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I. INTRODUCTION

The girl liked her teacher from the moment she stepped into her tenth grade class. Older and wiser, he exuded the warmth and comfort she desperately sought in the chaotic high school environment. He remained her teacher throughout the tenth and eleventh grades. When he later needed a classroom aide, she jumped at the chance, even offering to babysit his children after school hours. The two continued to see each other during and after school. Then, one day, he made a move.

The girl, an Elkins High School student known as A.D., is now eighteen years old and the key player in the recent Arkansas Supreme Court decision focusing on the legality of student-teacher sexual relationships.¹ In a landmark four-to-three decision, the court vacated the conviction of thirty-six-year-old former teacher David Paschal and overturned Arkansas’s statutory prohibition against the sexual contact between teachers and students less than twenty-one years old.² As a result, students eighteen years and older are legally permitted to engage in consensual sexual relationships with their teachers.³

Paschal v. State⁴ is one example of the increasing litigation involving sexual relationships between students and their teachers. There currently exists no national consensus concerning the age at which a student can legally engage in sexual relationships with their teachers. Even still, 9.6 percent of all students in grades eight to eleven have reported unwanted educa-

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¹ Paschal v. State, 2012 Ark. 127, 388 S.W.3d 429. According to the defendant-teacher, A.D. was eighteen years old at the time the contested sexual relationship began. Id. at 8–9, 388 S.W.3d at 432.
² Id. at 14–15, 388 S.W.3d at 437, overruling Ark. Code Ann. § 5-14-125(a)(6) (Repl. 2009). Importantly, the statute challenged in Paschal was an “as applied” challenge, rather than a facial challenge. Id. at 8, 388 S.W.3d at 434.
⁴ 2012 Ark. 127, 388 S.W.3d 429.
tor sexual misconduct. The judicial divide primarily revolves around how the state can protect its general interest in the welfare of children without infringing on an individual’s “fundamental right to engage in private, consensual, noncommercial acts of sexual intimacy with an adult.” In *Paschal*, the Arkansas Supreme Court concluded such a fundamental right applies to teachers and students who reach the age of eighteen. If, however, the sexual relationship between A.D. and Paschal had begun the day before her eighteenth birthday, the state could prosecute Paschal for sexual assault in the second degree.

While the decision reflects an accurate judicial interpretation of the age at which individuals are legally entitled to consent to sexual relationships, the court ignored the overwhelming and persuasive scientific and academic evidence demonstrating that students—whether one day shy or beyond their eighteenth birthday—lack sufficient decision-making mechanisms to rationally consent to acts of sexual intimacy with their teacher. Rather than focusing on Paschal’s fundamental right to privacy, the court should have focused on the state’s compelling interest—a duty to provide a protected learning environment. Further, the court should not have focused on the jurisprudence involving privacy interests of adults because teachers occupy positions of authority over students that are not present in the typical interactions between adults.

In Part I, this note tracks the Supreme Court of the United States’s attempt to define the right of privacy regarding consensual sexual relationship...
ships between adults, followed by lower court interpretations of such right in light of Arkansas’s recent interpretation in Paschal in the context of student-teacher sexual relationships. Part II analyzes the problems with the current state laws while Part III proposes a clear, concise resolution: employees of public or private primary or secondary schools should be prohibited from engaging in sexual contact or intercourse with a person who is enrolled in the school at which the employee works and who is not a spouse.

II. BACKGROUND TO THE FUNDAMENTAL RIGHT TO PRIVACY IN SCHOOLS

Tabloids,\textsuperscript{11} national newspapers,\textsuperscript{12} electronic media,\textsuperscript{13} and talk radio\textsuperscript{14} have placed the prevalence\textsuperscript{15} of student-teacher\textsuperscript{16} sexual relationships at the forefront of social discussion.\textsuperscript{17} One of the most notorious examples involves Mary Letourneau, a thirty-five-year-old sixth-grade teacher and mother of four children, who pleaded guilty to two counts of rape in the second degree involving her thirteen-year-old student Vili Fualaau.\textsuperscript{18} Letourneau subsequently violated the conditions of her probation, re-engaged in sexual contact with Fualaau, and gave birth to her fifth and sixth children, both of whom Fualaau fathered.\textsuperscript{19}

\textsuperscript{11} See The 50 Most Infamous Female Teacher Sex Scandals, ZimBio (April 28, 2009), http://www.zimbio.com/The+50+Most+Infamous+Female+Teacher+Sex+Scandals/articles/AMRS0Tc4IYN/15+Beth+Geisel.


\textsuperscript{15} In a seven-month investigation conducted by the Associated Press in 2007, 2,570 educators from all fifty states and the District of Columbia were discovered to have had their teaching credentials “revoked, denied, surrendered or sanctioned from 2001 through 2005 following allegations of sexual misconduct.” Report: Sexual Misconduct Plaguing U.S. Schools, Fox News (Oct. 20, 2007), http://www.foxnews.com/story/0,2933,303780,00.html. Eighty percent of the victims were students. Id.

