere, and it's absolutely explicit. . . There's hardly a film that doesn't show a man and a woman having sex. There's MTV, lurid rap lyrics, and now we've got technosex on the Internet." Jarrell, *supra* note 1 (quoting Dr. Allen Waltzman, a New York psychiatrist who sees many adolescent patients).

<sup>255</sup> Kunkel et al., *supra* note 251. Public concern has pushed television writers and producers to make story lines about sex more realistic by including information about and scenes depicting the possible consequences of sexual conduct. See Stodghill, *supra* note 4, at 56. Groups like the Kaiser Family Foundation have consulted on television programs in an attempt to "improve the public-health



These television portrayals play a role in the sexual socialization of children. When asked about sexual content on television, one thirteen-year-old responded, "You name the show, and I've heard about [sex]—*Jerry Springer*, MTV, *Dawson's Creek*, HBO *After Midnight*."<sup>256</sup> Not surprisingly, many adolescents regularly seek answers to their questions about sex from television.<sup>257</sup> The ubiquitous messages about sex are not limited to entertainment television. Sex is everywhere, even on the news. From the White House sex scandal to the public discussions about sexually transmitted diseases like AIDS and herpes, children in the United States are bombarded daily with information about sex.<sup>258</sup> This excessive indoctrination has contributed not only to higher sex I.Q.s among youths, but also to a widespread indifference toward sex and sexual conduct.<sup>259</sup>

Among the many forces that power the adolescent quest for carnal knowledge—the rising divorce rate, inattentive parents, peer norms, promotional and entertainment media filled with sexual content and innuendo—the most frequent explanation is that today's culture conveys

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content" of the shows. *Id.* (quoting Matt James, a Kaiser senior vice president). The Kaiser Family Foundation has consulted on daytime soaps, such as *General Hospital* and *One Life to Live*, and prime-time dramas, such as *ER*, about a variety of subjects, including teen pregnancy. *Id.*

<sup>256</sup> Stodghill, *supra* note 4, at 54. *Dawson's Creek*, one of the most widely-watched shows on television, is also one of the most-explicit shows on teen sexuality. The program centers around the lives of a handful of teenagers, growing up and coming into their own. *Dawson's Creek* (WB Television Network, 2000).

<sup>257</sup> Channel-surfing answers many a question about sex. According to a fourteen-year-old in Denver, "If you watch TV, they've got everything you want to know. That's how I learned to kiss, when I was eight." Stodghill, *supra* note 4, at 56. A sixteen-year-old from Florida, who lost her virginity when she was fourteen years of age, says, "You can learn a lot about sex from cable. It's all mad-sex stuff." *Id.* at 54. Teens are also tuning in to information talk shows that focus on sex. MTV's *Loveline*, an hour-long question-and-answer show about sex and sexuality, is very popular among teens. The show features sex expert Dr. Drew Pinsky, who answers questions posed by adolescents and young adults over the telephone. "Dr. Drew has some excellent advice," says a Denver eighth-grade student. *Id.* at 56.

<sup>258</sup> Rationalizing their sexual conduct, boys at a middle school in Denver, Colorado stated, "If the President can do it, why can't we?" *Id.* at 53.

<sup>259</sup> "Teens today are almost nonchalant about sex. It's like we've been to the moon too many times," says a junior high counselor in Salt Lake City. *Id.* at 54. In a discussion about sexual themes in the media, one seventh grader stated, "It's like everywhere, even in *Skateboarding* [magazine]. It's become so normal it doesn't even affect you." *Id.* at 59 (alteration in original).

a mixed message to our children. Although ninety-three percent of Americans believe that sexual education should be taught in high schools and eighty-four percent believe it should be taught in middle or junior high schools, adults are uncertain about how they feel about teenage sexual activity.<sup>260</sup> Parents seem inclined toward two seemingly contradictory approaches: 1) advocating abstinence or 2) encouraging prophylactics and, arguably, thus endorsing sexual activity. Many schools in the United States teach abstinence as the sole contraception method,<sup>261</sup> yet kids are confronted daily with messages about sex. Consequently, “[m]any kids are torn between living up to a moral code espoused by their church and parents and trying to stay true to the swirling laissez-faire.”<sup>262</sup>

## ii. *Lack of Parental Control*

The analytical difficulty with introducing an abstinence-only standard into a parental responsibility law ultimately centers on the gray area between parental control and teenage autonomy.<sup>263</sup> Many relationships and situations outside of the home and family are effectively beyond parental jurisdiction.<sup>264</sup> Although a parent or legal custodian must have knowledge

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<sup>260</sup> See *supra* notes 116-21 and accompanying text. “You start out talking about condoms in this country, and you end up fighting about the future of the American family.” Stodghill, *supra* note 4, at 58 (quoting Sarah Brown, director of the Campaign Against Teen Pregnancy).

