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Jennifer M. Kinsley

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# Sexual Privacy in the Internet Age: How Substantive Due Process Protects Online Obscenity

Jennifer M. Kinsley\*

## ABSTRACT

*Obscenity is one of the narrow categories of speech that has historically lacked First Amendment free-speech protection, and courts and scholars alike have wrestled with the indefinable and often unworkable nature of the obscenity test. The advent of the Internet has both intensified and yet potentially resolved these problems. Recent Supreme Court cases, such as Lawrence v. Texas, suggest that sexually explicit expression that falls outside the scope of the First Amendment may nevertheless be entitled to privacy protection under Fourteenth Amendment substantive due process. Yet Lawrence's potential applicability to online obscenity has created tension in lower-court decisions and produced more questions than it has answered.*

*In an attempt to address these lingering questions, this Article discusses the burgeoning right to sexual privacy and argues that certain sexual decisions fall within the autonomy of personhood protected by the Fourteenth Amendment, even when those decisions involve some public action. Relying on Stanley v. Georgia and Lawrence v. Texas, this Article examines the intersection of public expression and private decision making in the context of the Internet and argues that online*

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*obscenity that neither involves children nor unwitting adult viewers is entitled to privacy protection.*

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*“[T]he fantastic advances in the field of electronic communication constitute a greater danger to the privacy of the individual . . . .”*

—Earl Warren (1963)<sup>1</sup>

The Internet, a medium of communication that did not exist at the time the Supreme Court last significantly revisited laws defining obscenity, has created unique opportunities for both private and public communication.<sup>2</sup> Perhaps as much as any technological development

1. *Lopez v. United States*, 373 U.S. 427, 441 (1963) (Warren, J., concurring).

2. See *A Brief History of the Internet & Related Networks*, INTERNET SOCIETY (2013), <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet>

in our nation's history, the Internet has fundamentally altered the nature of virtually every aspect of our society, including how we define our communities and how we relate to one another.<sup>3</sup> This new medium has so affected society's concepts of both privacy and interpersonal communication that the principles of obscenity and the legality of its distribution—issues that, by their very nature, necessarily bridge the concepts of privacy and speech—need serious reassessment.

To be sure, the Supreme Court has consistently recognized that technological advancements are both the cause and effect of societal changes; when this happens, old cases—like outdated technologies—must be replaced as they become obsolete.<sup>4</sup> The Court's historical obscenity jurisprudence, as it presently exists, fails to accommodate speech and privacy concerns in the Internet age. In light of both the changes in technology and society and the Court's emerging modernization of the right of privacy, this Article argues that traditional First Amendment principles must give way to broader substantive due process protection when consenting adults distribute, access, possess, and view obscenity online. Scholars have long noted practical and theoretical difficulties with “the intractable obscenity problem.”<sup>5</sup> This Article posits that the solution to those difficulties, at least in the context of online obscenity, lies outside the First Amendment and within the Fourteenth Amendment.<sup>6</sup>

To date, one federal appellate court has acknowledged that public transactions of obscene materials may in fact be entitled to

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related-networks (last visited Sept. 26, 2013) (noting that integration of Internet protocols across computer networks occurred in the 1980s); see also *Miller v. California*, 413 U.S. 15, 24 (1973) (defining test for obscenity prior to the implementation of Internet protocols).

3. See, e.g., DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 11 (2007) (discussing the impact of the Internet on interpersonal communication).

4. See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (“Each medium of expression . . . may present its own problems.” (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969))).

5. *Miller*, 413 U.S. at 16 (quoting *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part)); see also, e.g., J. Mason Kjar, *2 Obscenity Standards, 1 Neat Solution: How Geotargeting Extends Traditional Obscenity Law to the Internet*, 3 CASE W. RES. J.L. TECH. & INTERNET 125, 125 (2012); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1636 (2005); Clay Calvert et al., *Judicial Erosion of Protection for Defendants in Obscenity Prosecutions? When Courts Say, Literally, Enough is Enough and When Internet Availability Does Not Mean Acceptance*, 1 HARV. J. SPORTS & ENT. L. 7, 11–12 (2010).

6. In an effort to extend constitutional protection to online obscenity, one scholar, Professor Marc Jonathan Blitz, has argued that the First Amendment should embody Fourth Amendment privacy concepts. See Marc Jonathan Blitz, Stanley in *Cyberspace: Why the Privacy Protection of the First Amendment Should Be More Like that of the Fourth*, 62 HASTINGS L.J. 357, 357 (2010). This Article offers an alternative to Professor Blitz's Fourth Amendment analysis by positing that the Fourteenth Amendment, rather than the Fourth, should supply privacy protection to obscenity which is consumed, viewed, or exchanged online.

privacy protection.<sup>7</sup> Relying upon the ruling in *Lawrence v. Texas* that consensual, non-public homosexual intercourse cannot be criminalized, the US Court of Appeals for the Fifth Circuit invalidated Texas's obscene-devices law on substantive due process grounds.<sup>8</sup> This was the case even though the law contemplated public commercial transactions, specifically the public sale and dissemination of obscene devices.<sup>9</sup> The Fifth Circuit's decision in *Reliable Consultants* constitutes a departure from other federal circuits' approaches.<sup>10</sup> For example, in *United States v. Extreme Associates, Inc.*, the Third Circuit rejected the notion that the sale of online obscenity triggers Fourteenth Amendment substantive due process protection.<sup>11</sup> Its decision did not completely dismiss the idea but instead relied upon principles of stare decisis.<sup>12</sup> Because the Supreme Court previously ruled that legislatures could criminalize commercial distribution of obscenity, only the Supreme Court, and not the Third Circuit, could reverse or limit that holding.<sup>13</sup> As highlighted by the *Extreme Associates* and *Reliable Consultants* cases, the diverging responses by the lower courts to substantive due process protection for online sexual expression commands further analysis.

This Article attempts to resolve the tension between the *Reliable Consultants* and *Extreme Associates* decisions by looking more closely at the overlap between First Amendment obscenity and Fourteenth Amendment substantive due process concepts. Part I of this Article examines the traditional exclusion of obscenity from First Amendment free-speech protection and the justifications underlying the obscenity doctrine. Part II analyzes the emerging right of sexual privacy and autonomous decision making embedded within Fourteenth Amendment substantive due process. Part III discusses the ways in which the Internet, as a new medium of communication, calls the obscenity doctrine into question and culminates with the conclusion that because traditional obscenity concepts are unworkable as applied to the Internet, the appropriate source of constitutional protection is instead Fourteenth Amendment substantive due process.

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7. See *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742–43 (5th Cir. 2008).

8. See *id.*

9. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68–69 (1973).

10. See *Reliable Consultants*, 517 F.3d at 742–43.

11. See *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 162 (3d Cir. 2005); see also *United States v. Little*, 365 Fed. Appx. 159, 162 (11th Cir. 2010).

12. See *Extreme Assocs.*, 431 F.3d at 161–62.

13. See *id.* at 156.

## I. THE HISTORY OF THE OBSCENITY DOCTRINE

A. *Obscene Speech and the First Amendment*

Although scholars long suspected that obscenity is not protected by the First Amendment, the Supreme Court held for the first time in 1957, in *Roth v. United States*,<sup>14</sup> that the First Amendment right to free speech does not include obscenity.<sup>15</sup> While the basis of the Court's decision was primarily historical,<sup>16</sup> the *Roth* opinion also reflected the Court's judgment that obscenity is "utterly without redeeming social importance."<sup>17</sup> Over a decade later, the Court clarified in *Paris Adult Theatre I v. Slaton*<sup>18</sup> that concerns for moral decency<sup>19</sup> and pristine community standards also support divesting obscenity of First Amendment protection. Writing for the majority in *Paris Adult Theatre I*, Justice Burger remarked:

In particular, we hold that there are legitimate<sup>20</sup> state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests "other than those of the advocates are involved." *Beard v. Alexandria*, 341 U.S. 622, 642, 71 S.Ct. 920, 932, 95 L.Ed.2d 1233 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.<sup>21</sup>

Although the Court outlined the moral underpinnings of the obscenity doctrine in its early obscenity jurisprudence,<sup>22</sup> it has

14. 354 U.S. 476 (1957).

15. *See id.* at 485.

16. *Roth* hypothesized that the First Amendment was not intended to protect obscene expression because all states criminalized obscenity at the time and because Congress had prohibited distribution of obscenity in various forms since 1842. *See id.* at 482–83, 485. *Roth* was also grounded in original intent analysis, noting without extensively describing that obscenity prosecutions existed at the time the First Amendment was adopted. *See id.* at 483 n.13.

17. *Id.* at 484.

18. 413 U.S. 49 (1973).