\textsuperscript{16} The term “teacher” is used generally in this note to include teachers, supervisors, principals, superintendents, and other professional employees of public and private schools that serve students enrolled in grades kindergarten through twelfth.

\textsuperscript{17} See Goldberg, supra, note 12 (“Despite its frequency, teacher-student sex is always wrong, educators said, a betrayal of trust that is harmful to the student and indicative of an emotional defect in the teacher.”).\textsuperscript{18} State v. Letourneau, 997 P.2d 436, 439–40 (Wash. Ct. App. 2000).

\textsuperscript{19} Id. at 440. As of January 28, 2011, the two are still married at the ages of forty-eight and twenty-seven, respectively. Scott Sunde, Mary K. Letourneau, now a grandma, has few
State legislatures across the country have been forced to determine when teachers can be held criminally liable for sexual involvement with a student within the educational system without impeding upon what the Supreme Court of the United States has deemed a “fundamental right to privacy.”

The following is an analysis of the courts.

A. Fundamental Right to Privacy as Defined by the Supreme Court of the United States

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits any state from “depriv[ing] any person of life, liberty, or property, without due process of law . . . .” The Court has not consistently articulated privacy interests, but it has determined that the “right to privacy,” includes, among other things, the right to marital privacy, the right of reproductive freedom, and the right of intimate association.

Justice Brandeis once characterized “the right to be let alone” as “the right most valued by civilized men.” Since then, the Supreme Court has recognized a penumbra of rights emanating from the Bill of Rights that pro-


20. Quotations are used with “fundamental right to privacy” because of the varying interpretations that the Court and state courts have deemed implicitly protected.


23. The constitutional right to privacy encompasses, generally, the right to be free from unreasonable government surveillance, collection or dissemination of personal information, and the individual right of autonomy. Id. at 972 n.1. Importantly, this note focuses only on those rights pertinent to intimate sexual relationships implicit to unmarried adults. For additional information on the right to privacy, see William L. Prosser, Privacy, 48 CALIF. L. REV. 383, 389 (1960).


tects individuals’ privacy from governmental intrusion. Specifically, in *Griswold v. Connecticut*, the Court struck down a state law banning the sale of contraceptives as it applied to married persons. By doing so, the Court explicitly recognized a fundamental right to marital privacy, and later declared that individuals should be protected from “unwarranted governmental intrusion into matters so fundamentally affecting a person as to the decision whether to bear or beget a child.”

In 2003, the Court explained that the liberty component of the Due Process Clause protects persons from unwarranted government intrusions into the spheres of life and existence outside of the home. In *Lawrence v. Texas*, the Court invalidated a Texas law criminalizing homosexual sodomy. The Court affirmed that adults are free to engage in private, sexual conduct as an exercise of their liberty under the Due Process Clause. The Court did not extend the right to privacy to “involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”

The Court has not, however, determined whether laws that place criminal restrictions on student-teacher sexual relationships implicate a fundamental right to privacy. As a result, lower courts have been forced to determine whether a fundamental right has been implicated, and further, which judicial standard of review to apply. When a fundamental interest is involved, a state law limiting that right can be justified only if the State can prove that the limitation is both necessary and narrowly tailored to serve a compelling government interest. If, on the other hand, a fundamental right or suspect class has not been implicated, restraints on certain privacy interests will be upheld if the State identifies that the statutory limitations served a legitimate state interest. Consequently, a diverse judicial landscape has

29. 381 U.S. 479 (1965).
30. *Id.* at 485.
31. *Id.* at 485–86.
34. 539 U.S. 558 (2003).
35. *Id.* at 578.
36. *Id.*
37. *Id.* (emphasis added).
developed among state and federal courts in determining whether limitations on the student-teacher sexual relationship violate a fundamental right to privacy.

B. Courts Finding No Fundamental Right to Privacy in Education

State court litigation is replete with constitutional challenges to statutes that limit consensual sexual relations between consenting adults. In *State v. Hirschfelder*, the Washington Supreme Court applied a rational basis review in upholding a statute that criminalized sexual intercourse between school employees and students who were at least sixteen years old. In challenging the constitutionality of the statute, Hirschfelder argued that the law violated his equal protection rights, averring that the statute applied only to school employees that interacted with students through certain school programs. On appeal, the Washington Supreme Court noted that the appropriate level of scrutiny depends on the nature of the rights involved because the Fourteenth Amendment guarantees equal protection under the law. Because Hirschfelder was not specifically claiming that school employees have a fundamental right to engage in sexual contact with students, rational basis review was appropriate.