<sup>261</sup> See *supra* notes 9-12 and accompanying text.

<sup>262</sup> Stodghill, *supra* note 4, at 59.

<sup>263</sup> As teens mature, they begin to make their own life decisions, including decisions about sexuality. Expecting parents to control the sexual activities of their teens could result in vicarious liability for parents.

<sup>264</sup> The issue of control leads to causation concerns. See generally Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547 (1988) (criticizing the concept of legal duty as a limit on liability for omissions). Unless the parental liability law is carefully drafted to reflect a parent’s reasonable ability to exert control over the child, the statute will likely violate the principle of causation. In most jurisdictions, to warrant criminal sanction, a defendant’s conduct must be both the actual and proximate cause of the resulting harm. See LAFAVE, *supra* note 56, § 3.12, at 292-93. If a parent lacks control over his or her child, then taking or failing to take “reasonable steps” to prevent the child from engaging in sexual intercourse will do little to effect a change in such behavior. The existence of a parent-child relationship does not prove causation; the parent’s actions must foreseeably lead to the child’s sexual activity. The absence of a causal link between the parent’s actions and the sexual conduct removes the parent from the reach of the criminal liability statute.

of the child's sexual activities before liability can attach pursuant to section 150/5.1,<sup>265</sup> the use of such an ordinance to control juvenile sexual behavior is questionable. The statute extends the parent's duty of supervision beyond realistic expectations of parental capacities. The responsibilities of parenthood unquestionably include the duty to guide the child's personal development. A parent's ability to supervise the child, however, seldom remains constant throughout the child's life.<sup>266</sup> As the child grows up, maturity and competing social forces dilute parental influence, weakening the parent's command over the child.<sup>267</sup> Section 150/5.1 is oblivious to the changing nature of parental control, which results in parents being punished not for their own acts or omissions, but for those of their children.

When a parent learns that his or her teen is willingly involved in sexual conduct with another teen, the list of parenting alternatives is long. For example, a parent might forbid the teen from continuing the sexual relationship or insist that the teen completely cease spending time with his or her partner. Or, if the behavior is not limited to a single partner, the parent might promulgate a ban on sexual activities altogether. A parent could also condemn the teen's actions and, perhaps, punish the child in some manner. Another option might be to educate the teen about the emotional and physical consequences of sexual behavior and advise the teen that abstaining from sexual conduct is the wisest solution for all concerned. A parent may choose to inform the parents or custodians of the teen's partner or partners, or a parent might report the conduct to proper authorities—the police or a state prosecuting attorney.<sup>268</sup>

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<sup>265</sup> Liability pursuant to section 150/5.1 is predicated on the parent's actual knowledge of the sexual activities. 720 ILL. COMP. STAT. ANN. 150/5.1(A) (West Supp. 2000) (requiring that "[a] parent knowingly allow[ ] or permit[ ] an act of criminal sexual abuse upon his or her child") (emphasis added).

<sup>266</sup> See GERALD R. ADAMS ET AL., *ADOLESCENT LIFE EXPERIENCES* 98-101 (3d ed. 1994); J. ROY HOPKINS, *ADOLESCENCE: THE TRANSITIONAL YEARS* 13, 215 (1983); Charles E. Bowerman & John W. Kinch, *Changes in Family and Peer Orientation of Children Between the Fourth and Tenth Grades*, 37 SOC. FORCES 206, 207 (1959); Wyndol Furman, *The Development of Children's Social Networks*, in *CHILDREN'S SOCIAL NETWORKS AND SOCIAL SUPPORTS* 151 (Deborah Belle ed., 1989).