19. Professor Daniel F. Piar traces the morality justification for banning obscenity in his comprehensive article on the government's interest in legislating moral values. *See* Daniel F. Piar, *Morality as a Legitimate Government Interest*, 17 PENN ST. L. REV. 139, 147–49 (2012).

20. As Part III(B) discusses, Justice Burger's observation that protecting commercial centers and public safety are *legitimate*, rather than *compelling*, state interests, is significant. *See infra* Part III(B). Because these interests are merely legitimate, they cannot justify burdening a fundamental right. *See, e.g.,* *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008) ("[S]ignificant encroachments [on First Amendment rights] 'cannot be justified by a mere showing of some legitimate government interest.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976))).

21. *Paris Adult Theatre I*, 413 U.S. at 57–58.

22. Certain scholars, primary among them Professor Andrew Koppelman, have traced the Court's shifting justifications for its obscenity doctrine. *See, e.g.,* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005). Koppelman posits that moral harm, or the collective degradation of societal values, has historically justified obscenity law,

struggled over the years to define precisely what constitutes obscenity, resulting in Justice Stewart's famous description, "I know it when I see it."<sup>23</sup> Despite this prescient observation, the test propounded by the Court in its 1973 *Miller v. California* decision remains virtually unchanged.<sup>24</sup> Pursuant to this test, material is obscene and therefore unprotected if: (1) "the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to a prurient interest"; (2) "the work depicts or describes, in a patently offensive way, sexual conduct" as defined by state law; and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."<sup>25</sup>

This test is difficult to apply to electronically exchanged communications.<sup>26</sup> Various Justices of the Supreme Court have noted, for example, that community standards are difficult to determine in the context of the World Wide Web.<sup>27</sup> In addition, *Miller's* requirement that the material be "taken as a whole"<sup>28</sup> is problematic when applied to the Internet because "everything on the Web is connected to everything else."<sup>29</sup> Despite these and other oft-cited difficulties with the obscenity doctrine, the federal government instituted a number of high-profile prosecutions against online pornographers in the 2000s.<sup>30</sup> These

although he also argues that laws banning obscenity cannot cure perceived moral harm and should therefore be abandoned. *See id.*

23. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

24. *See Pope v. Illinois*, 481 U.S. 497, 498 (1987) (maintaining *Miller's* test for obscenity).

25. *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Roth v. California*, 354 U.S. 476, 489 (1957), for the first prong). The third prong of the *Miller* test was clarified in *Pope*, which held that the serious value of a particular work is to be judged by a reasonable person test and not by community standards. *See* 481 U.S. at 500–01. The Supreme Court has not altered the *Miller* test for obscenity since its 1987 decision in *Pope*. *See* RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 14.35 (2013).

26. Even those scholars who propose solutions to the problem of applying the *Miller* test to web-based expression concede the unworkability of the test in an online environment. *See, e.g.,* Clay Calvert, *The End of Forum Shopping in Internet Obscenity Cases? The Ramifications of the Ninth Circuit's Groundbreaking Understanding of Community Standards in Cyberspace*, 89 NEB. L. REV. 47, 80 (2010).

27. *See, e.g., Ashcroft v. ACLU*, 535 U.S. 564, 597 (2002) (Kennedy, J., concurring) ("The national variation in community standards constitutes a particular burden on Internet speech."). In response to this concern, the Ninth Circuit recently held that the relevant community to be considered in adjudicating the obscenity of online expression is the entire United States. *See United States v. Kilbride*, 584 F.3d 1240, 1254 (9th Cir. 2009).

28. *Miller*, 413 U.S. at 24.

29. *Ashcroft*, 535 U.S. at 600 (Kennedy, J., concurring).

30. The comprehensive work of Clay Calvert documents these prosecutions, most notable among them the prosecution of well-known producer Paul Little, known by the stage name Max Hardcore, in the Middle District of Florida. *E.g.,* Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years after Roth v. United States*, 9 TEX. REV. ENT. & SPORTS L. 1, 2–3 (2007); Robert D. Richlands & Clay Calvert, *Untangling Child Pornography from the Adult Entertainment Industry: An Inside Look at the Industry's Efforts to Protect Minors*, 44 CAL. W. L.

prosecutions not only highlight the unworkability of the *Miller* test as applied to online speech but also provide a possible solution to the constitutional conundrum the obscenity doctrine creates. The next frontier: the right of sexual privacy protected by Fourteenth Amendment substantive due process.

*B. Constitutional Distinctions between Private Possession and Public Distribution of Obscenity*

Before the Supreme Court defined precisely what constitutes obscene speech in *Miller*, the Court observed in other cases that the state cannot criminalize the private possession of obscenity.<sup>31</sup> In the mid-1960s, police officers searching a home for evidence of illegal bookmaking uncovered an 8-millimeter reel of film in the suspect's bedroom desk drawer.<sup>32</sup> Although the courts never described the content of the film,<sup>33</sup> the suspect—Robert Eli Stanley—was charged, tried, and convicted of possessing obscene matter.<sup>34</sup> He appealed to the Supreme Court, alleging that his conviction violated his First Amendment right of privacy.<sup>35</sup> In sweeping terms, the Supreme Court agreed.<sup>36</sup> Because the right to be free from unwanted governmental intrusions into the home is fundamental and because the First Amendment protects the right to receive information and ideas, Stanley could not be convicted of a crime for merely possessing obscenity.<sup>37</sup> In overturning Stanley's conviction, the Court was clear that the First

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REV. 511, 524 n.68 (2008); *see also* *United States v. John Stagliano*, 693 F. Supp. 2d 25, 28 (D.D.C. 2010); Press Release, Dep't of Justice, Federal Jury Finds Ira Isaacs Guilty in Los Angeles Adult Obscenity Case (Apr. 27, 2012), *available at* <http://www.justice.gov/opa/pr/2012/April/12-crm-554.html>.

31. *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 563–65 (1969).

32. *See id.* at 558.

33. One irony of the *Miller* test is that descriptions of obscene material in court documents may not be immune from prosecution. On its face, the *Miller* test applies to written words as well as visual depictions, and the “serious value” prong does not specifically preclude the criminalization of written documents that have legal value. In fact, the United States Department of Justice recently prosecuted the written word alone without images or videos. *See* Press Release, Dep't of Justice, Donora Woman Charged with Distributing Obscene Matter on the Internet (Sept. 27, 2006), *available at* <http://www.dmlp.org/sites/citmedialaw.org/files/2006-09-27Department%20of%20Justice%20Press%20Release.pdf>; *see also* Scott Michels, *Art or Obscenity? Unusual Case Draws Controversy*, ABC NEWS (Feb. 1, 2008), <http://abcnews.go.com/TheLaw/story?id=4222798&page=1>.

34. *See Stanley v. State*, 161 S.E.2d 309 (Ga. 1968), *rev'd*, 394 U.S. 557 (1969).

35. *See Stanley v. Georgia*, 394 U.S. 557, 559 (1969).

36. *See id.* (“[W]e agree that the mere private possession of obscene matter cannot constitutionally be made a crime.”).

37. *See id.* at 563–65.



Amendment, as applied to the states through the Fourteenth Amendment, insulated Stanley's possession of obscenity in his home.<sup>38</sup>

In the wake of *Stanley*, numerous other obscenity defendants attempted to extend First Amendment protection for private possession to their public possession and distribution of obscenity. For example, in *United States v. Reidel*, the defendant argued that First Amendment privacy concepts precluded his conviction for mailing obscene material.<sup>39</sup> Reading *Stanley* to imbue only the possession of obscenity in one's own home with constitutional protection, the Court rejected Reidel's argument.<sup>40</sup> Because the conduct at issue—mailing obscene expression—moved outside the sphere of protected space, the First Amendment did not shield Reidel's conduct.<sup>41</sup> In a similar vein, the post-*Stanley* Supreme Court declined to extend First Amendment protection to the transportation of obscenity in luggage,<sup>42</sup> the display of an obscene film in a public theater,<sup>43</sup> the act of moving obscene material across the US border,<sup>44</sup> and the transportation of obscenity on common carriers and airlines.<sup>45</sup> Thus, in the years immediately following *Stanley*, the Supreme Court actively limited the application of that holding to possession in the home.<sup>46</sup>

## II. THE EMERGING RIGHT OF SEXUAL PRIVACY

### A. *The Autonomy of Personhood and the Right to Control Intimate Sexual Choices under the Fourteenth Amendment*

Beginning in the 1960s and culminating with the Court's landmark decision in *Lawrence v. Texas*, which declared Texas's anti-sodomy statute unconstitutional,<sup>47</sup> the Court has recognized an emerging right of sexual privacy protected by the Fourteenth Amendment.<sup>48</sup> One of the earlier privacy cases, *Griswold v.*

38. See *id.*

39. See *United States v. Reidel*, 402 U.S. 351 (1971).

40. See *id.* at 355–56.

41. See *id.*

42. *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971).

43. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

44. *United States v. 12 200-Ft. Reels*, 413 U.S. 123 (1973).

45. *United States v. Orito*, 413 U.S. 139 (1973).

46. The cases discussed in this paragraph—*Reidel*, *Thirty-Seven Photographs*, *Paris Adult Theatre I*, *12-200-Ft. Reels*, and *Orito*—will be collectively referenced in later parts of this Article as “the post-*Stanley* cases.”

47. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

48. To be fair, the Court has yet to explicitly identify a right of sexual privacy by name. Nevertheless, as discussed in this Part, each of the cases in which the Court has applied substantive due process to invalidate restrictions on sexual privacy is grounded in the notion that

*Connecticut*, provides guidance on the scope of the protection for autonomous decision making in the realm of sex.<sup>49</sup> Decided in 1965, *Griswold* both identified a right of sexual privacy and expressly recognized a link between public commerce and the exercise of that right.<sup>50</sup> The plaintiffs in *Griswold* were not patients but instead pharmacists and doctors who had standing to assert the rights of their clients in obtaining contraceptives.<sup>51</sup> As the Court in *Griswold* recognized, individuals were powerless to exercise their right to prevent unwanted pregnancies because the government had criminalized the act of dispensing birth control.<sup>52</sup> In this way, the law at issue imposed a “maximum destructive impact” upon individual<sup>53</sup> sexual decision making, not by banning the decision making itself, but by prohibiting individuals from obtaining the information and materials necessary to prevent pregnancy.<sup>54</sup>

A mere three years later, in *Stanley*, the Court again confirmed that the right of sexual privacy includes the right to privately possess obscenity.<sup>55</sup> Of particular importance is the manner in which the Court described the right at issue. *Stanley* was not asserting the right to maintain dominion over his homestead but instead the right to be free from governmental control of his mind and thoughts.<sup>56</sup> Although the Court found it significant that *Stanley* maintained his obscenity collection in his home, the opinion employed much broader language to describe rights to receive information pertaining to sex and to exercise freedom of thought on matters of human sexuality.<sup>57</sup> As the Court observed, the “right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. . . . [A]lso fundamental is the right to be free, except in very limited

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sexual behaviors are sufficiently integral to the concept of personhood that they are constitutionally protected. See Kristin Fasullo, Note, *Beyond Lawrence v. Texas: Crafting a Right to Sexual Privacy*, 77 *FORDHAM L. REV.* 2997 (2009).

49. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

50. See *id.* at 482.

51. See *id.* at 481 (“[A]ppellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship.”).

52. See *id.* at 485–86. The Fifth Circuit’s decision in *Reliable Consultants* confirms that commercial distributors have standing to assert the privacy rights of the downstream consumer in challenging bans on certain commercial transactions. See *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008).

53. Each of the Supreme Court’s sexual-privacy cases involved an individual right to further one’s own intimate choices, rather than the right of the commercial provider who may facilitate those choices. See, e.g., *Roe v. Wade*, 410 U.S. 113, 129 (1973) (defining right at issue as the individual right of privacy and not the physician’s right to perform an abortion).

54. See *Griswold*, 381 U.S. at 485.

55. See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

56. See *id.* at 565–66.

57. See *id.*

circumstances, from unwanted governmental intrusions into one's privacy."<sup>58</sup> As a result, the state could not "constitutionally premise legislation on the desirability of controlling a person's private thoughts."<sup>59</sup>

The Court later observed that Fourteenth Amendment substantive due process protects an individual's right to make personal decisions about "marriage, procreation, contraception, family relationships, child rearing, and education."<sup>60</sup> In *Planned Parenthood of Southeastern Pennsylvania, Inc. v. Casey*, the Court acknowledged that although abortion is "an act fraught with consequences for others,"<sup>61</sup> the decision to have an abortion triggers "intimate views with infinite variations."<sup>62</sup> The Court further identified that the right "involve[s] personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it."<sup>63</sup> As a result, the Court reaffirmed that the Constitution protects the right to an abortion<sup>64</sup> because of abortion's deeply personal character.<sup>65</sup> Using expansive language, *Casey* further secured constitutional protection for autonomous personal decision making regarding intimate conduct:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>66</sup>

Along with recognizing this dimension of liberty,<sup>67</sup> the Court discussed its constitutional duty to overrule prior decisions that rested on an understanding of facts that have since changed in a way that "the

58. *Id.* at 564 (citing *Winters v. New York*, 333 U.S. 507 (1948)).

59. *Id.* at 566. The central holding of *Stanley*—that individuals have a right to be free from governmental interference into their private lives—has been echoed in other cases construing the right of autonomous decision making in matters innate to personhood. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (the right to an abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (the right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the right to marital privacy and contraception); *Rochin v. California*, 342 U.S. 165 (1952) (the right to bodily integrity).

60. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977)).

61. *Id.* at 852.

62. *Id.* at 853.

63. *Id.*

64. *Roe*, 410 U.S. at 153.

65. *Casey*, 505 U.S. at 853.

66. *Id.* at 851. The Court later quoted this language to reaffirm "the substantive force of the liberty protected by the Due Process Clause." *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

67. *Casey*, 505 U.S. at 853.

Court of an earlier day” would have been unable to perceive.<sup>68</sup> Accordingly, the Court noted that “changed circumstances may impose new obligations,”<sup>69</sup> and constitutional adjudication may be necessary when “the claimed justifications for the earlier constitutional resolutions” are “fundamentally different from the basis claimed for the [prior] decision.”<sup>70</sup>

The Court once again considered the scope of substantive due process protection as it pertains to sex in *Lawrence v. Texas*.<sup>71</sup> Explicitly overruling *Bowers v. Hardwick*,<sup>72</sup> which was decided seventeen years earlier, the Court struck down Texas’s anti-sodomy statute as unconstitutional.<sup>73</sup> *Lawrence* began with a fortuitous—or possibly staged<sup>74</sup>—police raid, in which John Geddes Lawrence and Tyrone Gardner were engaging in homosexual sex at the precise moment officers entered their apartment to investigate a weapons report.<sup>75</sup> They were charged with engaging in “deviate sexual intercourse,”<sup>76</sup> plead no contest after the trial court denied their motions attacking the constitutionality of the law, and received a sentence of a \$200 fine and court costs.<sup>77</sup> On appeal to the Supreme Court, Lawrence and Gardner alleged that the law violated their substantive due process rights and the right to equal protection under the Fourteenth Amendment.<sup>78</sup>

The Supreme Court agreed that the Texas law violated the right of sexual privacy without reaching the equal protection issue.<sup>79</sup> The Court began its substantive due process analysis with *Griswold*,<sup>80</sup> explicitly noting that “the right to make certain decisions regarding

68. *Id.* at 863.

69. *Id.* at 864.

70. *Id.* at 863. As the Court’s obscenity jurisprudence is viewed in light of its later decisions affording constitutional protection from unwanted governmental intrusions into one’s privacy, it both proves unworkable as applied to the Internet and also represents application of a constitutional principle to facts the Court could never have perceived in 1957 when it decided *Roth*.

71. *See Lawrence*, 539 U.S. 558, 564 (2003).

72. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

73. *See Lawrence*, 539 U.S. at 578–79.

74. *See, e.g., Janice Law, SEX APPEALED: WAS THE US SUPREME COURT FOOLED?* (2005).

75. *Lawrence*, 539 U.S. at 562–63.

76. The Texas criminal statute at issue defined “[d]eviate sexual intercourse” as: “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” TEX. PENAL CODE ANN. § 21.01(1) (2005).

77. *See Lawrence*, 539 U.S. at 563.

78. *See id.* at 564.

79. *See id.* Writing separately, Justice O’Connor would have invalidated the law on equal protection grounds. *See id.* at 579 (O’Connor, J., concurring).

80. *Id.* at 564 (“[T]he most pertinent beginning point is our decision in *Griswold*.” (citation omitted)).

sexual conduct extends beyond the marital relationship.”<sup>81</sup> The Court also emphasized the highly private nature of sexual conduct and its connection to intimate human relationships.<sup>82</sup> Without defining the right at issue as fundamental, the Court noted that the government’s interest in enforcing the majority’s moral code was insufficient to justify criminalizing intimate homosexual conduct.<sup>83</sup> The Court therefore reversed *Lawrence* and Gardner’s convictions and declared unconstitutional the statute under which they were charged.<sup>84</sup>

As *Lawrence* makes clear, the fundamental right of sexual privacy, at least as it governs the right to autonomous decision making, is not restricted to the home.<sup>85</sup> From its inception, the right to privacy—grounded in substantive due process—has restrained the reach of government into the personal lives, and not just spaces, of the people.<sup>86</sup> As the Court observed in *Lawrence*:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And *there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds.*<sup>87</sup>

Thus, the Supreme Court has explicitly recognized that the Fourteenth Amendment right of privacy, as contrasted to the First Amendment right of privacy at issue in *Stanley*, is no longer confined—if it ever was—to the sanctity of the home.<sup>88</sup> Rather, substantive due process protection extends to public activities that directly impact and influence private behavior.<sup>89</sup>

These principles do not change when the content of the material an individual elects to privately access and view is obscene.<sup>90</sup> In fact, if anything, the inclusion of sexual topics or activities heightens the constitutional concerns.<sup>91</sup> Because sexual behavior is “the most private

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81. *Id.* at 565 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

82. *See id.*

83. *See id.* at 571–72.