Quoting a prior case, the court explained that teachers are provided with unique, unsupervised access to children for which the prevention of sexual exploitation is rationally related to an important and compelling government purpose. The court determined that the statute withstood the test

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40. The law distinguishes between the age at which a person attains full legal rights, especially civil and political, known as the age of majority, from the age at which a person becomes legally capable of agreeing to sexual intercourse, known as the age of consent. BLACK’S LAW DICTIONARY 70 (9th ed. 2009). All but four states set the age of majority at eighteen. Alabama and Nebraska set the age of majority at nineteen. In Pennsylvania and Mississippi, persons reach their age of majority at twenty-one. U.S. DEP’T OF DEF., Age of Majority by State and United States Possession, FINANCIAL MANAGEMENT REGULATION 7000.14-R, app. H, http://comptroller.defense.gov/fmr/current/07b/volume_07b.pdf (Jan. 2012). Regarding age of sexual consent, thirty-four states list the age of consent as sixteen years old. Six states set the age of consent at seventeen years old while the remaining eleven states set the age of consent at eighteen years old. FIND THE DATA, http://age-of-consent.findthedata.org (last visited Nov. 17, 2012).
41. 242 P.3d 876 (Wash. 2010) (en banc).
42. Id. at 883. The student was eighteen years old at the time of the teacher’s conviction. Id. at 878.
43. Id. at 883.
44. Id.
45. Id.
46. Id. at 882–84 (“The statute singles out public school employees because they have unique access to children, often in an unsupervised context, and can use that access to groom or coerce children or young adults into exploitive or abuse conduct. Given the important goals of providing a safe school environment for children and preventing the sexual exploita-
for rational basis, but failed to specifically address whether the sexual contact between students and teachers involves a fundamental right to privacy.

In *State v. McKenzie-Adams*, a school employee challenged a similar statute, claiming that it violated his right to engage in noncommercial, consensual sex with other adults as protected by both state and federal constitutions. On appeal, the Connecticut Supreme Court determined that a fundamental right to privacy, even if it existed, would not “protect sexual intimacy in the context of an inherently coercive relationship, such as the teacher-student relationship, wherein consent might not easily be refused.” Applying the rational basis test, the court concluded that the right of privacy does not include the right for teachers to have sex with students enrolled in the same school system because of the state interest in providing a safe and healthy educational environment for school students.

In a civil context, the Court of Appeals for the Sixth Circuit reasoned that strict scrutiny review is appropriate only where governmental action has a “direct and substantial influence” on intimate association. In *Flaskamp v. Dearborn Public Schools*, the appellate court upheld the constitutionality of a school board’s decision to deny tenure to a teacher based on her sexual conduct with a seventeen-year-old former student. The court rejected Flaskamp’s argument that the decision burdened her right to intimate association and privacy because, even if it amounted to a ban on relationships with students until after the student’s graduation, it did nothing to prevent other teachers from dating a “wide range” of other adults. The court further noted that the school board had a legitimate policy reason for the decision so

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48. *Id.* The defendant was charged with having sex with two sixteen-year-old students. Connecticut law grants legal capacity to consent to sex at the age of sixteen. See *supra* note 40.
50. *Id.* at 832.
51. *Id.* at 841 (“[N]ot only are teachers afforded unique access to students, they also are vested with significant authority and control over those students . . . . Because the state has a strong interest in protecting and educating the elementary and secondary school students of this state, and because the defendant has failed to highlight any societal interest furthered by a recognition of a state constitutional right of sexual privacy between a teacher and a student, we conclude that this . . . factor weighs heavily in favor of the state.”).
53. 385 F.3d 935 (6th Cir. 2004).
54. *Id.* at 947.
55. *Id.* at 943.
as to avoid sexual harassment liability and prevent interference with the education of other enrolled family members.56

Most recently, a Kansas appellate court concluded that a statutory limitation on a teacher’s decision to engage in consensual sexual relationships with an eighteen-year-old student did not impose on any fundamental right to privacy.57 The court found it particularly significant that multiple federal courts have failed to interpret Supreme Court precedent as recognizing any specific fundamental right to sexual privacy.58 The court also recognized that the state constitution never provided protection for the private, consensual, noncommercial acts of sexual intimacy between adults.59 Equally important, the court reasoned that the state lacked a statute criminalizing the abuse of positions of trust and authority to coerce sexual contact with victims.60 As such, the determination that a fundamental right to sexual privacy between adults existed would render students between the ages of sixteen and eighteen unprotected.61

C. Arkansas—Fundamental Right to Privacy Between Adults

Arkansas recognizes that the fundamental right to privacy, implicit in the Arkansas Constitution, protects all private, consensual, noncommercial acts of sexual intimacy between adults.62 Although an individual is legally considered an adult at the age of eighteen,63 individuals can legally consent to noncommercial sexual intercourse upon their sixteenth birthday.64 The development of the right to privacy in Arkansas is best understood by analyzing two primary opinions: Jegley v. Picado65 and Talbert v. State.66

1. Jegley v. Picado

In Picado, a group of same-sex citizens brought an action against the prosecuting attorney for a declaratory judgment that a sodomy statute was