<sup>267</sup> See HOPKINS, *supra* note 266, at 215-16; Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEV. PSYCHOL. 608, 615 (1979); Bowerman & Kinch, *supra* note 266, at 207; David A. Utech & Kenneth L. Hoving, *Parents and Peers as Competing Influences in the Decisions of Children of Differing Ages*, 78 J. SOC. PSYCHOL. 267, 272 (1969).

<sup>268</sup> Ignoring, encouraging, or approving of such conduct would, arguably, violate a statute similar to section 150/5.1.

Possible outcomes resulting from these courses of action are many, and vary as to the extent of their achievement of governmental goals and impact on parental rights. A specific or blanket prohibition of sexual activity may be the simplest solution; it may also be futile.<sup>269</sup> More than half of today's schoolchildren are latchkey children.<sup>270</sup> When coupled with the decline of two-parent households, this leaves adolescents with less, if not little, supervision. Not only are kids inundated with messages about sex, they have more time to engage in it. If parents are working, they may be unable to exercise reasonable control and supervision over their children during the hours between three and seven p.m., the time when most adolescents are out of school and parents have not yet returned home from work.<sup>271</sup> Numerous opportunities abound for teens to be totally independent of their parents—while attending school, social events, or participating in extracurricular activities. What is more, adolescence is the period in most young lives when a child begins to spend less time with his or her parents and initiates his or her own social relationships.<sup>272</sup> As the teen seeks to exert greater autonomy over his or her affairs, parental control and influence is correspondingly diminished.<sup>273</sup> It is in these years that parents, however reluctantly, make the transition from control to guidance in the lives of their children. Consequently, parental efforts to condemn the sexual conduct or to punish the teen may be ineffective in preventing further sexual activity.

Opting to educate the child about the risks of sexual behavior may offer him or her needed emotional as well as informational support but, without at least a firm recommendation of abstinence, the parent runs the risk of having his or her actions perceived by legal authorities as sanctioning the

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<sup>269</sup> A case on point is *People v. Hall*, in which two teens were involved in a sexual relationship. *People v. Hall*, 204 N.E.2d 40 (Ill. App. Ct. 1965). Upon learning of the sexual nature of the relationship, the parents of the girl demanded that she stop seeing her boyfriend. Despite the prohibition, the daughter slipped away from the family home to meet with her boyfriend. *Id.* at 41.

<sup>270</sup> See Howard Hayghe, *Working Mothers Reach Record Number in 1984*, MONTHLY LAB. REV., Dec. 1984, at 31, 32.

<sup>271</sup> For example, "[o]ne 13-year-old boy at a junior high school in Manhattan . . . [says that] he first had oral sex at [the age of] 12 and has had it about eight times at parties and in the hours between 4 and 7 p.m., before [his] parents come home from work." Jarrell, *supra* note 1.

<sup>272</sup> See ADAMS ET AL., *supra* note 266, at 98-99; HOPKINS, *supra* note 266, at 13, 215; Bowerman & Kinch, *supra* note 266, at 207; Furman, *supra* note 266, at 151.

<sup>273</sup> See HOPKINS, *supra* note 266, at 215-16; Berndt, *supra* note 267, at 615; Bowerman & Kinch, *supra* note 266, at 207; Utech & Hoving, *supra* note 267, at 272.

teen's conduct. A weak abstinence message might run afoul of a statute similar to section 150.5.1. Anything beyond counseling abstinence, however, might be seen by the child as intruding on the teen's authority over his or her own interactions. Regardless of the force used to back the communication to abstain from sexual relations, parental authority over an adolescent child is uncertain. Advising a parent or guardian of the other teen about the sexual conduct confronts comparable difficulties. In addition to expanding potential liability under the statute to another party, this avenue does not guarantee a cessation of sexual activity. Reporting the conduct to law enforcement individuals—a more extreme alternative—triggers the risk that one or both teens will be criminally charged for their actions.