84. *See id.* at 579.

85. *See id.* at 562, 578.

86. *See id.*

87. *Id.* at 562 (emphasis added).

88. *See id.* at 578.

89. *See id.* at 562 (“[L]iberty of the person [involves] both . . . spatial and . . . more transcendent dimensions.”); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (recognizing that the right to contraception includes not only the right of married persons to use contraceptive devices, but also the right of the physician to dispense them).

90. *See Stanley v. Georgia*, 394 U.S. 557, 559 (1969).

91. *See Ashcroft v. ACLU*, 535 U.S. 564 (2002). This is due in part to the fact that because obscenity is difficult to define, increased sensitivity is warranted when expression is involved. *See id.* at 574–75.

human conduct,<sup>92</sup> multiple constitutional protections are at work when an individual seeks to access sexually explicit speech in private. The First Amendment protects the right to receive information and ideas, while the Fifth and Fourteenth Amendments protect the privacy and liberty interests inherent in any sexual activity that occurs outside the public view.<sup>93</sup>

Once properly defined, the individual right of sexual privacy cannot properly be limited, as some have suggested, to include only those intimate activities undertaken for the purposes of procreation.<sup>94</sup> It is clear that the right *not* to procreate is as important as the right to procreate and, therefore, that there exists a right to engage in sexual practices that limit the likelihood of conception.<sup>95</sup> The Court built its rulings in *Griswold* and *Roe v. Wade*<sup>96</sup> on the rights of procreation and marital association—likely an accommodation to the facts of those cases and contemporary social currents—but the Court declined to expressly limit the right of privacy to procreative sex.<sup>97</sup> Moreover, the Court's decision in *Lawrence* confirms its intention to expand the right of sexual privacy beyond procreation.<sup>98</sup>

Indeed, neither the sexual behavior in *Lawrence* (sodomy) nor the participants (two men) presented any chance of conception.<sup>99</sup> Yet the Court still found the activity to fall within a “realm of personal liberty which the government may not enter.”<sup>100</sup> Even more importantly, the Court concluded that “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>101</sup> The Court has never qualified that protection with a requirement that sex be undertaken for the purpose of conceiving a child.<sup>102</sup> To the contrary, the Court has observed that

92. *Lawrence*, 539 U.S. at 567, 574.

93. *See id.* at 564; *Stanley*, 394 U.S. at 565.

94. *See, e.g.*, Angela Holt, Comment, *My Cold Dead Hands: Williams v. Pryor and the Constitutionality of Alabama's Anti-Vibrator Law*, 53 ALA. L. REV. 927, 938–39 (2002).

95. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

96. *Roe*, 410 U.S. at 116; *Griswold*, 381 U.S. at 480.

97. While these decisions on their face appear to recognize a right of privacy in one's intimate sexual conduct, there is a line of thinking that interprets the right at issue as autonomy in decision making. Whatever the holdings in *Roe*, *Griswold*, and *Carey*, however, it is clear that, at a minimum, they stand for the proposition that the government cannot control the private practices, attitudes, and thoughts of its people by criminalizing the outer contours of sexual behavior. *See e.g.*, *Roe*, 410 U.S. at 153–54.

98. *Lawrence*, 539 U.S. at 573–74 (“Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”).

99. *See id.* at 562–63.

100. *Id.* at 578 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)).

101. *Id.* at 572.

102. *See id.* at 573–74.

“individual decisions by married persons, concerning the intimacies of their physical relationship, *even when not intended to produce offspring*, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.”<sup>103</sup>

In the wake of *Lawrence*, courts have questioned and—in some cases—condemned similar laws that burden individual freedoms by restricting commercial transactions.<sup>104</sup> Most recently, the Fifth Circuit in *Reliable Consultants, Inc. v. Earle* invalidated a statewide ban on the possession and distribution of obscene devices, noting that the law unduly burdened the “right to be free from governmental intrusion regarding ‘the most private human contact, sexual behavior.’”<sup>105</sup> The Eleventh Circuit considered a similar ban on the sale of sexual devices in the *Williams* line of cases.<sup>106</sup> Although the court in *Williams III* ultimately declined to invalidate a restriction on the sale of sexual aids (after initially doubting its validity in *Williams I* and *II*), the Eleventh Circuit did cast the issue as the right of the consumer to use sexual devices and not the right of the business to sell them.<sup>107</sup>

The *Williams* line of cases contains several internal inconsistencies that warrant further observation.<sup>108</sup> First, the Eleventh Circuit in *Williams III* deviated from its prior holding that bans on the distribution of sexual devices must be analyzed based on their impact upon the private right of use.<sup>109</sup> This holding violated the law of the case doctrine.<sup>110</sup> Because a separate panel of the court had previously

103. *Id.* at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (emphasis added).

104. *See, e.g.*, *Carey v. Population Servs. Int’l*, 431 U.S. 678, 687–88 (1977) (striking down restrictions on distribution and advertising of prophylactics that violated the privacy right in procreative decision making); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (declaring ban on abortions unconstitutional because it violated personal liberty interest).

105. *Reliable Consultants Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008) (quoting *Lawrence*, 539 U.S. at 564).

106. *Williams v. Morgan (Williams III)*, 478 F.3d 1316, 1318 (11th Cir. 2007); *Williams v. Att’y Gen. of Ala. (Williams II)*, 378 F.3d 1232, 1233 (11th Cir. 2004); *Williams v. Pryor (Williams I)*, 240 F.3d 944, 947 (11th Cir. 2001).

107. *See Williams II*, 378 F.3d at 1242 (“Because a prohibition on the distribution of sexual devices would burden an individual’s ability to use the devices, our analysis must be framed not simply in terms of whether the Constitution protects a right to *sell* and *buy* sexual devices, but whether it protects a right to *use* such devices.”).

108. Although resolving the conflict between the Fifth Circuit’s decision in *Reliable Consultants* and the Eleventh Circuit’s decision in the *Williams* cases is beyond the scope of this Article, some observations about the *Williams* cases are warranted given their treatment of the right to sexual privacy.

109. *See Williams III*, 478 F.3d at 1316.

110. *This That & The Other Gift & Tobacco, Inc. v. Cobb Cnty., Ga.*, 439 F.3d 1275, 1283 (11th Cir. 2006) (“[T]he findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal.” (citing *Heathcoat v. Potts*, 905 F.2d 367, 370 (11th Cir. 1990))).

determined that the right at issue in *Williams I* was the right of consumers to use sexual aids in the privacy of their own bedrooms, the court erred in changing course on this key issue.<sup>111</sup> Adding to the confusion, the *Williams* court observed that its prior rulings only considered the right of private use to determine whether a fundamental right exists.<sup>112</sup>

Moreover, and most notably, it is impossible to square the holding in *Williams III* with *Griswold*<sup>113</sup> and *Roe*.<sup>114</sup> While there is ostensibly some distinction between wholly private conduct and the right to use sexual devices at issue in *Williams*, there is no intellectually honest way to distinguish *Williams* from the procreation-autonomy cases. Both the right to an abortion in *Roe* and the right to purchase contraceptives in *Griswold* require, by their very nature, a public, commercial act as a predicate to the constitutionally protected private conduct.<sup>115</sup> In fact, as the Supreme Court recognized in each of those cases, the public business transaction enables the exercise of the private right, such that one could not exist without the other.<sup>116</sup> This symbiotic relationship between public and private conduct underscores why bans on public sale effectively function as prohibitions on private use.

Notwithstanding *Williams III*, the Supreme Court's decisions in *Griswold*, *Stanley*, *Casey*, and *Lawrence* support the conclusion that the right of autonomous decision making includes the protection of both intimate sexual conduct and the commercial transactions that enable and promote sexual intimacy. As discussed at length in *Stanley*, the right of sexual privacy included in the right of personhood is fundamental.<sup>117</sup> It necessarily follows that laws prohibiting commercial transactions that burden the fundamental right of sexual autonomy suffer from the same constitutional flaws that a direct ban on the right would trigger.<sup>118</sup> In the absence of a compelling governmental

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111. See *id.*; *Williams II*, 378 F.3d at 1242.