56. Id. at 944.
58. Id. (citing Muth v. Frank, 412 F.3d 808, 817–18 (7th Cir. 2005); Williams v. Attorney. Gen. of Ala., 378 F.3d 1232, 1236 (11th Cir. 2004)).
60. Id. at 501–02 (distinguishing from Paschal).
61. In Kansas, the age of consent is statutorily defined as sixteen years old. See supra note 40.
65. 349 Ark. 600, 80 S.W.3d 332 (2002).
unconstitutional.\textsuperscript{67} “Appellees [were] long-time gay and lesbian residents of Arkansas, several of whom live[d] with [their] partners in long-term, committed relationships.”\textsuperscript{68} All members admitted to having violated Arkansas’s anti-sodomy statute\textsuperscript{69} and intended to do so again despite fear of prosecution, loss of jobs, professional licenses, housing, and child custody.\textsuperscript{70}

In deciding the case, the court recognized that the Supreme Court of the United States has not expressly defined the right to privacy, nor is it specifically enumerated in the Arkansas Constitution.\textsuperscript{71} However, article II, section 29 of the Arkansas Constitution provides that the “enumeration of rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights herein retained . . .”.\textsuperscript{72} Further, article II, sections 8 and 21 of the Arkansas Constitution ensure that no Arkansan shall be “deprived of life, liberty or property without due process of law.”\textsuperscript{73} The court also looked to the Arkansas Rules of Criminal Procedure, noting that the commentary disfavored the “intrusion against the individual’s right to privacy and personal freedom” when considering the necessity of a government interest.\textsuperscript{74}

Recognizing Arkansas’s judicial hesitance to place governmental interests ahead of a citizen’s privacy interests, the court concluded that the Arkansas Constitution implicitly recognizes a fundamental right to privacy for which strict scrutiny was appropriate.\textsuperscript{75} Accordingly, the court declared section 5-14-112 of the Arkansas Code unconstitutional as applied to private, consensual, noncommercial, same-sex sodomy because it furthered no compelling state interest.\textsuperscript{76}

\textbf{2. Talbert v. State}

Talbert, a minister of New Birth Ministries in North Little Rock, Arkansas, was charged and convicted of two counts of sexual assault in the third degree for “using his position of trust and authority to engage in sexual

\textsuperscript{67} 349 Ark. at 608, 80 S.W.3d at 334.
\textsuperscript{68} Id. at 609, 80 S.W.3d at 334.
\textsuperscript{70} Picado, 349 Ark. at 609, 80 S.W.3d at 334–35. Despite lack of imminent prosecution, it is the law in Arkansas that appellees are not required to suffer prosecution prior to challenging the constitutionality of a statute. See Bryant v. Picado, 338 Ark. 227, 996 S.W.2d 17 (1999).
\textsuperscript{71} Picado, 349 Ark. at 623-26, 80 S.W.3d at 344.
\textsuperscript{72} ARK. CONST. art. 2, § 29.
\textsuperscript{73} Id. §§ 8, 21.
\textsuperscript{74} Picado, 349 Ark. at 629, 80 S.W.3d at 348 (citing commentary to ARK. R. CRIM. P. 2.2 (Repl. 2002)).
\textsuperscript{75} Id. at 632, 80 S.W.3d at 350.
\textsuperscript{76} Id. at 632, 80 S.W.3d at 350.
activity with a victim.” 77 On appeal, Talbert argued that, pursuant to Lawrence v. Texas, 78 the state was prohibited from intruding on his right to engage in private, consensual sex with other adults. 79 The court rejected Talbert’s arguments under both the United States and Arkansas Constitutions, concluding instead that the statute did “not infringe upon Talbert’s fundamental right to have private, consensual sex” because “[t]he conduct criminalized by the statute is the use of trust and authority as a minister over individuals to engage in unwanted sexual activity with them.” 80 Further, the court distinguished it from Picado, finding that the conduct criminalized in Picado was consensual whereas the conduct criminalized in Talbert was not. 81

3. Paschal v. State

Recently, an Arkansas teacher challenged a similar statute barring sexual contact between educators and students less than twenty-one years old on the grounds that it violated his fundamental right to privacy. 82 In Paschal, a thirty-six-year-old high school teacher admittedly engaged in a five-month sexual relationship with one of his eighteen-year-old students. 83 At the time of Paschal’s conviction, Arkansas law stated:

A person commits sexual assault in the second degree if the person . . .
[t]is a teacher in a public school in a grade kindergarten through twelve
(K-12) and engages in sexual contact with another person who is [a] student enrolled in the public school and [l]ess than twenty-one (21) years of age.