### *iii. Harm to the Parent-Child Relationship*

Exercising any or all of the aforementioned options could also negatively impact a parent's relationship with his or her teen. Disapproval in any form—proscription, reprimand, punishment, or criticism—may cause a teen to refrain from sharing information about sexual experiences.<sup>274</sup> Although this might safeguard the parent from criminal prosecution pursuant to a statute similar to section 150.5/1, when a parent is cut out of the information loop he or she cannot provide assistance or advice when a child needs help.<sup>275</sup> If the child is sexually active, he or she may be without adequate information about how to prevent pregnancy and sexually transmitted diseases.<sup>276</sup> Similarly, studies show that children

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<sup>274</sup> In many cases, a child will divulge information about his or her sexual activities because the relationship between the child and parent is one in which a child feels secure in sharing information that might otherwise remain secret. In these situations, the statute imposes a burden on parents who have developed close relationships with their children. One of the many advantages of cultivating trust and encouraging communication is the assurance that one's child will seek parental assistance in times of trouble. The statute effectively forecloses this option for both parent and child.

<sup>275</sup> Teens want their parents' help. When asked about "the best way to delay sexual activity and protect kids against AIDS and pregnancy," Debra Haffner, president of the nonprofit advocacy group Sexuality Information and Education Council of the United States, responded: "Parental involvement works. If you communicate openly and set clear limits, your children are more likely to abstain and use contraceptives. Children want to hear from you on these issues." Pat Wingert, *How to Talk to Kids About Sex*, NEWSWEEK, June 14, 1999, at 80, 81.

<sup>276</sup> Nearly half of high school students nationwide report that they need basic information on birth control, HIV/AIDS, and other sexually transmitted diseases;

without parental guidance are more likely to become young sexual initiates and that young sexual initiates without guidance are more likely to have multiple partners.<sup>277</sup> Disclosing information about sexual conduct to the parent of the child's partner or to the police may damage the parent-child relationship even more severely by betraying the teen's confidence and trust in the parent.<sup>278</sup> Impeding communication between a parent and child or, even more egregiously, injuring the parent-child relationship, impermissibly invades the sanctity of the family and robs a parent of the privilege and joy of closeness with and the comfort of his or her children.<sup>279</sup> Moreover, it damages the institution of the family in general and thus does more harm to the social fabric than any amount of teenage sexual experimentation. This sort of harm to the family runs counter to the purpose of the statute to provide for the welfare of the adolescent and positions the statute beyond the pale of constitutional protection.<sup>280</sup>

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nearly half are unaware that having a sexually transmitted disease increases the risk of getting HIV if sexually active. Press Release, The Kaiser Family Foundation, *Many Teens in the Dark About Sexual Health* (Oct. 18, 1999), <http://www.kff.org/content/1999/1548/teenfindings.htm>. Forty percent of students would like more information about where to get contraception; thirty percent would like more information on how to use condoms. *Id.* Fifty-one percent would like more information on where to go to get tested for HIV and other sexually transmitted diseases. *Id.*

<sup>277</sup> A year-long campaign co-sponsored by Seventeen Magazine and the Kaiser Family Foundation discovered that, among 1000 teens ages thirteen to nineteen, twenty-one percent had not discussed sex with their parents or guardians. Press Release, Seventeen, *Teen Sex Survey Results* (June 2000), at <http://news1.newstream.com> (on file with author). Individuals comprising this twenty-one percent were more likely to have sex at a younger age and with multiple partners. *Id.* Thirty percent of the interviewees who were sexually active and were at least fifteen years of age had had five or more partners. *Id.*

<sup>278</sup> This places a parent in the untenable situation of having to choose between guarding the intimacy of the relationship with a child and the threat of imprisonment and a criminal record. Aggressive prosecution of section 5/12-15(c) infractions could also have an adverse impact on the teen population it is designed to protect. See 720 ILL. COMP. STAT. ANN. 5/12-15(c) (West Supp. 2000). Among other things, it could discourage sexually active or pregnant adolescents from seeking medical care if they fear being prosecuted under the criminal sexual abuse statute or having to reveal the identity and age of their respective partners, who might then be charged under the statute.

<sup>279</sup> See *supra* Part V.A.2.