112. See *Williams II*, 378 F.3d at 1235–37 (construing whether a fundamental right to use sexual devices exists under the test propounded in *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

113. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

114. *Roe v. Wade*, 410 U.S. 113, 164 (1971).

115. See *Roe*, 410 U.S. at 117–18; *Griswold*, 381 U.S. at 481.

116. See, e.g., *Roe*, 410 U.S. at 117–18 (noting that the statute at issue criminalized the act of procuring an abortion); *Griswold*, 381 U.S. at 480 (noting that fees were charged for recommending and prescribing contraceptives).

117. See *Stanley v. Georgia*, 394 U.S. 557, 564 (“[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”).

118. See, e.g., *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008).



justification, laws restricting the private transaction of obscenity online are invalid.<sup>119</sup>

### B. *The Insufficient Justification of Morality*

Traditional obscenity doctrine suggests that morality and a desire to maintain pristine and proper public spaces were the driving justifications for divesting obscenity of First Amendment protection.<sup>120</sup> However, it is doubtful that the government retains a cognizable interest in regulating private sexual conduct as a matter of public morality after *Lawrence*.<sup>121</sup> In weighing the right to sexual privacy implicated by the Texas sodomy law against the government's purported interest in prohibiting immoral sex acts, the Supreme Court specifically disavowed morality as a justification for regulating private sexual activity.<sup>122</sup> It did so cognizant of the risk—emphasized so eloquently in Justice Scalia's now infamous dissent—that other laws restricting sexually immoral behavior might be in jeopardy as well.<sup>123</sup> Whether the government maintains a legitimate interest in enforcing a preferred moral code post-*Lawrence* has been the subject of a highly contested debate.<sup>124</sup> Yet this Article need not resolve such a broad and perplexing question. Because *Lawrence*, *Casey*, *Stanley*, and *Griswold*, taken together, imply the existence of a fundamental right to sexual privacy under the First and Fourteenth Amendments, morality can only justify burdening that right if it constitutes a compelling governmental interest.<sup>125</sup> Applying the logic of *Lawrence*, the possession and

119. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 929 (1992) (Blackmun, J., concurring in part and dissenting in part).

120. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973); see also *Stanley*, 394 U.S. at 566 (“Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.”).

121. This is not to dismiss outright the reasoned arguments of Piar and others who argue that morality can support laws which do not burden a fundamental right, but rather is an acknowledgment of *Lawrence*'s impact on the specific aspect of substantive due process law that governs sexual privacy. See, e.g., Piar, *supra* note 25, at 147–49.

122. See *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003).

123. See *id.* at 590 (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision . . .”).

124. See, e.g., Matthew J. Clark, *Rational Relationship to What? How Lawrence v. Texas Destroyed Our Understanding of What Constitutes a Legitimate State Interest*, 6 LIBERTY U.L. REV. 415 (2012); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004).

125. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 929 (1992) (Blackmun, J., concurring in part and dissenting in part) (“[L]imitations on the right of privacy are permissible only if they survive ‘strict’ constitutional scrutiny—that is, only if the governmental entity

distribution of online obscenity triggers the fundamental right in sexual privacy.<sup>126</sup> Because a fundamental right is at stake, morality can only justify laws that burden the exercise of this right—like the laws precluding the distribution of online obscenity—if morality is a compelling government interest.<sup>127</sup> Under *Lawrence*, it is nothing of the sort.<sup>128</sup> Thus, the government's attempts to sanitize the Internet by prosecuting online obscenity cannot survive strict scrutiny solely on the basis of an asserted state interest in producing a moral society.<sup>129</sup>

The argument that morality nevertheless justifies the criminalization of commercial online transactions of obscenity is unpersuasive. If morality is not a sufficient justification to directly burden the right (e.g., by explicitly banning private sexual conduct), then it equally does not justify burdening the right indirectly (e.g., by banning commercial distribution or online access to the very expression individuals have a right to enjoy in private).<sup>130</sup> A strategic choice to regulate one aspect of the right of sexual privacy instead of another does not alleviate the requirement that the government provide a sufficiently compelling interest to justify the prohibition.<sup>131</sup> The state's morality justification for the criminalization of online obscenity cannot survive post-*Lawrence*.<sup>132</sup>

Any concerns that *Lawrence's* invalidation of the morality justification for restrictions on sexual privacy will lead to the entire criminal code being declared unconstitutional are apocalyptic and unfounded.<sup>133</sup> Other governmental interests, including the protection of life, limb, and property, justify the bulk of our penal laws.<sup>134</sup> Even

imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest." (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

126. One might question whether the possession and viewing of sexually explicit content is so integral to the concept of personhood that it rises to the level of a fundamental right. *Stanley* suggests that it is. See *Stanley*, 394 U.S. at 563–65. The material *Stanley* was convicted of possessing was declared obscene and therefore lacked serious value; yet the First Amendment still protected *Stanley's* basic human right to watch the film in the privacy of his own home. See *id.*

127. See, e.g., Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (describing strict scrutiny test for laws that burden fundamental rights).

128. See *Lawrence v. Texas*, 539 U.S. 558, 583 (2003).

129. See *id.*

130. See *id.*

131. See *id.*

132. See *id.* at 578–80.

133. See *id.* at 590 (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.").

134. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14–19 (6th ed. 2012); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.2(e) (2d ed. 2012).

laws that on their face appear to enforce a moral code—for example, bans on human trafficking and sexual assault—address serious concerns for public health, individual well-being, and safe social structures.<sup>135</sup> Moreover, courts can appropriately limit the holding in *Lawrence* to the conclusion that public morality does not justify invading the sphere of privacy that protects one's intimate sexual behaviors, thereby alleviating any concerns about invalidating criminal laws addressing nonsexual and even public sexual conduct.<sup>136</sup> Read in this way, *Lawrence* is not such harsh medicine. It merely concludes that, on balance, the individual interest in private sexual autonomy outweighs the governmental interest in enforcing its own moral code.<sup>137</sup>

*Lawrence* thus represents the culmination of the Supreme Court's sexual privacy cases. When read in combination with *Griswold*, *Casey*, and *Stanley*, *Lawrence* lends broad constitutional protection not only to sexual behaviors that occur in the home, but also to private sexual conduct that produces little or no societal harm.<sup>138</sup> Because *Stanley* and the cases limiting its holding to the residential possession of obscenity were decided before the advent of email, websites, message boards, and text messages, the question becomes: In the age of the Internet, can sexual exchanges occur outside the home and still be sufficiently private to trigger substantive due process protection?<sup>139</sup> In other words, can the government criminally prosecute online obscenity that is neither foisted on children or unwitting adults nor broadcast to a public audience in public space?

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135. See, e.g., H.R. REP. NO. 106-487(II), at 16–18 (2000) (summarizing public health and safety concerns supporting the passage of the Trafficking Victims Protection Act of 2000). This law, which criminalizes human trafficking and offers protection and services for trafficking victims, has been readopted through reauthorization acts in 2003, 2005, 2008, and 2011. See S. REP. NO. 112-96 (2001).

136. See *Lawrence*, 539 U.S. at 583.

137. See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality and Marriage*, 55 SUP. CT. REV. 27, 31 (2004).

138. See *Lawrence*, 539 U.S. at 583.

139. Indicating that “changed circumstances may impose new obligations,” the Court in *Casey* recognized its constitutional duty to overrule a prior case when it rested on an understanding of facts that has since changed. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 863–64 (1992).

### III. FOURTEENTH AMENDMENT PROTECTIONS FOR THE PRIVATE DISTRIBUTION OF ONLINE OBSCENITY

#### A. *Questioning First Amendment Principles in the Internet Age*

The Internet is a global mechanism of computerized communication.<sup>140</sup> Since its introduction, the Internet has generated new possibilities for commerce, speech, and the rapid proliferation of information.<sup>141</sup> The best known protocol for communicating on the Internet is the World Wide Web.<sup>142</sup> Consisting of an almost infinite number of individual websites, each with potentially innumerable individual webpages, the World Wide Web allows users with simple software to post text, graphics, images, and videos into cyberspace.<sup>143</sup> As of February 2013, an estimated 630 million websites exist worldwide, a number that continues to climb exponentially.<sup>144</sup> Almost anyone<sup>145</sup> with a computer and an Internet connection can access and view these websites,<sup>146</sup> although certain websites restrict access to authorized users, who use a password or other credentials to access private information or protected webpages or websites.<sup>147</sup>

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140. See *Reno v. ACLU*, 521 U.S. 844, 849–50 (1997).

141. See *Vint Cerf on How the Internet Changed Communication*, FORBES.COM (Oct. 24, 2005, 9:00 AM), [http://www.forbes.com/2005/10/19/cerf-vint-networking-internet-comm05-cx\\_de\\_1024cerfnet.html](http://www.forbes.com/2005/10/19/cerf-vint-networking-internet-comm05-cx_de_1024cerfnet.html).