Paschal was convicted of four counts of second-degree sexual assault and sentenced to thirty years imprisonment. 85 On appeal, Paschal challenged the constitutionality of section 5-14-125(a)(6) of the Arkansas Code on the basis that it impermissibly criminalized consensual sexual conduct between adults, and therefore, infringed on his fundamental right to privacy. 86

In response, the State cited Talbert to support its assertion that a public high school teacher retains no fundamental right to have sexual contact with

79. Id. at 269, 239 S.W.3d at 511.
80. Id. at 270, 239 S.W.3d at 511–12.
81. Id. at 270, 239 S.W.3d at 512.
83. Id. at 3, 388 S.W.3d at 432.
85. Paschal, 2012 Ark. at 1, 388 S.W.3d at 431.
86. Id. at 8–9, 388 S.W.3d at 434.
an eighteen-year-old high school student enrolled in a public school.\footnote{Id. at 9, 388 S.W.3d at 435.} Relying on such argument, the State asserted Paschal’s fundamental right to privacy had not been violated, and therefore, neglected to address Paschal’s contention that the statute was subject to strict scrutiny review.\footnote{Id. at 13 n.8, 388 S.W.3d at 437 n.8.} By doing so, the State failed to claim a compelling state interest but instead argued that the Arkansas Constitution contemplated “the preservation of a special learning environment for high school students through the age of twenty-one” for which the state had a legitimate interest in protecting.\footnote{Id. at 12, 388 S.W.3d at 436 (citing ARK. CONST. art. 14, § 1).} Further, the State argued that the statute was designed to protect both minors and adults from having consensual sexual relationships with “people who have power, authority, or control over them on a day-to-day basis.”\footnote{Id. at 13, 388 S.W.3d at 436. The court interpreted the argument as the State asserting “that it has an interest in protecting adult students from the sexual advances of teachers who have power, authority, or control over them.” Id. at 436–37.}

The court disagreed.\footnote{Paschal, 2012 Ark. at 14–15, 388 S.W.3d at 437.} Citing no case law\footnote{Specifically, the court failed to cite case law to support the ruling as it pertains to the student-teacher sexual relationship in particular.} and failing to acknowledge McKenzie-Adams, Hirschfelder, and Flaskamp, the court concluded that section 5-14-125(a)(6) of the Arkansas Code criminalized “consensual sexual conduct between adults” and, therefore, infringed on a teacher’s fundamental right to sexual privacy with adults.\footnote{Id. at 12, 388 S.W.3d at 436 (quoting Jegley v. Picado, 349 Ark. 600, 632, 80 S.W.3d 330, 350; Thompson v. Ark. Social Servs. 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984)).} Accordingly, the court applied a strict scrutiny form of review, requiring that the State successfully prove that “a compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.”\footnote{Id. at 13, 388 S.W.3d at 437 (quoting Picado, 349 Ark. at 637, 80 S.W.3d at 353).}

While recognizing that the state has a proper role in “protect[ing] people from forcible sexual conduct, and to protect minors from sexual abuse by adults”\footnote{Id. at 11–12, 388 S.W.3d at 436.} and an additional “interest in protecting adult students from the sexual advances of teachers,”\footnote{Id. at 12, 388 S.W.3d at 436 (quoting Jegley v. Picado, 349 Ark. 600, 632, 80 S.W.3d 330, 350; Thompson v. Ark. Social Servs. 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984)).} the court determined that the statutory prohibition against adult consensual sex was not the least restrictive method to carry out the state’s interest.\footnote{Id. at 13–14, 388 S.W.3d at 437.} Instead, the court concluded that the state’s interest was already furthered by the statute prohibiting mandated reporters,\footnote{Mandated reporters are legally obligated to notify the Child Abuse Hotline if they have reasonable cause to suspect a child has been subjected to maltreatment. ARK. CODE} who hold positions of trust and authority, from using their position to...
engage in “sexual intercourse or deviate activity.” Further, the court concluded that the statute was unconstitutional because it infringed on a fundamental right of adults to engage in consensual sexual relationships while providing no other less restrictive method for promoting any compelling state interest. The majority went on to say that “regardless of how we feel about Paschal’s conduct, which could correctly be referred to as reprehensible, we cannot abandon our duty to uphold the rule of law when a case presents distasteful facts.”

The dissenting justices, on the other hand, argued that teachers always hold a position of power and authority over students; therefore, any sexual relationship necessarily involves a violation of the teacher’s power.

In a scathing dissent, Justice Brown argued that the majority’s opinion erroneously equated same-sex consensual sex, for which both parties retained “equal footing as adults, to a student-teacher relationship in high school where the teacher is without question the authority figure.” By doing so, the role between teacher and student was improperly minimized in favor of a sexual relationship merely between consenting adults. The dissenting justices went on to denounce the majority’s inference that the court

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99. Paschal, 2012 Ark. at 14, 388 S.W.3d at 437 (citing Ark. Code Ann. § 5-14-125(a)(6) (Supp. 2011)). Interestingly, the court failed to specifically hold that section 12-18-402(a) of the Arkansas Code applies only to children under the age of eighteen, leaving any other student who has reached the age of majority unprotected by the statute. Ark. Code Ann. § 12-18-402(a). Therefore, Paschal likely was not in violation of the Mandated Reporter Law because the student was eighteen at the time the sexual relationship began, and the Mandated Reporter Law requires only certain individuals to report suspected abuse of minor children. Paschal, 2012 Ark. at 3, 388 S.W.3d at 432; Ark. Code Ann. § 12-18-402(a). The court did not discuss this issue.