<sup>280</sup> Section 150/5.1 also appears to impose a heightened duty on parents who have control over their children and thus seems to penalize parents who have

*iv. Conflicting Statutes*

Placing section 150/5.1 alongside other Illinois statutes that confer rights on parents underscores the incongruity between the statutory method and legislative goal. Adding to the injustice of the statute itself, parental liability for failing to prevent sexual intercourse among teenagers, when contrasted with the parental right to assist a child in acquiring birth control,<sup>281</sup> presents a curious, and potentially felonious, dilemma. On the one hand, parents are required to take steps to ensure abstinence among their teens. On the other hand, parents may wish to educate their teenagers about and to protect them from the risks of unwanted pregnancies and sexually transmitted diseases. The resulting message from parent to teen is garbled and might read as follows: teenagers under the age of seventeen are unable to consent to any sexual activity and thus should not get involved in sexual relationships; however, if the teen chooses to ignore this parental caution and advice, the teen should protect himself or herself by using birth control; if requested, the parent will help the teen obtain birth control; nonetheless, the parent does not wish to be apprised of any ongoing or upcoming sexual conduct for fear of criminal prosecution and felony conviction. The last segment of these confusing legislative directives robs both parent and child of their respective rights of childrearing and parental guidance and smacks of the controversy surrounding the current debate between advocates of abstinence-only education and those who favor sexual education that includes "safe-sex" components or condom availability programs.<sup>282</sup>

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developed a sense of closeness and respect for authority in their homes. *See* 720 ILL. COMP. STAT. ANN. 150/5.1 (West Supp. 2000).

<sup>281</sup> *See* 325 ILL. COMP. STAT. ANN. 10/1 (West 1993) ("Birth control services and information may be rendered by doctors licensed in Illinois to practice medicine in all of its branches to any minor who has the consent of his parent or legal guardian."). In 1972, the United States Supreme Court expanded the privacy right articulated in *Griswold* and struck down a variety of state prohibitions on the sale or distribution of contraceptives to single adults. *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972). Five years later, the Court further enhanced individual autonomy when it invalidated a New York law prohibiting the sale of contraceptives to minors under sixteen and forbidding anyone who was not a licensed pharmacist from selling even nonprescription contraceptives to persons over fifteen. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 694-95 (1977).

<sup>282</sup> According to a recent poll by the Alan Guttmacher Institute, abstinence is the sole contraception method taught at one-third of all U.S. public schools. Jarrell, *supra* note 1. Public health experts are concerned that the abstinence-only programs "could undo a decade of progress in education about safe sex." Morse, *supra* note

Joining the fray and elevating it to a fracas is the parental right to object to a child's participation in any class or course in sex education.<sup>283</sup> The statute codifying this right appreciates the fundamental nature of the parental right to bring up children.<sup>284</sup> Helping one's children prepare for mature sexual relationships is a parent's prerogative, and decisions about the extent and timing of sexual education are exclusively within the province of parental prudence. When lifted from print and put into practice, these three parental rights and duties—the respective rights to help a minor child obtain birth control and to determine the particulars of a minor child's sexual education, and the duty to prevent minor teenagers from engaging in sexual conduct—become entangled. This squabbling triumvirate simultaneously defers to and disrespects the parental privilege of raising children, binding the hands of parents and leaving children bereft of their inherent right to the counsel of their parents.<sup>285</sup>

In summary, the use of criminal statutes against parents of sexually-active teenagers is too intrusive a method for achieving state goals.<sup>286</sup>

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10, at 80. Debra Haffner, president of the Sexuality Information and Education Council of the United States, warns, "Denying [teens] information about contraception and STD protection puts them at risk." *Id.*

<sup>283</sup> 105 ILL. COMP. STAT. ANN. 5/27-9.1(a) (West 1998) ("No pupil shall be required to take or participate in any class or course in comprehensive sex education if his parent or guardian submits written objection thereto, and refusal to take or participate in such course or program shall not be reason for suspension or expulsion of such pupil.").

<sup>284</sup> See *supra* Part V.A.2.

<sup>285</sup> Statutes that are not narrowly tailored may be struck for overbreadth. In *Johnson v. City of Opelousas*, the Court of Appeals for the Fifth Circuit invalidated a curfew ordinance that violated associational rights because it made no provision for protected activities such as attending school meetings and religious functions. *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. Unit A Oct. 1981).