142. See *Reno*, 521 U.S. at 852. The foundations of the Internet were developed in 1969 through a military program known as ARPANET. See *id.* at 849–50. The Internet as we know it today, however, was not introduced until the 1980s and, as the number of personal computer users grew, took on greater prominence in the 1990s. See *id.* at 850–51. The term “Internet” was officially adopted by the Federal Networking Council in 1995. See Barry M. Leiner et al., *A Brief History of the Internet*, INTERNET SOCIETY, <http://www.isoc.org/internet/history/brief.shtml#References> (last visited Oct. 19, 2013).

143. See Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 925 (2009) (discussing types and origin of user-generated Internet content).

144. See *February 2013 Web Server Survey*, NETCRAFT, <http://news.netcraft.com/archives/2013/02/01/february-2013-web-server-survey.html> (last visited Feb. 4, 2013).

145. China has notoriously restricted Internet usage by its citizens, as have certain Middle Eastern countries. See, e.g., *Google’s Services Unable to Reach Much of China*, USA TODAY (Nov. 9, 2012), <http://www.usatoday.com/story/tech/2012/11/09/googles-services-unable-to-reach-much-of-china/1695703>; *Google Search and Gmail Censored in Iran*, BBC (Sept. 24, 2012), <http://www.bbc.co.uk/news/technology-19700910>.

146. The Federal Communications Commission (FCC) is presently considering a proposal to expand wireless Internet access by creating a national Wi-Fi network. See *White Space*, FCC, <http://www.fcc.gov/topic/white-space> (last visited Feb. 6, 2013).

147. For example, organizations may restrict access to portions of their websites to “members only.” See, e.g., FIRST AMENDMENT LAWYERS ASSOCIATION, [www.firstamendmentlawyers.org](http://www.firstamendmentlawyers.org) (last visited Feb. 4, 2013) (containing a link where members of the First Amendment Lawyers Association may log in to access additional content). In addition, commercial websites may also require payment or a subscription to access content online. See, e.g., *Subscriptions*, N. Y. TIMES, <http://www.nytimes.com/subscriptions/Multiproduct/lp5558.html>

The regulation of the Internet poses unique challenges for lawmakers. As Justice White prophetically observed more than forty years ago: “[D]ifferences in the characteristics of the new media justify differences in the [constitutional] standards applied to them.”<sup>148</sup> Of particular concern is the fact that website content providers cannot typically control the geographic location of the information’s recipients and cannot reliably confirm the age of those who view their webpages.<sup>149</sup> These peculiarities make it easy for laws intended to protect children or sensitive adults from being exposed to unwanted materials online to have the effect of chilling the speech that is available to all consenting, adult Internet users.<sup>150</sup>

The Court has yet to address the question of whether the Internet, as expansive as it is, deserves privacy protection, particularly when the method of communication prevents the ordinary Internet user from accessing it.<sup>151</sup> While the Internet offers unprecedented opportunities for the free exchange of ideas, it also permits users to share information only with those possessing proper clearance to enter

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campaignId=37WXW (last visited Feb. 4, 2013) (outlining the subscription and payment options).

148. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). The medium in question in *Red Lion* was broadcast television, but the Court drew upon a variety of technological advancements in crafting its constitutional analysis. *See, e.g., id.* at 386–87. In arguing that the First Amendment must flex and bend to accommodate new technology, Justice White analogized to the advent of amplification, capable of producing sounds louder and “more raucous than those of the human voice.” *Id.* (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)). While the creation of new media has the ability to throw entire constitutional doctrines into flux, the fact that a particular mode of communication has stood the test of time by no means settles the First Amendment issues. Even the regulation of broadcast television, hardly considered a technology at all in today’s digital world, remains a subject of frequent Supreme Court intervention. *See, e.g., FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012) (holding that FCC violated networks’ due process rights by failing to give them fair notice that a fleeting expletive or a brief shot of nudity could be actionably indecent).

149. *See, e.g., Ashcroft v. ACLU*, 535 U.S. 564, 577 (2002) (“Web publishers currently lack the ability to limit access to their sites on a geographic basis . . .”); *Reno v. ACLU*, 521 U.S. 844, 855–56 (1997) (discussing the problem of age verification on the Internet).

150. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 670–71 (2004) (noting that criminal prosecution of online materials poses “a potential for extraordinary harm and a serious chill upon protected speech.”); *see also Doe v. Prosecutor, Marion Cnty., Ind.*, 705 F.3d 694, 699 (7th Cir. 2013). Relying on the First Amendment, the Seventh Circuit recently held Indiana’s blanket ban on social media for most registered sex offenders was unconstitutional because it was “not narrowly tailored to serve the state’s interest” of “protecting minors from harmful online communications.” *Id.* at 695, 698. For example, the court in *Doe* determined that Indiana had “other methods to combat unwanted and inappropriate communication between minors and sex offenders,” such as existing criminal laws with enhanced penalties for using a computer network to solicit children. *Id.* at 699. Thus, because “illicit communication comprises a minuscule subset of the universe of social network activity,” the Seventh Circuit concluded “the Indiana law targets substantially more activity than the evil it seeks to redress.” *Id.*

151. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (noting that unresolved questions exist with respect to Internet and digital privacy concerns).

password-protected websites.<sup>152</sup> In this regard, the Internet triggers potentially competing constitutional protections: the First Amendment, which protects and values free expression, and Fourteenth Amendment substantive due process, which shields private decision making from government intervention.<sup>153</sup> Yet the courts have not defined the precise contours of these protections as they may apply to online communication.<sup>154</sup> The increased prominence of the Internet in daily life has spawned unique constitutional questions that have often required the Supreme Court's intervention.<sup>155</sup> As the content on the World Wide Web has grown, Congress has increasingly sought to regulate the distribution of harmful materials through computerized means. Under the guise of protecting children, Congress enacted three bills designed to punish those who post objectionable materials online: the Communications Decency Act,<sup>156</sup> the Child Online Protection Act,<sup>157</sup> and the Child Pornography Prevention Act.<sup>158</sup>

Without discussing any privacy interests that may be implicated, the Supreme Court applied First Amendment principles to invalidate portions of all three statutes.<sup>159</sup> These decisions all rested, at least to some degree, on the assumption that the statutes in question would restrict or diminish the quality and quantity of speech available to the general public online.<sup>160</sup> Yet as the Court has noted, none of these laws were necessary to achieve the government's legitimate objectives regarding the Internet.<sup>161</sup> The existing criminal laws remain a powerful weapon in the government's campaign to slow the spread of unlawful speech online.<sup>162</sup> For example, the government remains free to charge those who distribute child pornography—an unprotected form of expression—through computerized channels.<sup>163</sup> The government can also target unwanted emails, pop-ups, and advertisements for obscenity

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152. See, e.g., NORTHERN KENTUCKY UNIVERSITY, mynku.nku.edu (last visited Feb. 4, 2013) (restricting website access to authorized users with log-in credentials and a password).

153. See *supra* Parts I(B), II(A).

154. See *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).

155. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997).

156. 47 U.S.C. § 223(a), (d) (2012).

157. 47 U.S.C. § 231 (2012).

158. 18 U.S.C. § 2256(8) (2012).

159. See *Ashcroft v. ACLU*, 542 U.S. 656, 658 (2004); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002); *Reno*, 521 U.S. at 874.

160. See, e.g., *Free Speech Coal.*, 535 U.S. at 252 (“[S]peech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.” (citing *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989))).

161. See *Ashcroft v. ACLU*, 542 U.S. 656, 668 (2004) (observing that filtering software may be more effective than Congressional regulation at shielding children from harmful materials on the Internet).

162. See *id.* at 671.

163. See *New York v. Ferber*, 458 U.S. 747, 763–64 (1982).

under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act).<sup>164</sup>

The application of existing obscenity laws to the Internet, however, raises separate and distinct constitutional concerns, particularly in the area of privacy. In fact, the Court explicitly left open the possibility in *Stanley* that novel factual contexts could result in the extension of constitutional protection to previously unprotected expression when it observed:

*Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. *But the assertion of that interest cannot, in every context, be insulated from all constitutional protections.*<sup>165</sup>

The Internet provides the context in which, on balance, the government's interest in penalizing obscenity fades and the individual right to sexual privacy trumps.