101. Id. at 15, 388 S.W.3d at 438.

102. Id. at 18-19, 388 S.W.3d at 439-40 (Brown, J., dissenting in part and concurring in part) (citing Logan v. State, 299 Ark. 266, 273, 773 S.W.2d 413, 416 (1989) (teacher retains “authority relationship” between he and student in context of rape); Smith v. State, 354 Ark. 226, 238, 118 S.W.3d 542, 549 (2003) (The state “has an interest in making laws which punish school district employees who abuse their positions of trust and authority to facilitate inappropriate relationships . . . . “)). Importantly, Justice Brown’s dissent criticized the majority opinion’s articulation of the issue, arguing that instead of asking whether Paschal’s right to privacy was violated, the court should have focused on A.D.’s right to a protected learning environment. Paschal, 2012 Ark. at 19–23, 388 S.W.3d at 440–42. For more discussion of the right to a protected learning environment, see infra Section III.

103. Paschal, 2012 Ark. at 18, 388 S.W.3d at 439 (Brown, J., dissenting in part and concurring in part) (citing Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002)).

104. Id. at 18, 388 S.W.3d at 439 (Brown, J., dissenting in part and concurring in part).
had ever recognized a fundamental right to privacy “to enable high school teachers to have sex with the school’s enrolled students.”

For support, Justice Brown cited the Sixth Circuit Court of Appeals in *Flaskamp*, arguing that a heightened strict scrutiny review was appropriate only when government action “has a ‘direct and substantial influence’ on intimate association.” Given the myriad of dangers for permitting student-teacher sexual relationships, Justice Brown concluded that the court’s opinion completely undermined the state’s duty to protect students against sexual advances and exploitation by teachers.

The interaction between teachers and students is an everyday reality. The inquiry into the welcome-ness of the conduct should never be considered, regardless if the inquiry occurs in a civil or criminal context.

III. TAILORING THE GUIDELINES TO THE EDUCATIONAL ENVIRONMENT

Legislatures and the United States Department of Education should adopt streamlined guidelines governing sex-based relationships between students and teachers patterned after right-to-privacy case law. However, the guidelines should take into account the differences between the employment and education environments in three ways. First, educational institutions should recognize that the student-teacher relationship encapsulates both a position of custody and authority, so there should be a strong presumption against the appropriateness of sexual contact between students and teachers. Second, the sexual relationship between secondary students and teachers is drastically different than other sexual relationships. Thus, equating consent with the capacity to consent in this context is an improper consideration. Third, the student-teacher sexual relationship should not be subjected to strict scrutiny review without a direct and substantial government interference upon a protected privacy interest.

105. *Id.* at 19, 388 S.W.3d at 440.
106. *Id.* at 20, 388 S.W.3d at 440 (citing *Flaskamp v. Dearborn Pub. Sch.*, 385 F.3d 935, 942 (6th Cir. 2004)).
107. *Id.* at 23, 388 S.W.3d at 442.
108. See *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 707 (E.D. Pa. 2007); see also *Drobac*, supra note 9, at 58 (arguing that “[a]dolescents are, in every way, embryonic human adults. Since we cannot tell whether an adolescent behaves maturely at any given time, we cannot tell which ‘consent’ we should treat as legally binding.”).
A. The Student-Teacher Relationship is Custodial and Deserves Elevated Protection

Sexual relationships between students and teachers are different from sexual relationships between two consenting adults. All fifty states have enacted compulsory education laws that require children to attend school until a certain age. While some laws do not require children to attend

school beyond the age of sixteen, the value of a high school degree in a competitive economy creates a strong incentive to complete school.\footnote{111} While individuals in sexual relationships can arguably find other places to work and socialize to avoid sexual attention from teachers, students cannot.\footnote{112}

Educators maintain a powerful, controlling position over their students for several reasons. At the onset of a student’s education, teachers act in \textit{loco parentis},\footnote{113} which increases over time. Teachers not only possess greater knowledge concerning the academic subject matter, but they also maintain the power to influence students’ grades and futures.\footnote{114}

Additionally, the Supreme Court of the United States,\footnote{115} federal courts,\footnote{116} and many state courts\footnote{117} have long recognized the custodial nature of the student-teacher relationship. The Court has gone so far as to hold that “a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be per-

\footnote{111.} Fulgoni-Britton, supra note 9, at 266.