<sup>286</sup> Valid state statutes already exist to punish parents who abuse or neglect their children or who allow others to abuse their children. See, e.g., 720 ILL. COMP. STAT. ANN. 130/2 (West 1993) (punishing a parent for contributing to the dependency or neglect of a child); MINN. STAT. ANN. § 609.378 (Supp. 2000) (punishing a parent who knowingly permits the continuing physical or sexual abuse of a child); OKLA. STAT. ANN. tit. 10, § 7115 (West Supp. 2000) (punishing a parent who knowingly permits the continuing physical or sexual abuse of a child); W. VA. CODE ANN. § 61-8D-5 (Michie Supp. 2000) (punishing a parent who knowingly permits the continuing physical or sexual abuse of a child). Additionally, courts may terminate the parental rights of parents who sexually abuse, or permit sexual abuse of, their children. See Mary J. Cavins, Annotation, *Sexual Abuse of Child by Parent as Ground for Termination of Parent's Right to*



Although Illinois may have a compelling interest in preventing child abuse and neglect, no evidence suggests that policing parental behavior in situations similar to that found in the *Maness* case achieves that end. Factors other than parental control may be more significant causes of the child's behavior. Identifying all of the variables that underlie teenage sexual conduct would be a formidable task; isolating the most culpable causes would be impossible. The statute as applied to consensual sexual activity among adolescents fails strict scrutiny because the means do not closely fit the end.

## VI. CONCLUSION

By relying on the application of its criminal parental responsibility statute to reduce teenage sexual activity, the Illinois General Assembly attempted to avoid the tough issues surrounding the changing sexual customs of our society.<sup>287</sup> Initiatives to decrease teenage sexual activity cannot succeed without a general reassessment of the attitudes and mores regarding adolescent sexuality in the United States. Adolescent curiosity about sex is well-fed—in the schoolyard, on the bus, in the media, and at home when no adult is watching.<sup>288</sup> If the threat of criminal sanctions for sexually active teens does not deter their sexual activity,<sup>289</sup> the threat of

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*Child*, 58 A.L.R.3d 1074, 1075 (1974) (collecting cases in which “courts have considered the propriety of terminating the parental rights of parents who have sexually abused, or permitted sexual abuse of, their children”).

<sup>287</sup> Many people worry that teenage nonchalance toward sex will lead to the “desecration of love and the subversion of mature relationships.” Stodghill, *supra* note 4, at 54. As stated by Debra Haffner, president of the Sexuality Information and Education Council of the United States: “We should not confuse kids’ pseudo-sophistication about sexuality and their ability to use the language with their understanding of who they are as sexual young people or their ability to make good decisions.” *Id.*

<sup>288</sup> A telephone poll taken for Time/CNN reveals the wellsprings of teenage information about sex: in 1998, forty-five percent of teens primarily looked to their friends for information, twenty-nine percent relied on television programs, seven percent sought help from their parents, and three percent depended upon sexuality education classes. *Id.* (citing Time/CNN poll, Apr. 8-9, 2000, conducted by Yankelovich Partners, Inc.).

<sup>289</sup> See, e.g., 720 ILL. COMP. STAT. ANN. 5/12-15(c) (West Supp. 2000) (criminalizing sexual conduct among adolescents who are at least thirteen years of age but under seventeen years of age). In a similar vein, there is scant evidence that enforcing statutory rape laws will affect the sexual behavior of teenagers. See generally Hollenberg, *supra* note 212, at 274-76 (discussing the development of

criminal penalties directed at parents will not likely hold much sway. Placing responsibility on parents to prevent adolescent sexual activity, when juxtaposed with the inundation of our youths by a seemingly constant barrage of multimedia information laced with sexual content is not only misguided and futile, but also a frivolous waste of the precious right of parents to raise their children.

Parental responsibility statutes like the Illinois law impermissibly violate the constitutional guarantee of privacy in family matters.<sup>290</sup> Although lawmakers cannot disregard the problem of unconcerned parents who allow their children to be abused, punishing parents who fail to take measures to prevent their teens from engaging in sexual activity treads too far afield from any compelling state interest in safeguarding the welfare of children. State authority must end at the point at which parents are making childrearing decisions. Helping young people prepare for mature sexual relationships is a family affair.

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specialized statutory rape prosecution programs and evaluating the effectiveness of such programs with respect to preventing teenage pregnancy). "The vague possibility of being prosecuted is a slim deterrent for those involved in age-disparate relationships when compared to the powerful psychological and economic motivations for pursuing such relationships." *Id.* at 277

<sup>290</sup> See *supra* Part V.B.1.