While it is true that obscenity receives no First Amendment protection, the private possession and viewing of obscene materials is, in certain circumstances, immunized from governmental intervention.<sup>166</sup> The Internet offers new possibilities to privately transact and obtain obscenity, actions that, when conducted in public prior to *Lawrence*, failed to trigger protections surrounding the consumer's right to private possession.<sup>167</sup> For example, consenting adults can now voluntarily download pornographic videos and images into their computers and portable tablets from both public and "members-only" websites and by receiving emails and attachments.<sup>168</sup> They can access and view sexually explicit content on web-enabled smartphones and through cell-phone apps,<sup>169</sup> and they can view erotic content, both words and images, exchanged through text messaging and MMS.<sup>170</sup> Where the end-user merely maintains the sexually explicit

164. 15 U.S.C. §§ 7701–13; 18 U.S.C. § 1037 (2012).

165. *Stanley v. Georgia*, 394 U.S. 557, 563 (1969) (emphasis added).

166. *See id.*

167. *See, e.g., United States v. Orito*, 413 U.S. 139, 142-43 (1973) ("It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public.").

168. *See, e.g., htaccess Tutorial*, FREEWEBMASTERHELP.COM, <http://www.freewebmasterhelp.com/tutorials/htaccess> (last visited Feb. 4, 2013) (explaining technology used to password-protect websites). For an example of a password-protected, non-obscene website, visit [mynku.nku.edu](http://mynku.nku.edu).

169. *See, e.g., Pornotube Video Downloader 3.26*, BROTHERSOFT.COM, <http://www.brothersoft.com/pornotube-video-downloader-77961.html> (last viewed Feb. 4, 2013) (offering software download which converts videos from [www.pornotube.com](http://www.pornotube.com) to cell phone format).

170. *See, e.g., Benny Taylor, What is MMS on a Cellular Phone?*, OPPOSING VIEWS, <http://science.opposingviews.com/mms-cellular-phone-12517.html> (last visited Feb. 4, 2013)

content in his electronic device and views it individually without exposing others to the expression, the acquisition of digital obscenity mirrors the private possession of film at issue in *Stanley*.<sup>171</sup> The Supreme Court's modern privacy jurisprudence weighs in favor of extending the Fourteenth Amendment to this new form of communication.<sup>172</sup>

To be sure, the criminalization of obscenity from the Internet based on obsolete and inapplicable First Amendment jurisprudence threatens online consumers' privacy rights.<sup>173</sup> The Internet has now become one of the most popular media by which individuals access sexually explicit materials and other private communications.<sup>174</sup> These transactions occur largely in private settings, with an individual using a personal computer or mobile device, normally in a secluded location, to view websites that exist only in cyberspace.<sup>175</sup> Because both the method of access and the place of consumption are private, the entire transaction is entitled to constitutional protection.<sup>176</sup> Applying traditional obscenity principles to this form of private online speech would endanger the rights of individuals to access those materials in the comfort of their homes and other non-public arenas.<sup>177</sup> Substantive due process does not permit such a result.<sup>178</sup>

### *B. Reconciling Supreme Court Jurisprudence on the Distribution of Obscenity with the Realities of Private Online Communication*

The Supreme Court has addressed bans on the traditional distribution of obscenity as potentially impermissible burdens on the individual right to free speech on at least five prior occasions: (1) *United*

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(describing multimedia text messaging technology for exchanging photographs and images between cell phone users).

171. See *Stanley v. Georgia*, 394 U.S. 557, 558–59, 564 (1969).

172. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

173. See *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744–45 (5th Cir. 2008).

174. See Ashlee Vance, *Online Porn is Huge. Like Really Really Huge. Who Knew?*, BLOOMBERGBUSINESSWEEK (Apr. 5, 2012), <http://www.businessweek.com/articles/2012-04-05/online-porn-is-huge-dot-like-really-really-huge-dot-who-knew>, for an example of a report that notes two popular online pornography websites—Xvideos and YouPorn—gross 6.5 billion web-page views per month.

175. Pornography accessed in the public view at public libraries, for example, would not trigger the privacy concerns addressed in this Article. See, e.g., *Libraries Struggle with Issue of Internet Access and Porn*, NBCNEWS.COM (Feb. 3, 2012, 10:39 AM), [http://usnews.nbcnews.com/\\_news/2012/02/03/10309475-libraries-struggle-with-issue-of-internet-access-and-porn?lite](http://usnews.nbcnews.com/_news/2012/02/03/10309475-libraries-struggle-with-issue-of-internet-access-and-porn?lite).

176. See *Stanley*, 394 U.S. at 559, 567.

177. See *id.* at 561–62, 564.

178. See *id.*



*States v. Reidel*;<sup>179</sup> (2) *United States v. Thirty-Seven Photographs*;<sup>180</sup> (3) *Paris Adult Theatre I v. Slaton*;<sup>181</sup> (4) *United States v. 12 200-Ft. Reels of Super 8mm Film*;<sup>182</sup> and (5) *United States v. Orito*.<sup>183</sup> None of these cases, however, specifically discussed the application of Fourteenth Amendment substantive due process protection to the exchange of obscenity. Instead, they merely rejected the application of First Amendment privacy protection to the distribution and public possession of obscene expression.<sup>184</sup> Moreover, the majority opinions in each case focused on whether a corollary right to distribute obscene materials exists and not whether a ban on such activities violates the personal right of possession.<sup>185</sup> In addition, there are key factual differences—such as the role of border control in *12 200-Ft. Reels*<sup>186</sup> or the fact that the film was shown in a public theater in *Paris Adult Theatre I*<sup>187</sup>—that distinguish these cases from modern electronic communication.

Given these distinctions, the Court's existing obscenity doctrine does not conclusively resolve the issue.<sup>188</sup> To the extent the post-*Stanley* cases do control the analysis here, however, there are substantial reasons for reconsidering their holdings. Indeed, given that these cases are more than forty years old and in light of society's changing and evolving views on privacy, the time has come to address anew the constitutional protections afforded to those who privately transact obscene materials online.

### 1. The Questionable Relevance of *Reidel* and Its Progeny

Two significant developments since the courts decided *Reidel*, *Orito*, and *Paris Adult Theatre* call the essential holdings of those cases into question. First, in the more than forty years since the Court settled its post-*Stanley* jurisprudence, the Court has increasingly recognized

179. *United States v. Reidel*, 402 U.S. 351 (1971).

180. *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971).

181. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

182. *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973).

183. *United States v. Orito*, 413 U.S. 139 (1973).

184. See *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. at 129–30; *Orito*, 413 U.S. at 145; *Paris Adult Theatre I*, 413 U.S. at 69–70; *Reidel*, 402 U.S. at 356–57; *Thirty-Seven (37) Photographs*, 402 U.S. at 376–77.

185. See, e.g., *Orito*, 413 U.S. at 139, 141. But see *Paris Adult Theatre I*, 413 U.S. at 85, 112–13 (1973) (Brennan, J., dissenting); *Orito*, 413 U.S. at 147–48 (Brennan, J., dissenting) (arguing that prohibiting distribution of obscenity effectively eviscerates the right of individuals to view and access obscene works in their homes).

186. See 413 U.S. at 128–29.

187. See 413 U.S. at 50–51.

188. See *supra* Part I(A).

the commercial aspect of free speech. For example, in *Buckley v. Valeo*,<sup>189</sup> the Court rejected a speech-conduct distinction in the context of campaign finance reform. In the Court's view, there is no practical difference between actually speaking, on the one hand, and paying to produce, distribute, or obtain speech on the other.<sup>190</sup> The Court has been consistent in this approach as its campaign finance jurisprudence has developed.<sup>191</sup>

So too has the Court recognized the negative impact of economic disincentives in the adult entertainment context. In *United States v. Playboy Entertainment Group, Inc.*,<sup>192</sup> the Court found a law that limited the hours of certain sexually explicit broadcasts to be unconstitutional because of its perceived negative effect upon the economic viability of a single adult-entertainment business. The Court struck down the law in question because it restricted the ability of the Playboy Channel to broadcast at certain times, resulting in "significant restriction of communications, with a corresponding reduction in Playboy's revenues."<sup>193</sup> This newly emerging emphasis on economics undermines the Court's previous rejection of a right to commercially distribute obscenity.<sup>194</sup>

In addition, the Court's decision in *Lawrence* at least raises the specter that morality is no longer a compelling—or perhaps even a legitimate—government interest when the state seeks to regulate private sexual matters.<sup>195</sup> While the opinion in *Lawrence* does not disclose whether the Court viewed the right to sexual intimacy as a fundamental right entitled to strict scrutiny or merely a basic right triggering rational basis review, the Court was clear that the morality justification raised by the state was insufficient to override the constitutional protection afforded to private sexual behavior.<sup>196</sup> This

189. 424 U.S. 1 (1976).

190. *See id.* at 15–20.

191. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010); *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 161–62 (2003).

192. 529 U.S. 803 (2000).

193. *See id.* at 809.

194. *See, e.g.*, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–58 (1973).

195. In addition to altering the Court's views of morality as a government interest, *Lawrence* also recognized the need to revisit matters of societal importance as preferences and viewpoints evolve. *See Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (“[T]hose who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”).