\footnote{112.} Id.; see also Angela Duffy, \textit{Can a Child Say Yes? How the Unwelcomeness Requirement Has Thwarted the Purpose of Title IX}, 27 \textit{J. L. \\& EDUC.} 505, 509 (1998) (“[C]hildren do not have a choice about whether to attend school, and most cannot choose which school they attend.”); Mary M. v. N. Lawrence Cmty. Sch. Corp., 131 F.3d 1220, 1226 (7th Cir. 1997) (quoting Davis v. Monroe Cnty. Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996)) (“[A]s economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school.”).

\footnote{113.} The term \textit{in loco parentis} is used to reflect the psychological fact that teachers are regarded by their students, to some extent, as substitute parents. Phyllis Coleman, \textit{Sex in Power Dependency Relationships: Taking an Unfair Advantage of the “Fair” Sex}, 53 \textit{ALB. L. REV.} 95, 121 n. 153 (1988); see also VERNONIA SCH. DIST. 47J v. ACTON, 115 S.Ct. 2386, 515 U.S. 646 (1995) (“When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in \textit{loco parentis} over the children entrusted to them.”); see also BLACK’S LAW DICTIONARY 787 (6th ed. 1990).


\footnote{115.} See VERNONIA SCH. DIST. 47J v. ACTON, 515 U.S. 646, 655 (1995) (“[T]he nature of that power [over students] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.”).


fectly permissible if undertaken by an adult.”

In the classroom environment, teachers are charged with regulating bathroom breaks, seating arrangements, student discussion, and student grades. Consequently, how teachers choose to exercise their great authority over the students’ actions can have a direct influence on the students’ futures.

The phrase “custodial relationship” bestows upon the custodian an elevated amount of responsibility. The United States Constitution imposes upon a person who takes another into his custody “a corresponding duty to assume some responsibility for his safety and general well-being.” Because students are statutorily required to attend school, giving teachers the responsibility of caring for another’s child for more than six hours of a day, it is reasonable to assume an elevated expectation of responsibility for the child’s safety and general well-being.

1. Consent v. Capacity to Consent

In situations involving sexual contact between students and teachers, consent is usually a highly disputed issue. In a custodial relationship, however, “consent is a legal impossibility.” The very nature of the power imbalance renders true consent impossible.

The majority opinion in Paschal focuses largely on the fact that the State cannot intrude on matters of consensual sex between legal adults. However, a rule that relies upon statutory-rape statutes or age-of-consent statutes in the jurisdiction where the sexual conduct occurred is improper. The laws are inconsistent across the states, and using them creates an in-

120. Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 827, 94 Cal. Rptr. 318 (Cal. App. 1971) (“The integrity of the educational system under which teachers wield considerable power in the grading of students and the granting or withholding of certificates and diplomas is clearly threatened when teachers become involved in relationships with students.”).
121. Fulgoni-Britton, infra note 9, at 277.
124. Id. at 40.
126. See supra note 110.
consistent marker for which students and teachers can govern their actions. In one jurisdiction, a freshman in high school could have the legal capacity to consent to sex with a teacher. In another, the teacher would be criminally prosecuted for statutory rape. Although it is true that these circumstances exist in different contexts across the country, the inherent custodial nature of the student-teacher sexual relationship demands a different approach.

2. Inconsistent Protection

States have multiple statutes addressing the criminality of the abuse of custodial relationships, providing inconsistent, fact-driven inquiries in determining what protection methods apply for individual students. For example, certain states have enacted separate statutes criminalizing the abuse of trust or authority to coerce another into having sexual relations and student-teacher sexual contact. Other states have only statutory prohibitions against student-teacher sexual relationships. As a practical matter, a state’s failure to allege that a teacher abused his position of trust or authority to coerce a nineteen-year-old into having sexual relations would leave a teacher innocent in Arkansas but guilty in Kansas.

Students should not receive different protection against sexual advances from teachers simply because of the jurisdiction where they are compelled to attend school. Therefore, a uniform, bright-line rule criminalizing the sexual contact between all secondary students and their teachers, regardless of the relevant age of consent or age of majority laws, is necessary to serve states’ compelling interests in protecting the sanctity of the educational forum.

127. Id.
128. Id.
129. See supra note 110.
130. For example, in Arkansas, section 5-14-126(a)(1)(C) of the Arkansas Code makes it a crime to use a position of trust or authority to coerce another into having sexual relations while section 5-14-125(a)(6) of the Arkansas Code makes it a crime for a teacher to have sexual contact with a student less than eighteen years old.
132. Id.
133. See Fulgoni-Britton, supra note 9, at 273 (making a similar argument for the benefit of avoiding problems applying to Title IX).
IV. SOLUTION: RIGHT TO A PROTECTED LEARNING ENVIRONMENT—
PROTECT PRIMARY AND SECONDARY STUDENTS BY FINDING THEY DO NOT 
HAVE THE CAPACITY TO CONSENT TO SEXUAL CONTACT WITH TEACHERS 
UNTIL THE DATE OF GRADUATION

The Arkansas General Assembly should create a bright-line rule barring any sexual contact between teachers and students because it would properly balance the state’s interest in protecting the sanctity of the educational environment and the privacy rights of adults.