196. *See Lawrence*, 539 U.S. at 578 (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”). Several lower courts have read *Lawrence* as the latter, namely a case employing rational basis review because a non-fundamental right was at stake. *See, e.g.*, *Williams II*, 378 F.3d 1232, 1236 (11th Cir. 2004). If this reading is correct, then the assertion that *Lawrence* changed the

conclusion fundamentally alters the outcome-determinative morality rationale of *Paris Adult Theatre*.<sup>197</sup> There, the Court relied heavily upon the government's interest in maintaining a "decent society" to justify obscenity citations against a public theater.<sup>198</sup> Concern for public harm was similarly important in *Orito*.<sup>199</sup> After *Lawrence*, the continuing validity of such a justification for online obscenity prosecutions is in serious doubt.

In light of these developments, obscenity remains the one area where the Court has acknowledged a privacy interest, but refuses to recognize that an absolute ban on distribution impedes that interest.<sup>200</sup> In contrast, other matters of protected personal autonomy routinely lead to protections that include their public components. The private use of birth control requires a public component, such as the decision to purchase of birth control; yet the public aspect of the transaction does not destroy the privacy protection that extends to the private choice. Instead, the private rights extend a measure of constitutional protection over the public transaction.

Also tellingly, the Court has declined to carve out an exception for the private possession of marijuana for medicinal purposes, adhering to the principle that access to an item is either protected by the Constitution *in toto* or can be entirely banned.<sup>201</sup> In no other sphere, save obscenity, does the dichotomy exist where it is lawful to possess, but not to obtain, the material in dispute.<sup>202</sup> It is therefore time for the Court to reconsider its post-*Stanley* cases in the Internet age.

## 2. The Impact of the Internet on the Rationale for Banning the Distribution of Obscenity

The Internet age demands new constitutional analysis.<sup>203</sup> The availability of new technology to distribute obscene materials, not

governmental interest portion of substantive due process analysis is all the more correct. Because rational basis review requires only a legitimate government interest, as opposed to a compelling one, the fact that morality was insufficient to justify the anti-sodomy law strongly suggests that the government's interest in promoting morality is not even legitimate.

197. See *Paris Adult Theatre I*, 413 U.S. at 58–59.

198. *Id.* at 59–60 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964)).

199. See *United States v. Orito*, 413 U.S. 139, 143–44 (1973) ("Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil . . ." (quoting *N. Am. Co. v. SEC*, 327 U.S. 686, 705 (1946))).

200. See *Paris Adult Theatre I*, 413 U.S. at 66–67; *Stanley v. Georgia*, 394 U.S. 557, 563–64 (1969).

201. See *Gonzales v. Raich*, 545 U.S. 1, 2–3 (2005).

202. See, e.g., *id.*

203. As the Justices of the Supreme Court have recognized, for example, "[t]he economics and technology of Internet communication differ in important ways from those of telephones and

anticipated in 1973 when the latest of the Court's post-*Stanley* cases was decided, implicates the right of privacy in ways that a brick-and-mortar store cannot. Because the Internet does not exist in any one place but only comes into being when it is accessed on a private computer, material can truly be viewed in private without "intrud[ing] upon the sensibilities or privacy of the general public."<sup>204</sup> Thus, the existence of the Internet as a new medium of communication undermines the viability of *Reidel* and its progeny<sup>205</sup> and further demands that the Court reconsider its position on the impact of existing obscenity laws on the individual right of privacy.

This is not to say that the government lacks a compelling interest in prohibiting the dissemination of child pornography online or in precluding pandering obscenity to those who do not wish to view it. In the instance of child pornography, the prevention of future harm to the depicted minor supports criminalizing the possession and trafficking of the material.<sup>206</sup> Where obscenity is foisted on non-consenting adults, the government's interest in protecting the unwilling listener from unwanted communication is sufficiently compelling to overcome First and Fourteenth Amendment privacy concerns.<sup>207</sup> In fact, Congress specifically asserted such an interest when it passed the CAN-SPAM Act.<sup>208</sup> The CAN-SPAM Act offers a viable and narrower alternative to the criminalization of online obscenity exchanged privately between consenting adults, in that it allows the government to punish unwanted and non-consensual

mail." *Ashcroft v. ACLU*, 535 U.S. 564, 595 (2002) (Kennedy, J., concurring). "In light of th[e] fundamental difference in technologies, the rules applicable to the mass mailing of an obscene montage or to obscene dial-a-porn should not be used to judge the legality of messages on the World Wide Web." *Id.* at 606 (Stevens, J., dissenting).

204. *Stanley v. Georgia*, 394 U.S. 557, 567 (1969) (citing *Redrup v. New York*, 386 U.S. 767, 769 (1967)).

205. *See supra* Part III(B).

206. *See Osborne v. Ohio*, 495 U.S. 103, 111 (1990) ("The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come." (citing *New York v. Ferber*, 458 U.S. 747, 759 (1982))); *Ferber*, 458 U.S. at 759 ("[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.").

207. The expectation of privacy in unsolicited email blasts, pop-up advertisements, and other online solicitation is also diminished, such that the Fourteenth Amendment right of sexual privacy likely would not protect these communications. *See, e.g., Guest v. Leis*, 255 F.3d 325, 338 (6th Cir. 2001).

208. *See* 15 U.S.C. §§ 7701–13 (2012). The CAN-SPAM Act: (1) prohibits false or misleading transmission information, (2) prohibits deceptive subject headings, (3) requires return address and an opt-out feature for future emails, and (4) requires a heading identifying sexually oriented materials as such and requiring that the material not be immediately viewable upon opening the email. *Id.*

sexually explicit digital communication.<sup>209</sup> The government can therefore protect children and sensitive adults online without burdening the privacy rights of consenting adult users.

### C. *The Need for Additional Guidance Regarding Online Privacy*

Additional considerations warrant reconsideration of traditional obscenity doctrine. First and foremost is the precise meaning of Justice Scalia's observation in his dissent in *Lawrence*: "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*'s validation of laws based on moral choices. Every single one of these laws is called into question by today's decision . . ." <sup>210</sup> Absent additional explanation from the Court as to whether *Lawrence* entirely eviscerates the government's interest in morality in matters dealing with private decision making, it remains uncertain the degree to which legislatures, including Congress, are free to impose their moral will on others.<sup>211</sup> Thus, as the status of the law stands today, lower courts are without guidance as to whether Justice Scalia's observation was indeed apocalyptic or merely hyperbolic.

In the absence of guidance from the Supreme Court, it remains to be seen whether and how substantive due process protects the possession and exchange of online obscenity through private channels. As discussed in this Article, the Court's recognition of an emerging right of sexual privacy indicates that the constitutionality of prosecuting online obscenity is seriously in doubt.<sup>212</sup>

## IV. CONCLUSION

The unique aspects of Internet communication, now a regular component of the human condition, call into question the validity of traditional obscenity principles when applied to the World Wide Web. These principles must be reconsidered by the courts, particularly in

209. See *id.* Congress enacted the CAN-SPAM Act in 2003 to address concerns with unsolicited commercial email that was disguised or fraudulent as to its source or purpose, and the vulgar and pornographic nature of much of the commercial email. See *Free Speech Coal., Inc., v. Shurtleff*, No. 2:05CV949DAK, 2007 WL 922247, at \*7 (D. Utah Mar. 23, 2007).

210. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

211. Compare *Lawrence*, 539 U.S. at 584 (O'Connor, J., concurring) ("[T]he State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law."), with *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) ("The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986))).

212. See *supra* Parts II, III.

light of the expanding right of sexual privacy recognized in *Lawrence v. Texas*. To be clear, courts should not abandon the obscenity doctrine wholesale in the context of online child pornography and obscenity pandered to unwitting adults via the Internet, although there may be substantial justification for doing so.<sup>213</sup> Instead, courts must recognize that certain components of the Internet implicate identical privacy concerns to those that adhere to intimate decisions innate in the definition of personhood.

Even if the courts acknowledge the applicability of privacy protection to allegedly obscene online speech, the government would remain free to enforce obscenity statutes for publicly distributed obscene images. In this regard, the Court's observation that "the Government . . . can enforce obscenity laws already on the books" remains true in the vast majority of online transactions.<sup>214</sup> However, given the important substantive due process interests at stake, the Supreme Court should rethink and refine its position regarding the application of existing obscenity doctrine to the distribution of obscenity on the Internet, where the exchange occurs wholly in private, absent any risk to children, unwitting adults, or the public at large.

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213. See, e.g., *Ashcroft v. ACLU*, 535 U.S. 564, 597 (2002) (Kennedy, J., concurring) ("The national variation in community standards constitutes a particular burden on Internet speech.").

214. See *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004).