Problems arise when viewing sexual relationships between teachers and students by age.\textsuperscript{134} Primarily, the type of intimate association protected by the fundamental right to privacy, regardless of jurisdiction, cannot be said to “generally spring into existence at one point in time . . . .”\textsuperscript{135} Romantic relationships develop over a period of time. By permitting age of consent or age of majority laws to be the only guiding factor in this context, the Arkansas Supreme Court improperly forces lower courts to engage in a fact-seeking mission to determine the extent of the sexual relationship created, the moment it began, the state interest advanced, and the scope of privacy rights advanced within Arkansas.

Further, defining a specific age that students can legally consent to sex with teachers is unnecessary when considering that the prohibition of student-teacher sexual relationship was designed to protect the sanctity of the educational environment.\textsuperscript{136} If the fundamental purpose of prohibiting sex between teachers and students in primary and secondary education is to create and protect a supportive environment that facilitates education without interference,\textsuperscript{137} then the age at which a student is capable of maturely handling sex is an improper inquiry.

In short, the state has an overarching interest in protecting the sanctity of the educational environment, which temporarily supersedes any teacher’s fundamental right to privacy.\textsuperscript{138} Further, establishing a rule that prohibits student-teacher sexual relationships until after graduation merely delays, not denies, any fundamental right to engage in consensual sexual relationships with other consenting adults.\textsuperscript{139} Delay, not total deprivation, of an individu-

\begin{itemize}
  \item \textsuperscript{134} See Drobac, supra note 9, at 59 n.271 (acknowledging that setting the age of majority to twenty-one years is politically impossible).
  \item \textsuperscript{135} Flaskamp v. Dearborn Pub. Sch., 385 F.3d 935, 944 (6th Cir. 2004).
  \item \textsuperscript{136} Paschal v. State, 2012 Ark. 127, 20, 388 S.W.3d 429, 440 (2012) (Brown, J., dissenting in part and concurring in part); see also infra text accompanying note 140.
  \item \textsuperscript{137} Fulgoni-Britton, supra note 9, at 266; see also Ronna Greff Schneider, Sexual Harassment and Higher Education, 65 TEX. L. REV. 525, 540 (disrupting the educational environment results in “a reduction in the educational benefit that the student receives”).
  \item \textsuperscript{138} Paschal, 2012 Ark. at 23, 388 S.W.3d at 429 (Brown, J., dissenting in part and concurring in part).
  \item \textsuperscript{139} See supra note 3.
\end{itemize}
al’s constitutional rights has long been recognized as a practical and important method of balancing an individual’s constitutional rights with important state interests. \footnote{For example, it has long been recognized that statutes that merely delay, but not deny, an individual’s constitutional rights are permissible. \textit{See} WADLINGTON \& RAYMOND C. O’BRIEN, DOMESTIC RELATIONS: CASES \& MATERIALS, 225-232 (6th ed. 2007); \textit{see also} Moe v. Dinkins, 533 F. Supp. 623, 630–31 (S.D.N.Y. 1981), aff’d, 669 F.2d 67 (2d Cir. 1982).}

Lastly, prohibiting sex between a student and teacher until the student graduates from high school would not have a “direct and substantial influence” on intimate association. \footnote{\textit{See} Flaskamp v. Dearborn Pub. Sch., 385 F.3d 935, 942 (6th Cir. 2004) (citing Anderson v. LaVergne, 371 F.3d 879, 882 (6th Cir. 2004)).} Teachers and students alike would not be prevented from creating intimate associations with a substantial part of the otherwise eligible population. Where both students and teachers are considered adults in the relevant jurisdiction, this rule proposes a lesser intrusion on the rights of intimate association without unnecessarily altering the education environment.

A clear, bright-line rule can and should be established by the Arkansas General Assembly. Regardless of age, a student should not be permitted to legally consent to a sexual relationship with a teacher employed at the student’s school.

\section*{V. Conclusion}

The scope of what the Arkansas Supreme Court has determined to be a fundamental right to privacy is unclear. As society advances, the question of whether students and teachers have a constitutionally protected right to engage in sexual intercourse with one another will continue to be debated until the Supreme Court of the United States finds that a student has a right to a learning environment free from sexual advances, regardless of the student’s age. Until the Supreme Court or Congress rules on the matter, the law will continue to divest into various definitions of the “right to privacy.” Rather than continuously debating the issue, the Arkansas General Assembly needs to establish a clear, bright-line rule that protects the sanctity of the educational environment while balancing the fundamental rights of adults. Preventing teachers from engaging in sexual contact with students until after the student graduates from high school provides a compelling, bright-line rule that protects both the interests of the state and the fundamental rights of individuals.
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